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FEDERAL REGISTER

Vol. 80 Monday,
No. 143 July 27, 2015

Pages 44251–44828

OFFICE OF THE FEDERAL REGISTER

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DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

7 CFR Part 6

RIN 0551–AA82

Dairy Tariff-Rate Quota Import Licensing Program

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulation that provides for the issuance of licenses to import certain dairy articles under tariff-rate quotas (TRQs) as set forth in the Harmonized Tariff Schedule of the United States. The three most significant changes to the rule are to suspend for an additional seven years the historical license reduction provision which was set to expire with the beginning of quota year 2016; to modify procedures for collecting licensing fees in order to better align the fee collection to the costs of administering the program; and to exclusively use electronic communications in the application, reporting and payment processes. The expected outcome from these changes is to allow license holders to adjust to changing market conditions impacting the dairy sector; increase the Department's ability to more closely align cost recovery with the actual costs of administering the program; and allow the Department to reduce lag times, minimize paper files, and increase the efficiency of the program operations.

DATES: *Effective Date:* September 1, 2015.

FOR FURTHER INFORMATION CONTACT: Sugar and Dairy Branch, Import Policies and Export Reporting Division, Office of Trade Programs, Foreign Agricultural Service, U.S. Department of Agriculture, (202) 720–0638; fax (202) 720–0876; *dairy-ils@fas.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The rule has been determined to be not significant under E.O. 12866 and has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act ensures that regulatory and information requirements are tailored to the size and nature of small businesses, small organizations, and small governmental jurisdictions. This rule will not have a significant economic impact on small businesses participating in the program.

Executive Order 12988

This rule has been reviewed under Executive Order 12988. The provisions of this rule would not have a preemptive effect with respect to any State or local laws, regulations, or policies which conflict with such provision or which otherwise impede their full implementation. This rule will not have a retroactive effect. Before any judicial action may be brought forward regarding this rule, all administrative remedies must be exhausted.

National Environmental Policy Act

The Administrator has determined that this action will not have a significant effect on the quality of the human environment. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is necessary for this rule.

Unfunded Mandates Reform Act (Pub. L. 104–4)

Public Law 104–4 requires consultation with state and local officials and Indian tribal governments. This rule does not impose an unfunded mandate or any other requirement on state, local, or tribal governments. Accordingly, these programs are not subject to the provisions of the Unfunded Mandates Reform Act.

Executive Order 12630

This Executive Order requires careful evaluation of governmental actions that interfere with constitutionally protected property rights. This rule does not interfere with any property rights and, therefore, does not need to be evaluated on the basis of the criteria outlined in Executive Order 12630.

Government Paperwork Elimination Act

The United States Department of Agriculture (USDA) is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Background

The Foreign Agricultural Service (FAS), under a delegation of authority from the Secretary of Agriculture, administers the Dairy Tariff-Rate Quota Import Licensing regulation codified at 7 CFR 6.20 through 6.37 that provides for the issuance of licenses to import certain dairy articles under tariff-rate quotas (TRQs) as set forth in certain notes in Chapter 4 of the Harmonized Tariff Schedule of the United States. These dairy articles may only be entered into the United States at the low-tier tariff by or for the account of a person, as defined in the regulation, to whom such licenses have been issued and only in accordance with the terms and conditions of the regulation. Licenses are issued on a calendar year basis, and each license authorizes the licensee to import a specified quantity and type of dairy article from a specified country of origin.

Under TRQs, a low tariff rate, commonly referred to as the in-quota rate, applies to imports up to a specified quantity. A higher tariff rate, commonly referred to as the over-quota rate, applies to any imports in excess of that amount. No license is required to import products at the over-quota tariff rate.

USDA issues three types of licenses: Historical, non-historical (lottery), and designated. For all three license types, the current regulation provides that persons must apply each year between September 1 and October 15. Historical and designated licensees may apply for lottery licenses subject to certain conditions. Licensees may fail to qualify for a license for a specific item from a specific country in the following year, if they do not meet certain requirements. Licensees must (i) apply for the license each year, (ii) pay an annual fee, and (iii) have imported at least 85 percent of the final license amount from the

previous year. To avoid ineligibility due to the 85 percent rule, licensees may surrender up to 100 percent of the license, but must import 85 percent of any quantity not surrendered. Section 6.25(b) of this regulation provides that beginning with the 2023 quota year, any historical licensee who surrenders more than 50 percent of the license amount for the same item from the same country during at least three of the most recent five years will be issued a license thereafter in an amount equal to the average amount imported under that license for those five quota years.

This rule provides historical license holders additional time to adjust to changing market conditions by suspending the § 6.25(b) provision through the end of quota year 2022. Since this rule was adopted in order to implement U.S. obligations under the Uruguay Round Agreement on Agriculture, the § 6.25(b) provision has previously been suspended on three different occasions: For five years, 2001–2005; for two years, 2009–10; and for five years, 2011–15. The rule also now provides that reporting, payment, and application for licenses be made only by electronic submission in order to reduce the use of paper and streamline operations. Additionally, the rule modifies procedures for collecting licensing fees in order to better align the fee collection with the costs of administering the program. The previous regulation allowed applicants to apply for a license, generating administrative costs for the USDA, and then choose not to pay for the license, thus resulting in unrecovered administrative expenses. This rule imposes financial consequences for such non-payment, which will increase USDA's ability to recover program expenses.

This rule does not make any modifications to the appendices to this subpart.

Discussion of Comments

On February 6, 2013, USDA published in the **Federal Register** (78 FR 8434) an advanced notice of proposed rulemaking (ANPR) soliciting comment on all aspects of the previous dairy import licensing rule. USDA received comments from 46 interested parties and a summary of the comments was provided in the background to the Proposed Rule published December 23, 2014 (79 FR 76919).

The comment period on the Proposed Rule ended February 23, 2015, and a total of 23 comments were received. Twenty-two of the comments received were similar in nature, provided support for the proposed rule, and are summarized as follows.

Historical License Reduction Provision

Respondents generally support the additional seven year suspension of the historical license reduction provision (§ 6.25(b)) from the rule, but would prefer its complete elimination. They were concerned that market factors outside of importers' control will in the future lead to low fill-rates and possible loss of licenses. One respondent did not oppose the additional seven year suspension, but suggested it be enforced only to the same extent as the relative fill rates for non-historical licenses. In such a system, a historical license holder would not be in jeopardy unless its fill rate fell below the fill-rate of non-historical licenses for the same article.

Response: USDA chose the seven year suspension over complete elimination because the provision is generally in the public interest. As market conditions change, it may be important in the future to maintain the existence of the § 6.25(b) provision in order to have a mechanism that stimulates the transfer of under-utilized historical licenses to the lottery category. USDA will not adopt a new system, such as the proposal to link § 6.25(b) provisions for retaining licenses with fill rates in the lottery category, because of the complexity of administering such a system and the lack of support from other respondents.

Timing of Implementation of Historical License Reduction Provision

They oppose implementing the historical license reduction provision beginning in 2023, and propose instead that 2023 would be the first of a new five-year base period lasting until 2027. Under this scheme, the first reductions could not occur until 2028.

Response: USDA chose to follow the same process used for the three previous suspensions. The seven year suspension should allow historical licenses holders sufficient time to adjust to changing market conditions and take necessary actions to comply with the provision.

Administering the License Fee

They generally support the proposed changes to tightening the timeline for making payments to 10 days from the date of issuance, and support requiring that an applicant who applies for and is issued a license pay for all licenses issued. One respondent preferred to maintain the payment deadline at 30 days and opposed revoking an entire licensee's portfolio for failure to pay the fee for a single license within ten days of receipt of a warning letter.

Response: USDA will implement the proposed changes to the license fee payment timeline and loss of all licenses for failure to pay for all licenses. The proposed changes have the support of the large majority of respondents, will expedite the processing of licenses and will allow USDA to better align the fee collection to the costs of administering the program.

Level of the License Fee

Twenty of the 23 respondents expressed concerns with the rising costs of license fees. These 20 respondents did not express concerns with the current fee but noted that fees have increased by more than 66 percent in recent years and expressed an opinion that future increases be avoided.

Response: USDA sets the license fee at the total estimated cost of administering the licensing program, divided by the number of licenses issued and accepted. The proposed changes will more closely align the fees to the cost of administering the program.

Electronic Communication

Twenty-two respondents commented that they appreciated the desire to move toward exclusive use of electronic communications, but are concerned about the ability of USDA's computer system to automatically access entry data from the CBP system. If eligibility requirements cannot be verified through entries on the CBP system, USDA currently requests CBP Form 7501 in order to conduct a manual evaluation. Unlicensed importers and licensed importers attempting to qualify with unlicensed entries occasionally submit the forms to USDA via U.S. Mail to verify entries and eligibility.

Response: USDA recognizes the need for manual verification of the CBP Form 7501 for un-licensed importers and licensed importers attempting to qualify with unlicensed entries. USDA has amended this final rule to explicitly recognize emails and attached electronic files (*e.g.* PDFs, Word Documents, and Excel Spreadsheets) as electronic communications. Licensed and un-licensed importers attempting to qualify using unlicensed entries must obtain an electronic copy, such as a digital scan of the CBP–7501 forms, and email them to USDA. USDA will no longer accept U.S. Mail, faxes, or hard copies. Licensed importers qualifying with licensed entries will continue to be assessed for eligibility based solely on CBP import records as cross-checked through DAIRIES. No additional verification is required for licensed refiners qualifying with licensed entries.

One respondent recommended the replacement of the current lottery system for non-historical and surrendered licenses with a first-come-first-served (FCFS) system. The respondent stated that a FCFS system would provide simplicity, lower transaction costs, eliminate licensing fees, allow greater flexibility for adapting to new market conditions and allow for continuing business relationships.

Response: USDA will not replace the current licensing system with a FCFS system. Although USDA recognizes some advantages to a FCFS system, the current system generally permits adequate flexibility to administer the dairy import licensing requirements.

Summary of Changes to Final Rule

The following is a summary of the substantive changes to the final regulation:

The name of the program has been changed throughout the document to read ''Dairy Tariff-Rate Quota Import Licensing.''

References to the process used for the initial allocation of licenses, which took place based on the 1997 quota year, have been removed throughout this rule due to the fact that current allocations are now based on the preceding quota year. References to the 1997 quota year allocations were removed from the following sections: §§ 6.20(b), 6.23(b)(2), 6.23(b)(3), 6.23(b)(4), 6.23(b)(5), 6.25(a)(1), 6.25(a)(2), 6.25(a)(3), and 6.26(f).

Section 6.21 Definitions has been updated to include several modifications. The definition of ''Article other than cheese or cheese products'' now specifies that the article is a dairy product. The definition of ''EC'' no longer lists the current members, because new members may be added at any time. Therefore, the definition of ''EC'' is defined to be those countries listed in Additional U.S. Note 2 to Chapter 4 of the Harmonized Tariff Schedule, because this is published annually and maintained current. ''Customs'' has been replaced throughout the rule with ''CBP'' which stands for U.S. Customs and Border Protection. The definition of ''Licensing Authority'' removes reference to a specific USDA division. The definition of ''Other Countries'' deletes the reference to the Harmonized Tariff Schedule. The definition of ''Postmark'' is deleted from this section, given that physical mail will no longer be accepted. This rule requires that all communications, applications, reporting and payment be made electronically as designated by the Licensing Authority. Therefore, references to physical mail, postmarks, mailing addresses, or physical locations have been deleted throughout the rule. The references to physical mail delivery that have been deleted are found in the following sections: §§ 6.24(a), 6.24(b)(1), 6.24(c), 6.25(d)(1), 6.26(a), 6.26(c), 6.28(b), 6.33(b), 6.33(c), 6.35(b), and 6.36(b). Additionally, a valid email address is now required for eligibility. The requirement for an email address has been added to § 6.23(a)(3).

Section 6.22(b) was deleted from the rule because these references to General Note 15 provisions of the HTS are not covered, nor in any way affected, by the dairy import licensing program.

Section 6.24(b)(1) requires for licensed qualifying entries, verification will be only processed through DAIRIES and cross checked with entries in the CBP system. For unlicensed qualifying entries, the applicant will submit an electronic copy (*e.g.* scanned PDF) of CBP Form 7501 to the Licensing Authority.

Section 6.24(c) was deleted because it primarily applied to mailed hardcopy applications. The information submitted through the current electronic application system obviates the need for submitting this additional information.

Section 6.25(a)(1) through (3) was deleted because the historic allocation process is no longer relevant. New quota year allocations are made based on the preceding year's allocations and usage.

Section 6.25(b) extends the date of the suspension of the historical licenses reduction provision for an additional seven years, expiring with the beginning of quota year 2023.

Section 6.25(d)(1)(ii) requires, for Appendix 3 allocations, that countries designate the allocations of specific articles to importers in kilograms. This requirement will reduce any disputes arising from converting percentages into weights.

Section 6.26(c) was rewritten to clarify the surrender and allocation process for persons who were issued an import license for a cheese or cheese product article versus a person who was issued an import license for an article other than cheese or cheese products.

Section 6.28(b) requires that all license holders who intend to convey their business and are requesting USDA to transfer a license, submit the required documentation by email. The option to send documents via physical mail or courier is no longer available.

Section 6.33(b) tightens the timeline for making payments and requires payment in full within 10 days from the date of the issuance of the license, rather than the current 30 day period. This change would allow USDA to accelerate some of its administrative functions of operating the licensing program because the use of electronic payment does not require the longer lag time necessary for processing paper checks.

Section 6.33(c) requires that an applicant who applies for and is issued a license pay for all licenses issued, or a hold will be placed on all licenses of such applicant. If after receiving a warning letter via email from the Licensing Authority, the applicant does not pay in full within 10 days for all licenses issued, then all licenses issued to the licensee, paid or unpaid, will be revoked.

Section 6.33(d) is deleted pursuant to the previous clause (§ 6.33(c)) and no longer permits licensees not to accept or pay for certain licenses issued to them. The cost of administering the licensing program is incurred by USDA during the application and allocation process; therefore, applicants will be required to pay for licenses issued in accordance with § 6.33(c) or have all licenses revoked.

Section 6.37 is removed. This administrative change is an improvement in the method of publishing the annual adjustment of the appendixes to reflect changes in the quantities of historical (Appendix 1) and lottery (appendix 2) license amounts (section 6.37). Previously, the final rule required an amendment each year. Instead, the Department of Agriculture will now annually publish the adjustments to the appendixes by Notice in the **Federal Register**.

List of Subjects in 7 CFR Part 6

Agricultural commodities, Dairy, Cheese, Imports, Procedural rules, Application requirements, Tariff-rate quota, Reporting and recordkeeping requirements.

Accordingly, for these reasons, 7 CFR part 6 is amended as follows:

PART 6—IMPORT QUOTAS AND FEES

Subpart—Dairy Tariff-Rate Quota Import Licensing

■ 1. The authority citation for Subpart—Dairy Tariff-Rate Quota Import Licensing continues to read as follows:

Authority: Additional U.S. Notes 6, 7, 8, 12, 14, 16–23 and 25 to Chapter 4 and General Note 15 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), Pub. L. 97–258, 96 Stat. 1051, as amended (31 U.S.C. 9701), and secs. 103 and 404, Pub. L. 103–465, 108 Stat. 4819 (19 U.S.C. 3513 and 3601).

■ 2. The heading for ''Subpart—Dairy Tariff-Rate Import Quota Licensing'' is revised to read as set forth above.

■ 3. Sections 6.20 through 6.36 are revised to read as follows:

6.20 Introduction.
6.21 Definitions.
6.22 Requirement for a license.
6.23 Eligibility to apply for a license.
6.24 Application for a license.
6.25 Allocation of licenses.
6.26 Surrender and reallocation.
6.27 Limitations on use of license
6.28 Transfer of license.
6.29 Use of licenses.
6.30 Record maintenance and inspection.
6.31 Debarment and suspension.
6.32 Globalization of licenses.
6.33 License fee.
6.34 Adjustment of appendices.
6.35 Correction of errors.
6.36 Miscellaneous.

* * * * *

§ 6.20 Introduction.

(a) Presidential Proclamation 6763 of December 23, 1994, modified the Harmonized Tariff Schedule of the United States affecting the import regime for certain articles of dairy products. The Proclamation terminated quantitative restrictions that had been imposed pursuant to section 22 of the Agricultural Adjustment Act of 1933, as amended (7 U.S.C. 624); proclaimed tariff-rate quotas for such articles pursuant to Public Law 103–465; and specified which of such articles may be entered only by or for the account of a person to whom a license has been issued by the Secretary of Agriculture.

(b) Effective January 1, 1995, the prior regime of absolute quotas for certain dairy products was replaced by a system of tariff-rate quotas. The articles subject to licensing under the tariff-rate quotas are listed in Appendices 1, 2, and 3 to be published annually in a notice in the **Federal Register**. Licenses permit the holder to import specified quantities of the subject articles into the United States at the applicable in-quota rate of duty. If an importer has no license for an article subject to licensing, such importer will, with certain exceptions, be required to pay the applicable over-quota rate of duty.

(c) The Secretary of Agriculture has determined that this subpart will, to the fullest extent practicable, result in fair and equitable allocation of the right to import articles subject to such tariff-rate quotas. The subpart will also maximize utilization of the tariff-rate quotas for such articles, taking due account of any special factors which may have affected or may be affecting the trade in the articles concerned.

§ 6.21 Definitions.

As used in this subpart and the appendices thereto, the following terms are defined as follows:

Article. One of the products listed in Appendices 1, 2, or 3, which are the same as those described in Additional U.S. Notes 6, 7, 8, 12, 14, 16–23 and 25 to Chapter 4 of the Harmonized Tariff Schedule.

Article other than cheese or cheese products. Any article that is a dairy product, but not a cheese or cheese product.

CBP. United States Customs and Border Protection, U.S. Department of Homeland Security.

Cheese or cheese products. Articles in headings 0406, 1901.90.34, and 1901.90.36 of the Harmonized Tariff Schedule.

Commercial entry. Any entry except those made by or for the account of the United States Government or for a foreign government, for the personal use of the importer or for sampling, taking orders, research, or the testing of equipment.

Country. Country of origin as determined in accordance with CBP rules and regulations, except that ''EC'', and ''Other countries'' shall each be treated as a country.

DAIRIES. The ''Dairy Accelerated Importer Retrieval and Information Exchange System''. The web-based user interface system which persons must utilize to apply for and manage licenses, and through which the Licensing Authority will communicate all program notices.

Dairy products. Articles in headings 0401 through 0406, margarine cheese listed under headings 1901.90.34 and 1901.90.36, ice cream listed under heading 2105, and casein listed under heading 3501 of the Harmonized Tariff Schedule.

Department. The United States Department of Agriculture.

EC. Those countries listed in Additional U.S. Note 2 to Chapter 4 of the Harmonized Tariff Schedule.

Enter or Entry. To make or making entry for consumption, or withdrawal from warehouse for consumption in accordance with CBP regulations and procedures.

Harmonized Tariff Schedule or HTS. The Harmonized Tariff Schedule of the United States.

Licensee. A person to whom a license has been issued under this subpart.

Licensing Authority. Any officer or employee of the U.S. Department of Agriculture designated to act in this position by the Director of the Division charged with managing the Dairy Tariff-Rate Quota Import Licensing System.

Other countries. Countries not listed by name as having separate tariff-rate quota allocations for an article.

Person. An individual, firm, corporation, partnership, association, trust, estate or other legal entity.

Process or processing. Any additional preparation of a dairy product, such as melting, grating, shredding, cutting and wrapping, or blending with any additional ingredient.

Quota year. The 12-month period beginning on January 1 of a given year.

Tariff-rate quota amount or TRQ amount. The amount of an article subject to the applicable in-quota rate of duty established under a tariff-rate quota.

United States. The customs territory of the United States, which is limited to the 50 states, the District of Columbia, and Puerto Rico.

§ 6.22 Requirement for a license.

A person who seeks to enter, or cause to be entered an article as a commercial entry, shall obtain a license, in accordance with this subpart.

§ 6.23 Eligibility to apply for a license.

(a) *In general.* To apply for any license, a person shall have:

(1) A business office, and be doing business, in the United States, and

(2) An agent in the United States for service of process, and

(3) An email address to be used for correspondence regarding licensing activities and reports.

The licensee is responsible to continuously maintain a valid email address in DAIRIES for use in communicating with the Licensing Authority.

(b) *Eligibility for 2016 and subsequent quota years.* (1) Historical licenses (Appendix 1). A person issued a historical license for an article for the current quota year may apply for a historical license (Appendix 1) for the next quota year for the same article from the same country, if such person was, during the 12-month period ending August 31 prior to the quota year, either:

(i) Where the article is cheese or cheese product,

(A) The owner of and importer of record for at least three separate commercial entries of cheese or cheese products totaling not less than 57,000 kilograms net weight, each of the three entries not less than 2,000 kilograms net weight;

(B) The owner of and importer of record for at least eight separate commercial entries of cheese or cheese products, from at least eight separate shipments, totaling not less than 19,000 kilograms net weight, each of the eight

entries not less than 450 kilograms net weight, with a minimum of two entries in each of at least three quarters during that period; or

(C) The owner or operator of a plant listed in Section II or listed in Section I as a processor of cheese of the most current issue of ''Dairy Plants Surveyed and Approved for USDA Grading Service'' and had processed or packaged at least 450,000 kilograms of cheese or cheese products in its own plant in the United States; or

(ii) Where the article is not cheese or cheese product,

(A) The owner of and importer of record for at least three separate commercial entries of dairy products totaling not less than 57,000 kilograms net weight, each of the three entries not less than 2,000 kilograms net weight;

(B) The owner of and importer of record for at least eight separate commercial entries of dairy products, from at least eight separate shipments, totaling not less than 19,000 kilograms net weight, each of the eight entries not less than 450 kilograms net weight, with a minimum of two entries in each of at least three quarters during that period;

(C) The owner or operator of a plant listed in the most current issue of ''Dairy Plants Surveyed and Approved for USDA Grading Service'' and had manufactured, processed or packaged at least 450,000 kilograms of dairy products in its own plant in the United States; or

(D) The exporter of dairy products in the quantities and number of shipments required under (A) or (B) above.

(2) Nonhistorical licenses for cheese or cheese products (Appendix 2). A person may annually apply for a nonhistorical license for cheese or cheese products (Appendix 2) if such person meets the requirements of paragraph (b)(1)(i) of this section.

(3) Nonhistorical licenses for articles other than cheese or cheese products (Appendix 2). A person may annually apply for a nonhistorical license for articles other than cheese or cheese products (Appendix 2) if such person meets the requirements of paragraph (b)(1)(ii) of this section.

(4) Designated license (Appendix 3). A designated license may be issued to a person who has applied for a license, has met the requirements of paragraph (b)(1)(i) of this section, and is designated by the government of a country for such license according to § 6.25(d).

(c) *Exceptions.* (1) A licensee that fails in a quota year to enter at least 85 percent of the amount of an article permitted under a license shall not be eligible to receive a license for the same article from the same country for the next quota year. For the purpose of this paragraph, the amount of an article permitted under the license will exclude any amounts surrendered pursuant to § 6.26(a), but will include any additional allocations received pursuant to § 6.26(b).

(2) Paragraph (c)(1) of this section will not apply where the licensee demonstrates to the satisfaction of the Licensing Authority that the failure resulted from breach by a carrier of its contract of carriage, breach by a supplier of its contract to supply the article, act of God or force majeure.

(3) Paragraph (c)(1) of this section may not apply in the case of historical or nonhistorical licenses, where the licensee demonstrates to the satisfaction of the Licensing Authority that the country specified on the license maintains or permits an export monopoly to control the dairy articles concerned and the licensee petitions the Licensing Authority to waive this requirement. The licensee shall submit evidence that the country maintains an export monopoly as defined in this paragraph. For the purposes of this paragraph ''export monopoly'' means a privilege vested in one or more persons consisting of the exclusive right to carry on the exportation of any article of dairy products from a country to the United States.

(4) The Licensing Authority will not issue a nonhistorical license (Appendix 2) for an article from a country during a quota year to an applicant who is affiliated with another applicant to whom the Licensing Authority is issuing a non-historical license for the same article from the same country for that quota year. Further, the Licensing Authority will not issue a nonhistorical license for butter to an applicant who is affiliated with another applicant to whom the Licensing Authority is issuing a historical butter license of 57,000 kilograms or greater. For the purpose of this paragraph, an applicant will be deemed affiliated with another applicant if:

(i) The applicant is the spouse, brother, sister, parent, child or grandchild of such other applicant;

(ii) The applicant is the spouse, brother, sister, parent, child or grandchild of an individual who owns or controls such other applicant;

(iii) The applicant is owned or controlled by the spouse, brother, sister, parent, child or grandchild of an individual who owns or controls such other applicant.

(iv) Both applicants are 5 percent or more owned or directly or indirectly controlled, by the same person;

(v) The applicant, or a person who owns or controls the applicant, benefits from a trust that controls such other applicant.

(5) The Licensing Authority will not issue a nonhistorical license (Appendix 2) for an article from a country during a quota year to an applicant who is associated with another applicant to whom the Licensing Authority is issuing a nonhistorical license for the same article from the same country for that quota year. Further, the Licensing Authority will not issue a nonhistorical license for butter to an applicant who is associated with another applicant to whom the Licensing Authority is issuing a historical butter license for 57,000 kilograms or greater. For the purpose of this paragraph, an applicant will be deemed associated with another applicant if:

(i) The applicant is an employee of, or is controlled by an employee of, such other applicant;

(ii) The applicant manages or is managed by such other applicant, or economically benefits, directly or indirectly, from the use of the license issued to such other applicant.

(6) The Licensing Authority will not issue a nonhistorical license for an article from a country during a quota year, for which the applicant receives a designated license.

§ 6.24 Application for a license.

(a) Application for license shall be made on electronic forms designated for the purpose by the Licensing Authority. All parts of the application shall be completed. The application shall be transmitted no earlier than September 1 and no later than midnight October 15 of the year preceding that for which license application is made. The Licensing Authority will not accept incomplete applications.

(b)(1) Where the applicant seeks to establish eligibility on the basis of imports, applications shall include identification of entries sufficient to establish the applicant as the importer of record of entries required under § 6.23, during the 12-month period ending August 31 prior to the quota year for which license is being sought. For qualifying licensed entries, verification will be only processed through DAIRIES and cross checked with entries in the CBP system. For qualifying unlicensed entries, the applicant will submit an electronic copy (*e.g.* scanned PDF) of CBP Form 7501 to the Licensing Authority.

(2) Where the applicant seeks to establish eligibility on the basis of exports, applications shall include:

(i) Census Form 7525 or a copy of the electronic submission of such form, and

(ii) The commercial invoice or bill of sale for the quantities and number of export shipments required under § 6.23, during the 12-month period ending August 31 prior to the quota year for which license is being sought.

(c) An applicant requesting more than one nonhistorical license must rank order these requests by the applicable Additional U.S. Note number. Cheese and cheese products must be ranked separately from dairy articles other than cheese or cheese products.

§ 6.25 Allocation of licenses.

(a) *Licensing Authority.* The Licensing Authority will issue historical, nonhistorical and designated licenses.

(b) *Historical licenses for the 2016 and subsequent quota years (Appendix 1).* A person issued a historical license for the current quota year will be issued a historical license in the same amount for the same article from the same country for the next quota year except that beginning with the 2023 quota year, a person who has surrendered more than 50 percent of such historical license in at least three of the prior 5 quota years will thereafter be issued a license in an amount equal to the average annual quantity entered during those 5 quota years.

(c) *Nonhistorical licenses (Appendix 2).* The Licensing Authority will allocate nonhistorical licenses on the basis of a rank-order lottery system, which will operate as follows:

(1) The minimum license size shall be:

(i) Where the article is cheese or cheese product:

(A) The total amount available for nonhistorical license where such amount is less than 9,500 kilograms;

(B) 9,500 kilograms where the total amount available for nonhistorical license is between 9,500 kilograms and 500,000 kilograms, inclusive;

(C) 19,000 kilograms where the total amount available for nonhistorical license is between 500,001 kilograms and 1,000,000 kilograms, inclusive;

(D) 38,000 kilograms where the total amount available for nonhistorical license is greater than 1,000,000 kilograms; or

(E) An amount less than the minimum license size established in paragraphs (c)(1)(i) (A) through (D) of this section, if requested by the licensee;

(ii) Where the article is not cheese or cheese product:

(A) The total amount available for nonhistorical license where such amount is less than 19,000 kilograms;

(B) 19,000 kilograms where the total amount available for nonhistorical license is between 19,000 kilograms and 550,000 kilograms, inclusive;

(C) 38,000 kilograms where the total amount available for nonhistorical license is between 550,001 kilograms and 1,000,000 kilograms, inclusive; and

(D) 57,000 kilograms where the total amount available for nonhistorical license is greater than 1,000,000 kilograms;

(E) An amount less than the minimum license sizes established in paragraphs (c)(1)(i)(A) through (D) of this section, if requested by the licensee.

(2) Taking into account the order of preference expressed by each applicant, as required by § 6.24(c), the Licensing Authority will allocate licenses for an article from a country by a series of random draws. A license of minimum size will be issued to each applicant in the order established by such draws until the total amount of such article in Appendix 2 has been allocated. An applicant that receives a license for an article will be removed from the pool for subsequent draws until every applicant has been allocated at least one license, provided that the licenses for which they applied are not already fully allocated. Any amount remaining after the random draws which is less than the applicable minimum license size may, at the discretion of the licensing Authority, be prorated equally among the licenses awarded for that article.

(d) *Designated licenses (Appendix 3).* (1) With respect to an article listed in Appendix 3, the government of the applicable country may, not later than October 31 prior to the beginning of a quota year, submit directly by email to the Licensing Authority:

(i) The names, addresses and emails of the importers that it is designating to receive licenses; and

(ii) The amount, in kilograms, of such article for which each such importer is being designated. Where quantities for designation result from both Tokyo Round concessions and Uruguay Round concessions, the designations should be made in terms of each.

(2) To the extent practicable, the Licensing Authority will issue designated licenses to those importers, and in those amounts, indicated by the government of the applicable country, provided that the importer designated meets the eligibility requirements set forth in § 6.23. Consistent with the international obligations of the United States, the Licensing Authority may disregard a designation if the Licensing Authority determines that the person designated is not eligible for any of the reasons set forth in § 6.23(c)(1) or (2).

(3) If a government of a country which negotiated in the Uruguay Round for the right to designate importers has not done so, but determines to designate importers for the next quota year, it shall indicate its intention to do so directly and in writing to the Licensing Authority not later than July 1 prior to the beginning of such next quota year. Furthermore, if a government that has designated importers for a quota year determines that it will not continue to designate importers for the next quota year, it shall so indicate directly and in writing to the Licensing Authority, not later than July 1 prior to such next quota year.

§ 6.26 Surrender and reallocation.

(a) If a licensee determines that it will not enter the entire amount of an article permitted under its license, such licensee shall surrender its license right to enter the amount that it does not intend to enter. Surrender shall be made to the Licensing Authority no later than October 1. Any surrender shall be final and shall be only for that quota year, except as provided in § 6.25(b). The amount of the license not surrendered shall be subject to the license use requirements of § 6.23(c)(1).

(b) For each quota year, the Licensing Authority will, to the extent practicable, reallocate any amounts surrendered.

(c) Any person who qualified for or was issued a cheese or cheese product license for a quota year may apply to receive additional license, or addition to an existing license for a portion of the amount being reallocated. A person who did not qualify for a cheese or cheese product license for a quota year, but qualified only for a license for articles other than cheese or cheese products, may only apply to receive an additional license for articles other than cheese or cheese products, or addition to an existing license for articles other than cheese or cheese products for a portion of the amount being reallocated. The application shall be submitted to the Licensing Authority no earlier than September 1 and not later than September 15, and shall specify:

(1) The name and control number of the applicant;

(2) The article and country being requested, the applicable HTS Additional U.S. Note number and, if more than one article is requested, a rank-order by Additional U.S. Note number; and

(3) If applicable, the number of the license issued to the applicant for that quota year permitting entry of the same article from the same country.

(d) The Licensing Authority will reallocate surrendered amounts among applicants as follows:

(1) The minimum license size, or addition to an existing license, will be the total amount of the article from a country surrendered, or 10,000 kilograms, whichever is less;

(2) Minimum size licenses, or additions to an existing license, will be allocated among applicants requesting articles on the basis of the rank-order lottery system described in § 6.25(c);

(3) If there is any amount of an article from a country left after minimum size licenses have been issued, the Licensing Authority may allocate the remainder in any manner it determines equitable among applicants who have requested that article; and

(4) No amount will be reallocated to a licensee who has surrendered a portion of its license for the same article from the same country during that quota year unless all other licensees applying for a reallocated quantity have been allocated a license;

(e) However, if the government of an exporting country chooses to designate eligible importers for surrendered amounts under Appendix 3, the Licensing Authority shall issue the licenses in accordance with § 6.25(d)(2), provided that the government of the exporting country notifies the Licensing Authority of its designations no later than September 1. Such notification shall contain the names, addresses, and emails addresses of the importers that it is designating and the amount in kilograms of such article for which each importer is being designated. In such case the requirements of paragraph (c) of this section shall not apply.

§ 6.27 Limitations on use of license.

(a) A licensee shall not obtain or use a license for speculation, brokering, or offering for sale, or permit any other person to use the license for profit.

(b) A licensee who is eligible as a manufacturer or processor, pursuant to § 6.23, shall process at least 75 percent of its licensed imports in such person's own facilities and maintain the records necessary to so substantiate.

§ 6.28 Transfer of license.

(a) If a licensee sells or conveys its business involving articles covered by this subpart to another person, including the complete transfer of the attendant assets, the Licensing Authority will transfer to such other person the historical, nonhistorical or designated license issued for that quota year. Such sale or conveyance must be unconditional, except that it may be in escrow with the sole condition for return of escrow being that the Licensing Authority determines that such sale does not meet the requirements of this paragraph.

(b) The parties seeking transfer of license shall give written notice to the Licensing Authority of the intended sale or conveyance described in paragraph (a) of this section by email. The notice must be received by the Licensing Authority at least 20 working days prior to the intended consummation of the sale or conveyance. Such notice shall include electronic copies of the documents of sale or conveyance. The Licensing Authority will review the documents for compliance with the requirements of paragraph (a) of this section and advise the parties in writing of its findings by the end of the 20-day period. The parties shall have the burden of demonstrating to the satisfaction of the Licensing Authority that the contemplated sale or conveyance complies with the requirements of paragraph (a) of this section. Within 15 days of the consummation of the sale or conveyance, the parties shall email the final documents to the Licensing Authority. The Licensing Authority will not transfer the licenses unless the documents are submitted in accordance with this paragraph.

(c) The eligibility for a license of a person to whom a business is sold or conveyed will be determined for the next quota year in accordance with § 6.23. For the purposes of § 6.23(b)(1) the person to whom a business is sold or conveyed shall be deemed to be the person to whom the historical licenses were issued during the quota year in which the sale or conveyance occurred. Further, for the purposes of § 6.23(b) and (c), the entries made under such licenses by the original licensee during the year in which the sale of conveyance is made, shall be considered as having been made by the person to whom the business was sold or conveyed.

§ 6.29 Use of licenses.

(a) An article entered under a license shall be an article produced in the country specified on the license.

(b) An article entered or withdrawn from warehouse for consumption under a license must be entered in the name of the licensee as the importer of record by the licensee or its agent, and must be owned by the licensee at the time of such entry.

(c) If the article entered or withdrawn from warehouse for consumption was purchased by the licensee through a direct sale from a foreign supplier, the licensee shall present, at the time of entry:

(1) A true and correct copy of a through bill of lading from the country; and

(2) A commercial invoice or bill of sale from the seller, showing the quantity and value of the product, the date of purchase and the country; or

(3) Where the article was entered into warehouse by the foreign supplier, CBP Form 7501 endorsed by the foreign supplier, and the commercial invoice.

(d) If the article entered was purchased by the licensee via sale-in-transit, the licensee shall present, at the time of entry:

(1) A true and correct copy of a through bill of lading endorsed by the original consignee of the goods;

(2) A certified copy of the commercial invoice or bill of sale from the foreign supplier to the original consignee of the goods; and

(3) A commercial invoice or bill of sale from the original consignee to the licensee.

(e) If the article entered was purchased by the licensee in warehouse, the licensee shall present, at the time of entry:

(1) CBP Form 7501 endorsed by the original consignee of the goods;

(2) A certified copy of the commercial invoice or bill of sale from the foreign supplier to the original consignee of the goods; and

(3) A commercial invoice or bill of sale from the original consignee to the licensee.

(f) The Licensing Authority may waive the requirements of paragraphs (c), (d) or (e), if it determines that because of strikes, lockouts or other unusual circumstances, compliance with those requirements would unduly interfere with the entry of such articles.

(g) Nothing in this subpart shall prevent the use of immediate delivery in accordance with the provisions of CBP regulations relating to tariff-rate quotas.

§ 6.30 Record maintenance and inspection.

A licensee shall retain all records relating to its purchases, sales and transactions governed by this subpart, including all records necessary to establish the licensee's eligibility, for five years subsequent to the end of the quota year in which such purchases, sales or transactions occurred. During that period, the licensee shall, upon reasonable notice and during ordinary hours of business, grant officials of the U.S. Department of Agriculture full and complete access to the licensee's premises to inspect, audit or copy such records.

§ 6.31 Debarment and suspension.

The provisions in 7 CFR part 3017—Government-wide Debarment and Suspension (Nonprocurement) and Government Requirements for Drug-Free Workplace (Grants), subparts A through E, apply to this subpart.

§ 6.32 Globalization of licenses.

If the Licensing Authority determines that entries of an article from a country are likely to fall short of that country's allocated amount as indicated in Appendices 1, 2, and 3, the Licensing Authority may permit, with the approval of the Office of the United States Trade Representative, the applicable licensees to enter the remaining balance or a portion thereof from any country during that quota year. Requests for consideration of such adjustments must be submitted to the Licensing Authority no later than September 1. The Licensing Authority will obtain prior consent for such an adjustment of licenses from the government of the exporting country for quantities in accordance with the Uruguay Round commitment of the United States. No globalization requests will be considered prior to April 1 of each year.

§ 6.33 License fee.

(a) A fee will be assessed each quota year for each license to defray the Department's costs of administering the licensing system. To the extent practicable, the fee will be announced by the Licensing Authority in a notice published in the **Federal Register** no later than August 31 of the year preceding the quota year for which the fee is assessed.

(b) The license fee for each license issued is due and payable in full no later than March 15 of the year for which the license is issued. The fee for any license issued after March 15 of any quota year is due and payable in full no later than 10 days from the date of issuance of the license. Fee payments are payable to the Treasurer of the United States and shall be made solely utilizing the electronic software designated for the purpose by the Licensing Authority as provided in § 6.36(b).

(c) If the license fees for all licenses issued to a licensee are not paid by the final payment date, a hold will be placed on the use of all licenses issued to the licensee and no articles will be permitted entry under those licenses. The Licensing Authority shall send a warning by email advising the licensee that if payment is not made in accordance with § 6.36(b) and received within 10 calendar days from the date of the email, all licenses issued to that licensee will be revoked. Where the license at issue is a historical license, this will result, pursuant to § 6.23(b), in the person's loss of historical eligibility for such license.

§ 6.34 Adjustment of appendices.

(a) Whenever a historical license (Appendix 1) is not issued to an applicant pursuant to the provisions of § 6.23, is permanently surrendered or is revoked by the Licensing Authority, the amount of such license will be transferred to Appendix 2.

(b) The cumulative annual transfers to Appendix 2 made in accordance with paragraph (a) of this section will be published by Notice in the **Federal Register** each year. If a transfer results in the addition of a new article, or an article from a country not previously listed in Appendix 2, the Licensing Authority shall afford all eligible applicants for that quota year the opportunity to apply for a license for such article.

§ 6.35 Correction of errors.

(a) If a person demonstrates, to the satisfaction of the Licensing Authority, that errors were made by officers or employees of the United States Government, the Licensing Authority will review and rectify the errors to the extent permitted under this subpart.

(b) To be considered, a person must provide sufficient documentation regarding the error to the Licensing Authority by email, not later than August 31 of the calendar year following the calendar year in which the error was alleged to have been committed.

(c) If the error resulted in the loss of a historical license by a license holder, the Licensing Authority will transfer the amount of such license from Appendix 2 to Appendix 1 in order to provide for the issuance of such license in the calendar year following the calendar year for which the license was revoked. The cumulative annual transfers to Appendix 1 in accordance with this paragraph will be published in the **Federal Register**.

§ 6.36 Miscellaneous.

(a) If any deadline date in this subpart falls on a Saturday, Sunday, or a Federal holiday, then the deadline shall be the next business day.

(b) All applications and fee payments required under this subpart shall be made utilizing the electronic software designated for this purpose by the Licensing Authority, and official correspondence with the Licensing Authority, except as provided under § 6.28(b), shall be by email. Digital scanned versions (*e.g.* PDF, JPEG, TIF, etc.) of hardcopy documents submitted by email are acceptable electronic communications.

§ 6.37 [Removed]

■ 4. Section 6.37 is removed.

Appendixes 1–3 to Subpart—Dairy Tariff-Rate Import Quota Licensing [Removed]

■ 5. Appendixes 1–3 to Subpart—Dairy Tariff-Rate Import Quota Licensing are removed.

Dated: June 23, 2015.

Philip C. Karsting,

Administrator, Foreign Agricultural Service.

[FR Doc. 2015–18122 Filed 7–24–15; 8:45 am]

BILLING CODE 3410–10–P

FARM CREDIT ADMINISTRATION

12 CFR Part 611

RIN 3052–AC85

Organization; Institution Stockholder Voting Procedures

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA, we, Agency or our) amended our regulations to clarify and enhance Farm Credit System (Farm Credit or System) bank and association stockholder voting procedures for tabulating votes, the use of tellers committees, and other items as identified. In accordance with the law, the effective date of the rule is no earlier than 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session.

DATES: *Effective Date:*

Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR part 611 published on May 28, 2015 (80 FR 30333) is effective July 27, 2015.

Compliance Date: All provisions of this regulation require compliance on or before January 1, 2016.

FOR FURTHER INFORMATION CONTACT: Thomas R. Risdal, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4257, TTY (703) 883–4056, or Nancy Tunis, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4061, TTY (703) 883–4056.

SUPPLEMENTARY INFORMATION: The Farm Credit Administration amended our regulations to clarify and enhance

System bank and association stockholder voting procedures for tabulating votes, the use of tellers committees, and other items as identified. In accordance with 12 U.S.C. 2252, the effective date of the final rule is no earlier than 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is July 27, 2015.

(12 U.S.C. 2252(a)(9) and (10))

Dated: July 21, 2015.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2015–18285 Filed 7–24–15; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–2962; Directorate Identifier 2015–NM–071–AD; Amendment 39–18221; AD 2012–11–09 R1]

RIN 2120–AA64

Airworthiness Directives; Various Transport Category Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are revising Airworthiness Directive (AD) 2012–11–09 for certain transport category airplanes. AD 2012–11–09 required either activating all chemical oxygen generators in the lavatories until the generator oxygen supply is expended, or removing the oxygen generator(s); and, for each chemical oxygen generator, after the generator is expended (or removed), removing or restowing the oxygen masks and closing the mask dispenser door. AD 2012–11–09 also required installing a supplemental oxygen system in affected lavatories, which terminated the requirements of AD 2012–11–09. This AD clarifies a certain restriction by providing a broader method of compliance. This AD was prompted by the discovery that the requirement to change the instructions for continued airworthiness under certain conditions may impose an unnecessary burden on operators. We are issuing this AD to eliminate a hazard that could jeopardize flight safety, and to ensure that all lavatories have a supplemental oxygen supply.

DATES: This AD is effective July 27, 2015.

We must receive any comments on this AD by September 10, 2015.

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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–2962; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The 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: Jeff Gardlin, Aerospace Engineer, Airframe and Cabin Safety Branch, ANM–115, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–2136; fax: 425–227–1149; email: *jeff.gardlin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On May 23, 2012, we issued AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), for certain transport category airplanes. AD 2012–11–09 superseded AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011). AD 2012–11–09 required either activating all chemical oxygen generators in the lavatories until the generator oxygen supply is expended, or removing the oxygen generator(s); and, for each chemical oxygen generator, after the generator is expended (or removed), removing or restowing the oxygen masks and closing the mask dispenser door. AD 2012–11–09 also required installing a supplemental oxygen system in affected lavatories, which terminated the requirements of AD 2011–04–09. AD 2012–11–09 was prompted by reports that the design of the oxygen generators presented a hazard that could jeopardize flight safety. We issued AD 2012–11–09 to eliminate a hazard that could jeopardize flight safety, and to ensure that all lavatories have a supplemental oxygen supply.

Actions Since Issuance of AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012)

Since we issued AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), we have discovered that a certain requirement might have imposed an unnecessary burden on Boeing and operators. Paragraph (l)(2) of AD 2012–11–09 required adding ''an airworthiness limitation that prohibits the installation of chemical oxygen generators in lavatories'' to the operator's maintenance program, if compliance with AD 2012–11–09 was shown without a chemical oxygen generator. The intent of this provision was to have a mechanism in place in the operators' maintenance programs that prevents the inadvertent reinstallation of a chemical oxygen generator in a lavatory.

That use of the term ''airworthiness limitation'' could be interpreted as the Airworthiness Limitations section of the Instructions for Continued Airworthiness (ICA), as required by section 25.1529 of the Federal Aviation Regulations (14 CFR 25.1529). While that is an acceptable method of compliance, the FAA did not intend to compel that specific method of compliance. We have therefore revised paragraph (l)(2) of this AD to remove the ''airworthiness limitation'' restriction and to instead prohibit installation of a chemical oxygen generator in a lavatory. We are issuing this AD to correct the unsafe condition on certain transport category airplanes.

FAA's Determination

We are issuing 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.

AD Requirements

This AD continues to require the actions specified in AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012). This AD clarifies a certain restriction by providing a broader method of compliance.

FAA's Justification and Determination of the Effective Date

The change provided in this AD clarifies the intent of a certain requirement of AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), by providing a broader method of compliance for the ''airworthiness limitation'' restriction described previously. Therefore, we find that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Approval Process for AD Compliance Using Chemical Oxygen Generators (COGs)

Because of the issues addressed by AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), COG installations will require new considerations in order to be found acceptable as methods of compliance with this AD. The approval for COG installations will therefore be in accordance with a method approved by the FAA as discussed below.

Approval Process for AD Compliance, Using Other Systems

Chemical oxygen generators are one type of system used to provide supplemental oxygen. While the majority of transport category airplanes use this system in lavatories, there are other systems as well. If another system type is used to meet the requirements of this AD, the original unsafe condition is not a concern. In that case, the means of compliance is straightforward, and we have determined that the approval method could be more flexible than is usually the case for an AD. For example, delegated organizations cannot normally make compliance findings for ADs; service information associated with ADs must be adhered to exactly, or else an alternative method of compliance (AMOC) must be approved.

For this AD, if the type of system is other than a COG, then we have determined that these restrictions could be relaxed. Therefore, paragraph (l)(2) of this AD contains provisions to permit existing approval processes to be used, as long as the means of compliance is other than a COG. This provision takes precedence over current limitations in operators' authority to use their organizational delegations when showing compliance with an AD. In addition, if an operator uses service information that is approved for such installations, deviations from the service information can be addressed using the operator's normal procedures without requiring an AMOC.

Oversight Office

Paragraph (l) of this AD refers to the FAA oversight office responsible for approval of modifications used to show compliance. This will typically be the aircraft certification office having geographic oversight of the applicant. In the case of service instructions from design approval holders of other countries, this would be the FAA, Transport Airplane Directorate (Transport Standards Staff). We anticipate that modifications to meet this AD will require either supplemental type certificate or amended type certificate approval.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2015–2962 and directorate identifier 2015–NM–071–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this 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 AD.

Costs of Compliance

We estimate that this AD affects 5,500 airplanes of U.S. registry. This new AD imposes no additional economic burden. The current costs for this AD are repeated for the convenience of affected operators, as follows:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Activate COG/expend oxygen supply [retained actions from AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012)].	Up to 2 work-hours × $85 per hour = up to $170.	$0	Up to $170	Up to $935,000.
Oxygen system installation [retained action from AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012)].	24 work-hours × $85 per hour = $2,040.	$6,000	$8,040	$44,220,000.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (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) 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), and adding the following new AD:

2012–11–09 R1 Transport Category Airplanes: Amendment 39–18221; Docket No. FAA–2015–2962; Directorate Identifier 2015–NM–071–AD.

(a) Effective Date

This AD is effective July 27, 2015.

(b) Affected ADs

This AD revises AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012).

(c) Applicability

This AD applies to transport category airplanes, in passenger-carrying operations, as specified in paragraph (c)(1) or (c)(2) of this AD.

(1) Airplanes that complied with the requirements of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011).

(2) Airplanes equipped with any chemical oxygen generator installed in any lavatory and are:

(i) Operating under part 121 of the Federal Aviation Regulations (14 CFR part 121); or

(ii) U.S. registered and operating under part 129 of the Federal Aviation Regulations (14 CFR part 129), with a maximum passenger capacity of 20 or greater.

(d) Subject

Air Transport Association (ATA) of America Code 35, Oxygen.

(e) Unsafe Condition

This AD was prompted by the determination that the current design of chemical oxygen generators presents a hazard that could jeopardize flight safety and the discovery that certain existing requirements could impose an unnecessary burden on operators. We are issuing this AD to eliminate a hazard that could jeopardize flight safety, and to ensure that all lavatories have a supplemental oxygen supply.

(f) Compliance

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

(g) Retained Requirements for the Oxygen Generator, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), with no changes. Within 21 days after March 14, 2011 (the effective date of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011)), do the actions specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Activate all chemical oxygen generators in the lavatories until the generator oxygen supply is expended. An operator may also remove the oxygen generator(s), in accordance with existing maintenance practice, in lieu of activating it.

(2) For each chemical oxygen generator, after the generator is expended (or removed), remove or re-stow the oxygen masks and close the mask dispenser door.

Note 1 to paragraph (g) of this AD: Design approval holders are not expected to release service instructions for the actions specified in paragraph (g) of this AD.

(h) Retained Information About Hazardous Material, With a Change to the Identification of the Code of Federal Regulations Citation

This paragraph restates the information in Note 1 of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), with a change to the identification of the Code of Federal Regulations citation. Chemical oxygen generators are considered a hazardous material and subject to specific requirements under Title 49 of the Code of Federal Regulations (49 CFR) for shipping. Oxygen generators must be expended prior to disposal but are considered a hazardous waste; therefore, disposal must be in accordance with all Federal, State, and local regulations. Expended oxygen generators are forbidden in air transportation as cargo. For more information, contact 1–800–467–4922.

(i) Retained Compliance With Federal Aviation Regulations of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), With No Changes

This paragraph restates the requirements of paragraph (h) of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), with no changes. Notwithstanding the requirements of sections 25.1447, 121.329, 121.333, and 129.13 of the Federal Aviation Regulations (14 CFR 25.1447, 121.329, 121.333, and 129.13), operators complying with this AD are authorized to operate affected airplanes until accomplishment of the actions specified in paragraph (l) of this AD.

(j) Retained Parts Installation Limitation of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), With No Changes

This paragraph restates the requirements of paragraph (i) of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), with no changes. After March 14, 2011 (the effective date of AD 2011–04–09), and until accomplishment of the actions specified in paragraph (l) of this AD, no person may install a chemical oxygen generator in any lavatory on any affected airplane.

(k) Retained Prohibition of Special Flight Permit of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2011–04–09, Amendment 39–16630 (76 FR 12556, March 8, 2011), with no changes. Special flight permits, as described in section 21.197 and section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed for the accomplishment of the actions specified in paragraph (g) of this AD.

(l) Retained Oxygen System Restoration, With Revised Restriction in Paragraph (l)(2) of This AD With a Change to the Identification of the Federal Aviation Regulations Citations in Paragraphs (l)(2) and (l)(2)(i) of This AD

This paragraph restates the requirements of paragraph (l) of AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), with a revised restriction in paragraph (l)(2) of this AD and with a change to the identification of the Federal Aviation Regulations citations in paragraphs (l)(2) and (l)(2)(i) of this AD. Within 37 months after August 10, 2012 (the effective date of AD 2012–11–09), install a supplemental oxygen system that meets all applicable sections of parts 25 and 121 of the Federal Aviation Regulations (14 CFR part 25 and 14 CFR part 121) in each lavatory, as specified in paragraph (l)(1) or (l)(2) of this AD, as applicable.

(1) If compliance with paragraph (l) of this AD is achieved using a chemical oxygen generator, the actions specified in paragraph (l) of this AD must be done in accordance with a method approved by the Manager of the responsible FAA oversight office having responsibility over the modification. For a method to be approved, it must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(2) If compliance with paragraph (l) of this AD is achieved without a chemical oxygen generator, the specifications of paragraphs (l)(2)(i) and (l)(2)(ii) of this AD apply. Any repairs or alterations to a system installed and approved in accordance with this paragraph may be accomplished in accordance with part 43 of the Federal Aviation Regulations (14 CFR part 43). The installation of chemical oxygen generators is prohibited unless approved in accordance with the requirements of paragraph (l)(1) of this AD.

(i) The modification must receive FAA approval in accordance with part 21 of the Federal Aviation Regulations (14 CFR part 21) as a major design change. Notwithstanding operations specification

restrictions to the contrary, organizational approval holders may exercise their full authority in approving installations that meet the installation requirements of this AD.

(ii) Deviation from approved service instructions and subsequent modifications may be handled by normal operator procedures without requiring approval of an alternative method of compliance.

(m) Retained Minimum Equipment List (MEL) Provisions, With a Change to the Identification of the Federal Aviation Regulations Citations

This paragraph restates the provision specified in paragraph (m) of AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), with a change to the identification of the Federal Aviation Regulations citations. Notwithstanding the requirements of sections 121.628(b)(2) and 129.14 of the Federal Aviation Regulations (14 CFR 121.628(b)(2) and 14 CFR 129.14), the equipment required by paragraph (l) of this AD may be included in the MEL, as applicable.

(n) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Transport Standards Staff, ANM–110, 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 Transport Standards Staff, send it to the attention of the person identified in paragraph (o) of this AD.

(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) AMOCs approved previously for AD 2012–11–09, Amendment 39–17072 (77 FR 38000, June 26, 2012), are approved as AMOCs for the corresponding provisions of this AD.

(o) Related Information

For more information about this AD, contact Jeff Gardlin, Aerospace Engineer, Airframe and Cabin Safety Branch, ANM–115, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–2136; fax: 425–227–1149; email: *jeff.gardlin@faa.gov.*

(p) Material Incorporated by Reference

None.

Issued in Renton, Washington, on July 17, 2015.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2015–18155 Filed 7–24–15; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1120

[CPSC Docket No. CPSC–2015–0003]

Substantial Product Hazard List: Extension Cords

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (''CPSC'' or ''Commission'') is issuing a final rule to specify that extension cords (both indoor and outdoor use extension cords) that do not contain one or more of five applicable readily observable characteristics set forth in the rule, as addressed in a voluntary standard, are deemed a substantial product hazard under the Consumer Product Safety Act (''CPSA'').

DATES: *Effective Date:* The rule takes effect on August 26, 2015. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of August 26, 2015.

FOR FURTHER INFORMATION CONTACT: Mary Kroh, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: 301–504–7886; *mkroh@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Statutory Authority

A. Statutory Authority

Section 223 of the Consumer Product Safety Improvement Act of 2008 (''CPSIA''), amended section 15 of the CPSA, 15 U.S.C. 2064, to add a new subsection (j). Section 15(j) of the CPSA provides the Commission with the authority to specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence are deemed a substantial product hazard under section 15(a)(2) of the CPSA. Section 15(a)(2) of the CPSA defines a ''substantial product hazard,'' in relevant part, as a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. A rule under section 15(j) of the CPSA (a ''15(j) rule'') is not a consumer product safety rule that imposes performance or labeling requirements for newly manufactured products. Rather, a 15(j) rule is a Commission determination of a product defect, based upon noncompliance with specific product characteristics that are addressed in an effective voluntary standard. For the Commission to issue a 15(j) rule, the product characteristics involved must be ''readily observable'' and have been addressed by a voluntary standard. Moreover, the voluntary standard must be effective in reducing the risk of injury associated with the consumer products, and there must be substantial compliance with the voluntary standard.

B. Background

On February 3, 2015, the Commission issued a notice of proposed rulemaking (''NPR'') in the **Federal Register** to amend the substantial product hazard list in 16 CFR part 1120 (''part 1120'') to add extension cords that lack certain readily observable safety characteristics addressed by a voluntary standard because such products pose a risk of electrical shock or fire. 80 FR 5701. The comment period on the proposed rule closed on April 20, 2015. As detailed in section II of this preamble, the Commission received four comments on the proposed rule, covering three issues.

The Commission is now issuing a final rule to amend part 1120 by adding four readily observable characteristics that apply to all general-use extension cords (indoor and outdoor extension cords, including indoor seasonal extension cords):

(1) Minimum wire size;
(2) sufficient strain relief;
(3) proper polarity; and
(4) proper continuity.

Additionally, the final rule includes one characteristic, outlet covers, that applies to 2-wire indoor extension cords, and one characteristic, jacketed cord, that applies to outdoor extension cords. Accordingly, as of the effective date of this rule, extension cords within the scope of the rule that do not conform to all five applicable characteristics described in the voluntary standard, Underwriters Laboratories (''UL''), *Standard for Cord Sets and Power-Supply Cords,* UL 817, 11th Edition, dated March 16, 2001, as revised through February 3, 2014 (''UL 817'') will constitute a substantial product hazard.[1] Nonconforming extension cords are deemed to create a substantial product hazard under section 15(a)(2) of the CPSA because such products pose a risk of electrical shock or fire.

The Commission is finalizing the rule with two minor clarifications as recommended by CPSC staff. First, the

[1] The UL mark and logo are trademarks of Underwriters Laboratories, Inc.

final rule deletes an erroneous citation to section 31 of UL 817 in § 1120.3(d)(1), the requirements for minimum wire size. Section 31 of UL 817 states requirements for attachment plugs, which are not related to minimum wire size, and thus should not be referenced in the section of the rule concerning minimum wire size. Second, the term ''jacketed insulated cord'' is replaced with ''jacketed cord'' in § 1120.3(d)(6) of the final rule and in this preamble, when describing a readily observable characteristic for outdoor extension cords. This change is not intended to change the scope of the rule or the requirements, but to clarify the characteristics of UL 817 being incorporated by reference. As explained more fully in response to comment 3 in section II of the preamble, the NPR proposed (and the final rule would require) jacketing—not insulation—as a readily observable characteristic of outdoor extension cords.

C. Extension Cords

The final rule uses the phrase ''extension cords'' to identify the products that are within the scope of the rule. The Commission received no comments on the definition of ''extension cords'' described in the NPR; accordingly, the final rule will continue to define an ''extension cord'' (also known as a cord set), consistent with the description of products subject to UL 817, as a length of factory-assembled flexible cord with an attachment plug or current tap as a line fitting and with a cord connector as a load fitting. Extension cords are used for extending a branch circuit supply of an electrical outlet to the power-supply cord of a portable appliance, in accordance with the National Electrical Code.® The final rule applies to extension cords that are equipped with National Electrical Manufacturer Association (''NEMA'') 1–15, 5–15 and 5–20 fittings, and that are intended for indoor use only, or for both indoor and outdoor use. We refer to cords intended for indoor use only as ''indoor cords'' and to cords intended for both indoor and outdoor use as ''outdoor cords.'' The term ''extension cord'' does not include detachable power supply cords, appliance cords, power strips and taps, and adaptor cords supplied with outdoor tools and yard equipment.

All products within the scope of the final rule are covered by UL 817. Table 1 provides a non-exhaustive list of examples of extension cords that fall within and outside the scope of the final rule. Not included in this rule are detachable power supply and appliance cords and adaptor cords supplied with outdoor tools and yard equipment because these cords are specific-purpose, rather than general-use cords. The products that are outside the scope of the final rule are not subject to UL 817, or they do not present the same risks of injury.

TABLE 1—EXTENSION CORDS: PRODUCTS WITHIN AND OUTSIDE THE SCOPE OF THE FINAL RULE

In Scope: Household extension cords, factory-assembled, 120 volts AC, including:
- Indoor or general-use cord sets, including seasonal indoor cord sets.
- Outdoor cord sets.

Out of Scope:
- Detachable power cords, either with appliance or other nonstandard plugs (*e.g.,* accompanying electronic or other electrically powered items), or with fittings of different configurations (*e.g.,* a clothes washer replacement cord with a plug at one end and individual wire terminals at the other end).
- Unassembled components, such as flexible cord or fittings, which may be assembled into extension cords or installed in permanent branch circuit wiring systems.
- Cord sets intended for use with non-branch-circuit household current, *i.e.,* greater or less than nominal 120 volts AC (*e.g.,* for use with 220 volt appliances, or for 15–50 ampere/125–250-volt recreational vehicles).
- Power strips, power taps, and surge protectors.

D. Applicable Voluntary Standard

The current voluntary standard applicable to extension cords is UL 817–2014. UL has updated UL 817 over the years to address various safety issues to make extension cords safer, *see* Staff's Draft Proposed Rule to Add Extension Cords to the Substantial Product Hazard List in 16 CFR part 1120, January 21, 2015 (''Staff NPR Briefing Package'') Tab B, Extension Cords: Abbreviated History and the Associated UL Standards. The Staff's NPR Briefing Package is available on the CPSC's Web site at: *http://www.cpsc.gov/Global/Newsroom/FOIA/CommissionBriefingPackages/2015/Proposed-Rule-to-Amend-Substantia-Product-Hazard-List-to-Include-Extension-Cords.pdf.*

Many of the safety requirements for extension cords predate the existence of the CPSC. For example, CPSC staff believes that UL incorporated requirements for polarized (and grounded) plugs and receptacles on cord sets around 1962. A search by CPSC staff found that grounded plugs were developed as early as 1911, and polarized plugs became available in 1914. The National Electrical Code (''NEC'') adopted requirements for polarized electrical outlets in 1948 and for grounded 120-volt receptacles in 1962. Since 1987, UL 817 has addressed the identified, readily observable characteristics that are included in the rule (minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers for indoor cords, and jacketed cords for outdoor extension cords).

Table 2, which also appeared in the NPR at 80 FR 5703, summarizes the required readily observable characteristics in UL 817 associated with all extension cords, as well as specific requirements for indoor- and outdoor-use extension cords. The Commission received no comments on these requirements for extension cords and no comments on Table 2. Thus, Table 2 remains an accurate summary of the provisions of UL 817 that are being incorporated by reference into the final rule.

TABLE 2—READILY OBSERVABLE CHARACTERISTICS FOR EXTENSION CORDS

General extension cord usage	Readily observable characteristics				
	Minimum wire size (AWG)	Sufficient strain relief	Proper polarization	Proper continuity	Protective feature
Indoor ..... *UL 817 Section 20*	16AWG, or 17/18AWG with integral overcurrent protection. *UL 817 Sections 2.10, 21*	18AWG or larger must withstand 30 pound force. *UL 817 Section 84*	Cord fittings must be polarized (NEMA1–15) or have a grounding pin (NEMA5–15). *UL 817 Sections 9, 19*	Plug and outlet terminals must be connected in identical configuration (*i.e.,* Hot-to-Hot, likewise for Neutral and Ground). *UL 817 Sections 16, 105*	Outlet covers must be provided on unused outlets on 2-wire parallel *UL 817 Section 26.7.*
Outdoor ..... *UL 817 Section 30*	SAME ..... *UL 817 Section 2.13, 30*	SAME	SAME ..... *UL 817 Sections 31, 32*	SAME	Jacketed flexible cord *UL 817 Section 30.*

E. Risk of Injury

1. Electrocution and Fire Hazards

The preamble to the NPR explained that consumers can be seriously injured or killed by electrical shocks or fires if extension cord products are not constructed properly. 80 FR at 5703–04. To reduce the risk of injury caused by fires or electrical shocks, the final rule requires that all extension cords covered by UL 817 comply with requirements for minimum wire size, sufficient strain relief, proper polarization, and proper continuity.

• *Wire size.* Conforming to the minimum wire size requirement in UL 817 supports a product's electrical load to avoid the hazard of fire and electrical shock. When an extension cord does not contain the correct wire size for the load, the cord becomes hot and the insulation is degraded. Damaged insulation can fail by sagging, melting, or hardening and breaking apart, which can expose the energized wire inside the extension cord. Exposed energized wires present a risk of fire and electrical shock. Additionally, conforming to the minimum wire size requirement contributes to the necessary mechanical strength to endure handling and other forces imposed on an extension cord during expected use of the product.

• *Strain relief.* Conforming to the strain relief requirement in UL 817 helps to ensure that use of extension cords, including pulling and twisting the cords, does not cause mechanical damage to the connections and prevents separation of wires from their terminal connections during handling (*e.g.,* being pulled, twisted). Damaged connections, such as broken strands of copper wiring inside the insulated wiring, could cause overheating (leading to a fire) or separation of wires from their terminal connections, which could expose bare energized conductors (leading to electrical shock and fire).

• *Proper polarity.* An extension cord that conforms to the proper polarity requirements in UL 817 minimizes the risk of accidental contact with an energized conductor. Polarization clearly identifies the energized wire in the cord set and maintains, in conjunction with other construction requirements, the same orientation as the receptacle of the branch circuit for the products, such as lighting, appliances, and other equipment plugged into the extension cord. For example, a product that employs a power switch that must be located in the energized side of the power supply circuit will be supplied in the proper orientation, thus reducing the risk of electrical shock.

• *Proper Continuity.* An extension cord that conforms to continuity requirements in UL 817 provides a continuous conductive path from line to load fitting so that the cord can serve its intended function. For each terminal in the plug fitting, a corresponding conductor must be attached to the corresponding terminal in the load fitting. For example, a cord attached to a plug with a grounding pin must have a grounding conductor. Each wire in the cord also must be connected properly on each end so that, for example, the grounding pin of the plug on a three-wire cord is connected to the grounding socket on the outlet, and the energized blade on the plug is not wired to the non-energized receptacle on the outlet. Proper continuity from end to end reduces the risk of both fire and electrical shock.

Indoor (2-wire) and outdoor extension cords each have one additional safety requirement that is also readily observable and reduces the risk of injury.

• *Outlet covers.* Indoor 2-wire parallel extension cords with polarized parallel-blade and -slot fittings must contain outlet covers. Outlet covers reduce the risk of injury to children, in particular, by minimizing the opportunity for a child to probe plugs with small objects or chew on the exposed receptacle surfaces, which can lead to hand or mouth burns and electrical shock.

• *Jacketed cords.* Outdoor extension cords must have jacketed cords. A jacketed cord protects the individual insulated conductors from damage when exposed to weather and other conditions associated with outdoor use. An unjacketed extension cord used outdoors is susceptible to damage that can lead to exposed conductors, and thus, present a risk of shock and fire.

2. Incident Data

For the NPR, CPSC staff searched extension cord incident data reported between 1980 and May 2014 from CPSC's Injury or Potential Injury Database (''IPII'') for both fatal and nonfatal incidents; staff searched the Death Certificate Database (''DTHS'') for fatal incidents. Staff limited the scope of the incidents under consideration to incidents involving fire, burn, and shock hazards. CPSC staff has updated this data, and found that a total of 765 fatal incidents, 1,128 deaths, and 4,760 nonfatal incidents involving extension cords were in-scope, and occurred between 1980 and 2013.[2] 80 FR at 5704.

For the final rule, staff also searched IPII and DTHS for in-scope incidents reported from January 2014 through April of 2015. CPSC staff found an additional 21 in-scope fatal incidents that occurred in 2014 (involving 25 deaths) and two fatal incidents (two deaths) in 2015. CPSC staff found an additional 83 nonfatal extension cord

[2] Staff has updated incident data to include retailer reports.

incidents that occurred in 2014, and staff found 11 nonfatal incidents that occurred in 2015. *See* Tab E, Staff Briefing Package: Final Rule to Amend 16 CFR part 1120 to Add Extension Cords, dated July 15, 2015 (''Staff's Final Rule Briefing Package''), available at: *http://www.cpsc.gov/Global/Newsroom/FOIA/CommissionBriefingPackages/2015/FinalRuletoAmendSubstantialProductHazardListtoIncludeExtensionCords.pdf*.

Table 3 shows the annual average number of reported incidents associated with extension cords for five different periods for fatal incidents, deaths, and nonfatal incidents. The table presents data for the 35-year period, divided into five 7-year periods. Reporting may not be complete for the most recent period because sometimes CPSC receives reports of incidents years after the incidents have occurred. Table 3 shows a steady decline in the number of reported extension cord fire, burn, and shock fatal incidents, deaths, and nonfatal incidents in CPSC databases since the 1980s.

TABLE 3—EXTENSION CORD ANNUAL AVERAGE OF REPORTED FATAL INCIDENTS, DEATHS, AND NON-FATAL INCIDENTS FROM 1980–2014

Years	Fatal incidents	Deaths	Non-fatal incidents
1980–1986	32.7	47.7	201.0
1987–1993	27.7	46.6	179.3
1994–2000	23.6	31.1	131.6
2001–2007	15.9	21.7	114.3
2008–2014	12.4	17.6	65.7

F. Compliance Efforts to Address the Hazard

As noted in the preamble to the NPR, the Office of Compliance sent a letter dated January 9, 2015 to manufacturers, importers, distributors, and retailers of extension cords, informing them that the Office of Compliance considers products that do not conform to the UL 817 requirements for the five applicable readily observable characteristics to be defective and to present a substantial product hazard. 80 FR at 5704–05. In numerous instances over a period of 20 years, CPSC staff has considered the absence of one or more of the identified readily observable characteristics (minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers for 2-wire indoor cords, and jacketed cords for outdoor extension cords) to present a substantial product hazard and has sought appropriate corrective action to prevent injury to the public. Since August 2014, however, no additional recalls or import stoppages of extension cords have occurred.

II. Summary of Comments on the Proposed Rule and CPSC's Responses

The Commission received four comments, comprising three issues, in response to the NPR. No commenters opposed the rule. One comment was received from an industry association and three comments were from consumers. The industry association expressed general support for the proposed rule and suggested an additional readily observable characteristic of extension cords. The consumer commenters were also generally supportive of the NPR. As explained in response to comment 3, the Commission made one minor clarification to the final rule based on the comments received. Below are summaries of the comments and the Commission's responses:

Comment 1: One commenter suggested an additional ''readily observable'' characteristic of extension cords, a visual check and test using a magnet, to ensure that the wire strands in extension cords are made of copper instead of steel.

Response 1: UL 817, by reference to UL 62, *Standard for Safety for Flexible Cords and Cables,* requires that extension cords be made of annealed copper wire strands. For example, neither aluminum nor steel is an acceptable material for wire used in extension cords under UL 817. Magnets are not attracted to copper or aluminum, but are attracted to steel. Thus, the commenter is suggesting that CPSC use a magnet to test for noncompliant steel wire. Although a magnet can detect steel, it cannot detect other noncompliant wire materials, such as aluminum. Accordingly, the Commission disagrees with the commenter's suggestion because magnets cannot be used to detect the required copper wire strands, nor can magnets be used to detect all other noncompliant materials. A resistance measurement could distinguish whether a conductor is made of copper, but the high-precision equipment required for a sufficiently accurate measurement is costly, and use of it may not be ''readily observable.''

Regardless of the rule, if CPSC staff finds that the extension cord's construction is noncompliant with the voluntary standard, staff can collect samples of such products and conduct a preliminary determination of whether the product presents a substantial product hazard. If such product does present a substantial product hazard, CPSC can take action to remove the products from the market.

Comment 2: Two commenters asked whether an extension cord must include all of the readily observable characteristics outlined in the proposed rule, or just one characteristic.

Response 2: Four of the six observable characteristics apply to all general-use extension cords (indoor and outdoor extension cords, including indoor seasonal extension cords): (1) Minimum wire size; (2) sufficient strain relief; (3) proper polarity; and (4) proper continuity. All four characteristics must be present for the product not to present a substantial product hazard. Additionally, one characteristic (outlet covers) applies to 2-wire indoor extension cords, and one characteristic (jacketed cord) applies to outdoor extension cords. Thus, 2-wire indoor and all outdoor extension cords would each be required to exhibit five readily observable characteristics described in UL 817. If one or more applicable characteristics are missing, the product presents a substantial product hazard under section 15(a)(2) of the CPSA.

Comment 3: One commenter believed that UL 817 only requires an outdoor two-conductor extension cord to have flexible insulation on each conductor and does not require a jacket over the conductors.

Response 3: Section 30.1 of UL 817 specifies the types of flexible cords that may be used to construct outdoor extension cords. All of the cords specified in section 30.1 of UL 817 require a jacketed layer covering the

conductors.[3] A ''jacket'' is a layer of flexible plastic or rubber intended to prevent the individual insulated conductors inside the cord from being exposed to the environment, and to prevent mechanical damage to the conductors.

The commenter may misunderstand an additional requirement stated in section 30.1a: ''A 2-wire type of outdoor-use cord set shall contain two insulated circuit conductors.'' This requirement for the individual conductors in an extension cord to be insulated does not eliminate the primary requirement for a jacket to cover the conductors on extension cords for outdoor use.

In the NPR, the Commission described the requirement for a jacketed cord as a ''jacketed insulated cord.'' This designation may be confusing, because readers may conflate the two different requirements stated in section 30 of UL 817, one for a jacketed cord, and the other for insulated conductors inside the cord jacket. The NPR proposed to require a jacketed cord, not insulated conductors, as a readily observable characteristic of outdoor extension cords. Accordingly, the Commission has replaced the term ''jacketed insulated cord'' throughout the preamble and in the regulation text at § 1120.3(d)(6) to ''jacketed cord'' to clarify that the rule only applies to the jacket requirement in section 30 of UL 817 for outdoor-use extension cords.

III. Information Supporting Substantial Product Hazard Determination

A. Defined Characteristics Are Readily Observable and Addressed by UL 817

Sections 2, 9, 16, 19, 20, 21, 26, 30, 31, 32, 84, and 105 of UL 817 set forth the requirements for the readily observable characteristics specified in the final rule: minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers for 2-wire indoor cords, and jacketed cords for outdoor extension cords. Table 2 in section I.D of this preamble summarizes the technical requirements for the five applicable readily observable characteristics in UL 817. The final rule deems the absence of any one of these applicable characteristics to be a substantial product hazard under section 15(a)(2) of the CPSA. The preamble to the NPR set forth information to support a finding that minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers for 2-wire indoor cords, and jacketed cords for outdoor extension cords, are readily observable characteristics from UL 817. *See* 80 FR 5705–08. We summarize that information here.

1. Minimum Wire Size

Section 2 of UL 817 requires that a ''general-use cord set'' be made using flexible cord, as described in Table 20.1, with conductors sized 18, 17, 16, 14, 12, or 10 AWG terminated in a plug and outlet. Extension cords using flexible cord with conductors sized 18 or 17 AWG also require overcurrent protection. Minimum wire size, as required in section 2 of UL 817, is a readily observable characteristic of extension cords that can be observed visually by taking a measurement of the product's bare wires. 80 FR at 5705.

2. Sufficient Strain Relief

Section 84 of UL 817 describes the strain relief test required for all extension cords. Section 84.2.1 specifies that cords with 18AWG or larger conductors must withstand a 30-pound pull force on the connection between the fitting and the cord. Section 84.2.2 of UL 817 specifies that a weight must be steadily suspended from the cord for 1 minute so that the cord is pulled directly from the fitting without the cord pulling loose or stretching from the plug/load fitting. Sufficient strain relief, as required in section 84 of UL 588, is a readily observable characteristic of extension cords that can be determined by suspending a 30-lb. weight from the plug and load fittings and observing for conformance with section 84.2 of UL 817. 80 FR at 5705–06.

3. Proper Polarization

Section 19 of UL 817 requires that all two-wire extension cords must have polarized fittings. Sections 31 and 32 of UL 817 require that all two-conductor outdoor extension cords must have polarized fittings and that grounding fittings must be used on three-conductor cords. General UL construction specifications on fittings (Section 9.3 of UL 817) require that polarized outlets must reject improper or reversed insertion of polarized plugs to reduce the risk of shock. Proper polarization, as required by sections 9, 19, 31, and 32 of UL 817, is a readily observable characteristic of extension cords, which can be observed by visually inspecting the plug for the polarized configuration. 80 FR at 5706.

4. Proper Continuity

Section 16 of UL 817 requires that corresponding terminals of line (plug) and load (outlet) fittings must be connected to the same conductor of the cord. Section 105 of UL 817 prescribes testing requirements for all manufactured extension cords so that the conductors are connected to the intended terminals of the fittings, and that electrical continuity exists throughout the entire length of the conductor/contact assembly. The wires of an extension cord must form continuous paths from one end to the other so that the cord can serve its intended function. Each wire in the cord also must be properly connected on each end so that, for example, the grounding pin of the plug on a three-wire cord is connected to the grounding socket on the outlet, and the energized blade on the plug is not wired to the non-energized receptacle on the outlet. Proper continuity, as required by sections 16 and 105 of UL 817, is a readily observable characteristic of extension cords that can be visually observed using an inexpensive and readily available battery-light continuity tester. 80 FR at 5705–07.

5. Outlet Covers (2-Wire Indoor Extension Cords)

Section 26.7 of UL 817 requires that an indoor 2-wire parallel extension cord with polarized parallel-blade and -slot fittings that has more than one outlet must have covers for all the additional outlets. Outlet covers on indoor 2-wire parallel extension cords with polarized parallel-blade and -slot fittings, as required in section 26 of UL 817, are a readily observable characteristic of indoor extension cords, which can be observed by visually inspecting additional outlets for the presence of covers.

6. Jacketed Cords (Outdoor Extension Cords)

Section 30 of UL 817 requires that extension cords for outdoor use be manufactured using jacketed flexible cord; that is, a cord consisting of two or three insulated wires covered by an additional flexible plastic or rubber jacket. Jacketed cord on outdoor extension cords, as required in section 30 of UL 817, is a readily observable characteristic of outdoor extension cords that can be observed by visually inspecting for the presence of a jacketed cord.

B. Conformance to UL 817 Has Been Effective in Reducing the Risk of Injury

Conformance to sections 2, 9, 16, 19, 20, 21, 26, 30, 31, 32, 84, and 105 of UL 817, as summarized in Table 2 in section I.D of this preamble, has been effective in reducing the risk of injury from shock and fire associated with

[3] *Wire and Cable Marking and Application Guide,* January 2014, Regulatory Services Department, UL, Northbrook, IL.

extension cords. CPSC's incident data suggest that conformance to UL 817 has coincided with, and may have contributed to, a decline in the risk of injury associated with extension cords. *See* Tab A of Staff's Final Rule Briefing Package.

The preamble to the NPR reviewed the reported death and nonfatal incident data from 1980 through 2013, which demonstrated a decline during that period. 80 FR at 5708–09. Table 3 in section I.E.2 of this preamble shows the annual average number of reported incidents for five different periods for each of fatal incidents, deaths, and nonfatal incidents. The 35-year period is broken up into five 7-year periods. Reporting may not be complete for the most recent period because sometimes, CPSC receives reports of incidents years after they have occurred. Table 3 shows an overall decrease in the number of reported fire and shock incidents associated with extension cords, including fatal incidents, deaths, and nonfatal incidents, since the 1980s and early 1990s.

C. Extension Cords Substantially Comply With UL 817

The Commission has not articulated a bright-line rule for substantial compliance. Rather, in the rulemaking context, the Commission has stated that the determination of substantial compliance should be made on a case-by-case basis. Extension cord compliance with UL 817 is ''substantial,'' as that term is used in section 15(j) of the CPSA. The Commission estimates that a majority of extension cords, likely in excess of 90 percent, sold for consumer use in the United States, conforms to UL 817. *See* 80 FR at 5709–10. Since issuing the NPR, CPSC has not received any information in the comments, or otherwise, that would change the estimated level of compliance with UL 817.

IV. Description of the Final Rule

The rule regarding extension cords creates two new paragraphs in part 1120: One defines the products covered by the rule and the other states the characteristics that must be present for the products not to present a substantial product hazard. Two minor clarifications have been made in the final rule: (1) In § 1120.3(d)(1), deletion of the erroneous citation to section 31 of UL 817, and (2) in § 1120.3(d)(6), replacement of the phrase ''jacketed insulated cord'' with ''jacketed cord.'' Neither clarification is intended to change the scope or substance of the rule.

Definition. Section 1120.2(e) defines an ''extension cord,'' also known as a ''cord set,'' as a length of factory-assembled flexible cord with an attachment plug or current tap as a line fitting and with a cord connector as a load fitting. Extension cords are used for extending a branch circuit supply of an electrical outlet to the power-supply cord of a portable appliance, in accordance with the National Electrical Code.® As defined in the rule, the term applies to extension cords that are equipped with National Electrical Manufacturer Association (NEMA) 1–15, 5–15 and 5–20 fittings, and that are intended for indoor use only, or for both indoor and outdoor use. The term ''extension cord'' does not include detachable power supply cords, appliance cords, power strips and taps, and adaptor cords supplied with outdoor tools and yard equipment.

This definition is adapted from descriptions of extension cords defined in section 1 of UL 817. The rule includes indoor and outdoor general-use extension cords that can be used with many different types of electrical products. All in-scope products are covered by UL 817. Excluded from the definition are detachable power supply and appliance cords and adaptor cords supplied with outdoor tools and yard equipment because these are specific-purpose cords, rather than general-use cords. The products that are not covered by the rule are not subject to UL 817, or they do not present the same risks of injury.

Substantial product hazard list. Section 1120.3(d) states that extension cords that lack the identified characteristics in accordance with the requirements specified in the relevant sections of UL 817 (sections 2, 9, 16, 19, 20, 21, 26, 30, 31, 32, 84, and 105) are deemed a substantial product hazard under section 15(a)(2) of the CPSA:

- Minimum wire size requirements in sections 2, 20, 21, and 30 of UL 817;
- Sufficient strain relief requirements in sections 20, 30, and 84 of UL 817;
- Proper polarization requirements in sections 9, 19, 20, 30, 31, and 32 of UL 817;
- Proper continuity requirements in sections 16, 20, 30, and 105 of UL 817;
- Outlet cover requirement (for indoor 2-wire parallel extension cords with polarized parallel-blade and -slot fittings) in sections 20 and 26 of UL 817; or
- Jacketed cord requirement (for outdoor use extension cords) in section 30 of UL 817.

These characteristics and the UL 817 requirements are explained in more detail in sections I.D (Table 2) and III.A of this preamble.

Standards incorporated by reference. At the request of the Office of the Federal Register (''OFR''), the Commission made a formatting change to part 1120 in the final rule for seasonal and decorative lighting products, 80 FR 25216. This change created a new section, 1120.4, listing all of the incorporations by reference (''IBR'') for products added to the substantial product hazard list. The IBR for extension cords is included in a new § 1120.4(c)(4).

Incorporation by reference. The OFR has regulations concerning incorporation by reference. 1 CFR part 51. The OFR recently revised these regulations to require that, for a final rule, agencies must discuss, in the preamble of the rule, ways that the materials the agency incorporates by reference are reasonably available to interested persons and how interested parties can obtain the materials. In addition, the preamble of the rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR's requirements, Table 2 in section I.D of this preamble summarizes the requirements of UL 817. Interested persons may purchase a copy of UL 817 from UL, either through UL's Web site, *www.UL.com,* or by mail at the address provided in the rule. A copy of the standard also can be inspected at the CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission, or at NARA, as provided in the rule.

V. Commission Determination That Extension Cords That Lack Any One of Five Applicable Readily Observable Characteristics Present a Substantial Product Hazard

To place a product (or class of products) on the list of substantial product hazards pursuant to section 15(j) of the CPSA, the Commission must determine that: (1) The characteristics involved are ''readily observable''; (2) the characteristics are addressed by a voluntary standard; (3) the voluntary standard is effective in reducing the risk of injury associated with the consumer products; and (4) products are in substantial compliance with the voluntary standard. Accordingly, based on the information provided in this rulemaking, for extension cords, the Commission determines that:

- Minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers for 2-wire indoor extension cords, and jacketed cords for outdoor extension cords, are all readily observable characteristics of extension cords. Proper polarization,

outlet covers, and jacketed cords are all visually observable characteristics of an extension cord. Measurement of minimum wire size, sufficient strain relief, and proper continuity can be readily conducted and visually observed;

- the identified readily observable safety characteristics for extension cords are addressed in the following sections of a voluntary standard, UL 817:
  - Minimum wire size—sections 2, 20, 21, and 30;
  - Sufficient strain relief—sections 20, 30, and 84;
  - Proper polarization—9, 19, 20, 30, 31, and 32;
  - Proper continuity—sections 16, 20, 30, and 105;
  - Outlet cover (for indoor 2-wire parallel extension cords with polarized parallel-blade and -slot fittings)—sections 20 and 26;
  - Jacketed cord (for outdoor use extension cords)—section 30;
- conformance to UL 817 has been effective in reducing the risk of injury from shock and fire associated with extension cords. For example, the annual average reported deaths associated with extension cords from 1980 to 1986 was 47.7, and the annual average number of reported non-fatal incidents during the same time period was 201. These death and injury averages have declined over the years. In the most recent 7-year period, from 2008 to 2014, the annual average number of reported deaths fell to 17.6, and the annual average number of reported nonfatal incidents fell to 65.7. Although decreasing numbers of death and injury may be a result of several factors, conformance with UL 817 coincided with, and likely contributed to, the decline in deaths and injuries associated with extension cords; and
- extension cords sold in the United States substantially comply with UL 817. We estimate that more than 90 percent of the extension cords for sale in the United States comply with the readily observable safety characteristics addressed in UL 817: Minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers for 2-wire indoor cords, and jacketed cords for outdoor extension cords.

VI. Effect of the 15(j) Rule

Section 15(j) of the CPSA allows the Commission to issue a rule specifying that a consumer product or class of consumer products has characteristics whose presence or absence creates a substantial product hazard. A rule under section 15(j) of the CPSA is not a consumer product safety rule, and thus, does not create a mandatory standard that triggers testing or certification requirements under section 14(a) of the CPSA.

Although a rule issued under section 15(j) of the CPSA is not a consumer product safety rule, placing a consumer product on the substantial product hazard list in 16 CFR part 1120 has some ramifications. A product that is or has a substantial product hazard is subject to the reporting requirements of section 15(b) of the CPSA, 15 U.S.C. 2064(b). A manufacturer, importer, distributor, or retailer that fails to report a substantial product hazard to the Commission is subject to civil penalties under section 20 of the CPSA, 15 U.S.C. 2069, and possibly to criminal penalties under section 21 of the CPSA, 15 U.S.C. 2070.

A product that is or contains a substantial product hazard is also subject to corrective action under sections 15(c) and (d) of the CPSA, 15 U.S.C. 2064(c) and (d). Thus, a rule issued under section 15(j) for extension cords allows the Commission to order that a manufacturer, importer, distributor, or retailer of extension cords that do not contain one or more of the applicable readily observable characteristics must offer to repair or replace the product, or refund the purchase price to the consumer.

A product that is offered for import into the United States and is or contains a substantial product hazard shall be refused admission into the United States under section 17(a) of the CPSA, 15 U.S.C. 2066(a). Additionally, CBP has the authority to seize certain products offered for import under the Tariff Act of 1930 (19 U.S.C. 1595a) (''Tariff Act''), and to assess civil penalties that CBP, by law, is authorized to impose. Section 1595a(c)(2)(A) of the Tariff Act states that CBP may seize merchandise, and such merchandize may be forfeited if: ''its importation or entry is subject to any restriction or prohibition which is imposed by law relating to health, safety, or conservation and the merchandise is not in compliance with the applicable rule, regulation, or statute.''

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA'') requires that proposed and final rules be reviewed for the potential economic impact on small entities, including small businesses. 5 U.S.C. 601–612. In the preamble to the proposed rule (80 FR at 5711–12) the Commission certified that the rule will not have a significant economic impact on a substantial number of small entities. The Commission received no comments on the RFA analysis presented in the NPR, and we have not found any data that would alter that analysis.

VIII. Environmental Considerations

Generally, the Commission's regulations are considered to have little or no potential for affecting the human environment, and environmental assessments and impact statements are not usually required. *See* 16 CFR 1021.5(a). The final rule to deem extension cords that do not contain one or more of five applicable readily observable characteristics to be a substantial product hazard will not have an adverse impact on the environment and is considered to fall within the ''categorical exclusion'' for purposes of the National Environmental Policy Act. 16 CFR 1021.5(c).

IX. Paperwork Reduction Act

The rule does not require any stakeholder to create, maintain, or disclose information. Thus, no paperwork burden is associated with this final rule, and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) does not apply.

X. Preemption

A rule under section 15(j) of the CPSA does not establish a consumer product safety rule. Accordingly, the preemption provisions in section 26(a) of the CPSA, 15 U.S.C. 2075(a), do not apply to this rule.

XI. Effective Date

The preamble to the proposed rule stated that a final rule deeming that extension cords that do not conform to the specified sections of UL 817 regarding minimum wire size, sufficient strain relief, proper polarization, proper continuity, outlet covers (for 2-wire indoor extension cords), and jacketed cord (for outdoor extension cords), are a substantial product hazard be effective 30 days after publication of a final rule in the **Federal Register**. We received no comments on the effective date. Accordingly, the final rule will apply to extension cords imported or introduced into commerce on August 26, 2015.

List of Subjects in 16 CFR Part 1120

Administrative practice and procedure, Clothing, Consumer protection, Cord sets, Extension cords, Household appliances, Imports, Incorporation by reference, Infants and children, Lighting.

For the reasons stated above, and under the authority of 15 U.S.C. 2064(j), 5 U.S.C. 553, and section 3 of Public Law 110–314, 122 Stat. 3016 (August

14, 2008), the Consumer Product Safety Commission amends 16 CFR part 1120 to read as follows:

PART 1120—SUBSTANTIAL PRODUCT HAZARD LIST

■ 1. The authority citation for part 1120 continues to read as follows:

Authority: 15 U.S.C. 2064(j).

■ 2. In § 1120.2, add paragraph (e) to read as follows:

§ 1120.2 Definitions.

* * * * *

(e) *Extension cord (also known as a cord set)* means a length of factory-assembled flexible cord with an attachment plug or current tap as a line fitting and with a cord connector as a load fitting. Extension cords are used for extending a branch circuit supply of an electrical outlet to the power-supply cord of a portable appliance, in accordance with the National Electrical Code.® For purposes of this rule, the term applies to extension cords that are equipped with National Electrical Manufacturer Association (''NEMA'') 1–15, 5–15 and 5–20 fittings, and that are intended for indoor use only, or for both indoor and outdoor use. The term ''extension cord'' does not include detachable power supply cords, appliance cords, power strips and taps, and adaptor cords supplied with outdoor tools and yard equipment.

■ 3. In § 1120.3, add paragraph (d) to read as follows:

§ 1120.3 Products deemed to be substantial product hazards.

* * * * *

(d) Extension cords that lack one or more of the following specified characteristics in conformance with requirements in sections 2, 9, 16, 19, 20, 21, 26, 30, 31, 32, 84, and 105 of UL 817 (incorporated by reference, see § 1120.4):

(1) Minimum wire size requirement in sections 2, 20, 21, and 30 of UL 817;

(2) Sufficient strain relief requirement in sections 20, 30, and 84 of UL 817;

(3) Proper polarization requirement in sections 9, 19, 20, 30, 31, and 32 of UL 817;

(4) Proper continuity requirement in sections 16, 20, 30, and 105 of UL 817;

(5) Outlet cover requirement (for indoor 2-wire parallel extension cords with polarized parallel-blade and -slot fittings) in sections 20 and 26 of UL 817; or

(6) Jacketed cord requirement (for outdoor use extension cords) in section 30 of UL 817.

■ 4. In § 1120.4, add paragraph (c)(4) to read as follows:

§ 1120.4 Standards incorporated by reference.

* * * * *

(c) * * *

(4) UL 817, *Standard for Cord Sets and Power-Supply Cords,* 11th Edition, dated March 16, 2001, as revised through February 3, 2014 (''UL 817''), IBR approved for § 1120.3(d).

Dated: July 22, 2015.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2015–18294 Filed 7–24–15; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[Docket ID: DOD–2012–HA–0049]

RIN 0720–AB57

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)/ TRICARE: TRICARE Pharmacy Benefits Program

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This final rule implements new authority for an over-the-counter (OTC) drug program, makes several administrative changes to the TRICARE Pharmacy Benefits Program regulation in order to conform it to the statute, and clarifies some procedures regarding the operation of the uniform formulary. Specifically, the final rule: Provides implementing regulations for the OTC drug program that has recently been given permanent statutory authority; conforms the pharmacy program regulation to the statute (including recent statutory changes contained in the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015) regarding point-of-service availability of non-formulary drugs and copayments for all categories of drugs; clarifies the process for formulary placement of newly approved drugs; and clarifies several other uniform formulary practices.

DATES: This final rule is effective August 26, 2015.

FOR FURTHER INFORMATION CONTACT: Dr. George E. Jones, Jr., Chief, Pharmacy Operations Division, Defense Health Agency, telephone 703–681–2890.

SUPPLEMENTARY INFORMATION:

A. Executive Summary

1. Purpose of Regulatory Action

The final rule is necessary to incorporate new statutory authority for a permanent OTC program, make several administrative changes to the TRICARE Pharmacy Benefits Program regulation to conform to the statute (10 U.S.C. 1074g), and clarify some procedures regarding the uniform formulary.

Legal authority for this final rule is 10 U.S.C. 1074g.

2. Summary of the Final Rule

a. It establishes the process for identifying select OTC products for coverage under the pharmacy benefit program and the rules for making these products available to eligible DoD beneficiaries under the new authority enacted in section 702 of the National Defense Authorization Act for Fiscal Year 2013 (NDAA–13). In general, approved OTC pharmaceuticals will comply with the mandatory generic policy as stated in 32 CFR 199.21(j)(2) and will be available under terms similar to generic prescription medications, except that the need for a prescription and/or a copay may be waived in some circumstances.

b. It conforms the regulation to the statute regarding the point of service where non-formulary drugs are available. They would be generally available in the mail order program, except that if validated as medically necessary, they would be available from military treatment facility pharmacies and from retail pharmacies (at the formulary copay level) as well.

c. It clarifies the process for formulary placement of newly approved innovator drugs brought to market under a New Drug Application approved by the Food and Drug Administration (FDA), giving the Pharmacy and Therapeutics Committee up to 120 days to recommend tier placement on the uniform formulary. During this period, new drugs would be assigned a classification pending status; they would be available under terms comparable to non-formulary drugs, unless medically necessary, in which case they would be available under terms comparable to formulary drugs.

d. As a ''housekeeping'' change, it conforms the rule to the new statutory specifications for copayment amounts in 10 U.S.C 1074g.

3. Costs and Benefits

The benefits of this final rule are that it will more closely conform the regulation to the statute and facilitate more effective administration of the

TRICARE Pharmacy Benefits Program. The final rule will provide savings to the Department of a low-end estimate of $18.4 million and the high-end estimate of $26 million per year based on OTC program savings and estimated potential savings resulting from being able to offer non-formulary drugs through the most cost-effective venue. Revenue from implementation of copay changes resulting from statutory changes contained in the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015 is a low end estimate of $183.1 million annually and a high end estimate for $198.7 million annually. With respect to these statutory changes, this rule simply makes ''housekeeping'' amendments to conform to the specific statutory requirements. DoD has no administrative discretion on this matter.

B. Background

In 1999, Congress enacted 10 U.S.C. 1074g to, among other things, establish a uniform formulary program to incentivize the use of more cost-effective pharmaceutical agents and points of service. There are four points of service under the Pharmacy Benefits Program—military facility pharmacies, retail network pharmacies, retail non-network pharmacies, and the TRICARE mail order pharmacy program (TMOP)—and three uniform formulary tiers—First Tier for generic drugs, Second Tier for preferred brand name drugs (also referred to as ''formulary drugs''), and Third Tier for non-preferred brand name drugs (also referred to as ''non-formulary drugs''). In addition to establishing procedures for assigning drugs to one of the three tiers, the statute includes several other specifications, including that formulary drugs are generally available in all three points of service. Until very recently, the statute also provided that non-formulary drugs would be available in at least one point of service. TRICARE's regulations implementing this statute, issued in 2004, established or continued prior rules for, among other things: Assigning drugs to a formulary tier based on clinical and cost-effectiveness, and point of service availability for the respective tiers. Although the statute required Third Tier drugs to be available in only one point of service, the regulations made them available in two. Under section 702 of the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015 (NDAA–15), non-formulary drugs are now generally limited to the mail order pharmacy point of service (unless there is a validated medical necessity for the drug).

TRICARE's administration of the Pharmacy Benefits Program has achieved some improvements in cost-effectiveness through the retail refund program, increased utilization of formulary management tools such as step-therapy and prior authorizations, and increased copays. The final rule will provide savings to the Department of a low-end estimate of $18.4 million and the high-end estimate of $26 million per year based on a combination of the savings from the current OTC demonstration program and estimated potential savings resulting from being able to offer non-formulary drugs through the most cost-effective venue. Revenue from implementation of copay changes resulting from statutory changes contained in the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015 is a low end estimate of $183.1 million annually and a high end estimate for $198.7 million annually. As a ''housekeeping'' matter, this rule includes the necessary changes to conform to the new statutory specifications over which DoD has no administrative discretion. However, overall costs of the TRICARE Pharmacy Benefits Program have continued to increase substantially, from approximately $2 billion in fiscal year 2001, to approximately $7 billion for fiscal year 2012. Like other large health plans, DoD is experiencing rising pharmacy costs due to new expensive products, shorter hospital stays, and in some cases higher drug prices. DoD also has an expanded beneficiary population, which now includes ''TRICARE-for-Life'' beneficiaries and some members of the Selected Reserves and their families. Retail prescription co-payments reflect the cost for up to a 30-day supply of the prescription, while mail order co-payments cover up to a 90-day supply. This difference is part of the incentive for beneficiaries to use the more cost-effective mail order program, as is the recent elimination of copayments for mail order generic drugs. Encouraging increased use of DoD's more cost-effective points of service (*i.e.,* the mail order pharmacy or a military treatment facility pharmacy) and more cost-effective pharmaceutical products (*i.e.,* those on First Tier and Second Tier) continues to be a TRICARE program objective.

C. Summary of the Final Rule

This final rule establishes the process for selecting OTC products for coverage under the TRICARE pharmacy benefits program and would provide the guidelines for making selected OTC products available to eligible DoD beneficiaries. The OTC drugs demonstration project began through the TRICARE Mail Order Pharmacy program in May 2007 and in the TRICARE Retail Pharmacy program in October 2007. Due to the brevity of the demonstration, particularly in the retail pharmacy venue, in June 2009 an interim report to Congress was submitted with preliminary cost savings estimates and positive beneficiary feedback. In order to validate the initial results and identify areas for improvement to the program, the Department of Defense (DoD) extended the program through a **Federal Register** notice published on December 16, 2009. The demonstration program was due to terminate November 4, 2012. The DoD extended the OTC demonstration for another 2 years through publishing a **Federal Register** notice, while awaiting permanent legislative authority. A report to Congress in 2012 stated that DoD saved approximately $62M during the course of the OTC demo. Section 702 of NDAA–13 amended subsection (a)(2) of section 1074g of title 10, United States Code, providing permanent authority to place selected over-the-counter drugs on the uniform formulary.

The new legislation authorizes DoD to place selected OTC drugs on the uniform formulary and make such drugs available to eligible covered beneficiaries (eligibility specified in 32 CFR 199.3). The basic criteria regarding selection of OTC products for consideration are cost-effectiveness and patient access. DoD will consider and approve an OTC drug for inclusion in the uniform formulary only if it is expected to reduce government costs relative to a clinically comparable alternative drug that would otherwise be consumed and/or if an OTC product provided access to care not otherwise met by prescription-only products (*e.g.,* Plan B contraceptive). An OTC drug may be included on the uniform formulary only if the Pharmacy and Therapeutics (P&T) Committee finds that the OTC drug is both cost effective and clinically effective. Clinical effectiveness is judged by the criteria found in 32 CFR 199.21(e)(1)(i–ii) while cost effectiveness is determined based on criteria found in 32 CFR 199.21(e)(2). This cost-effectiveness standard is reinforced by the requirement for physician supervision through issuance of a prescription for the OTC drug. This requirement applies unless it is waived based on a recommendation of the Pharmacy and Therapeutics Committee for the use of the drug for certain medical situations, such as emergency care treatment.

The selected OTC drugs would be placed in First Tier with the corresponding copays applicable to the point-of-service involved. Alternatively, based on the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, the retail copay may be waived and $0.00 copay established for the particular OTC drug in all points of service. No cost sharing is required at any of the three points of service for a uniformed service member on active duty.

This final rule also makes several administrative changes to the TRICARE Pharmacy Benefits Program regulation to conform more closely to the statute (10 U.S.C. 1074g) and to clarify some procedures regarding the uniform formulary. One change aligns the regulation with the statute regarding the point of service where non-formulary drugs are generally available. Until very recently, the statute required availability in one of the three primary points of service (military facility, retail network, and mail order program). The current regulation specifies that non-formulary (Third Tier) drugs are generally unavailable in military facilities and generally available in the retail network and by mail order. The proposed rule would have revised this to state that non-formulary drugs would generally be available in the retail network or by mail order, but the Pharmacy and Therapeutics Committee could recommend and the DHA Director could approve limiting the drug to only one venue based on determinations that there is no significant clinical need and there is a significant additional government cost for access to both venues. However, since publication of the proposed rule, Congress has amended the statute to specify that non-formulary drugs will only be generally available in the mail order program. This removes any DoD discretion on the matter. Therefore, this final rule states that non-formulary drugs are generally available only in the mail order program. It should be noted that existing statutory and regulatory provisions allowing an exception to this in cases of medical necessity for the non-formulary drug remain in effect. Therefore, when medically necessary, non-formulary drugs are available at military treatment facility pharmacies and also from retail pharmacies. In the latter case, the copay will be the same as is applicable to formulary drugs.

This change will reinforce DoD policy, which encourages use of more cost-effective drugs and points of service. A beneficiary always has the option of asking the health care provider to change the prescription to a comparable formulary drug, or, in cases of medical necessity, obtaining approval for dispensing the non-formulary drug at the formulary copayment amount. Like all other health plans with formularies, physicians make professional decisions regarding formulary alternatives, often in consultation with the pharmacist in light of the individual patient's circumstances. Under DoD's policy, when a physician provides written justification stating why the non-preferred drug is expected to have better clinical outcomes than the preferred drug, the non-formulary drug may be obtained at the formulary copay. This process is clearly explained to the provider by the Pharmacy Benefit manager through telephone or fax when the situation occurs. Another option for most prescriptions when the beneficiary prefers a non-formulary drug is to have the prescription transferred to the mail order program, which has a lower co-payment for a 90-day supply of a non-formulary drug ($46) than the retail point of service would have for three 30-day prescriptions for a formulary drug (3 times $20).

Another administrative change in this final rule clarifies the process for formulary placement of innovator drugs newly approved by the Food and Drug Administration. Current practice for brand name drugs is that they are placed in the Second Tier the day FDA approves the drug. This practice has not led to the most cost-effective placement of these newly approved drugs and has the potential for confusion among patients and physicians if the drug is soon thereafter moved to Third Tier. DoD proposes that newly approved drugs be evaluated for their relative clinical benefit and relative cost, as compared to other drugs in the same class, at the next quarterly meeting of the Pharmacy and Therapeutics (P&T) Committee following FDA approval. A recommendation will then be made to the Director of the Defense Health Agency for tier placement of the drug.

The current statute and regulation do not specifically address the status of the drug from the date of FDA approval to the date the P&T Committee's recommendation is eventually implemented. This final rule addresses this by considering the newly approved drug to be in a classification pending status and covered by TRICARE under terms applicable to Third Tier drugs, and by providing a period of up to 120 days for the P&T Committee to make a final determination with respect to formulary classification. Tier classification will normally occur at the next quarterly meeting following FDA approval, but in cases when the FDA approval happens too close to a scheduled meeting for the necessary research to be done, the drug would be considered at the following meeting. The 120-day time period accommodates this. During the period prior to a decision on tier placement, the newly approved drug will be covered by TRICARE under Third Tier terms.

Under the current rule, new drugs are immediately placed on the Second Tier (formulary brand-name drugs). Once the new drug is properly reviewed and compared to all other drugs in its class, it is often moved to the Third Tier (non-formulary), *i.e.,* no clinical or cost advantage. Under this final rule, very briefly deferring tier placement pending a review would not require a ''tier move'' if the review finds no clinical or cost advantage. Movement of drugs between the tiers is always confusing to beneficiaries even though they are notified in writing of the change. The change to the rule will lessen the likelihood of a tier move for the new product.

This final rule also incorporates into the regulation several details of current practice. While the current regulation provides that a uniform formulary drug that is not a generic drug may be grouped for copayment purposes with generic drugs if it is judged to be as cost effective as generic drugs in the same drug class, this final rule adds that a generic drug may be classified as non-formulary if it is less cost-effective than non-generic formulary drugs in the same drug class. The Uniform Formulary process requires the P&T committee to make recommendations to the Director, Defense Health Agency who approves or disapproves each recommendation after reviewing comments from the Beneficiary Advisory Panel on the recommendations. In the case of all generic drugs, the beneficiary copayment amount for any prescription may not exceed the total charge to TRICARE for that prescription.

Finally, this final rule makes a ''housekeeping'' change to the paragraph on cost sharing amounts to make it conform to the current statutory specifications established by NDAA–13 and NDAA–15. In the current regulation, copays were calculated based on the previous statute that stated that the Third Tier copay could be no more than 20% for active duty dependents or 25% for retirees and their dependents of the cost of the drug. The NDAA–13 legislation provided specific set dollar amounts for copays from January 2014 through January 2023. NDAA–15 adjusted several of these amounts by $3 per prescription and

generally eliminated availability of non-formulary drugs at the retail pharmacy point of service. This has rendered the text of the current regulation out of date and no longer accurate. The new text of the regulation matches the current statutory specifications. The final rule also reissues without change paragraphs (h)(4) and (i)(2)(ii)(D) to clarify agency intent and correct a technical misstatement in a 2011 **Federal Register** publication.

D. Summary of and Response to Public Comments

The proposed rule was published in the **Federal Register** (79 FR 56312) September 19, 2014, for a 60-day comment period. We received three comments on the proposed rule from three commenters. We appreciate these comments, which are summarized here, along with DoD's response.

Comment: One comment expressed concern regarding limiting the availability of non-formulary pharmaceuticals to one point of service based on Pharmacy and Therapeutics Committee recommendations and approval by the Director, Defense Health Agency. The commenter's concern was specific to limiting the availability of compounded medications to one point of service.

Response: This final rule is not addressing compounded medications and the rule is doing nothing more that conforming with the current statutory specification (based on NDAA–15) that non-formulary drugs are generally only available through the mail order point of service. (Existing regulatory provisions at 32 CFR 199.21(h)(3)(iv) stating that with validated medical necessity, non-formulary drugs are provided at formulary drug copays remain in effect.)

Comment: One commenter objected to the proposed rule provision that newly approved drugs will be maintained for a brief administrative review period in a ''classification pending'' status and be available under terms comparable to Third Tier drugs. The commenter expressed the view that this is contrary to the statute, which establishes the default position for brand name drugs at the Second Tier, and could impair prompt access to important new drugs.

Response: DoD believes this change does not conflict with the statute, which does not address the issue of status pending the first opportunity of the Pharmacy and Therapeutics Committee to consider the appropriate tier placement of the drug. TRICARE is trying to minimize the beneficiary confusion associated with tier changes. This administrative review period is very short. It will last not more than 120 days, and often a shorter period. And perhaps most importantly, in any case in which there is a validated medical necessity for the newly approved drug, it will be available on the same terms as apply to Tier Two drugs. Thus, DoD is adopting this brief administrative review period for initial tier placement of newly approved brand name drugs.

Comment: One commenter expressed support for the proposed provisions on over-the-counter drugs, but recommended that a preamble summary of the provision and inclusion of an example of emergency contraception be written into the regulatory text.

Response: DoD acknowledges the commenter's agreement with the policy, but sees no need to revise the regulatory language. It correctly states the intended policy, and providing an example of a particular drug DoD expects to be covered by that policy is more appropriate for a preamble summary than regulatory text.

E. Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Executive Order (EO) 12866 and 13563 require that a comprehensive regulatory impact analysis be performed on any economically significant regulatory action, defined primarily as one that would result in an effect of $100 million or more in any one year. The DoD has examined the economic, legal, and policy implications of this final rule and has concluded that it is not an economically significant regulatory action under Section 3(f)(1) of the EO. The rule has been reviewed by the Office of Management and Budget.

Congressional Review Act, 5 U.S.C. 801, et seq.

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. For this purpose we note that the budget savings identified in this preamble are mostly associated with ''housekeeping'' changes to the Code of Federal Regulations to conform to specific statutory requirements, with respect to which DoD has no administrative discretion.

Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

This rule does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more (adjusted for inflation) in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This final rule does not have a significant impact on a substantial number of small entities.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This final rule contains no new information collection requirements subject to the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3511).

Executive Order 13132, ''Federalism''

This final rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on the States; the relationship between the National Government and the States; or the distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 199

Claims, Health care, Health insurance, Military personnel, Pharmacy Benefits.

Accordingly, 32 CFR part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.21 is amended by:
■ a. Adding paragraph (b)(3));
■ b. Adding paragraph (g)(5);
■ c. Revising paragraphs (h)(3)(i) and (ii);
■ d. Republishing paragraph (h)(4);
■ e. Adding paragraph (h)(5);
■ f. Revising paragraphs (i)(2)(ii) through (v), and (i)(2)(x); and
■ g. Adding paragraphs (i)(2)(xii) and (j)(4) and (5).

The additions and revisions read as follows:

§ 199.21 TRICARE Pharmacy Benefits Program.

* * * * *

(b) * * *

(3) *Over-the-counter drug.* A drug that is not subject to section 503(b)(1) of the

Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(b)(1)).

* * * * *

(g) * * *

(5) *Administrative procedure for newly approved drugs.* In the case of a newly approved innovator drug, other than a generic drug, the innovator drug will, not later than 120 days after the date of approval by the Food and Drug Administration, be added to the uniform formulary unless prior to that date the P&T Committee has recommended that the agent be listed as a non-formulary drug. If the Director, DHA subsequently approves that recommendation, the drug will be so listed. If the Director, DHA disapproves the recommendation to list the drug as non-formulary Third Tier, the drug will be then classified per the Director's decision. If, prior to the expiration of 120 days, the P&T Committee recommends that the agent be added to the uniform formulary and the recommendation is approved by the Director, DHA, that will be done as soon as feasible. Pending action under this paragraph (g)(5), the newly approved pharmaceutical agent will be considered to be in a classification pending status and will be available to beneficiaries under Third Tier terms applicable to all other non-formulary agents.

* * * * *

(h) * * *

(3) *Availability of non-formulary pharmaceutical agents.*—(i) *General.* Non-formulary pharmaceutical agents are generally not available in military treatment facilities or in the retail point of service. They are available in the mail order program.

(ii) *Availability of non-formulary pharmaceutical agents at military treatment facilities.* Even when particular non-formulary agents are not generally available at military treatment facilities, they will be made available to eligible covered beneficiaries through the non-formulary special approval process as noted in this paragraph (h)(3)(ii) when there is a valid medical necessity for use of the non-formulary pharmaceutical agent.

* * * * *

(4) *Availability of vaccines/immunizations.* A retail network pharmacy may be an authorized provider under the Pharmacy Benefits Program when functioning within the scope of its state laws to provide authorized vaccines/immunizations to an eligible beneficiary. The Pharmacy Benefits Program will cover the vaccine and its administration by the retail network pharmacy, including administration by pharmacists who meet the applicable requirements of state law to administer the vaccine. A TRICARE authorized vaccine/immunization includes only vaccines/immunizations authorized as preventive care under the basic program benefits of § 199.4 of this part, as well as such care authorized for Prime enrollees under the uniform HMO benefit of § 199.18. For Prime enrollees under the uniform HMO benefit, a referral is not required under paragraph (n)(2) of § 199.18 for preventive care vaccines/immunizations received from a retail network pharmacy that is a TRICARE authorized provider. Any additional policies, instructions, procedures, and guidelines appropriate for implementation of this benefit may be issued by the TMA Director.

(5) *Availability of selected over-the-counter (OTC) drugs under the pharmacy benefits program.* Although the pharmacy benefits program generally covers only prescription drugs, in some cases over-the-counter drugs may be covered and may be placed on the uniform formulary.

(i) An OTC drug may be included on the uniform formulary upon the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, based on a finding that it is cost-effective and clinically effective, as compared with other drugs in the same therapeutic class of pharmaceutical agents. Clinical need is judged by the criteria found in paragraph (e)(1)(i) and (ii) of this section. Cost effectiveness is determined based on criteria found in paragraph (e)(2) of this section.

(ii) OTC drugs placed on the uniform formulary, in general, will be treated the same as generic drugs on the uniform formulary for purposes of availability in MTF pharmacies, retail pharmacies, and the mail order pharmacy program and other requirements. However, upon the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, the requirement for a prescription may be waived for a particular OTC drug for certain emergency care treatment situations. In addition, a special copayment may be established under paragraph (i)(2)(xii) of this section for OTC drugs specifically used in certain emergency care treatment situations.

(i) * * *

(2) * * *

(ii) For pharmaceutical agents obtained from a retail network pharmacy there is a:

(A) $20.00 co-payment per prescription required for up to a 30-day supply of a formulary pharmaceutical agent.

(B) $8.00 co-payment per prescription for up to a 30-day supply of a generic pharmaceutical agent.

(C) $0.00 co-payment for vaccines/immunizations authorized as preventive care for eligible beneficiaries.

(iii) For formulary and generic pharmaceutical agents obtained from a retail non-network pharmacy there is a 20 percent or $20.00 co-payment (whichever is greater) per prescription for up to a 30-day supply of the pharmaceutical agent.

(iv) For pharmaceutical agents obtained under the TRICARE mail-order program there is a:

(A) $16.00 co-payment per prescription for up to a 90-day supply of a formulary pharmaceutical agent.

(B) $0.00 co-payment for up to a 90-day supply of a generic pharmaceutical agent.

(C) $46.00 co-payment for up to a 90-day supply of a non-formulary pharmaceutical agent. (D) $ 0.00 co-payment for smoking cessation pharmaceutical agents covered under the smoking cessation program.

* * * * *

(x) The per prescription co-payments established in this paragraph (i)(2) may be adjusted periodically based on experience with the uniform formulary, changes in economic circumstances, and other appropriate factors. Any such adjustment must be approved by the Assistant Secretary of Defense (Health Affairs). These additional requirements apply:

(A) Beginning January 1, 2016, the amounts specified in this paragraph (i)(2) shall be increased annually by the percentage increase in the cost-of-living adjustment by which retired pay is increased under 10 U.S. Code section 1401a for the year, rounded down to the nearest dollar. However, with respect to any amount of increase that is less than $1 or any amount lost in rounding down to the nearest dollar, that amount shall be carried over to, and accumulated with, the amount of the increase for the subsequent year or years and made when the aggregate amount of increases carried over for a year is $1 or more.

(B) Effective January 1, 2023 (unless otherwise provided by law), the Assistant Secretary of Defense for Health Affairs may adjust the amounts specified in this paragraph (i)(2) as considered appropriate. Between January 1, 2016, and January 1, 2023, the only adjustments allowed are the cost of living adjustments described in paragraph (i)(2)(x)(A) of this section, unless otherwise provided by law.

* * * * *

(xii) *Special copayment rule for OTC drugs in the retail pharmacy network.*

As a general rule, OTC drugs placed on the uniform formulary under paragraph (h)(5) of this section will have copayments equal to those for generic drugs on the uniform formulary. However, upon the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, the copayment may be established at $0.00 for any particular OTC drug in the retail pharmacy network.

(j) * * *

(4) Upon the recommendation of the Pharmacy and Therapeutics Committee, a generic drug may be classified as non-formulary if it is less cost effective than non-generic formulary drugs in the same drug class.

(5) The beneficiary copayment amount for any generic drug prescription may not exceed the total charge for that prescription.

* * * * *

Dated: July 21, 2015.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2015–18290 Filed 7–24–15; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 3, 50, 51, 52, 62, 67, 72, 80, 82, 83, 84, 90, 96, 100, 101, 110, 117, 150, 151, 155, 156, 161, 162, 164, 165, 177, and 183

[Docket No. USCG–2015–0433]

RIN–1625–AC25

Navigation and Navigable Waters; Technical, Organizational, and Conforming Amendments

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This final rule makes non-substantive technical, organizational, and conforming amendments to existing regulations throughout Title 33 of the Code of Federal Regulations. These changes provide the public with more accurate and current regulatory information, but they do not change the impact on the public of any Coast Guard regulation.

DATES: This final rule is effective July 27, 2015.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2015–0433. To view documents mentioned in this preamble, go to *www.regulations.gov,* type the docket number in the ''SEARCH'' box, and click ''Search.'' If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in room W12–140 of the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call or email Mr. Paul Crissy, Coast Guard; telephone 202–372–1093, email *Paul.H.Crissy@uscg.mil.* If you have questions on viewing the docket, call Ms. Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

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I. Abbreviations

CFR—Code of Federal Regulations
DHS—Department of Homeland Security
E.O.—Executive Order
FR—Federal Register
NOAA—National Oceanic and Atmospheric Administration
OMB—Office of Management and Budget
Pub. L.—Public Law
§—Section symbol
U.S.C.—United States Code

II. Regulatory History

This rule is subject to several exceptions from the regulatory procedure requirements of 5 U.S.C. 553. Before issuing this rule, the Coast Guard did not provide a notice of proposed rulemaking, because it is not required to do so because this rule involves rules of agency organization, procedure, or practice.[1] Moreover, notice and comment is unnecessary because the rule does not change the impact on the public of any Coast Guard regulation, but only makes non-substantive organizational and conforming amendments. For that reason, the Coast Guard finds it has good cause to issue this rule without first giving the public an opportunity to comment,[2] and to make the rule effective less than 30 days after publication in the **Federal Register**.[3]

III. Basis and Purpose

The legal basis of this rule is found in 5 U.S.C. 552(a) and 553; 14 U.S.C. 2(3) and 631–633; 33 U.S.C. 471 and 499; and Department of Homeland Security Delegation No. 0170.1.

The purpose of this rule is to provide the public with more accurate and current regulatory information by making technical, organizational, and conforming amendments to existing regulations throughout Title 33 of the Code of Federal Regulations (33 CFR). This rule does not change the impact on the public of any Coast Guard regulation.

IV. Discussion of the Rule

Each year, the Coast Guard issues technical, organizational, and conforming amendments to existing regulations in 33 CFR. These annual ''technical amendments'' provide the public with more accurate and current regulatory information, but do not change the impact on the public of any Coast Guard regulation.

The rule makes changes in the following sections of 33 CFR:

Sections 3.35–1, 3.35–35, 3.40–1(b), 3.40–10: Shift several Seventh and Eighth Coast Guard District boundaries so that they coincide with existing county political boundaries.

Part 50 authority line: Change from ''Sec. 8, 18 Stat. 127, as amended, sec. 302, 58 Stat. 287, as amended; 14 U.S.C. 92, 38 U.S.C. 693i'' to ''Sec. 10 U.S.C. 1554; 14 U.S.C. 92, 633; Department of Homeland Security Delegations No. 0160.1(II)(B)(1), 0170.1(II)(23)'' to conform to obsolete statutory references to current equivalents. Specifically, 18 Stat. 127 was superseded by 14 U.S.C. 92 and 633 in 1949. Section 302 of 58 Stat. 287 was codified at 38 U.S.C. 693i; that section was later re-enacted as 10 U.S.C. 1553 and 1554 in Public Law 85–857 in 1958.

Sections 50.1, 50.3, 50.5, 50.6: Change ''officer'' to ''member or former member'' to reflect change to 10 U.S.C. 1554 authorization for Retiring Review Board.

Part 51 authority line: Change from ''10 U.S.C. 1553; Pub. L. 107–296, 116 Stat. 2135'' to ''10 U.S.C. 1553; 14

[1] 5 U.S.C. 553(b)(A).

[2] 5 U.S.C. 553(b)(B).

[3] 5 U.S.C. 553(d)(3).

U.S.C. 92, 633; Department of Homeland Security Delegations No. 0160.1 II(B)(1), 0170.1(II)(23),'' to omit public law that confers no rulemaking authority and to add 14 U.S.C. 92, which does confer that authority.

Part 52 authority line: Add the Secretary's regulatory authority under 14 U.S.C. 92 and 633.

Section 62.21(c): Reflect discontinuation of print publication of Light List, United States Coast Pilot, Local Notices to Mariners, and Notice to Mariners, in favor of electronic-only publication.

Section 67.10–25(a): Update Coast Guard address information.

Sections 72.01–5, 72.01–25(c), 72.01–40, 72.05–1(a), 72.05–5, 72.05–10: Reflect discontinuation of print publication of Local Notices to Mariners, Notice to Mariners, in favor of electronic-only publication, and indicate in § 72.05–1 that Volume V of the Light List is now published annually rather than biennially.

Sections 80.155, 80.160, 80.165: Add geographical coordinates to the physical description of demarcation lines already in the regulations. The location of the demarcation lines is not affected.

Sections 80.170, 80.501, 80.502: Redesignate sections to indicate that the area from Sandy Hook to Toms River, NJ, is within the Fifth, and not the First, Coast Guard District geographical area of responsibility (First District sections are designated § 80.101 *et seq.,* while Fifth District sections are designated § 80.501 *et seq.),* and make wording changes to conform to Fifth District practice.

Section 80.748(f): Change ''shoreland'' to ''shoreline'' to make consistent with Coast Guard terminology.

Section 82.5: Change ''33 CFR 88.13'' to ''33 CFR 83.30(h)–(1)'' to conform to regulatory redesignation by 2014 final rule (79 FR 37898; Jul. 2, 2014).

Section 83.09, 83.19(d), 83.24(h), 83.29(a)(iii), 83.34(d), 83.37: Minor rewordings and terminology revisions to conform to International Regulations for Preventing Collisions at Sea (COLREGS).

Section 84.02(f)(ii): Change ''§ 84.03(d)'' to ''§ 84.03(c),'' the correct location of the cited requirements, which concern situations when two all-round masthead lights are required. Two all-round masthead lights are discussed in § 84.03(c) and not § 84.03(d), which only pertains to vessels with one masthead light.

Section 90.5: Change ''33 CFR 88.13'' to ''33 CFR 83.30(h) through (1)'' to conform to regulatory redesignation.

Part 96 authority line: Delete references to obsolete Department of Transportation delegations of regulatory authority.

Section 100.1104, 100.1105: Reflect discontinuation of print publication of Local Notices to Mariners, in favor of electronic-only publication.

Section 101.514(e): Remove paragraph that is obsolete because it incorporated a self-termination date of April 15, 2009.

Section 110.215(b)(3): Change ''33 CFR 204.195'' to ''33 CFR 334.930'' to correct cross-reference.

Sections 117.591(e), 117.605(b), (c), 117.647(a), 117.855(c): Reflect change in bridge owner.

Section 117.1081: Update telephone number.

Section 150.940: Remove and redesignate material as the referenced deepwater port is no longer in existence.

Section 151.1512: Change ''In order to'' to ''To''; ''U.S. waters'' to ''waters of the United States'' to conform to Coast Guard terminology; and in paragraph (b), in the phrase ''approved alternative ballast water management method per § 151.1510(a)(1) and (4),'' remove ''alternative.'' Sections 1510(a) and 1512 (a) make it clear that § 1510(a)(1) and (a)(4) are among the options provided by § 1510(a), only one of which is to be selected by a vessel's master.

Section 151.2035(a): Change the permitted alternative ''to ballast with water from a U.S. public water system'' to ''ballast exclusively with water from a U.S. public water system,'' for clarification. This is a non-substantive, clarifying change because § 151.2025(a)(2) requires that the use of water from a U.S. public water system be exclusive.

Section 151.2036: Change ''that despite all efforts to meet the ballast water discharge standard requirements in § 151.2030 of this subpart, compliance is not possible'' to ''that, despite all efforts, compliance with the requirement under § 151.2025 is not possible''. The change corrects the cross-reference, and reflects the fact that under existing regulations the master, owner, operator, agent, or person in charge of a vessel has several ballast water management methods by which he may achieve compliance with the ballast water discharge standard set forth in 33 CFR 151.2030.

Section 155.480(b)(2): Revise internal cross-references to conform to regulatory redesignations made by a 2013 rule (78 FR 42642, Jul. 16, 2013), which did not affect the meaning of the cross-references.

Section 156.330(b): Change name of referenced publication to conform to name approved for incorporation by reference in 33 CFR 156.111.

Section 161.18(a): In table, remove and add punctuation for grammatical reasons.

Section 161.60(c): Specify that a latitude coordinate refers to north latitude.

Section 162.65(b), 162.75(b): Substitute ''Inland Navigation Rules (33 CFR Subchapter E)'' for references to Coast Guard Commandant Instruction Manual COMDTINST M16672.2D. The Manual reiterated the language of international navigational safety regulations (COLREGS) [4] and the Inland Navigation Rules without change. It has been canceled in favor of referencing, in our regulations, the relevant international or inland rules. For §§ 162.65(b), 162.75(b), the Inland Navigation Rules (33 CFR Subchapter E) provide the relevant rules.

Section 162.90(b)(6): Remove ''the Pilot Rules for Inland Waters'' and substitute reference to Inland Navigation Rules, which now include the pilot rules.

Section 164.03(e)(3): Remove an obsolete ''incorporation by reference'' document.

Section 164.33(c), 164.72(b)(2)(ii)(B): Change ''National Imagery and Mapping Agency'' to its new agency name of ''National Geospatial-Intelligence Agency''.

Section 165.T01–0174(c)(9), 165.T01–0214(b)(6), 165.T01–0215(b)(5), 165.T01–0329(b)(7), 165.T01–0554(b)(5), 165.T01–0824(b)(7), 165.T01–0876(c)(7): Change ''Rules of the Road (33 CFR part 84—Subchapter E, inland navigational rules)'' to ''Inland Navigation Rules (33 CFR subchapter E)'' to correct current reference.

Section 165.T01–1059(c)(1): Change ''Navigation Rules'' to ''Inland Navigation Rules (33 CFR subchapter E)'' to correct current reference.

Section 165.T01–1063(b)(5): Change ''Rules of the Road, as codified in 33 CFR subchapter E, Inland Navigational Rules'' to ''Inland Navigation Rules (33 CFR subchapter E)'' to correct current reference.

[4] *Note on COLREGS:* Several amendments to parts 162 and 165 refer to the COLREGS (The Convention on the International Regulations for Preventing Collisions at Sea, adopted by the forerunner to the International Maritime Organization in 1972 and replacing a 1960 edition). The COLREGS (including its rules and annexes) were incorporated into U.S. law and entered into force in the U.S. on July 15, 1977, as proclaimed by the President in accordance with the International Navigational Rules Act of 1977, 33 U.S.C. 1602 (Pub. L. 95–75, Jul. 27, 1977, 91 Stat. 308). In accordance with § 33 U.S.C. 1602(c), the President is also authorized to proclaim any amendments to the COLREGS. The text of the amendment, with its effective date as proclaimed by the President, is then published in the **Federal Register**. On its effective date, the amendment enters into force in the U.S. and has effect as if enacted by statute.

Section 165.100(d): In (d)(2), change references to several buoys and other aids to navigation to give their current names or Light List numbers, or to indicate their discontinuance; substitute reference to current regulatory location of COLREGS and Inland Navigation Rules for their former statutory locations.

Section 165.122: In (b)(2) change ''Conimicut Point Light'' to its current name of ''Conimicut Light''; in (b)(6) change ''part 83'' to ''subchapter E'' to correct current reference.

Section 165.153(d)(9): Change ''navigation rules'' to ''Navigation Rules (COLREGS and their associated annexes and the Inland Navigation Rules (33 CFR Subchapter E)'' to correct current reference.

Section 165.156(a): Change ''Silver Point breakwater buoy'' to its current name of ''East Rockaway Inlet Breakwater Light''.

Section 165.160: In table, change ''Arthur Kill Channel Buoy'' to its current name of ''Arthur Kill Channel Lighted Buoy''.

Section 165.163(a)(5): Change ''the COLREGS Demarcation line at Ambrose Channel Entrance Lighted Bell Buoy 2'' to the more accurate location and current name of ''the COLREGS Demarcation line in the vicinity of Ambrose Channel Entrance Lighted Bell Buoy 6''.

Section 165.166(a): Change ''Liberty Island Lighted Gong Buoy 29'' to its current name of ''Liberty Island Lighted Gong Buoy 33''.

Section 165.170: Remove obsolete safety zone, added by rule published April 14, 2014 (79 FR 20792) and intended to protect the public ''while military munitions are rendered safe, detonated, and/or removed from the area.'' The U.S. Army Corps of Engineers has confirmed that removal has been completed.

Section 165.173: In lines 6.1 and 8.1 of Table 165.173, insert inadvertently omitted information that specific event dates may be announced in the Local Notice to Mariners, and conform the punctuation in line 5.1 to match the punctuation inserted in lines 6.0 and 8.0.

Section 165.511(c)(1): Change ''accordance with the Navigation Rules as seen in 33 CFR chapter I, subchapters D and E'' to ''accordance with the Navigation Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR Subchapter E))'' to correct current reference.

Section 165.514(a): Change ''Bogue Sound—New River Daybeacon 70'' to its current name of ''Bogue Sound—New River Light 70''.

Section 165.518(c)(4): Change ''Navigation Rules in 33 CFR chapter I, subparts D and E'' to ''Navigation Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR Subchapter E))'' to correct current reference.

Section 165.708(a)(1), 165.753(a): Change coordinate and landmark descriptions to reflect buoy removals.

Section 165.753(d): Change ''either the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) or the Inland Navigation Rules'' to ''the Navigational Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR Subchapter E))'' to correct current reference.

Section 165.765(b): Change ''33 U.S.C. 2001 *et seq.''* to ''(33 CFR Subchapter E)'' because the statute has been repealed and the referenced rules are now in regulations.

Sections 165.813, 165.814: Revise to incorporate changes in buoy names and positions.

Section 165.1152(e)(5): Change ''Light 2'' to its current name of ''Light 8''.

Section 165.1156(b)(3): Change ''Navigation Rules as defined in 33 CFR chapter I, subchapters D and E'' to ''Navigation Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR Subchapter E))'' to correct current reference.

Section 165.1181(d)(3): Change ''33 U.S.C. 2009'' to ''33 CFR Subchapter E'' because the referenced rules are now in regulations, not statutes.

Section 165.1182(a)(1), 165.1183(b)(1): Change ''buoys 7 and 8'' to their current names of ''Lighted Bell Buoy 7 and San Francisco Main Ship Channel Lighted Whistle Buoy 8''.

Section 165.T13–239(a)(3): Change ''33 CFR part 83'' to ''33 CFR Subchapter E'' to correct current reference.

Section 165.1321(c)(1): Change ''to the Commencement Bay Directional Light (light list number 17159)'' to ''approximate position 47°16′49″ N., 122°24′52″ W.'' to reflect discontinuance of the Directional Light.

Section 165.1407: Revise (a)(1) and (a)(3) to reflect several name changes for referenced aids to navigation and revise (a)(4) to change a degree symbol to a minutes symbol.

Section 165.1702(a): Revise coordinates to reflect discontinuance or minor relocation of referenced aids to navigation.

Part 177 authority line: Add 46 U.S.C. 4308 to more accurately reflect the Coast Guard's authority.

Section 183.803: Change ''Commandant Instruction 16672.2 series'' to ''COLREGS and their associated Annexes and Inland Navigation Rules (33CFR Subchapter E)''; change ''National Imagery and Mapping Agency'' to ''National Geospatial-Intelligence Agency'' to correct current reference and agency name.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The provisions of this final rule are technical and non-substantive; they will have no substantive effect on the public and will impose no additional costs. This final rule is not a significant regulatory action under section 3(f) of E.O. 12866 as supplemented by E.O. 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of E.O. 12866. The Office of Management and Budget (OMB) has not reviewed it under E.O. 12866.

B. Small Entities

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

There is no cost to this final rule, and we do not expect it to have an impact on small entities because the provisions of this rule are technical and non-substantive. It will have no substantive

effect on the public and will impose no additional costs. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Mr. Paul Crissy by phone at 202–372–1093 or via email at *Paul.H.Crissy@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

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

E. Federalism

A rule has implications for federalism under E.O. 13132 (''Federalism'') if it has 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. We have analyzed this rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any 1 year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This final rule will not cause a taking of private property or otherwise have taking implications under E.O. 12630 (''Governmental Actions and Interference with Constitutionally Protected Property Rights'').

H. Civil Justice Reform

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

I. Protection of Children

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

J. Indian Tribal Governments

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

K. Energy Effects

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

L. Technical Standards

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

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

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 2.B.2 and figure 2–1, paragraphs (34)(a) and (b) of the Instruction. This final rule involves regulations that are editorial or procedural, or that concern internal agency functions or organizations. An environmental analysis checklist and a categorical exclusion determination are available in the docket for this final rule where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 3

Organization and functions (Government agencies).

33 CFR Part 50

Administrative practice and procedure, Disability benefits, Military personnel, Retirement.

33 CFR Part 51

Administrative practice and procedure, Military personnel.

33 CFR Part 52

Administrative practice and procedure, Archives and records, Military personnel.

33 CFR Part 62

Navigation (water).

33 CFR Part 67

Continental shelf, Navigation (water), Reporting and recordkeeping requirements.

33 CFR Part 72

Government publications, Navigation (water).

33 CFR Part 80

Navigation (water), Treaties, Waterways.

33 CFR Part 82

Navigation (water), Treaties.

33 CFR Part 83

Fishing vessels, Navigation (water), Waterways.

33 CFR Part 84

Navigation (water), Waterways.

33 CFR Part 90

Navigation (water), Waterways.

33 CFR Part 96

Administrative practice and procedure, Marine safety, Reporting and recordkeeping requirements, Vessels.

33 CFR Part 100

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

33 CFR Part 101

Harbors, Maritime security, Reporting and recordkeeping requirements, Security measures, Vessels, Waterways.

33 CFR Part 110

Anchorage grounds.

33 CFR Part 117

Bridges.

33 CFR Part 150

Harbors, Marine safety, Navigation (water), Occupational safety and health, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 151

Administrative practice and procedure, Oil pollution, Penalties, Reporting and recordkeeping requirements, Water pollution control.

33 CFR Part 155

Alaska, Hazardous substances, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 156

Hazardous substances, Oil pollution, Reporting and recordkeeping requirements, Water pollution control.

33 CFR Part 161

Harbors, Navigation (water), Reporting and recordkeeping requirements, Vessels, Waterways.

33 CFR Part 162

Navigation (water), Waterways.

33 CFR Part 164

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

33 CFR Part 165

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

33 CFR Parts 177 and 183.

Marine safety.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 3, 50, 51, 52, 62, 67, 72, 80, 82, 83, 84, 90, 96, 100, 101, 110, 117, 150, 151, 155, 156, 161, 162, 164, 165, 177, and 183 as follows:

Title 33—Navigation and Navigable Waters

PART 3—COAST GUARD AREAS, DISTRICTS, SECTORS, MARINE INSPECTION ZONES, AND CAPTAIN OF THE PORT ZONES

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

Authority: 14 U.S.C. 92 & 93; Pub. L. 107–296, 116 Stat. 2135; Department of Homeland Security Delegation No. 0170.1, para. 2(23).

§ 3.35–1 [Amended]

■ 2. In § 3.35–1(b), after the text ''part of Georgia and Florida west of a line'', remove the text ''from the intersection of the Florida coast with Longitude 83°50′ W. (30°00′ N., 83°50′ W.) due north to a position 30°15′00″ N., 83°50′ W.″ and add, in its place, the text ''starting at the Florida coast at longitude 084°04′34″ W. (30° 05′45″ N., 084°04′34″ W.) proceeding northerly along the boundary between Wakulla and Jefferson counties to position 30°15′00″ N., 084°04′33″ W.''.

§ 3.35–35 [Amended]

■ 3. In § 3.35–35, after the text ''Port Zone start at the Florida coast at'', remove the text ''latitude 29°59′14″ N., longitude 83°50′00″ W., proceeding north to latitude 30°15′00″ N., longitude 83°50′00″ W.'' and add, in its place, the text ''30°05′45″ N., 084°04′34″ W., proceeding northerly along the boundary between Wakulla and Jefferson counties to position 30°15′00″ N., 084°04′33″ W.''; and after the text ''thence northeast to'', add the text ''position 29°23′09″ N., 084°04′34″ W.; thence due north''.

§ 3.40–1 [Amended]

■ 4. Amend § 3.40–1(b) as follows:

■ a. After the text ''Florida and Georgia west of a line starting at the Florida coast at'', remove the text ''83°50′ W. longitude; thence northerly to 30°15′ N. latitude, 83°50′ W. longitude'' and add, in its place, the text ''longitude 084°04′34″ W. (30°05′45″ N., 084°04′34″ W.) proceeding northerly along the boundary between Wakulla and Jefferson counties to position 30°15′00″ N., 084°04′33″ W.''; and

■ b. After the text ''Gulf of Mexico area west of a line'', remove the text ''bearing 199 T. from the intersection of the Florida coast at 83°50′ W. longitude (the coastal end of the Seventh and Eighth Coast Guard District land boundary.)'' and add, in its place, the text ''proceeding due south from the intersection of the Florida coast at longitude 084°04′34″ W. (30°15′45″ N., 084°04′34″ W.) to position 29°23′09″ N., 084°04′34″ W., then bearing 199°T to the extent of the EEZ.''.

§ 3.40–10 [Amended]

■ 5. Amend § 3.40–10 as follows:

■ a. After the text ''Captain of the Port Zone start near the Florida coast at latitude'', remove the text ''29°59′ 14″ N., longitude 083°0050′00″ W., proceeding north to latitude 30°15′00″ N., longitude 83°0050′00″ W'' and add, in its place, the text ''30°05′45″ N., 084°04′34″ W. proceeding northerly along the boundary between Wakulla and Jefferson counties to position 30°15′00″ N., 084°04′33″ W.''; and

■ b. After the text ''EEZ to the intersection with a line bearing 199°T from'', remove the text ''the intersection of the Florida coast at longitude 83°50′00'' W.; thence northeast along a line bearing 199°T from the Florida coast at longitude 83°50′00″ W. to the coast'' and add, in its place, the text ''with a line bearing 199°T from 29°23′09″ N., 084°04′34″ W. to the EEZ (24°48′13″ N., 085°50′05″ W.); thence northeast to 29°23′09″ N., 084°04′34″ W.''; thence due north to the Florida coast at longitude 084°04′34″ W. (30°05′45″ N., 084°04′34″ W.)''.

PART 50—COAST GUARD RETIRING REVIEW BOARD

■ 6. The authority citation for part 50 is revised to read as follows:

Authority: Sec. 10 U.S.C. 1554; 14 U.S.C. 92, 633; Department of Homeland Security Delegations No. 0160.1(II)(B)(1), 0170.1(II)(23).

§ 50.1 [Amended]

■ 7. In § 50.1(b), after the text ''at the request of any Coast Guard'', remove the text ''officer'' and add, in its place, the text ''member or former member''.

§ 50.3 [Amended]

■ 8. In § 50.3(a), after the text ''Any'', remove the text ''officer'' and add, in its place, the text ''member or former member''.

■ 9. Revise § 50.5(b)(6) to read as follows:

§ 50.5 Action by the Board.

* * * * *

(b) * * *

(6) In the case of a member or former member who was in the Reserve or who served under a temporary appointment, when the physical disability was incurred.

* * * * *

§ 50.6 [Amended]

■ 10. In § 50.6, remove the text ''officer'' and add, in its place, the text ''member or former member''.

PART 51—COAST GUARD DISCHARGE REVIEW BOARD

■ 11. The authority citation for part 51 is revised to read as follows:

Authority: 10 U.S.C. 1553; 14 U.S.C. 92, 633; Department of Homeland Security Delegations No. 0160.1(II)(B)(1), 0170.1(II)(23).

PART 52—BOARD FOR CORRECTION OF MILITARY RECORDS OF THE COAST GUARD

■ 12. The authority citation for part 52 is revised to read as follows:

Authority: 10 U.S.C. 1552; 14 U.S.C. 92, 633; Department of Homeland Security Delegations No. 0160.1(II)(B)(1), 0170.1(II)(23).

PART 62—UNITED STATES AIDS TO NAVIGATION SYSTEM

■ 13. The authority citation for part 62 continues to read as follows:

Authority: 14 U.S.C. 85; 33 U.S.C. 1222, 1233; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

■ 14. In § 62.21, revise paragraphs (c)(1) through (c)(4) to read as follows:

§ 62.21 General.

* * * * *

(c) * * *

(1) The Light List, published by the Coast Guard and available for viewing on the Coast Guard Navigation Center Web site at *http://www.navcen.uscg.gov* lists federal and private aids to navigation. It includes all major Federal aids to navigation and those private aids to navigation that have been deemed to be important to general navigation, and includes a physical description of these aids and their locations.

(2) The United States Coast Pilot, published by the National Ocean Service and available from NOAA Certified Printer Partners listed at *http://www.nauticalcharts.noaa.gov/mcd/NOAAChartViewer.html.* Free on-line versions and weekly updates supplement the information shown on nautical charts, and are available directly from NOAA at *http://www.nauticalcharts.noaa.gov/nsd/cpdownload.htm.* Subjects such as local navigation regulations, channel and anchorage peculiarities, dangers, climatalogical data, routes, and port facilities are covered.

(3) Local Notices to Mariners are published by local Coast Guard District Commanders. Persons may view Local Notices to Mariners on the Coast Guard Navigation Center Web site at *http://www.navcen.uscg.gov.* Changes to aids to navigation, reported dangers, scheduled construction or other disruptions, chart corrections and similar useful marine information is made available through this publication.

(4) The Notice to Mariners is a national publication, similar to the Local Notice to Mariners, published by the National Geospatial-Intelligence Agency. The notices may be viewed on the National Geospatial-Intelligence Agency's Web site at *http://msi.nga.mil/NGAPortal/MSI.portal.* This publication provides oceangoing vessels significant information on national and international navigation and safety.

* * * * *

PART 67—AIDS TO NAVIGATION ON ARTIFICIAL ISLANDS AND FIXED STRUCTURES

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

Authority: 14 U.S.C. 85, 633; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

§ 67.10–25 [Amended]

■ 16. In § 67.10–25(a), after the text ''Direct a written request to the'', remove the text ''Commandant (CG–NAV), Attn: Navigation System Division'' and add, in its place, the text ''Aids to Navigation Division (CG–NAV–1), U.S. Coast Guard Stop 7418, 2703 Martin Luther King Jr. Ave. SE., Washington DC 20593–7418''.

PART 72—MARINE INFORMATION

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

Authority: 14 U.S.C. 85, 633; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

■ 18. In § 72.01–5, revise paragraphs (b) and (c) to read as follows:

§ 72.01–5 Local Notice to Mariners.

* * * * *

(b) ''Local Notices to Mariners'' are published weekly by each Coast Guard district or more often if there is a need to notify mariners of local waterway information. Local Notices to Mariners are available for viewing on the Coast Guard Navigation Center Web site at *http://www.navcen.uscg.gov/?pageName=lnmMain.*

(c) Any person may apply to the Coast Guard Navigation Center to receive automatic notices via email when new editions of the Local Notices to Mariners are available. Apply at *http://www.navcen.uscg.gov/?pageName=listServerForm.*

§ 72.01–25 [Amended]

■ 19. In § 72.01–25(c), remove the text ''an authorized agent listed at *http://aeronav.faa.gov/agents.asp* or authorized Print-on-Demand agent listed at *http://www.nauticalcharts.noaa.gov/staff/charts.htm.* Free on-line versions, as well as weekly updates, are available directly from NOAA at *http://www.nauticalcharts.noaa.gov/nsd/cpdownload.htm*'' and add, in its place, the text ''NOAA Certified Printer Partners listed at *http://www.nauticalcharts.noaa.gov/staff/print_agents.html#mapTabs-2.*''

■ 20. Revise § 72.01–40 to read as follows:

§ 72.01–40 Single copies.

Single copies of the ''Notice to Mariners'' described in § 72.01–10 may be viewed at the National Geospatial-Intelligence Agency's Web site at *http://msi.nga.mil/NGAPortal/MSI.portal.*

§ 72.05–1 [Amended]

■ 21. In § 72.05–01(a), remove the text ''with the exception of Volume V, which is published biennially,''.

§ 72.05–5 [Removed and Reserved]

■ 22. Remove and reserve § 72.05–5.

■ 23. Revise § 72.05–10 to read as follows:

§ 72.05–10 Free distribution.

The Light List, including weekly updates, may be downloaded through the Coast Guard Navigation Center's Web site (*http://www.navcen.uscg.gov/?pageName=lightlists*). A notice advising mariners of the availability of new editions of the Light Lists will be published in the Coast Guard Local Notice to Mariners and the National

Geospatial-Intelligence Agency's Notice to Mariners.

PART 80—COLREGS DEMARCATION LINES

■ 24. The authority citation for part 80 continues to read as follows:

Authority: 14 U.S.C. 2; 14 U.S.C. 633; 33 U.S.C. 151(a).

■ 25. Revise § 80.155 to read as follows:

§ 80.155 Watch Hill, RI to Montauk Point, NY.

(a) A line drawn from 41°18′13.999″ N., 071°51′30.300″ W. (Watch Hill Light) to East Point on Fishers Island.

(b) A line drawn from Race Point to 41°14′36.509″ N., 072°02′49.676″ W. (Race Rock Light); thence to 41°12′2.900″ N., 072°06′24.700″ W. (Little Gull Island Light) thence to East Point on Plum Island.

(c) A line drawn from 41°10′16.704″ N., 072°12′21.684″ W. (Plum Island Harbor East Dolphin Light) to 41°10′17.262″ N., 072°12′23.796″ W. (Plum Island Harbor West Dolphin Light).

(d) A line drawn from 41°10′25.745″ N., 072°12′42.137′ W. (Plum Gut Light) to 41°09′48.393″ N., 072°13′25.014″ W. (Orient Point Light); thence to Orient Point.

(e) A line drawn from 41°06′35.100″ N., 072°18′21.400″ W. (Long Beach Bar Light) to Cornelius Point.

(f) A line drawn from 41°04′12.000″ N., 072°16′48.000″ W. (Coecles Harbor Entrance Light) to Sungic Point.

(g) A line drawn from Nicholl Point to 41°02′25.166″ N., 072°15′42.971″ W. (Cedar Island Light 3CI).

(h) A line drawn from 41°02′06.060″ N., 072°11′19.560″ W. (Threemile Harbor West Breakwater Light) to 41°02′05.580″ N., 072°11′15.777″ W. (Threemile Harbor East Breakwater Light).

(i) A line drawn from 41°04′44.210″ N., 071°56′20.308″ W. (Montauk West Jetty Light 2) to 41°04′46.095″ N., 071°56′14.168″ W. (Montauk East Jetty Light 1).

■ 26. Revise § 80.160 to read as follows:

§ 80.160 Montauk Point, NY to Atlantic Beach, NY.

(a) A line drawn from the 40°50′17.952″ N., 072°28′29.010″ W. (Shinnecock Inlet Breakwater Light 2) to 40°50′23.490″ N., 072°28′40.122″ W. (Shinnecock Inlet Breakwater Light 1).

(b) A line drawn from 40°45′47.763″ N., 072°45′11.095″ W. (Moriches Inlet Breakwater Light 2) to 40°45′49.692″ N., 072°45′21.719″ W. (Moriches Inlet Breakwater Light 1).

(c) A line drawn from the westernmost point on Fire Island to the southernmost extremity of the spit of land at the western end of Oak Beach.

(d) A line drawn from 40°34′23.568″ N., 073°34′32.364″ W. (Jones Inlet Light) 322° true across Jones Inlet to the shoreline.

■ 27. Revise § 80.165 to read as follows:

§ 80.165 New York Harbor.

A line drawn from 40°34′56.600″ N., 073°45′17.200″ W. (East Rockaway Inlet Breakwater Light) to 40°27′42.177″ N., 074°00′07.309″ W. (Sandy Hook Light).

■ 28. Redesignate § 80.501 as § 80.502, and revise the newly redesignated section to read as follows:

§ 80.502 Tom's River, NJ to Cape May, NJ.

(a) A line drawn from the seaward tangent of Long Beach Island to the seaward tangent to Pullen Island across Beach Haven and Little Egg Inlets, thence across Brigantine Inlet to Brigantine Island.

(b) A line drawn from the seaward extremity of Absecon Inlet.

(c) A line drawn parallel with the general trend of highwater shoreline from the southernmost point of Longport at latitude 39°17.6′ N., longitude 74°33.1′ W. across Great Egg Harbor Inlet.

(d) A line drawn parallel with the general trend of highwater shoreline across Corson Inlet.

(e) A line formed by the centerline of the Townsend Inlet Highway Bridge.

(f) A line formed by the shoreline of Seven Mile Beach to 39°00′23.757″ N., 074°47′28.017″ W. (Hereford Inlet Light).

(g) A line drawn across the seaward extremity of Cape May Inlet.

■ 29. Redesignate § 80.170 as § 80.501, and revise the newly redesignated section to read as follows:

§ 80.501 Sandy Hook, NJ to Tom's River, NJ.

(a) A line drawn across the seaward extremity of Shark River Inlet.

(b) A line drawn across the seaward extremity of Manasquan Inlet.

(c) A line drawn across the seaward extremity of Barnegat Inlet.

§ 80.748 [Amended]

■ 30. In § 80.748(f), remove the text ''shoreland'' and add, in its place, the text ''shoreline.''

PART 82—72 COLREGS: INTERPRETATIVE RULES

■ 31. The authority citation for part 82 continues to read as follows:

Authority: 14 U.S.C. 2, 633; 33 U.S.C. 1602; E.O. 11964, 42 FR 4327, 3 CFR, 1977 Comp., p. 88; 49 CFR 1.46(n).

§ 82.5 [Amended]

■ 32. In § 82.5, after the text ''on the corners in accordance with 33 CFR'', remove the text ''88.13'' and add, in its place, the text ''83.30(h) through (1)''.

PART 83—RULES

■ 33. The authority citation for part 83 continues to read as follows:

Authority: Sec. 303, Pub. L. 108–293, 118 Stat. 1042 (33 U.S.C. 2071); Department of Homeland Security Delegation No. 0170.1.

■ 34. Revise § 83.09(d) to read as follows:

§ 83.09 Narrow channels (Rule 9).

* * * * *

(d) A vessel must not cross a narrow channel or fairway if such crossing impedes the passage of a vessel which can safely navigate only within such channel or fairway. The latter vessel must use the signal prescribed in Rule 34(d) (§ 83.34(d)) if in doubt as to the intention of the crossing vessel.

§ 83.19 [Amended]

■ 35. In § 83.19(d), after the text ''close-quarters situation is developing'', remove the text ''or'' and add, in its place, the text ''and/or''.

§ 83.24 [Amended]

■ 36. In § 83.24(h), after the text ''to indicate the presence of'', remove the text ''the unlighted'' and replace it with ''such.''

§ 83.29 [Amended]

■ 37. In § 83.29(a)(iii), after the text ''lights, or shape prescribed in Rule 30'', remove the text '' for anchored vessels'' and add, in its place, the text ''for vessels at anchor''.

§ 83.34 [Amended]

■ 38. In § 83.34(d), after the text ''five short and rapid blasts on the whistle.'', remove the text ''This'' and add, in its place, the text ''Such''.

PART 84—ANNEX I: POSITIONING AND TECHNICAL DETAILS OF LIGHTS AND SHAPES

■ 39. The authority citation for part 84 continues to read as follows:

Authority: Sec. 303, Pub. L. 108–293, 118 Stat. 1042 (33 U.S.C. 2071); Department of Homeland Security Delegation No. 0170.1

§ 84.02 [Amended]

■ 40. In § 84.02(f)(ii), remove the text ''§ 84.03(d)'' and add, in its place, the text ''§ 84.03(c)''.

PART 90—INLAND RULES: INTERPRETATIVE RULES

■ 41. The authority citation for part 90 continues to read as follows:

Authority: 33 U.S.C. 2071; 49 CFR 1.46(n)(14).

§ 90.5 [Amended]

■ 42. In § 90.5, after the text ''on the corners in accordance with 33 CFR'', remove the text ''88.13'' and add, in its place, the text ''83.30(h) through (1)''.

PART 96—RULES FOR THE SAFE OPERATION OF VESSELS AND SAFETY MANAGEMENT SYSTEMS

■ 43. The authority citation for part 96 is revised to read as follows:

Authority: 46 U.S.C. 3201 et. seq.; 46 U.S.C. 3103; 46 U.S.C. 3316; 33 U.S.C. 1231.

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 44. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

§ 100.1104 [Amended]

■ 45. In § 100.1104(a), remove the text ''To be placed on the mailing list for Local Notice to Mariners contact: Commander (dpw), Eleventh Coast Guard District, Coast Guard Island, Building 50–2, Alameda, CA 94501–5100'' and add, in its place, the text ''Local Notices to Mariners are available for viewing on the Coast Guard Navigation Center Web site at *http://www.navcen.uscg.gov/?pageName=lnmDistrict&region=11*''.

§ 100.1105 [Amended]

■ 46. In § 100.1105(a), remove the text ''To be placed on the Local Notice to Mariners mailing list contact: Commander (oan), Eleventh Coast Guard District, 400 Oceangate Boulevard, Long Beach, CA 90822–5399'' and add, in its place, the text ''Local Notices to Mariners are available for viewing on the Coast Guard Navigation Center Web site at *http://www.navcen.uscg.gov/?pageName=lnmDistrict&region=11*''.

PART 101—MARITIME SECURITY: GENERAL

■ 47. The authority citation for part 101 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 192; Executive Order 12656, 3 CFR 1988 Comp., p. 585; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department of Homeland Security Delegation No. 0170.1.

§ 101.514 [Amended]

■ 48. In § 101.514, remove paragraph (e).

PART 110—ANCHORAGE REGULATIONS

■ 49. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2071; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

§ 110.215 [Amended]

■ 50. In § 110.215(b)(3), remove the text ''§ 204.195'' and add, in its place, the text ''§ 334.930''.

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 51. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1.

§ 117.591 [Amended]

■ 52. In 117.591(e), remove the text ''Metropolitan District Commission'' and add, in its place, the text ''Massachusetts Department of Transportation''.

§ 117.605 [Amended]

■ 53. Amend § 117.605 as follows:
■ a. Remove the text ''Boston and Maine'' and add, in its place, the text ''Massachusetts Bay Transportation Authority (MBTA)''; and
■ b. Remove the text ''Public Works'' and add, in its place, the text ''Transportation''.

§ 117.647 [Amended]

■ 54. In § 117.647(a), remove the text ''Canadian National Railway'' and add, in its place, the text ''Central Michigan Railroad''.

■ 55. Revise § 117.855(c) to read as follows:

§ 117.855 Maumee River.

* * * * *

(c) The draws of the CSX Transportation railroad bridge, mile 1.07, Wheeling and Lake Erie Railroad Bridge, mile 1.80 and Norfolk Southern railroad bridge, mile 5.76, all at Toledo, shall operate as follows:

* * * * *

§ 117.1081 [Amended]

■ 56. In 117.1081, after the text ''via VHF–FM Channel 16 or telephone'', remove the text ''(507) 895–6087'' and add, in its place, the text ''(612) 851–5784''.

PART 150—DEEPWATER PORTS: OPERATIONS

■ 57. The authority citation for part 150 continues to read as follows:

Authority: 33 U.S.C. 1231, 1321(j)(1)(C), (j)(5), (j)(6), (m)(2); 33 U.S.C. 1509(a); E.O. 12777, sec. 2; E.O. 13286, sec. 34, 68 FR 10619; Department of Homeland Security Delegation No. 0170.1(70), (73), (75), (80).

§ 150.940 [Amended]

■ 58. Amend § 150.940 as follows:
■ a. Remove paragraph (b);
■ b. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively; and
■ c. In newly redesignated paragraph (b), remove the text ''(c)(1)'' wherever it appears, and add, in its place, the text ''(b)(1)'';
■ d. In newly redesignated paragraph (b)(4)(iii), remove the text ''(c)(4)(i)'' and add, in its place, the text ''(b)(4)(i)'';
■ e. In newly redesignated paragraph (b)(4)(iv), remove the text ''(c)(2)'' and add, in its place, the text ''(b)(2)'';
■ f. In newly redesignated paragraph (c), remove the text ''(d)(1)'' wherever it appears, and add, in its place, the text ''(c)(1)'';
■ g. In newly redesignated paragraph (c)(4)(ii), remove the text ''(d)(4)(i)'' and add, in its place, the text ''(c)(4)(i)''; and
■ h. In newly redesignated paragraph (c)(4)(iv), remove the text ''(d)(2)'' and add, in its place, the text ''(c)(2)''.

PART 151—VESSELS CARRYING OIL, NOXIOUS LIQUID SUBSTANCES, GARBAGE, MUNICIPAL OR COMMERCIAL WASTE, AND BALLAST WATER

■ 59. The authority citation for part 151 continues to read as follows:

Authority: 33 U.S.C. 1321, 1902, 1903, 1908; 46 U.S.C. 6101; Pub. L. 104–227 (110 Stat. 3034); Pub. L. 108–293 (118 Stat. 1063), § 623; E.O. 12777, 3 CFR, 1991 Comp. p. 351; DHS Delegation No. 0170.1, sec. 2(77).

§ 151.1512 [Amended]

■ 60. Amend § 151.1512 as follows:
■ a. In paragraph (a), remove the text ''In order to'' and add, in its place, the text ''To''; and
■ b. In paragraph (b), after the text *''BWMS to manage ballast water discharged to'', remove the text ''U.S. waters''* and add, in its place, the text *''waters of the United States.'';* and after the text ''or employ an approved'', remove the text ''alternative''.

§ 151.2035 [Amended]

■ 61. In § 151.2035(a), remove the words ''or ballast with water from a U.S. public water system'' and insert in their place

the words ''or ballast exclusively with water from a U.S. public water system''.

§ 151.2036 [Amended]

■ 62. In § 151.2036, in the first sentence, remove the words ''that despite all efforts to meet the ballast water discharge standard requirements in § 151.2030 of this subpart, compliance is not possible'' and add in its place the words ''that, despite all efforts, compliance with the requirement under § 151.2025 is not possible''.

PART 155—OIL OR HAZARDOUS MATERIAL POLLUTION PREVENTION REGULATIONS FOR VESSELS

■ 63. The authority citation for part 155 continues to read as follows:

Authority: 3 U.S.C. 301 through 303; 33 U.S.C. 1225, 1231, 1321(j), 1903(b), 2735; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1. Section 155.480 also issued under section 4110(b) of Pub. L. 101.380.

■ 64. In § 155.480, revise paragraphs (b)(2)(i) through (b)(2)(iii) to read as follows:

§ 155.480 Overfill devices.

* * * * *

(b) * * *

(2) * * *

(i) Meets the requirements of 46 CFR 39.2007(b)(2) through (b)(4), (d)(1) through (d)(4), and 46 CFR 39.2009(a)(1) ;

(ii) Is an installed automatic shutdown system that meets the requirements of 46 CFR 39.2009(a)(2); or

(iii) Is an installed high-level indicating device that meets the requirements of 46 CFR 39.2003(b)(1).

* * * * *

PART 156—OIL AND HAZARDOUS MATERIAL TRANSFER OPERATIONS

■ 65. The authority citation for part 156 continues to read as follows:

Authority: 33 U.S.C. 1225, 1231, 1321(j); 46 U.S.C. 3703, 3703a, 3715; E.O. 11735, 3 CFR 1971–1975 Comp., p. 793; Department of Homeland Security Delegation No. 0170.1.

§ 156.330 [Amended]

■ 66. In § 156.330(b), before the text ''Ship to Ship Transfer Guide,'', remove the text ''Oil''.

PART 161—VESSEL TRAFFIC MANAGEMENT

■ 67. The authority citation for part 161 continues to read as follows:

Authority: 33 U.S.C. 1223, 1231; 46 U.S.C. 70114, 70119; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

§ 161.18 [Amended]

■ 68. Amend Table 161.18(a) as follows:

■ a. In the description for ''C–CHARLIE–Position'', after the text ''E (east) or W (west); or'', remove the period symbol; and

■ b. In the description for ''R–ROMEO–Description of pollution or dangerous goods lost'', after the text ''type of pollution (oil, chemicals, etc'', add a period symbol.

§ 161.60 [Amended]

■ 69. In § 161.60(c), remove the text ''61°02′06″ and add, in its place, the text ''61°02′06″ N.,''.

PART 162—INLAND WATERWAYS NAVIGATION REGULATIONS

■ 70. The authority citation for part 162 continues to read as follows:

Authority: 33 U.S.C. 1231; Department of Homeland Security Delegation No. 0170.1.

§ 162.65 [Amended]

■ 71. Amend § 162.65 as follows:

■ a. In paragraph (b)(2)(iv), after the text ''Lights shall be displayed in accordance with provisions of the Navigation Rules'', remove the text '', International-Inland, Commandant Instruction M16672.2 (series)'' and add, in its place, the text ''(33 CFR Subchapter E)''; and

■ b. In paragraph (b)(6), after the text ''proper signals and pass in accordance with the Navigation Rules'', remove the text '', International-Inland, Commandant Instruction M16672.2 (series)'' and add, in its place, the text ''(33 CFR Subchapter E)''.

■ 72. In § 162.75, revise paragraphs (b)(3)(iii) and (b)(7) to read as follows:

§ 162.75 All waterways tributary to the Gulf of Mexico (except the Mississippi River, its tributaries, South and Southwest Passes and Atchafalaya River) from St. Marks, Fla., to the Rio Grande.

* * * * *

(b) * * *

(3) * * *

(iii) Lights shall be displayed in accordance with provisions of the Inland Navigation Rules (33 CFR Subchapter E).

* * * * *

(7) Meeting and passing: Passing vessels shall give the proper signals and pass in accordance with the Inland Navigation Rules (33 CFR Subchapter E), where applicable. At certain intersections where strong currents may be encountered, sailing directions may be issued through navigation bulletins or signs posted on each side of the intersections.

* * * * *

§ 162.90 [Amended]

■ 73. In § 162.90(b)(6), after the text ''in accordance with'', remove the text ''the Inland Rules and the Pilot Rules for Inland Waters'', and add, in its place, the text ''the Inland Navigation Rules (33 CFR Subchapter E)''.

PART 164—NAVIGATION SAFETY REGULATIONS

■ 74. The authority citation for part 164 continues to read as follows:

Authority: 33 U.S.C. 1222(5), 1223, 1231; 46 U.S.C. 2103, 3703; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1. Sec. 164.13 also issued under 46 U.S.C. 8502. Sec. 164.46 also issued under 46 U.S.C. 70114 and Sec. 102 of Pub. L. 107–295. Sec. 164.61 also issued under 46 U.S.C. 6101.

§ 164.03 [Amended]

■ 75. In § 164.03, remove paragraph (e)(3), and redesignate paragraphs (e)(4) through (e)(9) as paragraphs (e)(3) through (e)(8), respectively.

§ 164.33 [Amended]

■ 76. In § 164.33(c), remove the text ''Imagery and Mapping'' and add, in its place, the text ''Geospatial-Intelligence''.

§ 164.72 [Amended]

■ 77. In § 164.72(b)(2)(ii)(B), remove the text ''Imagery and Mapping'' and add, in its place, the text ''Geospatial-Intelligence''.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

§ 165.T01–0174 [Amended]

■ 79. In § 165.T01–0174(c)(9), remove the text ''Rules of the Road (33 CFR part 84—Subchapter E, inland navigational rules)'', and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–0214 [Amended]

■ 80. In § 165.T01–0214(b)(6), remove the text ''Rules of the Road (33 CFR chapter I, subchapter E)'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–0215 [Amended]

■ 81. In § 165.T01–0215(b)(5), remove the text ''Rules of the Road, as codified in 33 CFR Subchapter E, Inland Navigational Rules'' and add, in its

place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–0329 [Amended]

■ 82. In § 165.T01–0329(b)(7), remove the text ''Rules of the Road (33 CFR part 84—Subchapter E, Inland Navigational Rules)'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–0554 [Amended]

■ 83. In § 165.T01–0554(b)(5), remove the text ''Rules of the Road, as codified in 33 CFR subchapter E, Inland Navigational Rules'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–0824 [Amended]

■ 84. In § 165.T01–0824(b)(7), remove the text ''Rules of the Road (33 CFR part 84—Subchapter E, inland navigational rules)'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–0876 [Amended]

■ 85. In § 165.T01–0876(c)(7), remove the text ''Rules of the Road (33 CFR part 84—Subchapter E, inland navigational rules)'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

§ 165.T01–1059 [Amended]

■ 86. § 165.T01–1059(c)(1), remove the text ''Navigation Rules'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E).''

§ 165.T01–1063 [Amended]

■ 87. In § 165.T01–1063(b)(5), remove the text ''Rules of the Road, as codified in 33 CFR subchapter E, Inland Navigational Rules'' and add, in its place, the text ''Inland Navigation Rules (33 CFR subchapter E)''.

■ 88. In § 165.100, revise paragraphs (d)(2) and (d)(5)(iv)(A)(*5*) to read as follows:

§ 165.100 Regulated Navigation Area: Navigable waters within the First Coast Guard District.

* * * * *

(d) * * *

(2) *Enhanced communications.* Each vessel engaged in towing a tank barge must communicate by radio on marine band or Very High Frequency (VHF) channel 13 or 16, and issue security calls on marine band or VHF channel 13 or 16, upon approach to the following places:

(i) Execution Rocks Light (USCG Light List No. [LLNR] 21440).

(ii) Matinecock Point Shoal Lighted Gong Buoy 21 (LLNR 21420).

(iii) 32A Buoy (LLNR 21380).

(iv) Cable and Anchor Reef Lighted Bell Buoy 28C (LLNR 21330).

(v) Stratford Shoal (Middle Ground) Light (LLNR 21260).

(vi) Old Field Point Light (LLNR 21275).

(vii) Approach to Stratford Point from the south (NOAA Chart 12370).

(viii) Falkner Island Light (LLNR 21170).

(ix) TE Buoy (LLNR 21160).

(x) PI Buoy (LLNR 21080).

(xi) Race Rock Light (LLNR 19815).

(xii) Valiant Rock Lighted Whistle Buoy 11 (LLNR 19825).

(xiii) Approach to Point Judith in vicinity of Block Island ferry route.

(xiv) Buzzards Bay Entrance Light (LLNR 630).

(xv) Buzzards Bay Midchannel Lighted Buoy BB (LLNR 16055)

(xvi) Cleveland East Ledge Light (LLNR 016080).

(xvii) Hog Island Channel Lighted Buoys 1 (LLNR 16130) and 2 (LLNR 16135).

(xviii) Approach to the Bourne Bridge.

(xix) Approach to the Sagamore Bridge.

(xx) Approach to the eastern entrance of Cape Cod Canal.

* * * * *

(5) * * *

(iv) * * *

(A) * * *

(5) Before meeting, crossing, or overtaking any other VMRS user in the area, communicate on the designated vessel bridge-to-bridge radiotelephone frequency, intended navigation movements, and any other information necessary in order to make safe passing arrangements. This requirement does not relieve a vessel of any duty prescribed by the Navigation Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E)).

* * * * *

§ 165.122 [Amended]

■ 89. Amend § 165.122 as follows:

■ a. In paragraph (b)(2)(iv), remove the text ''Point''; and

■ b. In paragraph (b)(6), remove the text ''set forth in 33 CFR part 83'' and add, in its place, the text ''33 CFR subchapter E).''

§ 165.153 [Amended]

■ 90. In § 165.153(d)(9), remove the text ''navigation rules'' and add, in its place, the text ''Navigation Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E)).''

§ 165.156 [Amended]

■ 91. In § 165.156(a), remove the text ''Silver Point breakwater buoy'' and add, in its place, the text ''East Rockaway Inlet Breakwater Light''.

§ 165.160 [Amended]

■ 92. In Table 1 to § 165.160, in the description for ''2.7 Arthur Kill, Elizabeth, NJ'', after the text ''Arthur Kill Channel'' add the text ''Lighted''.

§ 165.163 [Amended]

■ 93. In § 165.163(a)(5), after the text ''to the COLREGS Demarcation line'', remove the text ''at'' and add, in its place, the text ''in the vicinity of''; and after the text ''Ambrose Channel'', remove ''Entrance Lighted Bell Buoy 2'' and add, in its place, ''Lighted Bell Buoy 6''.

§ 165.166 [Amended]

■ 94. In § 165.166(a), after the text ''to Liberty Island Lighted Gong Buoy'', remove the number ''29'' and add, in its place, the number ''33''.

§ 165.170 [Removed]

■ 95. Remove § 165.170.

■ 96. In § 165.173, revise the Table to § 165.173 to read as follows:

§ 165.173 Safety Zones for annually recurring marine events held in Coast Guard Southeastern New England Captain of the Port Zone.

TABLE TO § 165.173

1.0 365 DAY JANUARY–DECEMBER	
1.1 Provincetown Fireworks	• Event Type: Fireworks Display. • Date: Enforced on any day during the duration of the event as specified by a Notice of Enforcement published in the **Federal Register**. • Time: Approximately 5:00 p.m. to 11:59 p.m.

TABLE TO § 165.173—Continued

1.2 Providence Fireworks	• Location: From a barge in the vicinity of the Provincetown Harbor, Provincetown, MA. • Position: Within 500 yards of 41°28′44″ N., 070°10′83″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks barge. • Event Type: Fireworks Display. • Date: Enforced on any day during the duration of the event as specified by a Notice of Enforcement published in the **Federal Register**. • Time: Approximately 5:00 p.m. to 11:59 p.m.
1.3 Fall River Fireworks	• Location: From a barge in the vicinity of the Hurricane Barrier in the Providence River, Providence, RI. • Position: Within 500 yards of 41°48′50″ N., 071°23′43″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks barge. • Event Type: Fireworks Display. • Date: Enforced on any day during the duration of the event as specified by a Notice of Enforcement published in the **Federal Register**. • Time: Approximately 5:00 p.m. to 11:59 p.m.
5.0 MAY	• Location: From a barge in the vicinity of Battleship Cove, Fall River, MA. • Position: Within 500 yards of 41°42′37″ N., 071°09′53″ W. (NAD 83). • Safety Zone Dimension: Approximately 200 yard radius circle around the fireworks barge.
5.1 RI National Guard Air Show	• Event Type: Air Show. • Date: One weekend (Friday, Saturday, and Sunday) in May, June, or July, as announced in the local Notice to Mariners. • Time: Approximately 9:00 a.m. to 7:00 p.m. • Location: (1) All waters over the West Passage of Narragansett Bay, in the vicinity of the Quonset State Airport, North Kingston, RI which are within a 4000-yard radius arc extending from position 41°35′44″ N., 071°24′14″ W. (NAD 83); and (2) All waters over the West Passage of Narragansett Bay, in the vicinity of Narragansett Pier, Narragansett, RI, which are within a 2000-yard radius arc extending from position 41°26′17″ N., 071°27′02″ W. (NAD 83) (Friday only). • Safety Zone Dimension: Approximately 1000 yards long by 1000 yards wide.
6.0 JUNE	
6.1 Oak Bluffs Summer Solstice	• Event Type: Fireworks Display. • Date: One night on the 3rd or 4th weekend of June, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Town Beach, Oak Bluffs, MA. • Position: Within 500 yards of 41°27′19″ N., 070°33′08″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks barge.
6.2 Swim Buzzards Bay	• Event Type: Swim Event. • Date: One Saturday or Sunday in June, July, or August, as announced in the Local Notice to Mariners. • Time: Start times will vary from 6:00 a.m. to 11:59 a.m., and last approximately two hours until the last swimmer is ashore. Start time will be announced in advance in the Local Notice to Mariners. • Location: The regulated area includes all waters in the vicinity of the Outer New Bedford Harbor, within 500 yards along a centerline with an approximate start point of 41°36′35″ N., 070°54′18″ W. (NAD 83) and an approximate end point of 41°37′26″ N., 070°53′48″ W. (NAD 83) at Davy's Locker Restaurant in New Bedford, MA, to Fort Phoenix Beach in Fairhaven, MA. • Safety Zone Dimension: 500 yards on either side of the centerline described above.
7.0 JULY	
7.1 Marion 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Outer Sipican Harbor, Marion, MA. • Position: Within 500 yards of 41°42′17″ N., 070°45′08″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks barge.
7.2 Oyster Harbors July 4th Festival.	• Event Type: Fireworks Display. • Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Tim's Cove, North Bay, Osterville, MA. • Position: Within 500 yards of 41°37′29″ N., 070°25′12″ W. (NAD 83). • Safety Zone Dimension: Approximately 200 yard radius circle around the fireworks barge.
7.3 North Kingstown Fireworks Display.	• Event Type: Fireworks Display. • Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Town Beach, North Kingston, RI. • Position: Within 500 yards of 41°33′59″ N., 071°26′23″ W. (NAD 83). • Safety Zone Dimension: Approximately 200 yard radius circle around the fireworks barge.
7.4 Falmouth Fireworks	• Event Type: Fireworks Display. • Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Falmouth Beach, Falmouth, MA. • Position: Within 500 yards of 41°32′27″ N., 070°35′26″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks barge.
7.5 Town of Nantucket Fireworks	• Event Type: Fireworks Display.

TABLE TO § 165.173—Continued

7.6 City of Newport 4th of July Fireworks.	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Jetties Beach, Nantucket Sound, MA. • Position: Within 500 yards of 41°19′00″ N., 070°06′30″ W. (NAD 83). • Safety Zone Dimension: Approximately 200 yard radius circle around the fireworks barge. • Event Type: Fireworks Display.
7.7 Town of Barnstable/Hyannis July 4th Fireworks.	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From the shore in the vicinity of Fort Adams, Newport, RI. • Position: Within 500 yards of 41°28′49″ N., 071°20′12″ W. (NAD 83). • Safety Zone Dimension: Approximately 350 yard radius circle around the launch site. • Event Type: Fireworks Display.
7.8 Edgartown 4th of July Fireworks Celebration.	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Lewis Bay, Hyannis, MA. • Position: Within 500 yards of 41°38′20″ N., 070°15′08″ W. (NAD 83). • Safety Zone Dimension: Approximately 350 yard radius circle around the fireworks barge. • Event Type: Fireworks Display.
7.9 City of New Bedford Fireworks Display.	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Edgartown Outer Harbor, Edgartown, MA. • Position: Within 500 yards of 41°22′39″ N., 070°30′14″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks barge. • Event Type: Fireworks Display.
7.10 Onset Fireworks	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of New Bedford Harbor, New Bedford, MA. • Position: Within 500 yards of 41°37′55″ N., 070°54′44″ W. (NAD 83). • Safety Zone Dimension: Approximately 250 yard radius circle around the fireworks barge. • Event Type: Fireworks Display.
7.11 Bristol 4th of July Fireworks	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: On the shore, in the vicinity of Shellpoint Beach, Onset, MA. • Position: Within 500 yards of 41°44′13″ N., 070°39′51″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks launch site. • Event Type: Fireworks Display.
7.12 [Reserved]	• Date: One night between July 1st and July 10th, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: In the vicinity of Northern portion of the Bristol Harbor, Bristol, RI, on the section of Poppasquash Rd separating the harbor and Mill Pond. • Position: Within 500 yards of 41°40′53.4″ N., 071°17′00″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks launch site.
7.13 Save the Bay Swim	• Event Type: Swim Event. • Date: One Saturday or Sunday in July or August, as announced in the Local Notice to Mariners. • Time: Start time will vary from 6:00 a.m. to 11:59 a.m. and last for approximately four hours, until the last swimmer is ashore. Start time will be announced in advance in the Local Notice to Mariners. • Location: The regulated area includes all waters in the vicinity of the Newport/Pell Bridge, East Passage of Narragansett Bay, along a centerline with an approximate start point of 41°30′24″ N., 071°19′49″ W. (NAD 83) and an approximate end point of 41°30′39″ N., 071°21′50″ W. (NAD 83), *i.e.,* a line drawn from the Officers' Club, Coaster's Harbor Island, Naval Station Newport, to Potter Cove, Jamestown. • Safety Zone Dimension: 500 yards on either side of the centerline described above.
8.0 AUGUST	
8.1 Boston Pops Nantucket	• Event Type: Fireworks Display. • Date: One night in August as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: On the shore, in the vicinity of Jetties Beach, Nantucket, MA. • Position: Within 500 yards of 41°17′43″ N., 070°06′10″ W. (NAD 83). • Safety Zone Dimension: Approximately 400 yard radius circle around the fireworks barge.
8.2 Oak Bluffs Fireworks	• Event Type: Fireworks Display. • Date: One night in August. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Oak Bluffs Harbor, Oak Bluffs, MA. • Position: Within 500 yards of 41°27′27″ N., 070°33′17″ W. (NAD 83). • Safety Zone Dimension: Approximately 350 yard radius circle around the fireworks barge.
8.3 Newport Salute to Summer Fireworks.	• Event Type: Fireworks Display.

TABLE TO § 165.173—Continued

	• Date: One night during the last two weekends in August or 1st weekend in September, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: From a barge in the vicinity of Naval Station Newport, Newport, RI. • Position: Within 500 yards of 41°30′15″ N., 071°19′50″ W. (NAD 83). • Safety Zone Dimension: Approximately 400 yard radius circle around the fireworks barge.
9.0 SEPTEMBER	
9.1 Provincetown Harbor Swim for Life.	• Event Type: Swim Event. • Date: On a day in September as announced in the Local Notice to Mariners. • Time: Times will vary from 10:00 a.m. until the last swimmer is ashore, no later than 2:00 p.m. • Location: The regulated area includes all waters in the vicinity of the Provincetown Harbor along a centerline between the start point, the Long Point Lighthouse. approximate position 42°01′59″ N., 070°10′07″ W. (NAD 83), and the end point, the Boatslip Resort, Provincetown, MA, approximate position 42°02′48″ N., 070°11′24″ W. (NAD 83). • Safety Zone Dimension: 250 yards on either side of the centerline described above.
9.2 Spirit of Somerset Celebration	• Event Type: Fireworks Display. • Date: One night in September, as announced in the Local Notice to Mariners. • Time: Approximately 8:00 p.m. to 11:59 p.m. • Location: On the shore, in the vicinity of Mallard Point, Somerset, MA. • Position: Within 500 yards of 41°46′18″ N., 071°07′14″ W. (NAD 83). • Safety Zone Dimension: Approximately 200 yard radius circle around the fireworks launch site.
10.0 OCTOBER	
10.1 Yarmouth Seaside Festival Fireworks.	• Event Type: Fireworks Display. • Date: One night in October, as announced in the Local Notice to Mariners. • Time: Approximately 7:00 p.m. to 11:59 p.m. • Location: On the shore, in the vicinity of Seagull Beach, West Yarmouth, MA. • Position: Within 500 yards of 41°38′06″ N., 070°13′13″ W. (NAD 83). • Safety Zone Dimension: Approximately 300 yard radius circle around the fireworks launch site.

§ 165.511 [Amended]

■ 97. In § 165.511(c)(1), after the text ''accordance with the Navigation Rules'', remove the text ''as seen in 33 CFR chapter I, subchapters D and E'' and add, in its place, the text ''(COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E))''.

§ 165.514 [Amended]

■ 98. In § 165.514(a), after the text ''from Bogue Sound—New River'' and before the text ''58 (LLNR 39210) at'', remove the text ''Daybeacon'' and add, in its place, the text ''Light''.

§ 165.518 [Amended]

■ 99. In § 165.518(c)(4), remove the text ''in 33 CFR chapter I, subparts D and E'' and add, in its place, the text ''(COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E)).''

§ 165.708 [Amended]

■ 100. In § 165.708(a)(1), after the text ''Charleston Harbor Entrance'', remove the text ''Buoy ''C'' (LLNR 1885, position 32–39.6N, 079–40.9W)'' and add, in its place, the text '', approximate position (32°37.1′ N., 079°35.5′ W.)''.

§ 165.753 [Amended]

■ 101. Amend § 165.753 as follows:

■ a. In paragraph (a), after the text ''Egmont Channel, Gulf of Mexico from Tampa Bay'', remove the text ''to the seabuoy, Tampa Lighted Whistle Buoy T, LLNR 18465'' and add, in its place, the text ''Tampa Bay Entrance, approximate position (27°35.3′ N., 079°35.5′ W.)''; and

■ b. In paragraph (d), after the text ''section shall supersede'', remove the text ''either the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) or the Inland Navigation Rules'' and add, in its place, the text ''the Navigational Rules (COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E))''.

§ 165.765 [Amended]

■ 102. In § 165.765(b), remove the text ''33 U.S.C. 2001 *et seq*'' and add, in its place, the text ''(33 CFR subchapter E)''.

§ 165.813 [Amended]

■ 103. Amend § 165.813 as follows:

■ a. In paragraph (a) after the text ''Galveston Bay Approach Lighted Buoy ''GB'', at approximate position'', remove the text ''29°21′18″ N., 94°37′36″ W.'', and add, in its place, the text ''29°14′44″ N., 094°32′41″ W.''; and .

■ b. In paragraph (b)(1)(ii), after the text ''Where the Houston Ship Channel narrows to 400 feet or less between Houston Ship Channel Entrance Lighted Bell Buoy ''18'', light list'', remove the text ''no. 34385 at approximately 29°21′06″ N., 94°47′00″ W.'' and add, in its place, the text ''nos. 23900/36055 at approximately 29°21′04″ N., 094°47′00″ W.''

■ 104. In § 165.814, revise paragraphs (a)(1) through (a)(4) to read as follows:

§ 165.814 Security Zones; Captain of the Port Houston-Galveston Zone.

(a) * * *

(1) *Houston, TX.* The Houston Ship Channel and all associated turning basins, bounded by a line drawn between geographic positions 29°45′14″ N., 095°05′47″ W. to 29°45′04″ N., 095°05′33″ W. west to the T & N Rail Road Swing Bridge at the entrance to Buffalo Bayou, including all waters adjacent to the ship channel from shoreline to shoreline and the first 200 yards of connecting waterways.

(2) *Morgan's Point, TX.* The Barbours Cut Ship Channel and Turning Basin containing all waters west of a line drawn between Barbours Cut Junction Light ''BC'' 29°41′12″ N., 094°59′10″ W. (LLNR–24750), and Houston Ship Channel Light 91, 29°40′58″ N., 094°58′59″ W. (LLNR–24595) (NAD 1983).

(3) *Bayport, TX.* The Port of Bayport, Bayport Ship Channel and Bayport Turning Basin containing all waters

south of latitude 29°36′45″ N. and west of position 29°36′45″ N., 094°59′31″ W. (NAD 1983).

(4) *Texas City, TX.* The Port of Texas City Channel, Turning Basin and Industrial Canal containing all waters bounded by the area south and west of a line drawn from Texas City Channel Light 19 (LLNR 26160) through Texas City Cut B Inner Range Front Light (LLNR 26110) and terminating on land in position 29°23′16″ N., 094°53′15″ W. (NAD 1983).

* * * * *

§ 165.1152 [Amended]

■ 105. In § 165.1152(e)(5), after the text ''Los Angeles Main Channel Entrance Light'', remove the number ''2'' and add, in its place, the number ''8''.

§ 165.1156 [Amended]

■ 106. In § 165.1156(b)(3), after the text ''the Navigation Rules'', remove the text ''as defined in 33 CFR chapter I, subchapters D and E'' and add, in its place, the text ''(COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E))''.

§ 165.1181 [Amended]

■ 107. In § 165.1181(d)(3), after the text ''Inland Navigation Rules (INRs) (33'' remove the text ''U.S.C. 2009'' and add, in its place, the text ''CFR subchapter E''.

§ 165.1182 [Amended]

■ 108. In § 165.1182(a)(1), after the text ''between San Francisco Main Ship Channel'', remove the text ''buoys 7 and 8'' and add, in its place, the text ''Lighted Bell Buoy 7 and San Francisco Main Ship Channel Lighted Whistle Buoy 8''.

§ 165.1183 [Amended]

■ 109. In § 165.1183(b)(1), after the text ''between San Francisco Main Ship Channel'', remove the text ''buoys 7 and 8'' and add, in its place, the text ''Lighted Bell Buoy 7 and San Francisco Main Ship Channel Lighted Whistle Buoy 8''.

§ 165.T13–239 [Amended]

■ 110. In § 165.T13–239(a)(3), after the text ''Inland Navigation Rules published in 33 CFR'', remove the text ''part 83'' and add, in its place, the text ''subchapter E''.

§ 165.1321 [Amended]

■ 111. In § 165.1321(c)(1), after the text ''northwesterly along the shoreline of the Blair Waterway'' remove the text ''to the Commencement Bay Directional Light (light list number 17159)'' and add, in its place, the text ''approximate position 47°16′49″ N., 122° 24′52″ W.''.

■ 112. Amend § 165.1407 to revise paragraphs (a)(1), (a)(3), and (a)(4)(i) to read as follows:

§ 165.1407 Security Zones; Oahu, HI.

(a) * * *

(1) Honolulu Harbor. All waters of Honolulu Harbor and Honolulu entrance channel commencing at a line between Honolulu Harbor Entrance Channel Lighted Buoys 1 and 2, to a line between Kalihi Channel Lights 14 and 15 west of Sand Island Bridge.

* * * * *

(3) Kalihi Channel and Keehi Lagoon, Oahu. All waters of Kalihi Channel and Keehi Lagoon beginning at Kalihi Channel Entrance Lighted Buoy 1 and continuing along the general trend of Kalihi Channel to Light 13, thence continuing on a bearing of 332.5°T to shore, thence east and south along the general trend of the shoreline to Light 15, thence southeast to Light 14, thence southeast along the general trend of the shoreline of Sand Island, to the southwest tip of Sand Island at 21°18.0′ N., 157°53.05′ W., thence southwest on a bearing of 233°T to Kalihi Channel Entrance Lighted Buoy 1.

(4) Honolulu International Airport—(i) Honolulu International Airport, North Section. All waters surrounding Honolulu International Airport from 21°18.25′ N., 157°55.58′ W., thence south to 21°18.0′ N., 157°55.58′ W., thence east to the western edge of Kalihi Channel, thence north along the western edge of the channel to Light 13, thence northwest at a bearing of 332.5°T to shore.

* * * * *

■ 113. Revise § 165.1702(a) to read as follows:

§ 165.1702 Gastineau Channel, Juneau, Alaska—safety zone.

(a) The waters within the following boundaries are a safety zone: A line beginning at position 58°17.8′ N., 134°24.9′ W., in the direction of 140° True to Rock Dump Lighted Buoy 2A (LLNR 23685) at position 58°17.1′ N., 134°23.8′ W.; thence in the direction of 003° true to a point at position 58°17.4′ N., 134°23. 8′ W., on the north shore of Gastineau Channel; thence northwesterly along the north shore of Gastineau Channel to the point of origin.

* * * * *

PART 177—CORRECTION OF ESPECIALLY HAZARDOUS CONDITIONS

■ 114. The authority citation for part 177 is revised to read as follows:

Authority: 46 U.S.C. 4302, 4308, 4311; Pub. L. 103–206, 107 Stat. 2439.

* * * * *

PART 183—BOATS AND ASSOCIATED EQUIPMENT

■ 115. The authority citation for part 183 continues to read as follows:

Authority: 46 U.S.C. 4302; Pub. L 103–206, 107 Stat. 2439; 49 CFR 1.46.

§ 183.803 [Amended]

■ 116. In § 183.803, in the definition of ''Navigation Lights'', remove the text ''(Commandant Instruction 16672.2 series)'' and add, in its place, the text ''(COLREGS and their associated Annexes and Inland Navigation Rules (33 CFR subchapter E)''.

Dated: June 30, 2015.

Katia Kroutil,

Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.

[FR Doc. 2015–16520 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2015–0656]

Safety Zones; Recurring Events in Captain of the Port Boston Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zones in the Captain of the Port Boston Zone on the specified dates and times listed below. This action is necessary to ensure the protection of the maritime public and event participants from the hazards associated with this annual recurring event. No person or vessel, except for the safety vessels assisting with the event may enter the safety zones unless given permission from the COTP or the designated on-scene representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

DATES: The regulation for the safety zones described in 33 CFR 165.118 will be enforced between August 1, 2015,

and August 15, 2015, on the date and times listed in the table below.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Mr. Mark Cutter, Coast Guard Sector Boston Waterways Management Division, telephone 617–223–4000, email *Mark.E.Cutter@uscg.mil*.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zones listed in 33 CFR 165.118 on the specified dates and times as indicated in Table 1 below. This regulation was published in the **Federal Register** on November 8, 2013 (78 FR 67028).

TABLE 1

7.13 Yankee Homecoming Fireworks	• Event Type: Fireworks Display. • Sponsor: Yankee Homecoming. • Date: August 1, 2015. • Time: 9:15 p.m. to 10:15 p.m. • Location: All waters of the Merrimack River, within a 350-yard radius of the fireworks launch site located at position 42°48.97′ N., 070°52.68′ W. (NAD 83).
8.1 Beverly Homecoming Fireworks	• Event Type: Fireworks Display. • Sponsor: Beverly Harbormaster. • Date: August 9, 2015. • Time: 9:00 p.m. to 11:00 p.m. • Location: All waters of Beverly Harbor within a 350-yard radius of the fireworks barge located at position 42°32.62′ N., 070°52.15′ W. (NAD 83).
8.5 Celebrate the Clean Harbor Swim	• Event Type: Swim. • Sponsor: New England Open Water Swimming Association. • Date: August 15, 2015. • Time: 9:00 a.m. to 12:00 p.m. • Location: All waters of Gloucester Harbor within the following points (NAD 83): 42°35.3′ N., 070°39.8′ W. 42°35.9′ N., 070°39.2′ W. 42°35.9′ N., 070°39.8′ W. 42°35.3′ N., 070°40.2′ W.
8.6 Boston Light Swim	• Event Type: Swim. • Sponsor: Boston Light Swim. • Date: August 15, 2015. • Time: 7:00 a.m. to 12:00 p.m. • Location: All waters of Boston Harbor between the L Street Bath House and Little Brewster Island within the following points (NAD 83): 42°19.7′ N., 071°02.2′ W. 42°19.9′ N., 071°10.7′ W. 42°19.8′ N., 070°53.6′ W. 42°19.6′ N., 070°53.4′ W.
8.8 The Boston Triathlon	• Event Type: Swim. • Sponsor: Ethos. • Date: August 9, 2015. • Time: 8:00 a.m. to 10:00 a.m. • Location: All waters of Columbus Park, Boston, Ma within the following points (NAD 83): 42°19.6′ N., 071°02.9′ W. 42°19.6′ N., 071°02.6′ W. 42°19.4′ N., 071°02.6′ W. 42°19.4′ N., 071°02.8′ W.

This notice is issued under authority of 33 CFR 165.118 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide mariners with advanced notification of enforcement periods via the Local Notice to Mariners and Broadcast Notice to Mariners. If the COTP determines that the regulated areas need not be enforced for the full duration stated in this notice, a Broadcast Notice to Mariners may be used to grant general permission to enter the regulated areas.

Dated: July 9, 2015.

C.C. Gelzer,

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

[FR Doc. 2015–18389 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2015–0662]

RIN 1625–AA00

Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: At various times throughout the month of July, the Coast Guard will enforce certain safety zones. This action is necessary and intended for the safety of life and property on navigable waters during this event. During each enforcement period, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo.

DATES: The regulations in 33 CFR 165.939(a)(19) will be enforced on July 26, 2015 from 9 p.m. to 10:30 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Waterways Management Division, Coast Guard Sector Buffalo, 1 Fuhrmann Blvd. Buffalo, NY 14203; Coast Guard telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Safety Zones; Annual Events in the Captain of the Port Buffalo Zone listed in 33 CFR 165.939 for the following event:

(1) *Tonawanda's Canal Fest Fireworks, Tonawanda, NY;* The safety zone listed in 33 CFR 165.939(a)(19) will be enforced from 9 p.m. to 10:30 p.m. on July 26, 2015.

Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within these safety zones during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or his designated representative. Those seeking permission to enter one of these safety zones may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter one of these safety zones shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register,** the Coast Guard will provide the maritime community with advance notification of these enforcement periods via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that one of these safety zones need not be enforced for the full duration stated in this notice he or she may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone.

Dated: July 14, 2015.

J.P. Higgins,

Commander, U.S. Coast Guard, Acting Captain of the Port Buffalo.

[FR Doc. 2015–18395 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2015–0286]

RIN 1625–AA00

Safety Zone, Fall River Grand Prix, Mt. Hope Bay and Taunton River, Fall River, MA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone in the navigable waters of Mt. Hope Bay and the Taunton River in the vicinity of Fall River, MA, during the Fall River Grand Prix marine event from August 14–16, 2015. This safety zone is intended to safeguard mariners from the hazards associated with high-speed, high-performance motorboats competing in the event. Vessels are prohibited from entering into, transiting through, mooring, or anchoring within this safety zone during periods of enforcement unless authorized by the Captain of the Port (COTP), Southeastern New England or the COTP's designated representative.

DATES: This rule is effective from 9 a.m., Friday, August 14, 2015 to 5 p.m., Sunday, August 16, 2015. It will be subject to enforcement between 9 a.m. and 5 p.m. on each of these three dates.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2015–0286. To view documents mentioned in the preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, contact Mr. Edward G. LeBlanc at Coast Guard Sector Southeastern New England, telephone 401–435–2351, email *Edward.G.LeBlanc@uscg.mil.* If you have questions on viewing the docket, please contact Ms. Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

On May 29, 2015, we published a notice of proposed rulemaking (NPRM) entitled ''Safety Zone, Fall River Grand Prix, Mt. Hope Bay and Taunton River, Fall River, MA'' in the **Federal Register** (80 FR 30637). We received no comments on the NPRM.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. This provision authorizes an agency to make a rule effective less than 30 days after publication in the **Federal Register** when the agency for good cause finds that delaying the effective period for 30 days or more is ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** to safeguard participants and the public at the Fall River Grand Prix, which is scheduled for August 14–16, 2015. State and local government officials support the event, there is no known opposition to the event, and no comments opposing the safety zone were received in response to the NPRM. Therefore, it is impracticable and unnecessary to make this rule effective 30 days or more after publication in the **Federal Register**.

B. Basis and Purpose

The legal basis for the rule is 33 U.S.C. 1231; 50 U.S.C. 191, 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to establish regulatory safety zones.

The initial Fall River Grand Prix is a three-day event where high-speed, high-performance motorboats participate in controlled races within a well-defined water area. This safety zone is intended to encompass the racing area and will include a buffer between the racing motorboats and spectator craft to provide a margin of safety. As these races are part of a national series of events, governed by a national racing and safety organization (the U.S. Offshore Powerboat Association), and

operated by experienced high-speed motorboat crews and support teams, they are expected to generate local and regional media coverage, and attract spectators on a number of recreational and excursion vessels.

The Coast Guard is establishing this safety zone, in conjunction with the Fall River Grand Prix, to ensure the protection of the maritime public and event participants from the hazards associated with high-speed, high-performance motorboat racing.

C. Discussion of Comments, Changes and the Final Rule

No comments were received and no changes were made to the language contained in the NPRM.

D. Regulatory Analyses

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

1. Executive Order 12866 and Executive Order 13563

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

We expect the adverse economic impact of this rule to be minimal. Although this regulation may have some adverse impact on the public, the potential impact will be minimized for the following reasons: The safety zone will be in effect for only a few hours each day for three consecutive days, and vessels will only be restricted from the zone in Mt. Hope Bay and the Taunton River in the vicinity of Fall River, MA during those limited periods when the races are actually ongoing; during periods when there is no actual racing (*e.g.,* racing vessels are transiting from the pier to the racing site; downtime between races, etc.) vessels may be allowed to transit through the safety zone; there is an alternate route available for recreational vessels to the west of the safety zone that does not add substantial transit time and is already routinely used by mariners; many vessels, especially recreational vessels, may transit in all portions of the affected waterway except for those areas covered by the safety zone; and vessels may enter or pass through the affected waterway with the permission of the COTP or the COTP's representative.

Notification of the Fall River Grand Prix and the associated safety zone will be made to mariners through both the Southeastern Massachusetts and Rhode Island Port Safety Forums, local Notice to Mariners, event sponsors, and local media well in advance of the event.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments on this rule from any small business, nor from the U.S Small Business Administration. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule may affect the following entities, some of which might be small entities: Owners or operators of vessels intending to transit in Mt. Hope Bay and the Taunton River in the vicinity of Fall River, MA, during the Fall River Grand Prix marine event. The impact to these entities will not be significant, and this rule will not affect a substantial number of small entities, because the waterway will be restricted and the safety zone enforced only during those limited periods when the races are actually ongoing. During periods when there is no actual racing (*e.g.,* racing vessels are transiting from the pier to the racing site; downtime between races, etc.) vessels may be allowed to transit through the safety zone. Also, there is an alternate route available for recreational vessels to the west of the safety zone that does not add substantial transit time and is already routinely used by mariners. And many vessels, especially recreational vessels, may transit in all portions of the affected waterway except for those areas covered by the safety zone. And all vessels may enter or pass through the affected waterway with the permission of the COTP or the COTP's representative.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

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

We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 reads as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0286 to read as follows:

§ 165.T01–0286 Safety Zone, Fall River Grand Prix, Mt. Hope Bay and Taunton River, Fall River, MA.

(a) *Location.* The following area is a safety zone: Mt. Hope Bay and the Taunton River navigation channel from approximately Mt. Hope Bay buoy R10 southwest of Brayton Point channel, and extending approximately two miles to the northeast up to and including Mt. Hope Bay buoy C17 north of the Braga Bridge. The safety zone is encompassed by the following coordinates:

Corner	Latitude	Longitude
SW	41°41.40′ N.	71°11.15′ W.
NW	41°41.48′ N.	71°11.15′ W.
SE	41°42.33′ N.	71°09.40′ W.
NE	41°42.42′ N.	71°09.47′ W.

(b) *Enforcement Period.* Vessels will be prohibited from entering this safety zone, when enforced, during the Fall River Grand Prix marine event between 9 a.m. and 5 p.m. from Friday, August 14, 2015 to Sunday, August 16, 2015.

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

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

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

(3) *Patrol Commander.* The Coast Guard may patrol each safety zone under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign ''PATCOM.''

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

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the safety zone established in conjunction with the Fall River Grand Prix, Taunton River, vicinity of Fall River, MA. These regulations may be enforced for the duration of the event.

(2) No later than 8 a.m. each day of the event, the Coast Guard will announce via Safety Marine Information Broadcasts and local media the times and duration of each race scheduled for that day, and the precise area(s) of the safety zone that will be enforced.

(3) Vessels may not transit through or within the safety zone during periods of enforcement without Patrol Commander approval. Vessels permitted to transit must operate at a no-wake speed, in a manner which will not endanger participants or other crafts in the event.

(4) Spectators or other vessels shall not anchor, block, loiter, or impede the movement of event participants or official patrol vessels in the safety zone unless authorized by an official patrol vessel.

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

(6) The Patrol Commander may delay or terminate the Fall River Grand Prix at any time to ensure safety. Such action may be justified as a result of weather, traffic density, spectator operation or participant behavior.

Dated: July 8, 2015.

Richard J. Schultz,

Commander, U.S. Coast Guard, Acting Captain of the Port Southeastern New England.

[FR Doc. 2015–18390 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2015–0313; FRL–9931–24–Region 4]

Approval and Promulgation of Implementation Plans for the State of Alabama: Cross-State Air Pollution Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve the State of Alabama's March 27, 2015, State Implementation Plan (SIP) revision, submitted by the Alabama Department of Environmental Management (ADEM). This SIP revision provides Alabama's state-determined allowance allocations for existing electric generating units (EGUs) in the State for the 2016 control periods and replaces the allowance allocations for the 2016 control periods established by EPA under the Cross-State Air Pollution Rule (CSAPR). The CSAPR addresses the ''good neighbor'' provision of the Clean Air Act (CAA or Act) that requires states to reduce the transport of pollution that significantly affects downwind nonattainment and maintenance areas. In this direct final action, EPA is approving Alabama's SIP revision, incorporating the state-determined allocations for the 2016 control periods into the SIP, and amending the regulatory text of the CSAPR Federal Implementation Plan (FIP) to reflect this approval and inclusion of the state-determined allocations. The CSAPR FIPs for Alabama remain in place until such time as the State decides to replace the FIPs with a SIP revision to allocate trading program allowances for control periods 2017 and beyond. EPA is taking direct final action to approve Alabama's SIP revision because it meets the requirements of the CAA and the CSAPR requirements to replace EPA's allowance allocations for the 2016 control periods. This action is being taken pursuant to the CAA and its implementing regulations.

DATES: This direct final rule is effective September 25, 2015 without further notice, unless EPA receives adverse comment by August 26, 2015. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2015–0313, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4-ARMS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2015–0313,'' Air Regulatory Management Section (formerly Regulatory Development Section), Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Chief, Air Regulatory Management Section, Air Planning and Implementation Branch (formerly Air Planning Branch), Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. 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 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2015–0313. 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 not have special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the 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 the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person 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 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Twunjala Bradley, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Twunjala Bradley can be reached by phone at (404) 562–9352 or via electronic mail at *bradley.twunjala@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What action is EPA taking?

EPA is taking direct final action to approve Alabama's March 27, 2015, SIP revision submitted by ADEM that narrowly modifies the allocations of allowances established by EPA under the CSAPR FIPs for existing EGUs for the 2016 control periods.[1] The CSAPR allows a subject state, instead of EPA, to allocate allowances under the SO_2, NO_X annual, and NO_X ozone season trading programs to existing EGUs in the State for the 2016 control periods provided that the state meets certain regulatory

[1] Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; August 8, 2011 (76 FR 48208).

requirements.[2] EPA issued the CSAPR on August 8, 2011, to address CAA section 110(a)(2)(D)(i)(I) requirements concerning the interstate transport of air pollution and to replace the Clean Air Interstate Rule [3] (CAIR), which the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded to EPA for replacement.[4] EPA found that emissions of SO_2 and NO_X in 28 eastern, midwestern, and southern states contribute significantly to nonattainment or interfere with maintenance in one or more downwind states with respect to one or more of three air quality standards—the annual $PM_{2.5}$ NAAQS promulgated in 1997 [5] (15 micrograms per cubic meter (μg/m^3), the 24-hour $PM_{2.5}$ NAAQS promulgated in 2006 [6] (35 μg/m^3), and the 8-hour ozone NAAQS promulgated in 1997 [7] (0.08 parts per million). The CSAPR identified emission reduction responsibilities of upwind states, and also promulgated enforceable FIPs to achieve the required emission reductions in each of these states through cost effective and flexible requirements for power plants.

Alabama is subject to the FIPs that implement the CSAPR and require certain EGUs to participate in the EPA-administered federal SO_2, NO_X annual, and NO_X ozone season cap-and trade programs. Alabama's March 27, 2015, SIP revision allocates state-determined allowances under the CSAPR to existing EGUs in the State for the 2016 control periods only, utilizing the same methodology EPA established to allocate unit-specific allowances under the CSAPR FIPs, but allowing for modifications to specific aspects of the allocation methodology to address the State's and source owners/operators unique implementation situations. Alabama's SIP revision includes state-determined allocations for the CSAPR NO_X (annual and ozone season) and SO_2 trading programs, and complies with the 2016 allocation SIP requirements set forth at 40 CFR 52.38 and 52.39. Under these regulations, a state may replace EPA's CSAPR allowance allocations for existing EGUs for the 2016 control periods provided that the state submits a SIP revision containing those allocations to EPA no later than April 1, 2015 that meets the requirements in 40 CFR 52.38 and 52.39.

Through this action, EPA is approving Alabama's March 27, 2015, SIP revision, incorporating the allocations into the SIP, and amending the CSAPR FIP's regulatory text for Alabama at 40 CFR 52.54 and 52.55 to reflect this approval and inclusion of the state-determined allowance allocation for the 2016 control periods. EPA is not making any other changes to the CSAPR FIPs for Alabama in this action. The CSAPR FIPs for Alabama remain in place until such time the State decides to replace the FIPs with a SIP revision to allocate trading program allowances for control periods 2017 and beyond. EPA is taking direct final action to approve Alabama's March 27, 2015, SIP submission because it complies with the CAA and the CSAPR. Below is a summary of the provisions allowing a state to submit SIP revisions to EPA to modify the 2016 allowance allocations. For more detailed information on the CSAPR, refer to the August 8, 2011, preamble and other subsequent related rulemakings referenced throughout this rulemaking.

II. 2016 CSAPR SIPs

The CSAPR allows states to make 2016 allowance allocations through submittal of a complete SIP revision that is narrower in scope than an abbreviated or full SIP submission states use to replace the FIPs and/or to make allocation decisions for 2017 and beyond. Pursuant to the CSAPR, a state may adopt and include in a SIP revision for the 2016 control period a list of units and the amount of allowances allocated to each unit on the list, provided the list of units and allocations meets specific requirements set forth in 40 CFR 52.38(a)(3) and (b)(3) and 52.39(d) and (g) for NO_X and SO_2, respectively. *See* 40 CFR 52.38 and 52.39. If these requirements are met, the Administrator will approve the allowance allocation provisions replacing the provisions in 40 CFR part 97 for the State. SIP revisions under this expedited process may only allocate each state budget minus the new unit set-aside and the Indian country new unit set-aside. For states subject to multiple trading programs, options are available to submit 2016 state-determined allocations for one or more of the applicable trading programs while leaving unchanged the EPA-determined allocations for 2016 in the remaining applicable trading programs.[8]

In developing this procedure, EPA set deadlines for submitting the SIP revisions for 2016 allocations and for recordation of the allocations that balanced the need to record allowances sufficiently ahead of the control periods with the desire to allow state flexibility for 2016 control periods. These deadlines allow sufficient time for EPA to review and approve these SIP revisions, taking into account that EPA approval must be final and effective before the 2016 allocations can be recorded and the allowances are available for trading. The CSAPR set an October 17, 2011 deadline for states to notify EPA of their intent to submit these SIP revisions modifying allowance allocations for the second control periods (except with respect to the changes established in the Supplemental Rule) and replace the provisions of the CSAPR FIPs (40 CFR part 97) with regard to the State and the control periods in 2016 with a list of EGUs and the amount of allowances allocated to each. *See* 40 CFR 52.38 and 52.39.[9]

Twelve states, including Alabama, notified EPA by the deadline of their intentions to submit their 2013 allocation SIPs to EPA by April 1, 2012, for the second control periods.[10] However, pursuant to EPA's December 3, 2014, Interim Final Rule, the deadline to submit these SIPs was tolled for three years, in effect requiring states, including Alabama, to submit a 2016 state-determined allocation SIP by April 1, 2015, for the CSAPR 2016 control periods.[11] Each state may submit a SIP to allocate state-determined allowances for the 2016 control periods provided it

[2] The CSAPR is implemented in two Phases (I and II) with Phase I referring to 2015 and 2016 control periods, and Phase II consisting of 2017 and beyond control periods.

[3] Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone Clean Air Interstate Rule; Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; May 12, 2005 (70 FR 25162).

[4] *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), *modified on reh'g by* 550 F.3d 1176.

[5] National Ambient Air Quality Standards for Particulate Matter; July 18, 1997 (62 FR 36852).

[6] National Ambient Air Quality Standards for Particulate Matter; October 17, 2006 (71 FR 61144).

[7] National Ambient Air Quality Standards for Ozone; July 18, 1997 (62 FR 38856).

[8] States can also submit SIP revisions to replace EPA-determined, existing unit allocations with state-determined allocations for control periods after 2016 via a separate process described at 40 CFR 52.38(a)(4), (a)(5), (b)(4), and (b)(5) and 52.39(e), (f), (h) and (i). *See also* Preamble of the CSAPR and Interim Final Rule (76 FR 48208 and 79 FR 71663).

[9] Alabama informed EPA of their intention in a letter dated September 16, 2011. For the five states (Iowa, Michigan, Missouri, Oklahoma, and Wisconsin) covered in the Supplemental Rule in the case of ozone season NO_X, March 6, 2012, was the date by which notifications of intentions to submit state allocations were due to the Administrator. *See* 76 FR 80760, 79 FR 71663 and 40 CFR 52.38(b)(3)(v). Note that the March 6, 2012 deadline for such notifications was modified by the December 3, 2014 Interim Final Rule to March 6, 2015. *See* 79 FR 71671.

[10] The docket for this action contains Alabama's September 16, 2011 letter notifying EPA of its intention to submit a SIP revision.

[11] In the case of ozone season NO_X, SIP revisions to address 2016 allocations for the five states covered by the Supplemental Rule are due by October 1, 2015. *See* 40 CFR 52.38(b)(3)(v)(B).

meets the following requirements pursuant to 40 CFR 52.38 and 52.39:

- Notify the EPA Administrator by October 17, 2011, of intent to submit state allocations for the 2016 control periods (formerly 2013) in a format specified by the Administrator. *See* 40 CFR 52.38(a)(3)(v)(A), 52.38(b)(3)(v)(A), 52.39(d)(5)(i), and 52.39(g)(5)(i).
- Submit to EPA the state-determined allocation list SIP revision modifying allowance allocations for the 2016 control periods no later than April 1, 2015. *See* 40 CFR 52.38(a)(3)(v)(B), 52.38(b)(3)(v)(B), 52.39(d)(5)(ii), and 52.39(g)(5)(ii).
- Provide a 2016 state-determined allocation list only for units within the State that commenced commercial operation before January 1, 2010. *See* 40 CFR 52.38(a)(3)(i), 52.38(b)(3)(i), 52.39(d)(1), and 52.39(g)(1).
- Ensure the sum of the state-determined allocations are equal to or are less than the total state budget for 2016 minus the sum of the new unit set-aside and the Indian country new unit set-aside. *See* 40 CFR 52.38(a)(3)(ii), 52.38(b)(3)(ii), 52.39(d)(2), and 52.39(g)(2).
- Submit the 2016 state-determined allowance allocation list as a SIP revision electronically to EPA in the format specified by the Administrator. *See* 40 CFR 52.38(a)(3)(iii), 52.38(b)(3)(iii), 52.39(d)(3), and 52.39(g)(3).
- Confirm that the SIP revision does not provide for any changes to the listed units or allocations after approval of the SIP revision by EPA and does not provide for any change to any allocation determined and recorded by the Administrator under subpart AAAAA, BBBBB, CCCCC, or DDDDD of 40 CFR part 97. *See* 40 CFR 52.38(a)(3)(iv), 52.38(b)(3)(iv), 52.39(d)(4), and 52.39(g)(4).

Additionally, these narrow SIP revisions for the 2016 state-determined allocations are required to comply with SIP completeness elements set forth in 40 CFR part 51, appendix V (*i.e.,* conduct adequate public notice of the submission, provide evidence of legal authority to adopt SIP revisions, and ensure the SIP is submitted to EPA by the State's Governor or his/her designee). If a qualified state (*i.e.,* one of the twelve states that met the October 17, 2011, notification deadline) submits to EPA a 2016 CSAPR SIP by April 1, 2015, meeting all the above-described requirements and EPA approves the SIP submission by October 1, 2015, EPA will record state-determined allocations for 2016 by October 1, 2015, into the Allowance Management System (AMS). Alabama's March 27, 2015, SIP submission addresses the aforementioned requirements allowing a state to allocate 2016 CSAPR allowances for the annual and ozone season NO_X and Group 2 SO_2 trading programs. EPA's analysis of Alabama's SIP submission is explained below in section III.

III. What is EPA's analysis of Alabama's SIP submission?

On March 27, 2015, Alabama submitted a SIP revision intended to replace the CSAPR FIP allocations of Transport Rule (TR) NO_X annual, TR NO_X Ozone season, and TR SO_2 Group 2 allowances for the 2016 control periods. For approval, this SIP revision must meet the specific requirements found in 40 CFR 52.38(a)(1) through (3), (b)(1) through (3), and 52.39(a), (c), and (g) described above. The following is a list of criteria under 40 CFR 52.38 and .39, described in Part II of this document, and the results of EPA's analysis of Alabama's SIP revision:

A. A complete SIP revision must be submitted to EPA no later than April 1, 2015 (40 CFR 52.38(a)(3)(v)(B), 52.38(b)(3)(v)(B), and 52.39(g)(5)(ii)).

EPA has reviewed the March 27, 2015 submittal from Alabama and found it to be complete. This submittal satisfies the applicable elements of SIP completeness set forth in appendix V to 40 CFR part 51.

B. Notification from a State to EPA must be received by October 17, 2011, or March 6, 2015, in the case of ozone season NO_X SIP revisions for states covered by the December 27, 2011 Supplemental Rule (76 FR 80760), of its intent to submit a complete SIP revision for 2016 existing unit allocations (40 CFR 52.38(a)(3)(v)(A), 52.38(b)(3)(v)(A), 52.39(d)(5)(i), and 52.39(g)(5)(i)).

On September 16, 2011, Alabama notified EPA via a letter of the State's intent to submit complete SIP revisions for allocating TR NO_X Annual, TR NO_X Ozone season, and TR SO_2 Group 2 allowances to existing units (*i.e.,* units that commenced commercial operation before January 1, 2010). Although the letter indicates that that the State intended to submit the SIP revisions by the April 2, 2012 [12] deadline addressing the allocation of TR allowances for the 2013 control periods, these dates have been tolled by three years in the Interim Final Rule (79 FR 71663, December 3, 2014. See footnote 5.). The September 16, 2011 letter submitted by Alabama notifying EPA of the State's intent to submit revised CSAPR SIPs submittal satisfies the requirements of 40 CFR 52.38(a)(3)(A), 52.38(b)(3)(A), and 52.39(g)(5)(i).

C. The SIP revision should include a list of TR NO_X Annual, TR NO_X Ozone Season, TR SO_2 Group 1 or Group 2 units, whichever is applicable, that are in the State and commenced commercial operation before January 1, 2010 (40 CFR 52.38(a)(3)(i), 52.38(b)(3)(i), 52.39(d)(1), and 52.39(g)(1)).

As part of Alabama's SIP revision, the State submitted a list of units to be allocated TR NO_X Annual, TR NO_X Ozone Season, and TR SO_2 Group 2 allowances for the 2016 control periods. The list identifies the same units as were identified in the notice of data availability (NODA) published by EPA on December 3, 2014 (79 FR 71674). Hence, EPA has determined that each unit on the list submitted by Alabama as part of the SIP revision is located in the State of Alabama and had commenced commercial operation before January 1, 2010.

D. The total amount of TR NO_X annual, TR NO_X Ozone Season, or TR SO_2 Group 1 or Group 2 allowance allocations, whichever is applicable, must not exceed the amount, under 40 CFR 97.410(a), 97.510(a), 97.610(a), 97.710(a), whichever is applicable for the State and the control periods in 2016, of TR NO_X Annual, TR NO_X Ozone Season, TR SO_2 Group 1 or Group 2 trading budget minus the sum of the new unit set-aside and Indian country new unit set-aside (40 CFR 52.38(a)(3)(ii), 52.38(b)(3)(ii), 52.39(d)(2), and 52.39(g)(2)).

The CSAPR established the budgets and new unit set-asides for Alabama for the 2016 control periods as 72,691 tons for TR NO_X annual emissions and 1,454 tons for TR NO_X Annual new unit set-aside; 31,746 tons for TR NO_X ozone season emissions and 635 tons for the TR NO_X ozone season new unit set-aside; 216,033 tons for TR SO_2 Group 2 emissions and 4,321 for the TR SO_2 Group 2 new unit set-aside. Alabama's SIP revision, for approval in this action, does not affect these budgets, which are total amount of allowances available for allocation for the 2016 control periods under the EPA-administered cap-and-trade program under the CSAPR FIPs. In short, the abbreviated SIP revision only affects allocations of allowances under the established budgets.

The Alabama SIP revision allocating TR NO_X annual allowances for the 2016 control period does not exceed the budget under 40 CFR 97.410(a) minus

[12] The original requirement to submit a complete SIP to EPA was by April 1, 2012 (as per 40 CFR 52.38(a)(3)(v)(B)). However, April 1, 2012 was a Sunday, thus, the notification from the State indicates that the State intended to submit the SIP revisions by April 2, 2012, rather than April 1, 2012.

the new unit set-aside (72,691 tons − 1,454 = 71,237).[13] The Alabama SIP revision allocates 71,234 TR NO_X annual allowances to existing units in the State. EPA will place the 1,457 unallocated allowances from the Alabama CSAPR 2016 budget into the TR NO_X annual new unit set-aside for the 2016 control period.

The Alabama SIP revision allocating TR NO_X ozone season allowances for the 2016 control period does not exceed the budget under § 97.510(a) minus the new unit set-aside (31,746 tons − 635 tons = 31,111).[14] The Alabama SIP revision allocates 31,107 TR NO_X ozone season allowances to existing units in the State. EPA will place the 639 unallocated allowances from the Alabama CSAPR 2016 budget into the TR NO_X ozone season new unit set-aside for the 2016 control period.

The Alabama SIP revision allocating TR SO_2 Group 2 allowances for the 2016 control period exceeds, by a very small number of allowances (three) due to rounding, the budget under § 97.710(a) minus the new unit set-aside (216,033 tons − 4,321 tons = 211,712).[15] The Alabama SIP revision allocates 211,715 TR SO_2 Group 2 allowances to existing units in the State. However, EPA notes that proportionately, three allowances is a tiny fraction of the overall new unit set-aside budget for new Group 2 SO_2 units in Alabama (approximately 0.07%). In addition, for 2015, none of the 4,318 Group 2 SO_2 allowances available to allocate to new units have been allocated due to a dearth of qualifying new units in Alabama, and it appears highly likely this will be the case again in 2016 (*i.e.,* it is very likely these allowances will not be needed by new units in Alabama in 2016). EPA therefore does not believe the extra three allowances allocated to Alabama's existing CSAPR units in 2016 should weigh negatively in EPA's evaluation of the State's 2016 CSAPR SIP submittal, and will enter 4,318 allowances from the Alabama CSAPR 2016 budget into the TR SO_2 Group 2 new unit set-aside for the 2016 control period.[16]

E. The list should be submitted electronically in the format specified by the EPA (40 CFR 52.38(a)(3)(iii), 52.38(b)(3)(iii), 52.39(d)(3), and 52.39(g)(3)).

On March 27, 2015, EPA received an email submittal from Alabama in the format requested.

F. The SIP revision should provide a permanent allocation for the units on the list for 2016 (40 CFR 52.38(a)(3)(iv), 52.38(b)(3)(iv), and 52.39(g)(4)).

The Alabama SIP revision does not provide for any changes to the listed units or allocations after approval of the SIP revision and do not provide for any change to any allocation determined and recorded by the Administrator under subpart AAAAA, BBBBB, or DDDDD of 40 CFR part 97.

For the reasons discussed above, Alabama's SIP submission complies with the 2016 SIP allocation requirements as codified at 40 CFR 52.38 and 52.39 and established in the CSAPR FIPs. Through this action, EPA is approving Alabama's March 27, 2015, SIP revision, incorporating the allocations into the SIP, and amending the CSAPR FIPs' regulatory text for Alabama at 40 CFR 52.54 and 52.55 to reflect this approval and inclusion of the state-determined allowance allocation for the 2016 control periods. EPA is not making any other changes to the CSAPR FIPs for Alabama in this action. EPA is taking final action to approve Alabama's March 27, 2015, SIP revision because it is in accordance with the CAA and its implementing regulations.

IV. Final Action

EPA is taking final action to approve Alabama's March 27, 2015, CSAPR SIP revision that provides Alabama's state-determined allowance allocations for existing EGUs in the State for the 2016 control periods to replace the allowance allocations for the 2016 control periods established by EPA under CSAPR. Consistent with the flexibility given to states in the CSAPR FIPs at 40 CFR 52.38 and 52.39, Alabama's SIP revision allocates state-determined allowances to existing EGUs in the State under the CSAPR's NO_X annual and ozone season and SO_2 Group 2 trading programs. Alabama's SIP revision meets the applicable requirements in 40 CFR 52.38 for NO_X annual and NO_X ozone season emissions, and 40 CFR 52.39 for Group 2 SO_2 emissions. EPA is approving Alabama's SIP revision because it is in accordance with the CAA and its implementing regulations.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective September 25, 2015 without further notice unless the Agency receives adverse comments by August 26, 2015.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on September 25, 2015 and no further action will be taken on the proposed rule.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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

[13] The State of Alabama does not have a budget under 40 CFR 97.410(a) for a NO_X Annual Indian Country new unit set-aside for the 2016 control period.

[14] The State of Alabama does not have a budget under 40 CFR 97.510(a) for a NO_X Ozone Season Indian Country new unit set-aside for the 2016 control period.

[15] The State of Alabama does not have a budget under 40 CFR 97.710(a) for a Group 2 SO_2 Indian Country new unit set-aside for the 2016 control period.

[16] The quantities of allowances to be allocated through this process may differ slightly from the amounts set forth in 40 CFR 97.410(a), 97.510(a), 97.610(a), and 97.710(a) because of rounding in the spreadsheet of CSAPR FIP allowance allocations to existing units.

Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 25, 2015. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: July 15, 2015.

Heather McTeer Toney,

Regional Administrator, Region 4.

40 CFR parts 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart B—Alabama

■ 2. Section 52.50(e) is amended by adding an entry for ''Cross State Air Pollution Rule—State-Determined Allowance Allocations for the 2016 control periods'' at the end of the table to read as follows:

§ 52.50 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED ALABAMA NON-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/effective date	EPA approval date	Explanation
*	*	*	*	*
Cross State Air Pollution Rule—State-Determined Allowance Allocations for the 2016 control periods.	Alabama	3/27/2014	7/27/2015 [Insert **Federal Register** citation].	

■ 3. Section 52.54 is amended by adding paragraphs (a)(3) and (b)(3) to read as follows:

§ 52.54 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

(a) * * *

(3) Pursuant to § 52.38(a), Alabama's state-determined NO_X annual allowance allocations established in the March 27, 2015, SIP revision replace the unit level NO_X annual allowance provisions of the CSAPR FIP at 40 CFR 97.411(a) for the State for the 2016 control period with a list of NO_X annual units that commenced operation prior to January 1, 2010, in the State and the amount of state-determined NO_X annual allowances allocated to each unit on such list, for the 2016 control period as approved by EPA on July 27, 2015 [Insert citation of publication].

(b) * * *

(3) Pursuant to § 52.38(b), Alabama's state-determined NO_X ozone season allocations established in the March 27, 2015, SIP revision replace the unit level NO_X ozone season allowance provisions of the CSAPR FIP at 40 CFR 97.511(a) for the State for the 2016 control period with a list of NO_X ozone season units that commenced operation prior to January 1, 2010, in the State and the amount of state-determined NO_X ozone season allowances allocated to each unit on such list, for the 2016 control period as approved by EPA on July 27, 2015 [Insert citation of publication].

■ 4. Section 52.55 is amended by adding paragraph (c) to read as follows:

§ 52.55 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of sulfur dioxide?

* * * * *

(c) Pursuant to § 52.39(g), Alabama's state-determined Group 2 SO_2

allowance allocations established in the March 27, 2015, SIP revision replace the unit level Group 2 SO_2 allowance provisions of the CSAPR FIP at 40 CFR 97.711(a) for the State for the 2016 control period with a list of Group 2 SO_2 units that commenced operation prior to January 1, 2010, in the State and the amount of state-determined SO_2 allowances allocated to each unit on such list, for the 2016 control period as approved by EPA on July 27, 2015 [Insert citation of publication].

[FR Doc. 2015–18217 Filed 7–24–15; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2015–0001; Internal Agency Docket No. FEMA–8391]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *http://www.fema.gov/fema/csb.shtm.*

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

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Bret Gates, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4133.

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

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

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

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

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

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

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

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

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

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

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

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

§ 64.6 [Amended]

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

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region II				
New York:				
Neversink, Town of, Sullivan County.	360828	July 7, 1975, Emerg; May 25, 1984, Reg; August 17, 2015, Susp.	August 17, 2015 ..	August 17, 2015.
Region III				
Maryland:				
Delmar, Town of, Wicomico County.	240186	N/A, Emerg; February 28, 2007, Reg; August 17, 2015, Susp.	.....do	Do.
Fruitland, City of, Wicomico County.	240139	March 14, 1977, Emerg; November 15, 1985, Reg; August 17, 2015, Susp.	.....do	Do.
Mardela Springs, Town of, Wicomico County.	240079	March 13, 1975, Emerg; September 27, 1985, Reg; August 17, 2015, Susp.	.....do	Do.
Salisbury, City of, Wicomico County.	240080	March 20, 1974, Emerg; September 28, 1984, Reg; August 17, 2015, Susp.	.....do	Do.
Sharptown, Town of, Wicomico County.	240081	August 15, 1975, Emerg; September 27, 1985, Reg; August 17, 2015, Susp.	.....do	Do.
Wicomico County, Unincorporated Areas.	240078	January 21, 1974, Emerg; September 28, 1984, Reg; August 17, 2015, Susp.	.....do	Do.
Willards, Town of, Wicomico County.	240082	May 28, 1982, Emerg; May 1, 1985, Reg; August 17, 2015, Susp.	.....do	Do.
Pennsylvania:				
Aliquippa, City of, Beaver County	420101	April 15, 1974, Emerg; February 1, 1980, Reg; August 17, 2015, Susp.	.....do	Do.
Ambridge, Borough of, Beaver County.	420102	January 14, 1975, Emerg; February 1, 1980, Reg; August 17, 2015, Susp.	.....do	Do.
Baden, Borough of, Beaver County.	420103	January 14, 1975, Emerg; September 28, 1979, Reg; August 17, 2015, Susp.	.....do	Do.
Beaver, Borough of, Beaver County.	420104	July 7, 1975, Emerg; September 5, 1979, Reg; August 17, 2015, Susp.	.....do	Do.
Beaver Falls, City of, Beaver County.	420105	December 12, 1974, Emerg; May 17, 1982, Reg; August 17, 2015, Susp.	.....do	Do.
Big Beaver, Borough of, Beaver County.	422307	August 7, 1975, Emerg; May 17, 1982, Reg; August 17, 2015, Susp.	.....do	Do.
Bridgewater, Borough of, Beaver County.	420106	October 24, 1974, Emerg; May 1, 1980, Reg; August 17, 2015, Susp.	.....do	Do.
Brighton, Township of, Beaver County.	422309	April 16, 1975, Emerg; September 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Center, Township of, Beaver County.	422310	August 11, 1976, Emerg; June 15, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Chippewa, Township of, Beaver County.	422311	February 18, 1976, Emerg; September 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Conway, Borough of, Beaver County.	420107	February 20, 1975, Emerg; November 4, 1988, Reg; August 17, 2015, Susp.	.....do	Do.
Darlington, Borough of, Beaver County.	421319	N/A, Emerg; December 20, 2013, Reg; August 17, 2015, Susp.	.....do	Do.
Darlington, Township of, Beaver County.	422312	March 11, 1975, Emerg; September 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Daugherty, Township of, Beaver County.	422313	February 4, 1976, Emerg; June 1, 1982, Reg; August 17, 2015, Susp.	.....do	Do.
East Rochester, Borough of, Beaver County.	420108	August 8, 1978, Emerg; July 16, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Eastvale, Borough of, Beaver County.	422314	March 16, 1982, Emerg; March 16, 1982, Reg; August 17, 2015, Susp.	.....do	Do.
Economy, Borough of, Beaver County.	420109	February 28, 1977, Emerg; June 15, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Fallston, Borough of, Beaver County.	420110	June 18, 1974, Emerg; September 2, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Franklin, Township of, Beaver County.	421065	January 15, 1975, Emerg; March 16, 1989, Reg; August 17, 2015, Susp.	.....do	Do.
Freedom, Borough of, Beaver County.	420111	May 12, 1975, Emerg; February 1, 1980, Reg; August 17, 2015, Susp.	.....do	Do.
Georgetown, Borough of, Beaver County.	422316	April 22, 1976, Emerg; February 24, 1978, Reg; August 17, 2015, Susp.	.....do	Do.
Glasgow, Borough of, Beaver County.	420112	March 9, 1977, Emerg; August 4, 1988, Reg; August 17, 2015, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Greene, Township of, Beaver County.	422317	March 9, 1976, Emerg; September 10, 1984, Reg; August 17, 2015, Susp.	.....do	Do.
Hanover, Township of, Beaver County.	421223	April 26, 1982, Emerg; September 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Harmony, Township of, Beaver County.	421038	February 6, 1974, Emerg; January 3, 1979, Reg; August 17, 2015, Susp.	.....do	Do.
Homewood, Borough of, Beaver County.	422318	September 12, 1978, Emerg; January 30, 1984, Reg; August 17, 2015, Susp.	.....do	Do.
Hookstown, Borough of, Beaver County.	422319	May 29, 1981, Emerg; May 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Hopewell, Township of, Beaver County.	421321	July 29, 1974, Emerg; November 4, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Independence, Township of, Beaver County.	421323	February 16, 1977, Emerg; September 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Industry, Borough of, Beaver County.	420113	February 18, 1975, Emerg; September 5, 1979, Reg; August 17, 2015, Susp.	.....do	Do.
Marion, Township of, Beaver County.	422249	August 6, 1974, Emerg; March 2, 1989, Reg; August 17, 2015, Susp.	.....do	Do.
Midland, Borough of, Beaver County.	422321	February 18, 1976, Emerg; October 18, 1988, Reg; August 17, 2015, Susp.	.....do	Do.
Monaca, Borough of, Beaver County.	420114	July 2, 1974, Emerg; December 4, 1979, Reg; August 17, 2015, Susp.	.....do	Do.
New Brighton, Borough of, Beaver County.	420115	April 17, 1975, Emerg; August 15, 1983, Reg; August 17, 2015, Susp.	.....do	Do.
New Galilee, Borough of, Beaver County.	422322	March 1, 1977, Emerg; September 24, 1984, Reg; August 17, 2015, Susp.	.....do	Do.
New Sewickley, Township of, Beaver County.	422323	December 2, 1975, Emerg; March 2, 1989, Reg; August 17, 2015, Susp.	.....do	Do.
Ohioville, Borough of, Beaver County.	422324	August 7, 1975, Emerg; September 24, 1984, Reg; August 17, 2015, Susp.	.....do	Do.
Patterson, Township of, Beaver County.	422326	November 28, 1975, Emerg; December 1, 1987, Reg; August 17, 2015, Susp.	.....do	Do.
Patterson Heights, Borough of, Beaver County.	422325	August 29, 1978, Emerg; April 15, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Potter, Township of, Beaver County.	422327	March 17, 1977, Emerg; December 2, 1988, Reg; August 17, 2015, Susp.	.....do	Do.
Pulaski, Township of, Beaver County.	422328	December 31, 1975, Emerg; June 1, 1982, Reg; August 17, 2015, Susp.	.....do	Do.
Raccoon, Township of, Beaver County.	421220	February 18, 1976, Emerg; October 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
Rochester, Borough of, Beaver County.	420116	February 12, 1975, Emerg; February 1, 1980, Reg; August 17, 2015, Susp.	.....do	Do.
Rochester, Township of, Beaver County.	421322	March 11, 1975, Emerg; June 15, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Shippingport, Borough of, Beaver County.	420117	March 8, 1977, Emerg; August 19, 1991, Reg; August 17, 2015, Susp.	.....do	Do.
South Beaver, Township of, Beaver County.	422329	December 11, 1975, Emerg; September 1, 1986, Reg; August 17, 2015, Susp.	.....do	Do.
South Heights, Borough of, Beaver County.	422330	May 13, 1977, Emerg; August 15, 1983, Reg; August 17, 2015, Susp.	.....do	Do.
Vanport, Township of, Beaver County.	421320	July 2, 1974, Emerg; February 1, 1980, Reg; August 17, 2015, Susp.	.....do	Do.
West Mayfield, Borough of, Beaver County.	422331	December 23, 1974, Emerg; April 15, 1981, Reg; August 17, 2015, Susp.	.....do	Do.
Region V				
Indiana:				
Cannelton, City of, Perry County	180196	March 24, 1975, Emerg; July 18, 1983, Reg; August 17, 2015, Susp.	.....do	Do.
Perry County, Unincorporated Areas.	180195	April 11, 1975, Emerg; November 1, 1995, Reg; August 17, 2015, Susp.	.....do	Do.
Tell City, City of, Perry County ...	180197	September 24, 1971, Emerg; March 1, 1977, Reg; August 17, 2015, Susp.	.....do	Do.
Troy, Town of, Perry County	180198	December 30, 1976, Emerg; July 5, 1983, Reg; August 17, 2015, Susp.	.....do	Do.
Region VII				
Nebraska:				
Diller, Village of, Jefferson County.	310269	June 4, 2012, Emerg; N/A, Reg; August 17, 2015, Susp.	.....do	Do.
Fairbury, City of, Jefferson County.	310120	August 28, 1974, Emerg; September 3, 1980, Reg; August 17, 2015, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Jefferson County, Unincorporated Areas.	310447	July 17, 1984, Emerg; June 1, 1988, Reg; August 17, 2015, Susp.	.....do	Do.
Steele City, Village of, Jefferson County.	310121	June 4, 1975, Emerg; June 1, 1987, Reg; August 17, 2015, Susp.	.....do	Do.
Region IX				
Arizona:				
Show Low, City of, Navajo County.	040069	September 15, 1975, Emerg; February 3, 1982, Reg; August 17, 2015, Susp..	.....do	Do.

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

Dated: July 2, 2015.

Roy E. Wright,

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

[FR Doc. 2015–18272 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

Proposed Rules

Federal Register
Vol. 80, No. 143
Monday, July 27, 2015

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

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE-2014-BT-STD-0059]

Energy Conservation Program: Energy Conservation Standards for Room Air Conditioners; Request for Information

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

ACTION: Extension of public comment period.

SUMMARY: On June 18, 2015, the U.S. Department of Energy (DOE) published in the **Federal Register** a Request for Information (RFI) regarding energy conservation standards for room air conditioners (room ACs). The RFI provided for the submission of written comments by August 3, 2015. This notice announces an extension of the public comment period for submitting comments in response to the RFI or any other aspect of the rulemaking for room ACs. The comment period is extended to September 2, 2015.

DATES: The comment period for the Request for Information published in the **Federal Register** on June 18, 2015 (80 FR 34843), is extended. DOE will accept comments, data, and information regarding this rulemaking received no later than September 2, 2015.

ADDRESSES: Interested persons may submit comments, identified by docket number EERE–2014–BT–STD–0059, by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: RoomAC2014STD0059@ee.doe.gov.* Include the docket number EERE–2014–BT–STD–0059 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–5B, Request for Information for Energy Conservation Standards for Room Air Conditioners, Docket No. EERE–2014–BT–STD–0059, 1000 Independence Avenue SW., Washington, DC 20585–0121. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Telephone (202) 586–2945. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. No telefacsimiles (faxes) will be accepted.

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 *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;D=EERE-2014-BT-STD-0059.* This Web page contains a link to the docket for this notice on the regulation.gov site. The *www.regulations.gov* Web page contains instructions on how to access all documents in the docket, including public comments.

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: 202–586–0371. Email: *room_air_conditioners@EE.Doe.Gov.*

Ms. Sarah Butler, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–1777. Email: *Sarah.Butler@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On June 18, 2015, DOE published in the **Federal Register** a request for information regarding energy conservation standards for room ACs to solicit information from the public to help DOE determine whether amended standards for room ACs would result in a significant amount of additional energy savings and whether those standards would be technologically feasible and economically justified. In addition, DOE identified several issues associated with the currently applicable test procedure for room ACs on which DOE is particularly interested in receiving comment. 80 FR 34843. The notice provided for the written submission of comments by August 3, 2015. The Association of Home Appliance Manufacturers (AHAM) has requested a 30 day extension of the comment period to allow additional time for the preparation of their comments. Major interested parties for this rulemaking include major room AC manufacturers, manufacturer association, energy utilities, state agencies, international organizations, and energy and environmental advocacy groups. AHAM represents the major room AC manufacturers. AHAM has requested this extension because the comments for the proposed standards rulemaking for residential dehumidifiers are also due on August 3, 2015 and comments for proposed oven standards rulemaking are due on August 10, 2015, thus making it difficult to give these rulemakings the attention necessary to provide DOE with meaningful and thoroughly considered comments.

DOE has determined that an extension of the public comment period is appropriate based on the foregoing reason. DOE will consider any comments received by midnight of September 2, 2015, and deems any comments received by that time to be timely submitted.

Issued in Washington, DC, on July 17, 2015.

Kathleen B. Hogan,

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

[FR Doc. 2015–18329 Filed 7–24–15; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2012–N–1210]

RIN 0910–AF22

Food Labeling: Revision of the Nutrition and Supplement Facts Labels; Reopening of the Comment Period as to Specific Documents

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; reopening of comment period as to specific documents.

SUMMARY: The Food and Drug Administration (FDA or we) is reopening, as to specific documents, the comment period regarding our proposed rule to revise the Nutrition Facts and Supplement Facts labels. We are reopening the comment period for 60 days for the sole purpose of inviting public comments on two consumer studies being added to the administrative record. The consumer studies pertained to proposed changes to the Nutrition Facts label formats.

DATES: The comment period for the proposed rule published March 3, 2014 (79 FR 11879), is reopened for the limited purpose described in this document. Submit either electronic or written comments by September 25, 2015.

ADDRESSES: You may submit comments 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 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 Docket No. (FDA–2012–N–1210) for this rulemaking. 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: Philip L. Chao, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–2112.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 3, 2014 (79 FR 11879), we published a proposed rule to amend our labeling regulations for conventional foods and dietary supplements to provide updated nutrition information on the label to assist consumers in maintaining healthy dietary practices. The proposed rule would update the list of nutrients that are required or permitted to be declared; provide updated Daily Reference Values and Reference Daily Intake values that are based on current dietary recommendations from consensus reports; amend requirements for foods represented or purported to be specifically for children under the age of 4 years and pregnant and lactating women and establish nutrient reference values specifically for these population subgroups; and revise the format and appearance of the Nutrition Facts label. In the preamble to the proposed rule (79 FR 11879 at 11905, 11947 to 11948, 11952), we indicated that we intended to conduct consumer studies related to proposed changes to the format of the Nutrition Facts label and that we might use the results of the studies to help inform our future actions on certain label-related issues. We also indicated that we would publish the results of the studies when they became available (79 FR 11879 at 11952), and we invited comment on the use of an alternative format design and other format-related issues (79 FR 11879 at 11961).

We recently completed two consumer studies and, as a result, are adding two documents pertaining to those studies to the administrative record and providing an opportunity for public comment. We believe that a public comment period of 60 days is adequate in this case because we are specifically limiting the reopened comment period to comments on the two consumer studies. Comments are invited, and will be considered, only to the extent that they are focused on the two consumer studies being added to the record. These two consumer studies (Refs. 1 and 2) being added to the record are as follows:

1. FDA, Eye-Tracking Experimental Study on Consumer Responses to Modifications to the Nutrition Facts Label Outlined in the Food and Drug Administration's Proposed Rulemaking, June 2015. This was a study in which 160 participants participated in a computer-based research of the potential effects of several possible changes to the label on consumer viewing and use of the label.
2. FDA, Experimental Study of Proposed Changes to the Nutrition Facts Label Formats, June 2015. This was a Web-based experiment, involving more than 5,000 participants, designed to explore whether modifications to the format of the Nutrition Facts label would affect consumers' interpretation of information on the Nutrition Facts label.

After reviewing the comments on the proposed rule, we have tentatively concluded that we do not intend to further consider the alternative format for the Nutrition Facts label. A review of the results of the consumer research made available in this document has not provided information to change our planned approach. Therefore, interested persons who intend to submit comments may wish to focus on the study results relevant to the current and proposed formats.

II. Comments

Interested persons may submit either electronic comments regarding the guidance 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.*

III. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *http://www.regulations.gov.*

1. FDA, Eye-Tracking Experimental Study on Consumer Responses to Modifications to the Nutrition Facts Label Outlined in the Food and Drug Administration's Proposed Rulemaking, June 2015.
2. FDA, Experimental Study of Proposed Changes to the Nutrition Facts Label Formats, June 2015.

Dated: July 17, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–17929 Filed 7–24–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2012–N–1210]

Food Labeling: Revision of the Nutrition and Supplement Facts Labels; Supplemental Proposed Rule To Solicit Comment on Limited Additional Provisions

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; supplemental notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA or we) is revising certain provisions of the proposed rule, issued in March 2014, that would amend FDA's labeling regulations for conventional foods and dietary supplements to provide updated nutrition information on the Nutrition Facts and Supplement Facts labels to assist consumers in maintaining healthy dietary practices (''the NFL/SFL proposed rule''). We are proposing text for the footnotes to be used on the Nutrition Facts label. We are taking this action after completing our consumer research in which we tested various footnote text options for the label. We are also proposing to establish a Daily Reference Value (DRV) of 10 percent of total energy intake from added sugars, proposing to require the declaration of the percent Daily Value (DV) for added sugars on the label, and are providing additional rationale for the declaration of added sugars on the label. We are taking these actions based, in part, on the science underlying a new report released by the 2015 Dietary Guidelines Advisory Committee.

DATES: Submit either electronic or written comments on the supplemental notice of proposed rulemaking by October 13, 2015. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 by August 26, 2015, (see the ''Paperwork Reduction Act of 1995'' section of this document).

ADDRESSES: You may submit comments by any of the following methods, except that comments on information collection issues under the Paperwork Reduction Act of 1995 (the PRA) must be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) (see the ''Paperwork Reduction Act of 1995'' section of this document).

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 submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5360 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Docket No. FDA–2012–N–1210 for this rulemaking. 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 ''How to Submit 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, 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, 5600 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: *With regard to the supplemental notice of proposed rulemaking:* Blakeley Fitzpatrick, Center for Food Safety and Applied Nutrition (HFS–830), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–5429, email: *NutritionProgramStaff@fda.hhs.gov. With regard to the information collection:* FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, email: *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

FDA is revising certain provisions of the proposed rule that published in the **Federal Register** on March 3, 2014 (79 FR 11879), that would amend FDA's labeling regulations for conventional foods and dietary supplements to provide updated nutrition information on the NFL/SFL proposed rule.

In the NFL/SFL proposed rule, we proposed to remove the requirement for the footnote listing the reference values for certain nutrients for 2,000 and 2,500 calorie diets and reserved space to provide a proposed footnote. We stated in the preamble of the NFL/SFL proposed rule that we would continue to perform research during this rulemaking process to evaluate how variations in label format may affect consumer understanding and use of the Nutrition Facts label. We also stated that we would publish the results of our research for public review and comment. We are making results of our research available in this document. We are also proposing text for the footnotes to be used on the Nutrition Facts label. We are taking this action after completing our consumer research in which we tested various footnote text options for the label. We are also providing an exemption from the footnote requirement for certain foods.

In addition, the NFL/SFL proposed rule would require the declaration of added sugars as an indented line item underneath the declaration of ''Sugars'' on the Nutrition Facts label. We discussed in the NFL/SFL proposed rule that we were considering whether to use the term ''Total Sugars'' instead of ''Sugars'' on the label if we finalize a declaration of added sugars.

We stated in the NFL/SFL proposed rule that we were planning to conduct a consumer study that would include, among other things, questions regarding the declaration of added sugars on the Nutrition Facts label in order to help enhance our understanding of how consumers would comprehend and use this new information. We also stated that we would publish the results of the study when they become available.

As we prepared to make the consumer study results for the footnote and added sugars declaration available, new information emerged from the ''Scientific Report of the 2015 Dietary Guidelines Advisory Committee'' (the 2015 DGAC report) regarding added sugars. The new information on added sugars led us to reconsider our thinking for not establishing a DRV or requiring the declaration of a percent DV for added sugars on the Nutrition Facts and Supplement Facts labels. Specifically, the 2015 DGAC report provided evidence suggesting a strong association between a dietary pattern of intake characterized, in part, by a reduced intake of added sugars and a reduced risk of cardiovascular disease. The evidence also suggested an applicable

reference amount for added sugars, *i.e.,* limiting added sugars intake to no more than 10 percent of total daily caloric intake. As a result of our review of the science underlying the 2015 DGAC report, we are proposing to establish a DRV for added sugars and to require the percent DV declaration of added sugars on the Nutrition Facts and Supplement Facts labels. We are not proposing to establish a DRV for total sugars or to require the mandatory declaration of a percent DV for total sugars because there is no quantitative intake level or other reference amount for which there is sufficient scientific evidence upon which we can base a DRV for total sugars. We are proposing to establish a DRV for added sugars because science underlying the 2015 DGAC report provided a scientific basis for a reference amount for added sugars upon which we can propose a DRV (a recommended maximum of 10 percent of total energy intake). We also received many comments suggesting that, if added sugars are declared on the label, a percent DV declaration would assist consumers in putting the amount of added sugars in a serving of a product into the context of their total daily diet.

A summary of the results of FDA's consumer research on footnote text options and on the added sugars declaration is available in section I.C., and a detailed description of the results is available in the docket.

Summary of the Major Provisions of the Regulatory Action in Question

We are proposing to establish a DRV for added sugars of 50 grams (g) for children 4 years of age and older and adults, and of 25 g for children 1 through 3 years of age. We are also proposing to require the declaration of the percent DV for added sugars on Nutrition and Supplement Facts labels, and have proposed revisions to the NFL/SFL proposed rule codified to reflect these changes. These proposed revisions are outlined in section III. We are also proposing footnote text for the space reserved in § 101.9(d)(9) (21 CFR 101.9(d)(9)) of the NFL/SFL proposed rule. The footnote text would explain that the % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet and that 2,000 calories a day is used for general nutrition advice. The language in this footnote is similar to the wording of one of the options tested in our study (as described in section I.C.), except that the sentences have been reversed. We believe this footnote explains the %DV in the most concise manner by providing a brief description of ''% Daily Value,'' which is lacking in the current footnote. While the consumer research study did not suggest strong support for a particular footnote, the language in this footnote was perceived by study participants to be more useful than the current footnote. We consider that switching the order of the sentences is important because it allows the first sentence to clearly follow the asterisk in the ''%DV'' column heading that leads to the footnote. When consumers look down to the footnote to see what additional information is linked to the asterisk that they see after the ''%DV'' column heading, they may expect to find the sentence that explains percent daily value first, rather than a sentence about calories. This supplemental notice of proposed rulemaking would also allow the footnote proposed in § 101.9(d) to be omitted from products that qualify for a simplified format (§ 101.9(f)), and on small or intermediate packages (§ 101.9(j)(13)(ii)(A)(*1*); § 101.9(j)(13)(ii)(A)(*2*)), provided that the following abbreviated statement is used: ''%DV = % Daily Value.''

The proposed statement is shorter than the current statement to allow for more space on the label. In addition, we realize that the standard format in the NFL/SFL proposed rule for the Nutrition Facts label had a placeholder for the footnote and did not explain the ''%DV.'' It is important for consumers to know what ''%DV'' on the label means. Consequently, we are proposing a statement that spells out ''%DV'' for products that qualify for a simplified format and on small or intermediate packages.

This supplemental notice of proposed rulemaking also proposes an exemption to the proposed footnote requirement in section § 101.9(d)(9) for the foods that can use the terms ''calorie free,'' ''free of calories,'' ''no calories,'' ''zero calories,'' ''without calories,'' ''trivial source of calories,'' ''negligible source of calories,'' or ''dietary insignificant source of calories'' on the label or in the labeling of foods as defined in 21 CFR 101.60(b). Such products would have little to no impact on the average daily 2,000 calorie intake, which the footnote addresses. Exempting the footnote for these packages is a practical solution that would assure adequate space is still available for the required nutrient declarations.

We are inviting comment only with respect to the following issues discussed in greater detail later in this document: (1) New information from the 2015 DGAC report and the science upon which that report is based regarding added sugars; (2) the proposal to establish a DRV for added sugars and to require the declaration of the percent DV for added sugars on the Nutrition and Supplement Facts labels; (3) using the term ''Total Sugars'' instead of ''Sugars'' on the label (4) the proposed text for the footnotes to be used on the Nutrition Facts label; (5) exemptions from the proposed footnote requirement; (6) whether we should make changes to the footnote used on the Supplement Facts label; and (7) whether there should be a footnote on labels of food represented for infants 7 through 12 months of age or children 1 through 3 years of age, and, if so, what that footnote should say. We will not consider comments outside the scope of these issues.

Costs and Benefits

In the NFL/SFL proposed rule we stated that we have developed one comprehensive Preliminary Regulatory Impact Analysis (PRIA) that presents the benefits and costs of this proposed rule as well as the proposed rule entitled ''Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed at One Eating Occasion; Dual Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments'' (the original PRIA). As stated earlier, we are proposing revisions to the NFL/SFL proposed rule. We are proposing footnote text and an exemption to that text for certain foods, and we are proposing that manufacturers declare the percent DV for added sugars on the Nutrition Facts and Supplement Facts labels. We estimate that just the changes specified in this supplemental notice of proposed rulemaking, if finalized, will generate annualized costs of $10 million (at 7 percent discount rate) and $8 million (at 3 percent discount rate), annualized benefits of $200 million (at 7 percent) and $300 million (at 3 percent), and annualized net benefits of $190 million (at 7 percent) and $292 million (at 3 percent) on top of those estimated in the previous proposed rules. In total, we estimate that these rules, including the changes outlined in this proposal, if finalized, will generate annualized costs of $200 million (at both 3 and 7 percent), annualized benefits of $2.1 billion (at 7 percent) and $2.3 billion (at 3 percent), and annualized net benefits of $1.9 billion (at 7 percent) and $2.1 billion (at 3 percent). This represents an annual increase in net benefits from the original PRIA's estimates of approximately $200 million per year.

We summarize the annualized costs and benefits (over a 20-year period discounted at both 3 percent and 7

percent) of the previous and revised proposed rules in the following table.

SUMMARY OF ANNUALIZED COSTS AND BENEFITS OVER 20 YEARS OF PREVIOUS AND REVISED PROPOSED RULES

[In billions of 2011 dollars]

	Benefits	Costs	Net benefits
Previous Proposed Rules:			
Annualized @3%	$2.0	$0.2	$1.8
Annualized @7%	1.9	0.2	1.7
Revised Proposed Rules:			
Annualized @3%	2.3	0.2	2.1
Annualized @7%	2.1	0.2	1.9

Notes: Compliance period is 24 months. Analysis assumes that the proposed rules will be enacted together. Costs include relabeling and reformulation costs, which are one-time costs, as well as recordkeeping costs, which recur. Recordkeeping costs, because of their recurring nature, differ by discount rate; however, such costs comprise a very small percentage of total costs.

I. Background

A. NFL/SFL Proposed Rule

In the **Federal Register** of March 3, 2014 (79 FR 11879), we published a proposed rule entitled ''Food Labeling: Revision of the Nutrition and Supplement Facts Labels'' (the ''NFL/SFL proposed rule''). The NFL/SFL proposed rule would amend our labeling regulations for conventional foods and dietary supplements to provide updated nutrition information on the label to assist consumers in maintaining healthy dietary practices. In the NFL/SFL proposed rule, we proposed to: (1) Update the list of nutrients that are required or permitted to be declared; (2) provide updated DRVs and Reference Daily Intake values that are based on current dietary recommendations from U.S. consensus reports; (3) amend requirements for foods represented or purported to be specifically for children under the age of 4 years and pregnant and lactating women and establish nutrient reference values specifically for these population subgroups; and (4) revise the format and appearance of the Nutrition Facts label.

In the NFL/SFL proposed rule, we proposed to remove the requirement for the footnote listing the reference values for certain nutrients for 2,000 and 2,500 calorie diets and reserved space to provide a proposed footnote (proposed § 101.9(d)(9)). We stated in the preamble of the NFL/SFL proposed rule that we would continue to perform research during this rulemaking process to evaluate how variations in label format may affect consumer understanding and use of the Nutrition Facts label. We also stated that we would publish the results of our research for public review and comment (79 FR 11879 at 11882). See section I.C. for a summary of the consumer study results.

In addition, the NFL/SFL proposed rule would require the declaration of added sugars as an indented line item underneath the declaration of ''Sugars'' on the Nutrition Facts label (proposed § 101.9(c)(6)(iii)). Such a declaration would only be required for the Supplement Facts label if added sugars are present in quantitative amounts that exceed the amount that can be declared as zero in § 101.9(c) (see proposed § 101.36(b)(2)(i)). Given our proposal to require the declaration of added sugars, we also considered establishing a DRV for added sugars. However, based on our review of scientific evidence and recommendations of U.S. consensus reports, we tentatively concluded in the NFL/SFL proposed rule that there was no sound scientific basis for the establishment of a quantitative intake recommendation upon which a DRV could be derived for total sugars (79 FR 11879 at 11902) and added sugars (79 FR 11879 at 11906). Therefore, we did not propose a DRV for added sugars. Accordingly, we proposed to require the declaration of added sugars on the Nutrition Facts label only in absolute amounts (in grams), similar to the declaration of total sugars.

We stated in the NFL/SFL proposed rule that we were planning to conduct a consumer study that would include, among other things, questions regarding the declaration of added sugars on the Nutrition Facts label to help enhance our understanding of how consumers would comprehend and use this new information. We stated that we would publish the results of the study when they became available. We also stated that we were interested in receiving, as part of any comment, other available research data and other factual information relevant to these issues, including the proposed double indented placement of added sugars below total sugars (79 FR 11879 at 11952). See section I.C. for a summary of the consumer study results.

B. Public Outreach

We requested comments on the NFL/SFL proposed rule by June 2, 2014, and comments on information collection issues under the PRA by April 2, 2014 (79 FR 11879). In the **Federal Register** of May 27, 2014 (79 FR 30055), we extended the comment period until August 1, 2014. In the **Federal Register** of May 29, 2014 (79 FR 30763), we announced our intent to hold a public meeting to discuss the NFL/SFL proposed rule and a proposed rule on serving sizes. The purpose of the public meeting was to inform the public of the provisions of the proposed rules, to invite oral stakeholder and public comments on the proposed rules, and to respond to questions about the proposed rules.

Nearly 300,000 comments were submitted to the docket on the NFL/SFL proposed rule. We continue to review these comments as part of our development of the NFL/SFL final rule. However, for the reasons discussed in section II., we are issuing revisions to certain provisions in the NFL/SFL proposed rule and requesting comment on the revisions.

C. Experimental Study on Consumer Responses to Nutrition Facts Labels With Various Footnote Formats and Declaration of Amount of Added Sugars

We conducted research to examine how a declaration of added sugars and alternative footnote statements may influence consumer use of the Nutrition Facts label in the absence of any consumer education. The study was a controlled, randomized, Web-based experiment completed in 2014. Although the research involved a single data collection effort, this data collection was composed of two separate experiments; one designed to address the effects of added sugars declarations and the other designed to address the effects of modified

footnotes. At the time the research was designed, we were not aware of any previous studies of consumer responses to added sugars information. This research was undertaken to help inform consumer education if added sugars were declared on the Nutrition Facts label. The research design did not include a percent DV for added sugars on the food label or the ingredient listing that will appear on packages, so we do not have data on how those pieces of information would affect consumer responses to an added sugars declaration. The study achieved its intended objectives of providing an initial understanding of potential consumer reactions to added sugars declarations and modified footnote information on Nutrition Facts labels. This information will help inform our future educational efforts related to food labeling. As with other new information, we would expect consumer understanding of an added sugars declaration, if finalized, to improve as the public's exposure to added sugars information increases and educational activities to explain the concept and how to use the new information on the Nutrition Facts label are undertaken.

1. Added Sugars Experiment

In the added sugars experiment, participants viewed Nutrition Facts label images displayed in one of three possible Nutrition Facts formats (see Ref. 1 for label formats):

- The ''Added Sugars'' Format, where an added sugars declaration was indented below a ''Sugars'' declaration;
- The ''Total Sugars + Added Sugars'' Format, where an added sugars declaration was indented below a ''Total Sugars'' declaration; and
- The Control Format, where participants viewed the current Nutrition Facts label throughout the study.

While viewing these label images, participants were asked a series of questions on their ability to accurately recognize and compare nutrients on the Nutrition Facts label, and their judgments about the foods' overall healthfulness and relative nutrient levels. Participants responded to these questions in the context of a one-product judgment task and a two-product comparison task. Participants were not given the proposed definition of added sugars or provided with the ingredients lists for the products tested, which could have affected their understanding.

The study found that when both total and added sugars declarations appeared on the label, the majority correctly reported the added sugars amount and accurately identified which products had less added sugars. The ''Total Sugars + Added Sugars'' format appeared to help participants better comprehend the total amount of sugars in a food than the ''Added Sugars'' format. The effect of the added sugars declarations on product judgments varied depending on the food category and the level of added sugars in the product. When declared, higher amounts of added sugars tended to produce more negative judgments about the product's healthfulness. Although the majority of the respondents correctly identified the total amount of sugars in a serving of food with each label presented that included an added sugars declaration, the added sugars experiment results show that a number of participants were confused about the distinction between sugars and added sugars, regardless of whether added sugars declarations appeared on the Nutrition Facts label. When participants were viewing Nutrition Facts labels without added sugars declarations, they could not accurately determine the amount of added sugars in the products, with the majority reporting that the total sugars amount was the amount of added sugars. Moreover, many participants who viewed Nutrition Facts labels without added sugars declarations assumed that the more nutritious products in the study had less added sugars.

A full description of the Added Sugars Experiment is in the Docket (Ref. 1).

2. Footnote Experiment

The footnote experiment compared consumer reactions to seven footnote formats, which included five modified footnotes, in addition to the current footnote and no footnote at all, for explaining percent DVs and how to use them. Results indicated that none of the modified footnotes significantly affected product perceptions or judgments of nutrient levels; all five footnote options produced similar perceptions and judgments relative to the current footnote and a no-footnote control. Nevertheless, all five modified footnotes were rated as easier to understand than the current footnote. Footnote 1 was perceived to be more believable than the current footnote. Footnote 1 stated the following: ''2,000 calories a day is used for general nutrition advice. *The % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet.'' We are proposing footnote text from Footnote 1 in this supplemental notice of proposed rulemaking. See section III.B. A full description of the Footnote Experiment is in the Docket (Ref. 2).

II. Decision To Issue Supplemental Notice of Proposed Rulemaking Regarding Limited Additional Provisions

As we prepared to make the consumer study results discussed in section I.C. available, new information emerged from the 2015 DGAC report (Ref. 3) regarding added sugars. The DGAC reviews the scientific evidence on specific topics and provides their assessment of the scientific evidence and recommendations. The new information on added sugars led us to reconsider our thinking for not establishing a DRV or requiring the declaration of a percent DV for added sugars on the Nutrition Facts and Supplement Facts labels. The 2015 DGAC report also included new important information and analysis related to requiring the declaration of added sugars on the Nutrition Facts label, which we had proposed in the NFL/SFL proposed rule, specifically evidence related to dietary patterns and risk of disease.

We have considered the evidence that the DGAC relied upon and have tentatively concluded that the new evidence provided in the 2015 DGAC report related to dietary patterns of intake that are associated with a reduced risk of chronic disease (specifically cardiovascular disease (CVD)) as well as the evidence provided in the report related to excess intake of added sugars in the U.S. supports our proposal to require the mandatory declaration of added sugars on the Nutrition and Supplement Facts labels. The DGAC report also provides evidence to support a reference amount for added sugars upon which we can establish a DRV for use in calculating a percent DV on the label. The percent DV is included to assist consumers in understanding the relative significance of the amount of added sugars in a serving of a product in the context of a total daily diet.

The 2015 DGAC report does not contain federal government recommendations. The independent advisory committee's views will be taken into consideration by the Federal government as the dietary guidelines are updated. In this supplemental notice of proposed rulemaking, we have considered the scientific evidence underpinning the recommendations provided in the advisory committee's report. As a result of our review of the 2015 DGAC report and the evidence that the DGAC relied upon, we are proposing to establish a DRV and to require the

percent DV declaration for added sugars on the Nutrition Facts and Supplement Facts labels.

We are also proposing text for the footnotes to be used on the Nutrition Facts label. We are not proposing any revisions to the footnote text used on the Supplement Facts label. As discussed in the NFL/SFL proposed rule, the current footnote statement required for the Supplement Facts label differs from that which is currently required on the Nutrition Facts label. We stated that based on the results of the consumer study, we will consider whether it is necessary to make corresponding changes to the footnote used on the Supplement Facts label when certain macronutrients are declared. We invited comment on whether we should consider changes to the footnote statement on the Supplement Facts label to be consistent with any changes to the footnote statement in the Nutrition Facts label (79 11879 at 11948). We also noted that ''[a] comment to the 2007 ANPRM requested that we permit the use of a footnote statement about not limiting fat intake on foods represented or purported to be specifically for infants and children less than 2 years to enable consumers to make informed choices, should the Agency decide to propose the mandatory declaration of saturated fat for infants and children less than 2 years. The comment noted that saturated fat should not be limited in the diets of children less than 2 years of age. The comment provided no consumer data about such a footnote statement. At this time, we are not proposing to require a footnote stating that total fat and other types of fat should not be limited in infants and children less than 2 years in response to this comment. However, we request comments and information on how consumers would understand and use the amount of saturated fat and cholesterol declared on the Nutrition Facts label, as well as on the need for an explanatory footnote to accompany the declaration of saturated fat and cholesterol, on food represented or purported to specifically for infants 7 through 12 months or children 1 through 3 years'' (79 FR 11879 at 11934–11935). We did not receive many comments on these issues in response to the proposed rule. We are inviting comment on whether we should consider requiring, instead of the current footnote for the Supplement Facts label that links the percent DV with a 2,000 calorie level, part of the Nutrition Facts label footnote text we are proposing for the Nutrition Facts label that states ''2,000 calories a day is used for general nutrition advice.'' We are also inviting further comment on whether we should consider a footnote for foods, other than infant formula, represented or purported to be specifically for infants 7 through 12 months or children 1 through 3 years of age in the NFL/SFL proposed rule, and if so, what the footnote should say.

This supplemental notice of proposed rulemaking provides the public with the opportunity to provide comment on our tentative conclusions with respect to the footnote, the DRV, the percent DV declaration for added sugars, and the new information from the 2015 DGAC report for the added sugars declaration. As noted, we are not seeking and will not consider comments with respect to other issues.

III. Description of the Supplemental Notice of Proposed Rulemaking

A. Proposing To Establish a DRV and Require the Declaration of the Percent DV for ''Added Sugars''

As originally proposed, the NFL/SFL proposed rule would require the declaration of the gram amount of added sugars on the Nutrition Facts and Supplement Facts labels, but would not establish a DRV or require the disclosure of the percent DV for added sugars. The proposed requirement for the declaration of the gram amount of ''added sugars'' was based, in large part, on data and information in the *Dietary Guidelines for Americans, 2010* (2010 DGA)(Ref. 4) related to the intake of excess calories in the U.S. diet from solid fats and added sugars, and the impact that these excess calories may have on the nutrient density of the diet. As discussed in the NFL/SFL proposed rule, no more than 5 to 15 percent of calories from solid fats and added sugars combined can be reasonably accommodated in the U.S. Department of Agriculture (USDA) Food Patterns for most people to avoid excess calorie consumption, yet added sugars alone contributed an average of 16 percent of the total calories in American diets (79 FR 11879 at 11903 through 11904).

In the 2014 NFL/SFL proposed rule we stated that although there is sufficient science to support a relationship between the intake of sugar-sweetened beverages and an increase in adiposity (body fat) in children, ''inadequate evidence exists to support the direct contribution of added sugars to obesity or heart disease.'' (79 FR 11879 at 11904). Thus, we included the evidence that added sugars contribute excess calories to the American diet as part of our rationale for proposing the mandatory declaration of added sugars.

We did not propose to establish a DRV or to require the declaration of a percent DV for added sugars in the NFL/SFL proposed rule because, at the time we issued the NFL/SFL proposed rule, there was ''no scientifically supported quantitative intake recommendation for added sugars on which a DRV for added sugars can be derived'' (79 FR 11879 at 11906). Following publication of the NFL/SFL proposed rule, the 2015 DGAC, a group of outside experts, submitted its recommendations to the Secretaries of the Department of Health and Human Services (HHS) and USDA, to inform the *Dietary Guidelines for Americans, 2015.* The Secretaries released the advisory committee's recommendations report online on February 19, 2015, making it available for public review and comment (see *http://www.health.gov/dietaryguidelines/2015-scientific-report/*).

The 2015 DGAC reaffirmed recommendations in the 2010 DGA, which included recommending reducing the intake of added sugars. The 2015 DGAC examined the relationship between dietary patterns and health outcomes more extensively than did earlier DGAC reports, through the use of a food modeling approach using the USDA Food Patterns (Ref. 5). The 2015 DGAC reviewed the current science, status and trends in the dietary pattern of intake in the U.S. population compared to a ''Healthy U.S.-style Pattern,'' a ''Healthy Mediterranean-style Pattern,'' and a ''Healthy Vegetarian Pattern'' associated with health benefits. The report found the current U.S. population intake of solid fats and added sugars is high across all age groups and genders with nearly 90 percent of the general population ''exceeding the recommended daily limits'' (Ref. 6). Added sugars intake alone remains high at 13.4 percent of total calories per day among the total population ages 1 year and older (Ref. 7). Importantly, the 2015 DGAC found strong and consistent evidence demonstrating that, relative to less healthy patterns, dietary patterns associated with decreased risk of cardiovascular disease (CVD) are characterized by higher consumption of vegetables, fruits, whole grains, low-fat dairy, and seafood, and lower consumption of red and processed meat, and lower intakes of refined grain, and sugar-sweetened foods and beverages (Ref. 8). The 2015 DGAC suggested the NFL/SFL should include an added sugars declaration and the declaration of a percent DV for added sugars (Ref. 9). The Federal government has not issued

a final 2015 Dietary Guidelines for Americans report.

Based on our review of the evidence presented in the 2015 DGAC report (see link to individual studies reviewed by the 2015 DGAC—(*http://www.nel.gov/*—then click on ''Dietary Patterns and Health Outcomes Systematic Review Report.''), we find that the evidence further supports FDA's proposal to require an added sugars declaration in the Nutrition and Supplement Facts labels. Specifically, there is evidence of a strong association between a dietary pattern of intake characterized, in part, by a reduced intake of sugar-sweetened foods and beverages and a reduced risk of CVD. There is also evidence to support a reference amount for added sugars, *i.e.,* limiting added sugars intake to no more than 10 percent of total daily caloric intake.

The 2015 DGAC report also recommended that Americans keep added sugars intake below 10 percent of total energy intake (Ref. 10). The 2015 DGAC based this ''less than 10 percent'' recommendation on modeling of dietary patterns, current added sugars consumption data, and a published meta-analysis on sugars intake and body weight. (Ref. 11). Based on the scientific evidence, we tentatively conclude that limiting consumption of added sugars to 10 percent of daily calories is a reasonable goal for consumers to achieve and is consistent with the goals of the *Dietary Guidelines for Americans* to provide advice for choosing and maintaining a healthful dietary pattern.

In the NFL/SFL proposed rule, we recognized that we did not have a scientifically supported quantitative intake recommendation for added sugars, based on a biomarker of risk of disease or other public health endpoint, on which a DRV for added sugars could be derived. However, we did consider a reference point for added sugars consumption based on the calories from solid fats and added sugars limits at each calorie level in the USDA Food Patterns in the 2010 DGAC report (79 FR 11879 at 11906). Based on that analysis, and without a declaration in the Nutrition Facts label of ''calories from solid fats and added sugars,'' consumers would have to multiply grams of saturated, *trans* fats, and added sugars by the number of calories per gram to determine the amount of calories from solid fats and added sugars in a product. The 2015 DGAC report, in its analysis of added sugars as part of a dietary pattern of intake among the U.S. population, found a strong association with that pattern of intake to an increase in CVD risk, in comparison to healthier dietary patterns with lower added sugars intakes. This analysis included publications of clinical trials and prospective cohort studies (*http://www.nel.gov/*—then click on ''Dietary Patterns and Health Outcomes Systematic Review Report.'') Therefore, we tentatively conclude that the 2015 DGAC report and the scientific information on which it relies provide a basis for FDA to establish a DRV reference point for the added sugars declaration at 10 percent of calories that is based on a public health endpoint and is necessary to assist consumers to maintain healthy dietary practices.

We are proposing a DRV of 50 g for added sugars from which the percent DV can be calculated. We determine a DRV of 50 g by first multiplying the 2,000 reference calorie intake by 10 percent (2,000 × .10 = 200 calories). The 2,000 reference calorie intake is used for other nutrients to calculate the DRV when the recommendations for the nutrient intake may fluctuate based on calorie intake. The 2,000 calorie value represents a reference intake for adults and children 4 years of age and older, including pregnant and lactating women. Dividing 200 calories by 4 calories/g (200 calories ÷ 4 calories/g = 50 g) provides us with the gram amount (50 g) of added sugars as a reference amount for use as the DRV. A 1,000 calorie reference amount would be used to calculate the DRV for children 1 through 3 years of age at 25 g of added sugars (1,000 calories × .10 = 100 calories and 100 calories ÷ 4 calories/g = 25 g).

The comments we received on the NFL/SFL proposed rule were generally supportive of a DRV of no more than 10 percent of total energy intake from added sugars. Many of the comments in support of a DRV of no more than 10 percent of total energy intake cited the 2014 World Health Organization (WHO) draft guideline. This WHO guideline, however, is not a U.S consensus report and was not specific to added sugars. There were also some comments that did not support a DRV for added sugars, citing a lack of scientific evidence to set a quantitative intake recommendation. We now have the 2015 DGAC report that supports a proposal to establish a DRV of 10 percent of total energy intake from added sugars and to require the declaration of percent DV for added sugars on the label. Specifying and requiring a percent DV declaration is also supported by comments we received stating that such a declaration will help consumers determine the amount of added sugars on the label in the context of their total daily diet.

If we finalize a declaration of added sugars, we tentatively conclude that a DRV or point of reference for consumers to understand the declaration of added sugars and what that number means in the context of the total daily diet is needed. We are proposing in section III.A. that a percent DV be declared for added sugars on the label.

Further, as discussed in the NFL/SFL proposed rule (79 FR 11879 at 11902), we are considering whether to use the term ''Total Sugars'' instead of ''Sugars'' on the label if we finalize a declaration of added sugars. The use of ''Total Sugars'' was supported by many comments. In addition, our added sugars experiment did show that use of the term ''Total Sugars'' helped improve study participants' understanding that added sugars are part of the total amount of sugars in the product. Therefore, we intend to consider finalizing the use of the term ''Total Sugars'' instead of ''Sugars'' on the label, if we finalize a declaration of added sugars. We are not proposing to establish a DRV for total sugars or to require the mandatory declaration of a percent DV for total sugars because there is no quantitative intake level or other reference amount for which there is sufficient scientific evidence upon which we can base a DRV for total sugars.

Given the discussion in section III.A., this supplemental notice of proposed rulemaking would:

- Amend § 101.9(c)(9) to add ''Added sugars'' to the list of food components with established DRVs with a unit of measurement of ''Grams (g),'' and to establish a DRV for adults and children 4 years of age and older, including pregnant and lactating women, of 50 g and a DRV for children 1 through 3 years of age of 25 g.
- Amend § 101.36(b)(2)(iii)(D) to require that the percent DV for added sugars be declared when added sugars are present in a dietary supplement at an amount greater than 1 gram per serving, such that the proposed requirement would say that if the percent of Daily Value is declared for total fat, saturated fat, total carbohydrate, dietary fiber, protein, or added sugars, a symbol shall follow the value listed for those nutrients that refers to the same symbol that is placed at the bottom of the nutrition label, below the bar required under § 101.9(e)(6) and inside the box, that is followed by the statement ''Percent Daily Values are based on a 2,000 calorie diet.''

Proposing to require the declaration of the percent DV for added sugars on the label are not the only revisions to the codified that would be needed if we

finalized the added sugars provisions. We proposed additional amendments related to added sugars and they are described in the NFL/SFL proposed rule (79 FR 11879 at 11905–11907).

B. Proposing the Footnote Text That Would Be Required on Certain Packages and Proposed Exemptions From the Footnote Requirement

In the NFL/SFL proposed rule, we proposed to remove the requirement for the footnote listing the reference values for certain nutrients for 2,000 and 2,500 calorie diets and reserved space to provide a proposed footnote (proposed § 101.9(d)(9)). We consider that a succinct statement about daily calorie intake (2,000 calories) is a necessary part of the footnote because 2,000 calories is consistent with widely used food plans, the percent DV of certain nutrients (*e.g.,* total fat, total carbohydrate, and dietary fiber) is based on 2,000 calories, and 2,000 calories approximates the estimated energy need for adults who are sedentary to moderately active. However, we recognize that a succinct statement about daily calorie intake should not suggest that the percent DV of all nutrients is linked to a 2,000 calorie diet.

We received comments on the footnote and many comments requested that the footnote continue to explain that percent DVs are based on a 2,000 calorie diet but individual calorie needs may be higher or lower. Many comments also emphasized that any revisions to the footnote should be research-based and that the results of our consumer research studies should be made available for review and comment.

Many comments emphasized that because the NFL/SFL proposed rule does not specify the exact footnote text and the amount of space the new footnote would require, more information is needed in order to comment on the footnote. Some comments emphasized that the footnote should be brief and not take up too much space, and expressed concerns about how the footnote would fit on small packages.

This supplemental notice of proposed rulemaking would add language to the space reserved in proposed § 101.9(d)(9) to explain that the % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet and that 2,000 calories a day is used for general nutrition advice. The language in this footnote is similar to one of the options tested during the consumer research study described in section I.C., except that we have reversed the order of the sentences from the footnote tested. While the consumer research study did not suggest strong support for a particular footnote, the language in this footnote was perceived by study participants to be more useful than the current footnote. We consider that switching the order of the sentences is important because it allows the first sentence to clearly follow the asterisk in the ''%DV'' column heading that leads to the footnote. When consumers look down to the footnote, to see what additional information is linked to the asterisk that they see after the ''% DV'' column heading, they may expect to find the sentence that explains percent daily value first, rather than a sentence about calories. We believe that this footnote explains the ''% DV'' in the most concise manner.

Previously, in the 1993 final rule entitled ''Food Labeling: Mandatory Status of Nutrition Labeling and Nutrient Content Revision, Format for Nutrition'' (58 FR 2079 (January 6, 1993)) (1993 final rule), we noted that prior research had shown that although most consumers do not notice footnotes, those who are given the information (and by inference, those who do read the footnote) are able to interpret it appropriately (58 FR 2079 at 2131). Consistent with our rationale in 1993, we continue to expect that the provision of a simple footnote will help those consumers who do read it in understanding the information on the nutrition label. The second sentence of the proposed footnote is the same as the succinct statement that will be required on menus and menu boards under our final rule entitled ''Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments'' (79 FR 71156 (December 1, 2014)). It is important to explain calories in the context of the total daily diet and also provide consistency in the wording of this nutritional advice between packaged and restaurant foods.

Some packaged foods do not require the full footnote. The footnote information specified in § 101.9(d)(9)(i) (which includes the footnote table) can be omitted from products that qualify for a simplified format and small or intermediate packages, provided that the following abbreviated footnote statement is used: ''Percent Daily Values are based on a 2,000 calorie diet'' (§§ 101.9(f)(5) and 101.9(j)(13)). In this supplemental notice of proposed rulemaking, we propose to allow the footnote proposed in § 101.9(d) to be omitted from products that qualify for a simplified format (§ 101.9(f)), and from small or intermediate packages (§ 101.9(j)(13)(ii)(A)(*1*); § 101.9(j)(13)(ii)(A)(*2*)), provided that the following abbreviated statement is used: ''%DV =% Daily Value.'' The proposed statement for these packages shortens it from what is currently required and allows for more space on the label. In addition, we realize that the standard format in the NFL/SFL proposed rule for the Nutrition Facts label had a placeholder for the footnote and did not explain the ''%DV.'' It is important for consumers to know what ''%DV'' on the label means. Consequently, we are proposing a statement for these packages that spells out ''%DV.'' We recognize that for these packages, additional information in the footnote is not needed. In this supplemental proposed rulemaking, we apply the same rationale we used in the 1993 final rule with regards to exempting small and intermediate packages from some of the footnote language we required for large packages. The 1993 final rule allowed manufacturers flexibility in using the complete footnote on all product labels. We recognized that the benefits of requiring this footnote were not relative to the specific product that carries the information, and that the information would be available to consumers if it appeared on a significant percentage of food labels (58 FR 2079 at 2129).

This supplemental notice of proposed rulemaking proposes an exemption to the proposed footnote requirement in § 101.9(d)(9) for the foods that can use the terms ''calorie free,'' ''free of calories,'' ''no calories,'' ''zero calories,'' ''without calories,'' ''trivial source of calories,'' ''negligible source of calories,'' or ''dietary insignificant source of calories'' on the label or in the labeling of foods as defined in § 101.60(b). Such products would have little to no impact on the average daily 2,000 calorie intake, which the footnote addresses. Exempting the footnote for these packages is a practical solution that would assure adequate space is still available for the required nutrient declarations.

We believe that consumer education programs regarding using and understanding the Nutrition Facts and Supplement Facts labels (including the footnote) are important, and plan to work with our federal partners to develop such programs after publication of the final rule.

Given the discussion in section III.B., this supplemental notice of proposed rulemaking would:

a. Amend § 101.9(d)(9) to replace the reserved space. Specifically, after the language in § 101.9(d)(8) explaining that when listed horizontally in two

columns, vitamin D and calcium should be listed on the first line and iron and potassium should be listed on the second line—the proposed requirement would replace ''[Reserved]'' with text stating that a footnote, preceded by an asterisk, shall be placed beneath the list of vitamins and minerals and be separated from the list by a hairline, except that the footnote may be omitted from foods that can use the terms ''calorie free,'' ''free of calories,'' ''without calories,'' ''trivial source of calories,'' ''negligible source of calories,'' or ''dietary insignificant source of calories'' on the label or in the labeling of foods as defined in § 101.60(b). The footnote text would explain that the %Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet and that 2,000 calories a day is used for general nutrition advice.

b. Amend § 101.9(j)(13)(ii)(C) to revise the footnote text. Specifically, after ''Sugar alcohol—Sugar alc,'' the proposed requirement would provide for omitting the footnote statement and placing another asterisk at the bottom of the label followed by the statement '%DV = %Daily Value'.''

C. Other Related Provisions-Future Revisions to the Sample Labels

The revisions to the NFL/SFL proposed rule described in this section would require revisions to the labels illustrated in §§ 101.9(d)(11)(iii), 101.9(d)(12), 101.9(d)(13)(ii), 101.9(e)(5), 101.9(e)(6)(i), 101.9(e)(6)(ii), 101.9(f)(4), 101.9(j)(13)(ii)(A)(*1*), and 101.9(j)(13)(ii)(A)(*2*) of the NFL/SFL proposed rule. As stated in section VII. we provided a sample label in proposed § 101.9(j)(5)(i) for foods, other than infant formula, represented or purported to be specifically for infants 7 through 12 months or children 1 through 3 years of age in the NFL/SFL proposed rule, however, we invite further input on whether such a footnote is needed and, if so, what it should say. If the NFL/SFL is finalized as proposed in this supplemental notice, we will make the changes needed to the labels in the codified in the NFL/SFL final rule.

IV. Preliminary Regulatory Economic Analysis of Impacts

As explained in the NFL/SFL proposed rule, we performed the necessary analyses to examine the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and the PRA (44 U.S.C. 3501–3520). We provided a PRIA of the proposed rule (see Ref. 187 of the NFL/SFL proposed rule) for public input (79 FR 11879 at 11959).

We performed additional analysis to examine the impacts of the revised proposed provisions described in the **Federal Register** document under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and the PRA. We present our additional analyses, including the total estimated costs and benefits of this supplement to the NFL/SFL proposed rule, in our supplemental PRIA for this proposed rule (Ref. 12), which will be made available at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/*. We invite comment on our additional analyses.

V. Paperwork Reduction Act of 1995

This supplemental notice of proposed rulemaking contains information collection provisions that are subject to review by OMB under the PRA. As explained in the NFL/SFL proposed rule, we performed the necessary analyses to examine the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and the PRA. We provided a PRIA of the NFL/SFL proposed rule (see Ref. 187 of the NFL/SFL proposed rule) for public input (79 FR 11879 at 11959). A description of the information collection provisions of the NFL/SFL proposed rule was given in the PRIA of the NFL/SFL proposed rule with an estimate of the annual third-party disclosure burden. A description of the information collection provisions of the supplemental notice of proposed rulemaking is given in the *Description* section with an estimate of the annual third-party disclosure burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

We invite comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Revision of the Nutrition and Supplement Facts Labels and Serving Sizes of Foods That Can Reasonably Be Consumed At One-Eating Occasion.

Description: This supplemental notice of proposed rulemaking proposes two changes to the third-party disclosure requirements discussed in the analysis of the NFL/SFL proposed rule: A percent DV labeling requirement as well as footnote requirements.

Description of Respondents: The likely respondents to this information collection are manufacturers of retail food products marketed in the United States whose products contain (1) a mixture of naturally occurring and added sugars or (2) a mixture of non-digestible carbohydrates that do and do not meet the proposed definition of dietary fiber. The likely respondents to this information collection also include manufacturers of retail food products marketed in the United States whose products contain (1) mixtures of different forms of vitamin E or (2) both folate and folic acid.

We estimate the burden of the information collection provisions of the supplemental notice of proposed rulemaking as follows. After careful review of the burden estimate analysis provided in the PRIA for the NFL/SFL proposed rule, we tentatively conclude that our previous estimate of the burden hours has not changed meaningfully as a result of this supplemental notice of proposed rulemaking. Thus, we have calculated no additional burden related to the proposed percent DV labeling requirement for added sugars described in this supplemental notice of proposed rulemaking.

With regard to the proposed footnote labeling requirements in this supplemental notice of proposed rulemaking, we note that the text of the footnote statements would be supplied by FDA in the final regulation. We tentatively conclude that the proposed footnote provisions in this supplemental notice of proposed rulemaking are ''public disclosure[s] of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)) and are therefore not subject to review by OMB under the PRA. Thus, we have calculated no additional burden related to the proposed footnote labeling requirements in this supplemental notice of proposed rulemaking.

To ensure that comments on information collection are received, OMB recommends that written

comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the title, ''Revision of the Nutrition and Supplement Facts Labels and Serving Sizes of Foods That Can Reasonably Be Consumed At One-Eating Occasion.''

In compliance with the PRA, we have submitted the information collection provisions of this proposed rule to OMB for review. These requirements will not be effective until we obtain OMB approval. We will publish a notice concerning OMB approval of these requirements in the **Federal Register.**

VI. Analysis of Environmental Impact

We have carefully considered the potential environmental effects of this action. This action revises certain provisions of the NFL/SFL proposed rule. For the NFL/SFL proposed rule, we concluded that the action would not have a significant impact on the human environment, and that an environmental impact statement was not required. Our finding of no significant impact and the evidence supporting that finding may be seen in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday.

We have not received any new information or comments that would affect our previous determination. Furthermore, we have reviewed the revisions to the NFL/SFL proposed rule as described herein, and have determined the revisions do not impact our previous determination. Therefore, our finding of no significant impact remains unchanged.

VII. Request for Comments

We are seeking comment only with respect to the following issues: (1) The new information from the 2015 DGAC report regarding added sugars; (2) the proposal to establish a DRV for added sugars and to require the declaration of the percent DV for added sugars on the Nutrition and Supplement Facts labels; (3) using the term ''Total Sugars'' instead of ''Sugars'' on the label; (4) the proposed text for the footnotes to be used on the Nutrition Facts label; (5) the exemptions from the proposed footnote requirement; (6) whether we should make changes to the footnote used on the Supplement Facts label; and (7) whether we should propose a footnote for foods other than infant formula, represented or purported to be specifically for infants 7 through 12 months or children 1 through 3 years of age. We acknowledge that in the NFL/SFL proposed rule, we provided in proposed § 101.9(j)(5)(i) a sample label for these foods that included a placeholder for a footnote. However, we would appreciate further input on whether such a footnote is needed and, if so, what it should say. We will not consider comments outside the scope of these issues.

Comments previously submitted to the Division of Dockets Management do not need to be resubmitted, because all comments submitted to the docket number, found in brackets in the heading of this document, will be considered in development of the final rule.

VIII. How To Submit Comments

Interested persons may submit either electronic or written comments regarding this document 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.*

IX. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. These references are also available electronically at *http://www.regulations.gov.* We have verified the Web site addresses in this section, but we are not responsible for subsequent changes to the Web sites after this document published in the **Federal Register**.

1. FDA Memorandum to the File—''Experimental Study on Consumer Responses to the Nutrition Facts Labels with Declaration of Amount of Added Sugars'' (OMB Control Number 0910–0764), 2015.
2. FDA Memorandum to the File—''Experimental Study on Consumer Responses to Nutrition Facts Labels with Various Footnote Formats'' (OMB Control Number 0910–0764), 2015.
3. USDA and HHS, *Scientific Report of Dietary Guidelines for Americans,* 2015, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
4. USDA and HHS, *Dietary Guidelines for Americans, 2010.* 7th Ed., Washington, DC: U.S. Government Printing Office (2010). Retrieved from *http://www.cnpp.usda.gov/DGAs2010-PolicyDocument.htm.*
5. USDA and HHS, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee,* 2015, Part D. ''Chapter 1: Food and Nutrient Intakes, and Health: Current Status and Trends,'' pg. 3, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
6. USDA and HHS, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee,* 2015, Part D. ''Chapter 1: Food and Nutrient Intakes, and Health: Current Status and Trends,'' pg. 35, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
7. USDA and HHS, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee,* 2015, Part D. ''Chapter 5: Food Sustainability and Safety,'' pg. 18, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
8. USDA and HHS, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee,* 2015, Part D. ''Chapter 2: Dietary Patterns, Foods and Nutrients, and Health Outcomes,'' pg. 8, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
9. USDA and HHS, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee,* 2015, Part D. ''Chapter 6: Cross-Cutting Topics of Public Health Importance,'' pg. 27, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
10. USDA and HHS, *Scientific Report of the 2015 Dietary Guidelines Advisory Committee,* 2015, Part D. ''Chapter 6: Cross-Cutting Topics of Public Health Importance,'' pgs. 20–21, available at *http://www.health.gov/dietaryguidelines/2015-scientific-report/.*
11. Te Morenga, L., S. Mallard, J. Mann, ''Dietary Sugars and Body Weight: Systematic Review and Meta-Analysis of Randomised Controlled Trials and Cohort Studies,'' *BMJ* 2013;346:e7492.
12. FDA, Supplemental Preliminary Regulatory Impact Analysis for Proposed Rules On ''Food Labeling: Revision of the Nutrition and Supplement Facts Labels'' (Docket No. FDA–2012–N–1210) and ''Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed At One Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments'' (Docket No. FDA–2004–N–0258), 2015.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

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 101, as proposed to be amended on March 3, 2014 (79 FR 11879), be further amended as follows:

PART 101—FOOD LABELING

■ 1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

■ 2. In § 101.9, revise paragraphs (c)(9), (d)(9), and (j)(13)(ii)(C) to read as follows:

§ 101.9 Nutrition labeling of food.

* * * * *

(c) * * *

(9) The following DRVs, nomenclature, and units of measure are established for the following food components:

Food component	Unit of measurement	DRV			
		Adults and children ≥ 4 years	Infants 7 through 12 months	Children 1 through 3 years	Pregnant and lactating women
Fat	Grams (g)	[1] 65	30	[2] 39	[1] 65
Saturated fatty acids	Grams (g)	[1] 20	N/A	[2] 10	[1] 20
Cholesterol	Milligrams (mg)	300	N/A	300	300
Total carbohydrate	Grams (g)	[1] 300	95	[2] 150	[1] 300
Sodium	Milligrams (mg)	2,300	N/A	1,500	2,300
Dietary fiber	Grams (g)	[1] 28	N/A	[2] 14	[1] 28
Protein	Grams (g)	[1] 50	N/A	[2] 13	N/A
Added Sugars	Grams (g)	[1] 50	N/A	[2] 25	[1] 50

[1] Based on the reference caloric intake of 2,000 calories for adults and children aged 4 years and older, and for pregnant and lactating women.
[2] Based on the reference caloric intake of 1,000 calories for children 1 through 3 years of age.

(d) * * *

(9) A footnote, preceded by an asterisk, shall be placed beneath the list of vitamins and minerals and shall be separated from the list by a hairline, except that the footnote may be omitted from foods that can use the terms ''calorie free,'' ''free of calories,'' ''without calories,'' ''trivial source of calories,'' ''negligible source of calories,'' or ''dietary insignificant source of calories'' on the label or in the labeling of foods as defined in § 101.60(b). The footnote shall state: *The % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

* * * * *

(j) * * *

(13) * * *

(ii) * * *

(C) Omitting the footnote statement required in paragraph (d)(9) of this section and placing another asterisk at the bottom of the label followed by the statement ''%DV=%Daily Value.''

* * * * *

■ 3. In § 101.36, revise paragraph (b)(2)(iii)(D) to read as follows:

§ 101.36 Nutrition labeling of dietary supplements.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(D) If the percent of Daily Value is declared for total fat, saturated fat, total carbohydrate, dietary fiber, protein, or added sugars, a symbol shall follow the value listed for those nutrients that refers to the same symbol that is placed at the bottom of the nutrition label, below the bar required under paragraph (e)(6) of this section and inside the box, that is followed by the statement ''Percent Daily Values are based on a 2,000 calorie diet.'' If the product is represented or purported to be for use by children 1 through 3 years of age, and if the percent of Daily Value is declared for total fat, total carbohydrate, dietary fiber, protein, or added sugars, a symbol shall follow the value listed for those nutrients that refers to the same symbol that is placed at the bottom of the nutrition label, below the bar required under paragraph (e)(6) of this section and inside the box, that is followed by the statement ''Percent Daily Values are based on a 1,000 calorie diet.''

* * * * *

Dated: July 17, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–17928 Filed 7–24–15; 8:45 am]

BILLING CODE 4164–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4010

RIN 1212–AB30

Annual Financial and Actuarial Information Reporting; Changes to Waivers

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is proposing to amend its regulation on Annual Financial and Actuarial Information Reporting to codify provisions of the Moving Ahead for Progress in the 21st Century Act and the Highway Transportation and Funding Act of 2014 and related guidance that affect reporting under ERISA section 4010. In addition, PBGC is proposing to limit the reporting waiver under the current regulation tied to aggregate plan underfunding of $15 million or less to smaller plans and to add reporting waivers for plans that must file solely on the basis of either a statutory lien resulting from missed contributions over $1 million or outstanding minimum funding waivers exceeding the same amount (provided the missed contributions or funding waivers were previously reported to PBGC). The proposed rule also makes some technical changes.

DATES: Comments must be submitted on or before September 25, 2015.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Email: reg.comments@pbgc.gov.*
- *Fax:* 202–326–4224.
- *Mail or Hand Delivery:* Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026.

All submissions must include the Regulatory Identification Number for this rulemaking (RIN 1212–AB30). Comments received, including personal information provided, will be posted to *www.pbgc.gov.* Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street

NW., Washington, DC 20005–4026, or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*Klion.Catherine@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel; or Daniel S. Liebman (*Liebman.Daniel@pbgc.gov*), Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026; 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:

Executive Summary—Purpose of the Regulatory Action

This rulemaking is necessary to implement statutory changes under the Moving Ahead for Progress in the 21st Century Act (MAP–21) and Highway Transportation and Funding Act of 2014 (HATFA) affecting reporting under PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010), to modify the regulation's waivers to better balance the burden of reporting with PBGC's need for information, and to make certain technical changes.

PBGC's legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of Title IV of ERISA, and section 4010 of ERISA.

Executive Summary—Major Provisions of the Regulatory Action

MAP–21 and HATFA Stabilized Interest Rate Rules

MAP–21 provided rules that limited the volatility of interest rates (which are used for certain funding and benefit restriction purposes) by constraining them within a range, or ''corridor,'' around the 25-year average segment rates. The rates inside the corridor are referred to as ''stabilized rates.'' HATFA extended the period during which the narrowest range applies. MAP–21 and HATFA included statutory provisions regarding the application of the stabilized rates to ERISA section 4010 reporting requirements. The proposed rule codifies the statutory changes and PBGC guidance on when stabilized rates are and are not taken into account for purposes of PBGC's regulation on Annual Financial and Actuarial Information Reporting.

Changes to $15 Million Aggregate Underfunding Waiver

Section 4010.11(a) of the current regulation provides a waiver from reporting if the aggregate underfunding of pension plans in a controlled group does not exceed $15 million. PBGC's experience with this waiver, especially after MAP–21 and HATFA, is that it results in critical information not being reported. As a result, PBGC's ability to timely intervene to protect potentially troubled plans, participant benefits, and the pension insurance system is significantly undermined. To address this issue, the proposed rule provides that the waiver would be limited to controlled groups with fewer than 500 participants.

New Waivers

As part of PBGC's review of its regulations under Executive Order 13563, PBGC determined that it could reduce the burden of 4010 reporting and avoid duplicative reporting by adding two new waivers. The proposed rule would waive reporting required solely on the basis of either a statutory lien resulting from missed contributions over $1 million or outstanding minimum funding waivers exceeding the same amount, provided that the missed contributions resulting in the lien or minimum funding waivers were reported to PBGC under its regulation on Reportable Events and Certain Other Notification Requirements (part 4043) by the due date for the 4010 filing.

Other Changes

The proposed rule also makes a few technical changes to the regulation.

Background

PBGC administers the pension insurance programs under Title IV of ERISA. ERISA section 4010 requires the reporting of actuarial and financial information by controlled groups with single-employer pension plans that have significant funding problems. ERISA section 4010 also requires PBGC to provide an annual summary report to Congress containing aggregate information filed with PBGC under that section.[1]

Current 4010 Regulation

PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010) implements ERISA section 4010. Under § 4010.4(a), reporting is required if any of the following conditions exist:

1. The funding target attainment percentage (FTAP)[2] at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent (80-percent Gateway Test).
2. The conditions specified in ERISA section 303(k) and section 430(k) of the Internal Revenue Code (Code) for imposing a lien for missed contributions exceeding $1 million have been met with respect to any plan maintained by any member of the controlled group.
3. The Internal Revenue Service (IRS) has granted one or more minimum funding waivers totaling in excess of $1 million to any plan maintained by any member of the controlled group, and any portion of the waiver(s) is still outstanding.

Part 4010 of PBGC's regulations specifies the identifying, financial, and actuarial information that filers must submit under ERISA section 4010. PBGC reviews the information that is filed and enters it into an electronic database for more detailed analysis. This analysis helps PBGC to anticipate possible threats to the pension insurance system and focus its resources on situations that pose the greatest risks to that system.

Filings under part 4010 play a major role in PBGC's ability to protect participant and plan interests because 4010 information is typically more current than other sources of information available to PBGC. Protection for participants may be lost if a company completes a transaction that creates possible significant risk to the plan and participants before PBGC can act. PBGC can use 4010 information to quickly evaluate a fast-moving transaction to protect participants.

When PBGC evaluates the risk of a plan terminating underfunded, it needs the plan's termination liability. If PBGC has a recent 4010 filing for the plan, it has the plan's termination liability calculated directly using seriatim data and certified by an enrolled actuary. With reliable information readily available, PBGC can conduct a timely and accurate analysis. But if PBGC does not have a 4010 filing for the plan, PBGC must estimate the plan's termination liability based on outdated Form 5500 Schedule SB data. This analysis takes time and, because it is based on estimates, may be less accurate, which may negatively impact asset recoveries and participant benefits if the plan terminates underfunded.

[1] See ERSIA section 4010(e). The report is submitted to the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate and the Committee on Education and the Workforce and the Committee on Ways and Means of the House of Representatives.

[2] The FTAP is a measure of how well the plan is funded. In general, a plan's FTAP is the ratio (expressed as a percentage) of the value of plan assets to the plan's funding target. See ERISA section 303(d)(2).

PBGC also uses information from 4010 filings to value its contingent liabilities, as reported in its annual financial statements. Under ERISA section 4010(e), PBGC submits an annual report to Congress summarizing the data received in 4010 filings.

Under § 4010.11(a) of the current regulation, reporting is waived if the aggregate underfunding of all plans (4010 funding shortfall) maintained by the filer's controlled group does not exceed $15 million (referred to in this preamble as the ''$15 million aggregate underfunding waiver''). PBGC added this waiver to the regulation in March 2009 when PBGC amended the regulation to implement changes under the Pension Protection Act of 2006.[3]

MAP–21 and HATFA

MAP–21 (enacted July 6, 2012) provided relief from the minimum funding requirements that apply to plan sponsors of single-employer defined benefit plans. This was accomplished by establishing rules that limit the volatility of certain interest rates used for funding purposes by constraining them within a corridor. MAP–21 also contained provisions on the application of those rules to ERISA section 4010 reporting requirements. Section 40211(b)(3)(D) of MAP–21 amended ERISA section 4010 by adding paragraph (d)(3), which provides that the stabilized interest rates do not apply for purposes of determining the funding target or the FTAP required to be reported under ERISA section 4010(d). However, they apply for all other 4010 requirements involving minimum funding-related determinations, including those requirements created solely by regulation.

MAP–21 provided that the stabilized interest rate corridor would begin phasing-out in 2013. HATFA (enacted August 8, 2014) delayed the start of that phase-out until 2018, thereby extending the period for which the stabilized interest rate rules are most likely to impact 4010 filings.

IRS issued Notice 2012–61 providing guidance on pension funding stabilization under MAP–21.[4]

PBGC issued two Technical Updates providing guidance on applying the statutory provisions of MAP–21 and HATFA to 4010 reporting.[5] PBGC wanted to provide guidance to the pension community more quickly than could be done through rulemaking. PBGC is now codifying the statutory changes and guidance in the 4010 regulation, after giving the public an opportunity to comment.

Regulatory Review

On January 18, 2011, the President issued Executive Order 13563, ''Improving Regulation and Regulatory Review,'' to ensure that Federal regulations seek more affordable, less intrusive means to achieve policy goals, and that agencies give careful consideration to the benefits and costs of those regulations. In response to the Executive Order, PBGC on August 23, 2011, promulgated its Plan for Regulatory Review,[6] noting several regulatory areas—including 29 CFR part 4010—for review to see how PBGC can reduce burden while preserving its ability to receive critical information. The plan identified expansion of waivers from 4010 reporting as an area to explore.

Proposed Regulatory Changes

MAP–21 and HATFA Stabilized Interest Rate Rules

ERISA section 4010(b)(1) provides that 4010 reporting is required if any plan sponsored by a member of the controlled group has an FTAP, ''as determined as defined in subsection (d),'' below 80 percent. Because section 4010(d), as amended by MAP–21, requires that the FTAP be determined without regard to the MAP–21 stabilized interest rate rules, the FTAP used for the 80-percent Gateway Test is also determined without regard to such rules.[7]

To codify the statutory change and the guidance in Technical Updates 12–2 and 14–2, PBGC is proposing to revise the definition of ''funding target attainment percentage'' in § 4010.2 to provide that it is determined without regard to the stabilized interest rate rules and rename it the ''4010 funding target attainment percentage.'' The proposed rule includes conforming changes in §§ 4010.4(a)(1), 4010.4(b), and 4010.8(a)(6). In addition, the proposed rule would revise § 4010.8(a)(5) to clarify that the plan's funding target as of the valuation date (required to be reported in a 4010 filing) is determined without regard to the stabilized interest rate rules.

To reduce the administrative burden of determining whether a 4010 filing is required, Technical Update 12–2 waives reporting if the FTAP of each plan maintained by the filer's controlled group, determined without regard to the MAP–21 stabilized interest rate rules, would be at least 80 percent if the value of plan assets used for minimum funding purposes were substituted for the value described in IRS Notice 2012–61, Q&A NA–3. The proposed rule would codify this waiver. (See Technical Update 12–2 for more explanation.)

Changes to $15 Million Aggregate Underfunding Waiver

As mentioned above, PBGC added the $15 million aggregate underfunding waiver to the 4010 regulation in 2009. In the preamble to the 2009 final rule, PBGC cited the Technical Explanation of the Pension Protection Act of 2006 prepared by the Staff of the Joint Committee on Taxation as support for the waiver. The Technical Explanation stated: ''It is intended that the PBGC may waive the requirement [for reporting under ERISA section 4010 based upon the 80-percent Gateway Test] in appropriate circumstances, such as in the case of small plans.''[8]

PBGC set the waiver threshold at $15 million in aggregate underfunding based on its experience that underfunding below that amount presented a level of risk and exposure to PBGC that was sufficiently low to warrant the waiver of reporting based solely on the 80-percent Gateway Test. The preamble to the 2009 final regulation stated that ''the waiver will generally exempt controlled groups maintaining only small plans from section 4010 reporting.''

Because of the impact of MAP–21 and HATFA, PBGC believes that further refinement of the $15 million aggregate underfunding waiver is necessary. Many sponsors that would not have qualified for the waiver if not for MAP–21 and HATFA are waived from reporting because, using stabilized rates, underfunding falls below $15 million.

As a result, PBGC is not receiving valuable information from approximately 200 controlled groups for which 4010 reporting was required before MAP–21 and HATFA (*i.e.,* after MAP–21 and HATFA, reporting was not required solely because the use of

[3] 74 FR 11022 (Mar. 16, 2009), *http://www.gpo.gov/fdsys/pkg/FR-2009-03-16/pdf/E9-5741.pdf.,* (2009 rule).

[4] *http://www.pbgc.gov/Documents/n-12-61.pdf.*

[5] Technical Update 12–2: Effect of MAP–21 on 4010 Reporting (Sept. 11, 2012), *http://www.pbgc.gov/prac/other-guidance/tu/tu12-2.html;* Technical Update 14–2: Effect of HATFA on 4010 Reporting (Oct. 17, 2014), *http://www.pbgc.gov/prac/other-guidance/tu/tu14-2.html.*

[6] See *http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf.*

[7] Thus, the FTAP used for purposes of the 80-percent Gateway Test might not be the same as the FTAP reported on line 14 of the 2014 Schedule SB of Form 5500.

[8] See Joint Committee on Taxation, Technical Explanation of H.R. 4, the ''Pension Protection Act of 2006,'' as passed by the House on July 26, 2006, and as considered by the Senate on August 3, 2006 (JCX–38–06), August 3, 2006 on page 115. *http://www.jct.gov/x-38-06.pdf.*

stabilized rates resulted in aggregate underfunding being less than $15 million).[9] To put that number in context, PBGC received only 313 filings for 2013. PBGC's ability to protect plans can be reduced significantly if it does not have 4010 information to use to analyze transactions, evaluate termination risks, and measure its contingent liabilities for its financial statements.

The vast majority of plans for which 4010 reporting would be required if not for MAP–21 and HATFA cover more than 1,000 participants and have very large unfunded benefit liabilities measured on a termination basis. Thus, the current regulation does not allow PBGC to access important available information on plans that present substantial risk and exposure to the pension insurance system. Further, because PBGC is required to submit an annual report to Congress summarizing the data received in 4010 filings, Congress is not receiving information it would otherwise receive solely because plans that were never intended to qualify for the regulatory waiver are, in fact, qualifying as a result of MAP–21 and HATFA.

Because Congress provided that stabilized rates are disregarded for purposes of determining whether a 4010 filing is required, PBGC believes it is appropriate to modify the $15 million aggregate underfunding waiver to fix this anomalous and unintended result. PBGC considered modifying the waiver to require that the 4010 funding shortfall be determined using non-stabilized rates, but concluded that doing so would be overly complicated and administratively burdensome. In order to preserve simplicity, better align the waiver with the plans it was originally intended to cover, and eliminate any need to do an additional calculation solely to determine if the waiver applies, PBGC is proposing to leave the determination of the 4010 funding shortfall unchanged and instead limit the availability of the $15 million aggregate underfunding waiver to controlled groups where the aggregate number of participants in all defined benefit plans maintained by the controlled group is fewer than 500. For purposes of the waiver, the number of participants in any plan could be determined either as of the end of the plan year ending within the information year or as of the valuation date for that plan year.

Basing the participant count threshold on fewer than 500 participants would provide PBGC with 4010 information on nearly all of the approximately 200 controlled groups for which reporting would have been required if not for MAP–21 and HATFA. In addition, the threshold would be similar to an exemption under § 4010.8(c) for plans with fewer than 500 participants from providing § 4010.11 actuarial information in a 4010 report. PBGC specifically requests public comment on whether using a different participant count threshold or tying the $15 million aggregate underfunding waiver directly to non-stabilized rates would be more appropriate.

New Waivers

In response to several public comments and as part of its implementation of its Plan for Regulatory Review, PBGC has reviewed part 4010 to see how it could reduce burden while preserving its ability to receive critical information. As part of this process, PBGC considered waiving reporting for plans that must file 4010 information solely on the basis of either a statutory lien resulting from missed required contributions of over $1 million or outstanding minimum funding waivers exceeding the same amount.

In 2012 and 2013, less than five percent of 4010 filers were required to report based on these two filing tests; in 2013, there were 15 such filers. PBGC can look to reportable events filings[10] to obtain information similar to that reported in 4010 filings required solely because of these reporting triggers.

Waiving reporting based on these two tests would reduce the compliance and cost burden on filers. A filer waived from 4010 reporting might save between six and 24 hours annually by not having to provide identifying and financial information and approximately $17,000 in actuarial costs (depending in part on whether it was a first-time filing). Based on 2013 data, the aggregate actuarial cost savings for all filers could be over $310,000.

Therefore, to reduce the burden of duplicative reporting, the proposed rule adds waivers from reporting for persons that must file a 4010 report solely on the basis of either a reporting trigger under § 4010.4(a)(2) for a statutory lien resulting from missed required contributions of over $1 million or under § 4010.4(a)(3) for outstanding minimum funding waivers exceeding the same amount, provided that the missed contributions or minimum funding waivers were reported under part 4043 by the due date for the 4010 filing.

Other Changes

The proposed rule revises § 4010.11 to conform to the new waivers discussed above, remove a paragraph on transition rules that are no longer necessary, and reorganize the paragraphs under the section.

The proposed rule deletes transition rules in current §§ 4010.4(b)(3) and (4) and 4010.8(h) that are no longer necessary and updates provisions regarding special funding rules.

Finally, the proposed rule makes two corrections to the regulation.

First, the proposed rule amends § 4010.8(b)(1) to correct a cross reference from § 4010.11(b) to § 4010.10(b).

Second, the proposed rule amends § 4010.8(d)(2) to provide that the form-of-payment assumption used when determining benefit liabilities for purposes of 4010 reporting is the assumption prescribed in § 4044.51 of PBGC's regulation on Allocation of Assets in Single-Employer Plans (part 4044). This change would conform the regulation to the statutory requirement. As a result of a drafting error in the 2009 4010 final rule, the current regulation provides that, for purposes of determining a plan's benefit liabilities, the form-of-payment assumption must be the same as what is used to determine the minimum required contribution. Although this assumption has a relatively minor impact on the overall calculation, PBGC was concerned about the programming changes that would need to be made to valuation software to effectuate this unintended assumption change and therefore issued guidance that the actuary may use either the form-of-payment assumption prescribed in § 4044.51 or the form-of-payment assumption used to determine the minimum required contribution for the plan year ending within the filer's information year.[11] PBGC specifically

[9] PBGC is aware of these 200 controlled groups because PBGC's regulation requires an explanation be provided where a filing is required one year, but not the next. These 200 controlled groups indicated on their 4010 filings that they had a plan below 80-percent funded, but the aggregate underfunding was below $15 million. PBGC believes the total number of reports it is not receiving solely due to the stabilized rates applicable to the $15 million aggregate underfunding waiver test is much greater than 200. Besides the 200 prior filers, PBGC is aware of other controlled groups that did not have to file in the past, but would be required to file now if not for the fact that the waiver is based on stabilized rates.

[10] PBGC receives reports for missed funding contributions under §§ 4043.25 and 4043.81 (Form 200) and applications for minimum funding waivers under § 4043.33.

[11] Technical Update 09–2: ERISA section 4010 reporting; Alternative form-of-payment assumption for determining benefit liabilities (Mar. 25, 2009),

Continued

requests comments on whether eliminating the option of using the latter form-of-payment assumption (*i.e.,* requiring that the § 4044.51 assumption be used) would necessitate significant programming changes or result in additional burden or cost.

Applicability

The proposed rule would be applicable to information years beginning after December 31, 2015.

Compliance With Rulemaking Guidelines

Executive Orders 12866 ''Regulatory Planning and Review'' and 13563 ''Improving Regulation and Regulatory Review''

PBGC has determined, in consultation with the Office of Management and Budget (OMB), that this rulemaking is not a ''significant regulatory action'' under Executive Order 12866.

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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Orders 12866 and 13563 require a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts.

Pursuant to section 1(b)(1) of E.O. 12866 (as amended by Executive Order 13422), PBGC has determined that regulatory action is required in this area. Principally, this regulatory action is necessary to codify changes made to 4010 reporting by MAP–21 and HATFA and related guidance. In addition, this proposed rule is necessary to modify waivers from 4010 reporting to better balance the burden of reporting with PBGC's need for the information and to target those plans with the highest risk and exposure to PBGC and the pension insurance system. Finally, the proposed rule is needed to correct errors in the current regulation. In accordance with OMB Circular A–4, PBGC also has examined the economic and policy implications of this proposed rule and has concluded that the action's benefits justify its costs.

Under Section 3(f)(1) of Executive Order 12866, a regulatory action is economically significant if ''it is likely to result in a rule that may * * * [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' PBGC has determined that this proposed rule does not cross the $100 million threshold for economic significance and is not otherwise economically significant. The annual effect of the regulation with the proposed rule changes would far be less than $100 million. See discussion under *Paperwork Reduction Act.*

This proposed rule is associated with retrospective review and analysis in PBGC's Plan for Regulatory Review issued in accordance with Executive Order 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the proposed rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to the proposed amendments to the Annual Financial and Actuarial Information Reporting regulation, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations [12] and is consistent with certain requirements in Title I of ERISA [13] and the Code,[14] as well as the definition of a small entity that the Department of Labor (DOL) has used for purposes of the Regulatory Flexibility Act.[15]

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. PBGC therefore requests comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments to part 4010.

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed amendments would limit application of a reporting waiver to larger plans and provide two new reporting waivers to plans of all sizes. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

Paperwork Reduction Act

PBGC is submitting the information requirements under part 4010 to OMB for review and approval under the Paperwork Reduction Act. The information requirements under part 4010 have been approved by the OMB under the Paperwork Reduction Act (OMB control number 1212–0049, expires July 31, 2015). Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street NW., Washington, DC 20005, 202–326–4040.

PBGC estimates that once the final rule takes effect it will receive 4010 filings from about 450 contributing sponsors or controlled group members annually and that the total annual burden of the collection of information

http://www.pbgc.gov/prac/other-guidance/tu/tu09-2.html.

[12] See *e.g.,* special rules for small plans under part 4007 (Payment of Premiums).

[13] See, *e.g.,* ERISA section 104(a)(2), which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

[14] See, *e.g.,* Code section 430(g)(2)(B), which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

[15] See, *e.g.,* DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

will be about 3,900 hours and $7,632,000.

Comments on the paperwork provisions under this proposed rule should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. Although comments may be submitted through September 25, 2015, the Office of Management and Budget requests that comments be received on or before August 26, 2015 to ensure their consideration. Comments may address (among other things)—

- Whether the proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
- The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

List of Subjects in 29 CFR Part 4010

Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC proposes to amend 29 CFR part 4010 as follows:

PART 4010—ANNUAL FINANCIAL AND ACTUARIAL INFORMATION REPORTING

■ 1. The authority citation for part 4010 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1310.

■ 2. Section 4010.2 is amended by removing the definition for ''Funding target attainment percentage'' and adding a definition for ''4010 funding target attainment percentage'' in alphanumeric order to read as follows:

§ 4010.2 Definitions.

* * * * *

4010 funding target attainment percentage means, with respect to a plan for a plan year, the percentage as determined under § 4010.4(b) for the plan year.

* * * * *

■ 3. In § 4010.4:

■ a. Paragraph (a) introductory text is amended by removing the words ''A contributing sponsor'' and adding in their place the words ''Subject to the waivers in § 4010.11, a contributing sponsor''.

■ b. Paragraph (a)(1) is amended by adding ''4010'' before the phrase ''funding target attainment percentage''.

■ c. Paragraph (d) is removed, and paragraphs (e) and (f) are redesignated as paragraphs (d) and (e), respectively.

■ d. Paragraph (b) and newly redesignated paragraph (e) are revised to read as follows:

§ 4010.4 Filers.

* * * * *

(b) *4010 funding target attainment percentage*—(1) *General.* The 4010 funding target attainment percentage for a plan for a plan year equals the funding target attainment percentage as provided under ERISA section 303(d)(2) and Code section 430(d)(2) determined as of the valuation date for the plan year without regard to the segment rate stabilized interest provisions of ERISA section 303(h)(2)(iv) and Code section 430(h)(2)(iv).

(2) *Prefunding balance and funding standard carryover balance elections.* For purposes of determining the 4010 funding target attainment percentage for a plan for the plan year, prefunding balances and funding standard carryover balances must reflect any elections (or deemed elections) under ERISA section 303(f) and Code section 430(f) that affect the value of such balances as of the beginning of the plan year, regardless of when the elections (or deemed elections) are made.

* * * * *

(e) *Certain plans to which special funding rules apply.* Except for purposes of determining the information to be submitted under § 4010.8(h) (in connection with the actuarial valuation report), the following statutory provisions are disregarded for purposes of this part:

(1) Section of 402(b) of the Pension Protection Act of 2006, Public Law 109–280, dealing with certain frozen plans of commercial passenger airlines and airline caterers.

(2) Section 104 of the Pension Protection Act of 2006 as amended by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Public Law 111–192, dealing with eligible charity plans and plans of certain rural cooperatives.

(3) The Cooperative and Small Employer Charity Pension Flexibility Act, Public Law 113–97, dealing with certain defined benefit pension plans maintained by more than one employer.

■ 4. In § 4010.8:

■ a. Paragraph (a)(6) is amended by adding ''4010'' before ''funding target attainment percentage.''

■ b. Paragraph (b)(1) is amended by removing the reference ''§ 4010.11(b)'' and adding in its place the reference ''§ 4010.10(b)''.

■ c. Paragraph (c)(1)(i) is amended by removing the reference ''§ 4010.11(c)'' and adding in its place the reference ''§ 4010.11(b)''.

■ d. Paragraph (d)(2)(i) is amended by adding the words ''form of payment,'' after ''Interest,''.

■ e. Paragraph (d)(2)(ii) is amended by removing the words ''form of payment''.

■ f. Paragraph (h) is removed and paragraph (i) is redesignated as paragraph (h).

■ g. Paragraph (a)(5) and newly redesignated paragraph (h) are revised to read as follows:

§ 4010.8 Plan actuarial information.

(a) * * *

(5) The funding target (as of the valuation date) for the plan year ending within the information year determined in accordance with ERISA section 303(i) and Code section 430(i)—

(i) Without regard to the segment rate stabilized interest provisions of ERISA section 303(h)(2)(iv) and Code section 430(h)(2)(iv); and

(ii) As if the plan has been in at-risk status for a consecutive period of at least five plan years;

* * * * *

(h) *Plans subject to special funding rules.* Instead of the requirements of paragraph (a)(11) of this section:

(1) In the case of a plan year for which a plan is subject to section 402(b) of the Pension Protection Act of 2006, Public Law 109–280, dealing with certain frozen plans of commercial passenger airlines and airline caterers, the plan must meet the requirements in connection with the actuarial valuation report in accordance with instructions on PBGC's Web site, *http://www.pbgc.gov.*

(2) In the case of a plan year for which the application of new funding rules is deferred for a plan under section 104 of the Pension Protection Act of 2006, Public Law 109–280, as amended by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Public Law 111–192, dealing with eligible charity plans and plans of certain rural cooperatives, the plan must meet the requirements in paragraph (a)(5) of this section (in connection with the actuarial valuation

report) in effect as of December 31, 2007.

(3) In the case of a plan year for which a plan is subject to the Cooperative and Small Employer Charity Pension Flexibility Act, Public Law 113–97, dealing with certain defined benefit pension plans maintained by more than one employer, the plan must meet the requirements in connection with the actuarial valuation report in accordance with instructions on PBGC's Web site, *http://www.pbgc.gov*.

■ 5. Section 4010.11 is revised to read as follows:

§ 4010.11 Waivers and extensions.

(a) *Plan funding/participant count waiver.* Unless reporting is required by § 4010.4(a)(2) or (3), reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year—

(1) The aggregate 4010 funding shortfall for all plans (including any exempt plans) maintained by the person's controlled group (disregarding those plans with no 4010 funding shortfall) does not exceed $15 million; and

(2) The aggregate number of participants in all plans (including any exempt plans) maintained by the person's controlled group is fewer than 500. For this purpose, the number of participants in any plan may be determined either as of the end of the plan year ending within the information year or as of the valuation date for that plan year.

(b) *4010 funding shortfall for waivers and exemptions*—(1) *General.* A plan's 4010 funding shortfall for a plan year equals the funding shortfall as provided under ERISA section 303(c)(4) and Code section 430(c)(4) determined as of the valuation date for the plan year, except that the value of plan assets is determined without regard to the reduction under ERISA section 303(f)(4)(B) and Code section 430(f)(4)(B) (dealing with reduction of assets by the amount of prefunding and funding standard carryover balances).

(2) *Multiple employer plans.* For purposes of § 4010.8(c) and paragraph (a) of this section, the entire 4010 funding shortfall of any multiple employer plan of which the filer or any member of the filer's controlled group is a contributing sponsor is included.

(c) *Alternative 4010 FTAP.* Unless reporting is required by § 4010.4(a)(2) or (3), reporting is waived for a person for an information year if the 4010 funding target attainment percentage of each plan maintained by the person's controlled group would be at least 80 percent if the value of plan assets used for minimum funding purposes were substituted for the asset value determined without regard to the segment rate stabilized interest provisions of ERISA section 303(h)(2)(iv) for purposes of determining such percentage.

(d) *Missed contributions resulting in a lien or outstanding minimum funding waivers.* Reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year, reporting would have been required solely under § 4010.4(a)(2) or (3), provided that the missed contributions or minimum funding waivers (as applicable) were reported to PBGC under part 4043 of this chapter by the due date for the 4010 filing.

(e) *Other waiver authority.* PBGC may waive the requirement to submit information with respect to one or more filers or plans or may extend the applicable due date or dates specified in § 4010.10. PBGC will exercise this discretion in appropriate cases where it finds convincing evidence supporting a waiver or extension; any waiver or extension may be subject to conditions. A request for a waiver or extension must be filed in writing with PBGC at the address provided in § 4010.10(c) no later than 15 days before the applicable due date specified in § 4010.10, and must state the facts and circumstances on which the request is based.

Issued in Washington, DC, this 17th day of July, 2015.

Alice C. Maroni,

Acting Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2015–18177 Filed 7–24–15; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AP34

Payment of Emergency Medication by VA

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its medical regulations that govern reimbursement of emergency treatment provided by non-VA medical care providers. VA proposes to clarify its regulations insofar as it involves the reimbursement of medications prescribed or provided to the veteran during the episode of non-VA emergency treatment.

DATES: Comments must be received by VA on or before September 25, 2015.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to: Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free telephone number.) Comments should indicate that they are submitted in response to ''RIN 2900–AP34–Payment of Emergency Medication by VA.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free telephone number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director, Business Policy, Chief Business Office (10NB6), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420; (202) 382–2508. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA is authorized under 38 U.S.C. 1725 to reimburse an eligible veteran (or the provider of the emergency treatment or another person or entity who paid such expenses on the veteran's behalf) for the reasonable value of emergency treatment furnished to the Veteran at a non-VA medical facility. Under 38 U.S.C. 1728, VA is authorized to reimburse eligible veterans (or the provider of the emergency treatment or another person or entity who paid such expenses on the veteran's behalf) for the customary and usual charges of non-VA emergency treatment furnished to the veteran.

Section 1725 provides that in order for VA to reimburse a veteran for the reasonable value of non-VA emergency treatment under that section, such veteran must, among other things, be personally liable for the emergency treatment received in a non-VA medical facility, be enrolled in the VA health care system, and must have received medical care under chapter 17 of title 38 U.S.C. within the 24-month period prior to the receipt of such emergency

treatment. Reimbursement is authorized under section 1728 when non-VA emergency treatment was rendered to such veteran for: The treatment of an adjudicated service-connected disability; a non-service-connected disability associated with and held to be aggravating a service-connected disability; any disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability; and for any illness, injury or dental condition if the veteran is participating in a vocational rehabilitation program and is determined to be in medical need of care or treatment to make possible the veteran's entrance into a course of training, or prevent interruption of a course of training, or hasten the return to a course of training which was interrupted because of such illness, injury, or dental condition.

Current VA regulations implementing 38 U.S.C. 1725 and 1728 each state that covered emergency treatment includes ''medication, including a short course of medication related to and necessary for the treatment of the emergency condition that is provided directly to the patient for use after the emergency condition is stabilized and the patient is discharged.'' See 38 CFR 17.120(b) and 17.1002. It is undisputed that medications directly provided to the veteran or administered to the veteran as part of the emergency treatment are covered. However, the language ''provided directly to the patient'' has been found to be vague inasmuch as it does not clearly indicate that it also extends to a short course of necessary medication provided to the veteran by way of a prescription that is written or called in to an outpatient or commercial pharmacy by the emergency non-VA provider with instructions to the veteran-patient to obtain and use the medication post-discharge, as directed. We note this issue was not addressed in the original rulemakings associated with the implementation of section 1725; it was raised however in subsequent amendatory rulemaking in 2011. In 2011, final rulemaking for §§ 17.120(b) and 17.1002 included changes to further define ''emergency treatment.'' Among other things, new language was added to §§ 17.120(b) and 17.1002 to indicate that emergency treatment includes ''medication, including a short course of medication related to and necessary for the treatment of the emergency condition that is provided directly to the patient for use after the emergency condition is stabilized and the patient is discharged.'' It was explained that such change merely reflected VA's original intention and was done for clarification purposes only, in response to a commenter's concerns. See 76 FR 79067, 79069–79070 (Dec. 21, 2011).

VA has interpreted, and still interprets, emergency treatment, for purposes of both §§ 17.120 and 17.1002, to extend to situations where the veteran receives, during the emergency treatment episode, a prescription from the non-VA emergency provider for a short course of necessary medication (related to and necessary for treatment of the emergency condition post-stabilization) which the veteran-patient is directed to obtain post-discharge and use at home as directed. Nor should it matter whether the non-VA emergency provider, in the course of providing such emergency treatment, provides the prescription in writing or, at the request of a patient, calls it into an outpatient or commercial pharmacy on the patient's behalf. Again it was never intended or contemplated that the language ''directly provided to the patient'' would be interpreted to mean only medications actually administered to the patient during the emergency treatment episode and exclude such related prescriptions. The proposed amendments would be consistent with VA policy and would help ensure our regulations are not interpreted more narrowly than VA intends (as discussed herein).

Specifically, we propose to amend § 17.120(b) to clarify that VA would reimburse the cost of a short course of medication prescribed for the veteran at the time that the veteran was receiving emergency treatment, by stating that emergency treatment would include ''a short course of medication related to and necessary for the treatment of the emergency condition that is provided directly to or prescribed for the patient for use after the emergency condition is stabilized and the patient is discharged.'' We propose to make similar amendment to the introductory paragraph of § 17.1002.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

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

Regulatory Flexibility Act

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

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually

within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

Unfunded Mandates

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on July 20, 2015, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Veterans.

Dated: July 22, 2015.

William F. Russo,

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

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

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

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

§ 17.120 [Amended]

■ 2. Amend the first sentence of § 17.120(b) by adding ''or prescribed for'' immediately after ''provided directly to''.

§ 17.1002 [Amended]

■ 3. Amend the introductory text of § 17.1002 by adding ''or prescribed for'' immediately after ''provided directly to''.

[FR Doc. 2015–18331 Filed 7–24–15; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2015–0313; FRL–9931–25–Region 4]

Approval and Promulgation of Implementation Plans for the State of Alabama: Cross-State Air Pollution Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the State of Alabama's March 27, 2015, State Implementation Plan (SIP) revision, submitted by the Alabama Department of Environmental Management. This SIP revision provides Alabama's state-determined allowance allocations for existing electric generating units (EGUs) in the State for the 2016 control periods and replaces the allowance allocations for the 2016 control periods established by EPA under the Cross-State Air Pollution Rule (CSAPR). The CSAPR addresses the ''good neighbor'' provision of the Clean Air Act (CAA or Act) that requires states to reduce the transport of pollution that significantly affects downwind nonattainment and maintenance areas. EPA is proposing to approve Alabama's SIP revision, incorporate the state-determined allocations for the 2016 control periods into the SIP, and amend the regulatory text of the CSAPR Federal Implementation Plan (FIP) to reflect approval and inclusion of the state-determined allocations. EPA is proposing to approve Alabama's SIP revision because it meets the requirements of the CAA and the CSAPR requirements to replace EPA's allowance allocations for the 2016 control periods. This action is being taken pursuant to the CAA and its implementing regulations. In the Final Rules Section of this **Federal Register**, EPA is approving the State's implementation plan revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule.

DATES: Written comments must be received on or before August 26, 2015.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2015–0313, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4-ARMS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2015–0313,'' Air Regulatory Management Section (formerly Regulatory Development Section), Air Planning and Implementation Branch (formerly Air Planning Branch), Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Chief, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. 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 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Twunjala Bradley, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S.

Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Twunjala Bradley can be reached by phone at (404) 562–9352 or via electronic mail at *bradley.twunjala@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: July 15, 2015.

Heather McTeer Toney,

Regional Administrator, Region 4.

[FR Doc. 2015–18218 Filed 7–24–15; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA–HQ–OPP–2014–0818; FRL–9930–89]

Proposal To Mitigate Exposure to Bees From Acutely Toxic Pesticide Products; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: EPA issued a notice in the **Federal Register** of May 29, 2015, concerning EPA's Proposal to Mitigate Exposure to Bees from Acutely Toxic Pesticide Products and a second notice on extending the comment period to July 29, 2015. This document extends the comment period for an additional 30 days, from July 29, 2015 to August 28, 2015. The Agency has received additional requests from multiple stakeholders to extend the comment period to allow them to adequately develop comments on this complex and important issue. EPA is granting the extension.

DATES: The comment period for the document published on May 29, 2015 (80 FR 30644) is extended. Comments identified by docket identification (ID) number EPA–HQ–OPP–2014–0818 must be received on or before August 28, 2015.

ADDRESSES: Follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of May 29, 2015 (80 FR 30644) (FRL–9927–36).

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8157; email address: *goodis.michael@epa.gov,* or Marietta Echeverria, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–8578; email address: *echeverria.marietta@epa.gov.*

SUPPLEMENTARY INFORMATION: This document further extends the public comment period established in the **Federal Register** document of May 29, 2015. In that document, EPA is seeking comment on a proposal to adopt mandatory pesticide label restrictions to protect managed bees under contract pollination services from foliar applications of pesticides that are acutely toxic to bees on a contact exposure basis. These label restrictions would prohibit applications of pesticide products, which are acutely toxic to bees, during bloom when bees are known to be present under contract. EPA is also seeking comment on a proposal to rely on efforts made by states and tribes to reduce pesticide exposures through development of locally-based measures, specifically through managed pollinator protection plans. These plans would include local and customizable mitigation measures to address certain scenarios that can result in exposure to pollinators. EPA intends to monitor the success of these plans in deciding whether further label restrictions are warranted. EPA is hereby extending the comment period, which was set to end on July 29, 2015 to August 28, 2015.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of May 29, 2015. If you have questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 7 U.S.C. 136a.

Dated: July 20, 2015.

Jack Housenger,

Director, Office of Pesticide Programs.

[FR Doc. 2015–18413 Filed 7–24–15; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1218]

Proposed Flood Elevation Determinations for Hawaii County, Hawaii

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Emergency Management Agency (FEMA) is withdrawing its proposed rule concerning proposed flood elevation determinations for Hawaii County, Hawaii.

DATES: The proposed rule published on September 21, 2011 (76 FR 58436), is withdrawn. This withdrawal is effective on July 27, 2015.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–1218, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

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

SUPPLEMENTARY INFORMATION: On September 21, 2011, FEMA published a proposed rulemaking at 76 FR 58436, proposing flood elevation determinations along one or more flooding sources in Hawaii County, Hawaii. FEMA is withdrawing the proposed rulemaking and intends to publish a Notice of Proposed Flood Hazard Determinations in the **Federal Register** and a notice in the affected community's local newspaper following issuance of a revised preliminary Flood Insurance Rate Map and Flood Insurance Study report.

Authority: 42 U.S.C. 4104; 44 CFR 67.4.

Dated: June 22, 2015.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2015–18284 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

RIN 0648–XB089

[Docket No. 120425024–5625–04]

Endangered and Threatened Species; Identification and Proposed Listing of Eleven Distinct Population Segments of Green Sea Turtles (Chelonia mydas) as Endangered or Threatened and Revision of Current Listings; Second Extension of Comment Period

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce; United States Fish and Wildlife Service (USFWS), Interior.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On March 23, 2015, NMFS and USFWS (or the Services) published a proposed rule to revise the listings of the green sea turtle (*Chelonia mydas;* hereafter referred to as the green turtle) under the Endangered Species Act (ESA). We opened a public comment period that lasted through June 22, 2015. On June 7, 2015, we published a notice extending the public comment period through July 27, 2015. Having received requests to further extend the comment period, with this document we extend the comment period to August 26, 2015.

DATES: Comments and information regarding this proposed rule must be received by close of business on August 26, 2015.

ADDRESSES: You may submit comments on the proposed rule, identified by NOAA-NMFS-2012-0154, by any of the following methods:

• *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0154,*
2. Click the ''Comment Now!'' icon, complete the required fields, and
3. Enter or attach your comments.

OR

• *Mail:* Submit written comments to Green Turtle Proposed Listing Rule, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Room 13535, Silver Spring, MD 20910; or Green Turtle Proposed Listing Rule, U.S. Fish and Wildlife Service, North Florida Ecological Services Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by the Services. All comments received will be a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. The Services will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). The proposed rule is available electronically at *http://www.nmfs.noaa.gov/pr/species/turtles/green.htm* and *http://www.fws.gov/northflorida/seaturtles/turtle%20factsheets/green-sea-turtle.htm.*

FOR FURTHER INFORMATION CONTACT: Jennifer Schultz, NMFS (ph. 301–427–8443, email *jennifer.schultz@noaa.gov*), or Ann Marie Lauritsen, USFWS (ph. 904–731–3032, email *annmarie_lauritsen@fws.gov*). Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, and 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

The green turtle is currently listed under the ESA as a threatened species globally, with the exception of the Florida and Mexican Pacific coast breeding populations, which are listed as endangered. On March 23, 2015 (80 FR 15271), the Services published a proposed rule to revise these listings because we found that the green turtle is composed of 11 distinct population segments (DPSs) that qualify for listing under the ESA. We proposed to remove the current listings and, in their place, list eight DPSs as threatened and three as endangered. We also proposed to apply existing protective regulations to the DPSs and to continue the existing critical habitat designation (*i.e.,* waters surrounding Culebra Island, Puerto Rico) in effect for the North Atlantic DPS. We solicited comments on these proposed actions and indicated that comments must be received by June 22, 2015. On June 7, 2015 (80 FR 34594), we announced public hearings in Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and American Samoa, and extended the public comment period through July 27, 2015. On July 13, 2015, we received requests to further extend the public comment period due to a typhoon and the island-wide loss of internet in Saipan, CNMI. We concur with these requests and hereby extend the public comment period by an additional 30 days, until August 26, 2015. Previously submitted comments do not need to be resubmitted.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: July 21, 2015.

Paul N. Doremus,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

Dated: July 20, 2015.

Stephen Guertin,

Acting Director U.S. Fish and Wildlife Service.

[FR Doc. 2015–18246 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 80, No. 143

Monday, July 27, 2015

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Document No. AMS–FV–15–0017]

Re-Charter of the Fruit and Vegetable Industry Advisory Committee

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of Re-charter of the U.S. Department of Agriculture (USDA) Fruit and Vegetable Industry Advisory Committee.

SUMMARY: The USDA intends to renew the Fruit and Vegetable Industry Advisory Committee (Committee) for a two-year term from 2015–2017. The purpose of the Committee is to examine the full spectrum of issues faced by the fruit and vegetable industry and provide suggestions and ideas to the Secretary of Agriculture on how USDA can tailor its programs to better meet the fruit and vegetable industry's needs. The Committee is necessary and is in the public interest.

FOR FURTHER INFORMATION CONTACT: Charles W. Parrott, Committee Executive Secretary; Phone: (202) 720–4722; Email: *Charles.parrott@ams.usda.gov;* and/or Pamela Stanziani, Designated Federal Official; Phone: (202) 720–3334; Email: *Pamela.stanziani@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA) (5 U.S.C. App.), notice is hereby given that the Secretary of Agriculture intends to renew the Fruit and Vegetable Industry Advisory Committee for two years. The purpose of the Committee is to examine the full spectrum of issues faced by the fruit and vegetable industry and provide suggestions and ideas to the Secretary on how USDA can tailor its programs to better meet the fruit and vegetable industry's needs.

The Deputy Administrator of the Agricultural Marketing Service's Fruit and Vegetable Program will serve as the Committee's Executive Secretary. Representatives from USDA mission areas and agencies affecting the fruit and vegetable industry will be called upon to participate in the Committee's meetings as determined by the Committee Chairperson.

Industry members are appointed by the Secretary of Agriculture and serve 2 year terms. Membership consists of up to twenty-five (25) members who represent the fruit and vegetable industry and will include individuals representing fruit and vegetable growers/shippers, wholesalers, brokers, retailers, processors, fresh cut processors, foodservice suppliers, state agencies involved in organic and non-organic fresh fruits and vegetables at local, regional and national levels, farmers markets and food hubs, state departments of agriculture, and trade associations. The members of the re-chartered Committee elect a Chairperson and Vice Chairperson of the Committee. In absence of the Chairperson, the Vice-Chairperson acts in the Chairperson's stead.

During the member outreach and nomination period, the Secretary of Agriculture seeks a diverse group of members representing a broad spectrum of persons interested in providing suggestions and ideas on how USDA can tailor its programs to meet the fruit and vegetable industry's needs.

Equal opportunity practices are followed in all appointments to the Committee in accordance with USDA policies. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by USDA, membership includes, to the extent practicable, individuals with demonstrated ability to represent minorities, women, persons with disabilities, and limited resource agriculture producers.

Dated: July 22, 2015.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2015–18317 Filed 7–24–15; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

July 21, 2015.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Consumer Complaint Monitoring System—Food Safety Mobile Questionnaire.

OMB Control Number: 0583–0133.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has

been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg Product Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). These statutes mandate that FSIS protect the public by ensuring that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged. FSIS tracks consumer complaints about meat, poultry, and egg products. FSIS also has a Food Safety Mobile that travels around the continental United States promoting food safety with respect to meal, poultry, and egg products.

Need and Use of the Information: The Consumer Complaint Monitoring System web portal is used primarily to track consumer complaints regarding meat, poultry, and egg products. FSIS will also collect information using the Food Safety Mobile Questionnaire that will assist them in planning and scheduling visits of the Food Safety Mobile. FSIS will use the information collected from the web portal and the questionnaire to look for trends that will enhance the Agency's food safety efforts.

Description of Respondents: Individuals or households.

Number of Respondents: 1,150.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 263.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2015–18252 Filed 7–24–15; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Proposed Posting, Posting, and Deposting of Stockyards

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice and request for comments.

SUMMARY: The Grain Inspection, Packers and Stockyards Administration (GIPSA) is taking several actions to post and depost stockyards under the Packers and Stockyards Act (P&S Act). Specifically, we are proposing that 17 stockyards now operating subject to the P&S Act be posted. We are also posting eight stockyards that were identified previously as operating subject to the P&S Act and deposting one stockyard that no longer meets the definition of a stockyard.

DATES: For the proposed posting of stockyards, we will consider comments that we receive on or before August 11, 2015.

ADDRESSES: We invite you to submit comments on this notice. You may submit comments by any of the following methods:

- *Internet:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Fax:* (202) 690–2173.
- *Mail, hand delivery, or courier:* R. Dexter Thomas, GIPSA, USDA, 1400 Independence Avenue SW., Room 2530–S, Washington, DC 20250–3604.

Instructions: All comments should refer to the date and page number of this issue of the **Federal Register**. The comments and other documents relating to this action will be available for public inspection during regular business hours.

FOR FURTHER INFORMATION CONTACT: Catherine M. Grasso, Program Analyst, Litigation and Economic Analysis Division at (202) 720–7201 or *Catherine.m.grasso@usda.gov*.

SUPPLEMENTARY INFORMATION: GIPSA administers and enforces the P&S Act of 1921, (7 U.S.C. 181 *et seq.*). The P&S Act prohibits unfair, deceptive, and fraudulent practices by livestock market agencies, dealers, stockyard owners, meat packers, swine contractors, and live poultry dealers in the livestock, poultry, and meatpacking industries.

Section 302 of the P&S Act (7 U.S.C. 202) defines the term ''stockyard'' as follows: ''. . . any place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other enclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.''

Section 302 (b) of the P&S Act requires the Secretary of Agriculture to determine which stockyards meet this definition, and to notify the owner of the stockyard and the public of that determination by posting a notice in each designated stockyard. Once the Secretary provides notice to the stockyard owner and the public, the stockyard is subject to the provisions of Title III of the P&S Act (7 U.S.C. 201–203 and 205–217a) until the Secretary deposts the stockyard by public notice. To post a stockyard, we assign the stockyard a facility number, notify the stockyard owner, and send an official posting notice to the stockyard owner to display in a public area of the stockyard. This process is referred to as ''posting.'' The date of posting is the date that the posting notices are physically displayed at the stockyard. A facility that does not meet the definition of a stockyard is not subject to the P&S Act, and therefore cannot be posted. A posted stockyard can be deposted, which occurs when the facility is no longer used as a stockyard.

We are hereby notifying stockyard owners and the public that the following 17 stockyards meet the definition of a stockyard, and that we propose to designate these stockyards as posted stockyards.

Proposed facility No.	Stockyard name and location
AR–184	Mid-State Stockyards, LLC, Damascus, Arkansas.
AZ–119	Arizona Livestock Auction, Buckeye, Arizona.
GA–236 ...	Trion Livestock Auction, LLC, Trion Georgia.
GA–237 ...	Deer Run Auction Co., Adel, Georgia.
KY–187	Steele Hollow Stockyard, LLC, Rockholds, Kentucky.
KY–188	Franklin Livestock Market, Inc., Franklin, Kentucky.
MS–179 ...	Integrity Livestock Auction, LLC, Brookhaven, Mississippi.
MS–180 ...	Ramsey Livestock Sales, Inc., Vicksburg, Mississippi.
MO–289 ...	Archangel Outreach Ministries, Inc., d/b/a CRS & Highlandville Sales, Highlandville, Missouri.
NC–180 ...	Stephens Auction Co., Lumberton, North Carolina.
NC–181 ...	Flippin Chicken Auction & Sales, Beulaville, North Carolina.
OK–218 ...	JC Stockyards Auction, LLC, Meeker, Oklahoma.
TN–212	WJ Auction Co., LLC, Telford, Tennessee.
TN–213	Saddle Brook Stables, Jamestown, Tennessee.
TN–214	Wiser Farms/Triple ''M'' Farms, Shelbyville, Tennessee.
TX–358	Paris Livestock Auction, LLC, Paris, Texas.
UT–119	Anderson Livestock Auction Co., Willard, Utah.

We are also notifying the public that the stockyards listed in the following table meet the P&S Act's definition of a stockyard and that we have posted the stockyards. On July 15, 2014, we published a notice in the **Federal Register** (79 FR 41255–41256) of our proposal to post these eight stockyards. Since we received no comments to our proposal, we assigned the stockyards a facility number and notified the owner of the stockyard facilities. Posting notices were sent to the owner of the stockyard to display in public areas of

the stockyard. The table below reflects the date of posting for each stockyard.

Facility No.	Stockyard name and location	Date of posting
AL–198	Central Auction Barn, Electic, Alabama	10/22/2014
AR–183	Mollie Wright—Wright's Small Animal Auction, Benton, Arkansas	10/06/2014
AZ–118	Sonoran Livestock Marketing, LLC, Douglas, Arizona	10/17/2014
KY–186	Ricky M. Kepley, dba Franklin Livestock Market, Franklin, Kentucky	09/30/2014
TN–208	Treadway Livestock Exchange, Thorn Hill, Tennessee	10/17/2014
TN–209	Darrells Auction and Livestock, Powder Springs, Tennessee	09/30/2014
TN–210	Rising Star Ranch, LLC, Shelbyville, Tennessee	10/06/2014
TN–211	Circle R Auction, Ethridge, Tennessee	10/07/2014

Finally, we are notifying the public that the following stockyard no longer meets the definition of a stockyard and it is being deposted. We depost stockyards when the facility can no longer be used as a stockyard. The reasons a facility can no longer be used as a stockyard may include the following: (1) The market agency has moved and the posted facility is abandoned; (2) the facility has been torn down or otherwise destroyed, such as by fire; (3) the facility is dilapidated beyond repair; or (4) the facility has been converted and its function has changed.

	Stockyard name and location	Date posted
AR–128	Searcy County Livestock Market, Marshall, Arkansas	02/18/1959

Authority: 7 U.S.C. 202.

Susan B. Keith,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2015–18251 Filed 7–24–15; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

Public Availability of FY 2014 Service Contract Inventories

AGENCY: Office of Procurement and Property Management, Departmental Management, USDA.

ACTION: Notice of public availability of FY 2014 Service Contract inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), U.S. Department of Agriculture is publishing this notice to advise the public of the availability of the FY 2014 Service Contract inventory. This inventory provides information on FY 2014 service contract actions over $25,000. 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, by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.*

The U.S. Department of Agriculture has posted its inventory and a summary of the inventory on the Office of Procurement and Property Management homepage at the following link: *http://www.dm.usda.gov/procurement/.*

FOR FURTHER INFORMATION CONTACT: Crandall Watson, Office of Procurement and Property Management (OPPM), at (202) 720–7529, or by mail at OPPM, MAIL STOP 9304, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250–9303. Please cite ''2014 Service Contract Inventory'' in all correspondence.

Signed in Washington, DC, on July 21, 2015.

Lisa M. Wilusz,

Director, Office of Procurement and Property Management.

[FR Doc. 2015–18399 Filed 7–24–15; 8:45 am]

BILLING CODE 3410–TX–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Institute of Standards and Technology.

Title: Student Information System.

OMB Control Number: 0693–XXXX.

Form Number(s): None.

Type of Request: Regular Submission

Number of Respondents: 400.

Average Hours per Response: 45 minutes.

Burden Hours: 300 hours.

Needs and Uses: The Student Information System (SIS) is designed to collect on-line applications from students for programs such as the Student Volunteer Program (SVP) and Summer High School Intern Program (SHIP). The purpose of the application is to obtain information needed to evaluate applicant qualifications for potential positions. Students can apply for multiple programs in a single application.

The SIS collects basic biographical information through an on-line application. The application contains four sections. The first section collects personal information to include name, address, phone, email, program selection, work availability, and location preferences. The second section collects work and volunteer experience including start and end date, hours worked, name and address of employer, supervisor's contact information, job description, and job-related skills. The third section collects any special training, knowledge, skill, ability, and/or publications that demonstrate the applicant's skill sets to perform a position. The fourth section collects education information to include current enrollment, name and address of the educational institution, grade point average, and expected date of program completion.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Required to obtain benefits.

This information collection request may be viewed at *reginfo.gov*. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Sheleen Dumas,

Departmental PRA Lead, Office of the Chief Information Officer.

[FR Doc. 2015–18296 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–46–2015]

Foreign-Trade Zone 147—Berks County, Pennsylvania; Application for Reorganization (Expansion of Service Area); Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the FTZ Corporation of Southern Pennsylvania, grantee of Foreign-Trade Zone 147, requesting authority to reorganize the zone to expand its service area under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on July 20, 2015.

FTZ 147 was approved by the FTZ Board on June 28, 1988 (Board Order 378, 53 FR 26094, July 11, 1988) and reorganized under the ASF on April 30, 2013 (Board Order 1897, 78 FR 27953–27954, May 13, 2013). The zone currently has a service area that includes Berks, Cumberland, Dauphin, Franklin, Lancaster and York Counties, Pennsylvania.

The applicant is now requesting authority to expand the service area of the zone to include Adams, Fulton, Juniata, Lebanon and Perry Counties, Pennsylvania, as described in the application. If approved, the grantee would be able to serve sites throughout the expanded service area based on companies' needs for FTZ designation. The proposed expanded service area is adjacent to the Harrisburg Customs and Border Protection Port of Entry.

In accordance with the FTZ Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is September 25, 2015. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to October 13, 2015.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz*. For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: July 20, 2015.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2015–18334 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–830]

Carbon and Certain Alloy Steel Wire Rod From Mexico: Notice of Court Decision Not in Harmony With Final Results and Notice of Amended Final Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On December 22, 2014, the United States Court of International Trade (CIT) entered its final judgment in *Deacero S.A.P.I. de C.V. and Deacero Usa, Inc.* v. *United States and Arcelormittal USA LLC, Gerdau Ameristeel U.S. Inc., Evraz Rocky Mountain Steel, and Nucor Corporation,* Court No. 12–00345, Slip Op. 14–151 (*Deacero III*), sustaining the Department of Commerce's (the Department) negative circumvention determination from the First Remand Results.[1] Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's *Final Determination*[2] that, pursuant to section 781(c) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.225, Deacero's entries of wire rod with an actual diameter of 4.75 millimeters (mm) to 5.00 mm constitute circumvention of the *Order.*[3]

DATES: *Effective Date:* January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Eric Greynolds, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6071.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2012, the Department issued its *Final Determination* in which it determined that Deacero's shipments of wire rod with an actual diameter of 4.75 mm to 5.00 mm constitute a circumventing minor alteration of the *Order.*[4] Deacero challenged the Department's determination. Upon review, the CIT remanded the *Final Determination,* holding that the Department improperly determined that wire rod with a thickness between 4.75 mm and 5.00 mm was inside the scope despite the fact that it was commercially available before the investigation and

[1] *See* Final Results of Redetermination Pursuant to *Deacero S.A. de C.V. and Deacero USA Inc.* v. *United States and Arcelormittal USA LLC, Gerdau Ameristeel U.S. Inc., Evraz Rocky Mountain Steel, and Nucor Corporation,* Court No. 12–00345; Slip Op. 13–126 (CIT 2013) (January 29, 2014) (First Remand Results).

[2] *See Carbon and Certain Alloy Steel Wire Rod From Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 77 FR 59892 (October 1, 2012) (*Final Determination*) and accompanying Issues and Decision Memorandum (Final Decision Memorandum).

[3] *See Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 67 FR 65945 (October 29, 2002) (*Order*).

[4] *See Final Determination.*

petitioners ''consciously chose to limit the *Order's* reach to certain steel products 5.00 mm or more, but less than 19.00 mm in solid cross-sectional diameter.'' [5] On remand, based on the Court's reasoning, the Department found that there is no alternative but to change the results of the anti-circumvention determination and find on remand that 4.75 mm wire rod is not within the scope of the *Order*.[6] In *Deacero II,* the Court held that although the Department ultimately reached a supportable result in the First Remand Results, remand was nonetheless necessary because the Department arrived at the result by misinterpreting *Deacero I*.[7] Therefore, in *Deacero II,* the Court instructed the Department to explain whether it seeks the Court's leave to revisit the issue of commercial availability.[8] In the Second Remand Results, the Department continued to respectfully disagree with the Court that the ''commercial availability'' of a product in the country in question, in a third country or in the United States bars the Department from reaching an affirmative anti-circumvention determination under the minor alteration provision of the statute.[9] For these same reasons, the Department did not request a remand to further consider ''commercial availability'' in the context of this minor alteration proceeding. On December 22, 2014, the CIT entered final judgment sustaining the First Remand Results.[10]

Timken Notice

In its decision in *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* the CAFC held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's December 22, 2014 judgment sustaining the Department's First Remand Results with respect to Deacero's shipments of wire rod with an actual diameter of 4.75 mm to 5.00 mm not constituting a circumventing minor alteration of the *Order* constitutes a final decision of the Court that is not in harmony with the Department's *Final Determination.* This notice is published in fulfillment of the publication requirements of *Timken.*

Amended Final Determination

Because there is now a final court decision, we are amending the *Final Determination* with respect to Deacero's shipments of wire rod with an actual diameter of 4.75 mm to 5.00 mm. Based on the negative circumvention determination, Deacero's 4.75 mm wire rod is not subject to antidumping duties.

Accordingly, the Department will continue the suspension of liquidation of the subject merchandise, but set the cash deposit rate for the 4.75 mm up to 5 mm diameter wire rod to zero pending a final and conclusive court decision. For any antidumping duties which have been deposited for 4.75 up to 5mm diameter wire rod entered from January 1, 2015 to the date of this notice, we will instruct Customs and Border Protection to refund the cash deposit upon request but continue to suspend the entries at a zero cash deposit rate.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(e)(1), 751(a)(1), and 777(i)(1) of the Act.

Dated: July 20, 2015.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2015–18335 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–DS–P

[5] *See Deacero S.A. de C.V.* v. *United States,* 37 CIT, 942 F. Supp. 2d 1321, 1324–25 (2013).

(*Deacero I*);*Deacero Remand,* Slip Op. 13–126 at 15.

[6] *See* First Remand Results at 6.

[7] *See Deacero S.A.P.I. de C.V.* v. *United States,* Slip Op. 14–99, 2014 WL 4244349, *1–3 (CIT Aug. 28, 2014) (*Deacero II*) at 11–12.

[8] *Id.* at 12.

[9] *See* Final Results of Redetermination Pursuant to *Deacero S.A. de C.V. et al* v. *United States,* Court No. 12–00345; Slip Op. 14–99 (CIT August 28, 2014) (Second Remand Results).

[10] *See Deacero III.*

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Advisory Committee on Earthquake Hazards Reduction Meeting

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Earthquake Hazards Reduction (ACEHR or Committee), will hold an open meeting via WEBEX on Friday, August 21, 2015, from 1:00 p.m. to 3:00 p.m. Eastern Time. The primary purpose of this meeting is to finalize the Committee's 2015 Report on the Effectiveness of the National Earthquake Hazards Reduction Program (NEHRP). The agenda may change to accommodate Committee business. The final agenda and any draft meeting materials will be posted prior to the meeting on the NEHRP Web site at *http://nehrp.gov/.* Interested members of the public will be able to participate in the meeting from remote locations by calling into a central phone number.

DATES: The ACEHR will hold a meeting via WEBEX on Friday, August 21, 2015, from 1:00 p.m. until 3:00 p.m. Eastern Time. The meeting will be open to the public.

ADDRESSES: Questions regarding the meeting should be sent to National Earthquake Hazards Reduction Program Director, National Institute of Standards and Technology (NIST), 100 Bureau Drive, Mail Stop 804, Gaithersburg, Maryland 20899–8604. For instructions on how to participate in the meeting via WEBEX, please see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Tina Faecke, Management and Program Analyst, National Earthquake Hazards Reduction Program, Engineering Laboratory, NIST, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, Maryland 20899–8604. Ms. Faecke's email address is *tina.faecke@nist.gov* and her phone number is (301) 975–5911.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the requirements of Section 103 of the NEHRP Reauthorization Act of 2004 (Pub. L. 108–360). The Committee is composed of 15 members appointed by the Director of NIST, who were selected for their established records of distinguished service in their professional community, their knowledge of issues affecting NEHRP, and to reflect the wide diversity of technical disciplines, competencies, and communities involved in earthquake hazards reduction. In addition, the Chairperson of the U.S. Geological Survey (USGS) Scientific Earthquake Studies Advisory Committee (SESAC) serves as an ex-officio member of the Committee.

The Committee assesses:

- Trends and developments in the science and engineering of earthquake hazards reduction;
- the effectiveness of NEHRP in performing its statutory activities;
- any need to revise NEHRP; and
- the management, coordination, implementation, and activities of NEHRP.

Background information on NEHRP and the Advisory Committee is available at *http://nehrp.gov/.*

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the ACEHR will hold an open meeting via WEBEX on Friday, August 21, 2015, from 1:00 p.m. to 3:00 p.m. Eastern

Time. There will be no central meeting location. Interested members of the public will be able to participate in the meeting from remote locations by calling into a central phone number. The primary purpose of this meeting is to finalize the Committee's 2015 Report on the Effectiveness of the NEHRP. The agenda may change to accommodate Committee business. The final agenda and any meeting materials will be posted prior to the meeting on the NEHRP Web site at *http://nehrp.gov/.*

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee's affairs are invited to request an opportunity to speak and detailed instructions on how to join the WEBEX from a remote location in order to participate by submitting their request to Felicia Johnson at *felicia.johnson@nist.gov* or 301–975–5324 no later than 5:00 p.m. Eastern Time, Wednesday, August 19, 2015. Approximately 15 minutes will be reserved from 2:45 p.m.–3:00 p.m. Eastern Time for public comments; speaking times will be assigned on a first-come, first-serve basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about three minutes each. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated, and those who were unable to participate are invited to submit written statements to ACEHR, National Institute of Standards and Technology, 100 Bureau Drive, MS 8604, Gaithersburg, Maryland 20899–8604, via fax at (301) 975–4032, or electronically by email to *info@nehrp.gov.*

All participants of the meeting are required to pre-register. Anyone wishing to participate must register by 5:00 p.m. Eastern Time, Wednesday, August 19, 2015, in order to be included. Please submit your full name, email address, and phone number to Felicia Johnson at *felicia.johnson@nist.gov* or (301) 975–5324. After pre-registering, participants will be provided with detailed instructions on how to join the WEBEX from a remote location in order to participate.

Richard Cavanagh,

Acting Associate Director for Laboratory Programs.

[FR Doc. 2015–18352 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE068

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Ecosystem Work Group (EWG) will hold a webinar, which is open to the public.

DATES: The EWG will hold the webinar on Monday, August 10, 2015, from 1 p.m. until business for the day is complete.

ADDRESSES: To attend the webinar, visit: *http://www.gotomeeting.com/online/webinar/join-webinar.* Enter the Webinar ID, which is 133–662–499, and your name and email address (required). Participants are encouraged to use their telephone, as this is the best practice to avoid technical issues and excessive feedback. (See the *PFMC GoToMeeting Audio Diagram* for best practices). Please use your telephone for the audio portion of the meeting by dialing this TOLL number 1+415–655–0059 (not a toll-free number); then enter the Attendee phone audio access code: 921–628–560; then enter your audio phone pin (shown after joining the webinar). System Requirements for PC-based attendees: Required: Windows® 7, Vista, or XP; for Mac®-based attendees: Required: Mac OS® X 10.5 or newer; and for mobile attendees: iPhone®, iPad®, Android™ phone or Android tablet (See the GoToMeeting Webinar Apps).

You may send an email to Mr. Kris Kleinschmidt or contact him at (503) 820–2280, extension 425 for technical assistance. A public listening station will also be provided at the Pacific Council office.

Council address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Pacific Council; telephone: (503) 820–2422.

SUPPLEMENTARY INFORMATION: During this work session, the EWG will discuss finalizing its report for the Council's September 2015 meeting in Sacramento, California. The Council has asked for an EWG report on two draft Fishery Ecosystem Plan (FEP) initiatives: An initiative for a coordinated review of the indicators used in the annual National Marine Fisheries Service's California Current Ecosystem Status Report; and an initiative on the potential multi-fisheries and multi-species effects of short-term climate shift and long-term climate change. Other topics may include one or more of the Council's scheduled Administrative Matters. Public comments during the webinar will be received from attendees at the discretion of the EWG Chair.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280, extension 425 at least 5 days prior to the meeting date.

Dated: July 21, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18249 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE052

North Pacific Fishery Management Council; Public Meeting; Cancellation

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

ACTION: Notice of cancellation of a public meeting.

SUMMARY: The North Pacific Fishery Management Council's Legislative Committee is cancelling the teleconference meeting scheduled for August 4, 2015, from 1 to 5 p.m. See **SUPPLEMENTARY INFORMATION.**

DATES: The meeting was scheduled for August 4, 2015.

ADDRESSES: North Pacific Fishery Management Council, 605 W 4th Avenue, Suite 306 Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Chris Oliver, Executive Director; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The meeting notice published on July 17, 2015 (80 FR 42479). Please call the North Pacific Fishery Management Council at (907) 271–2809 for any questions.

Dated: July 22, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18326 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE067

Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) will hold public meetings of the Council and its Committees.

DATES: The meetings will be held Monday, August 10, 2015 through Thursday, August 13, 2015. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held at: Holiday Inn Midtown, 440 West 57th St., New York, NY 10019; telephone: (212) 581–8100

Council address: Mid-Atlantic Fishery Management Council, 800 N. State St., Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255. The Council's Web site, *www.mafmc.org* also has details on the meeting location, proposed agenda, webinar listen-in access, and briefing materials.

SUPPLEMENTARY INFORMATION: The following items are on the agenda, though agenda items may be addressed out of order (changes will be noted on the Council's Web site when possible.)

Monday, August 10, 2015

10 a.m.–4 p.m.

Ecosystem and Ocean Planning Committee

—Review input from Advisory Panel on draft habitat policy documents

—Provide comment/revisions to draft documents

l—Other general Committee updates

Tuesday, August 11, 2015

9 a.m.–10 a.m.

Executive Committee

l—Discuss possible framework related to Council risk policy and harvest control rules.

10 a.m.

Council Convenes

10 a.m.–10:30 a.m.

Swearing in of New Council Members and Election of Officers

10:30 a.m.–11:45 a.m.

Industry Observer Amendment

l—Review Amendment development and analyses

l—Approve alternative range for completion of draft Environmental Assessment

11:45 a.m.–12 p.m.

Special Award

1 p.m.–2 p.m.

Blueline Tilefish Action

l—Review scoping comments and approve plan of action

2 p.m.–2:30 p.m.

Electronic For-Hire Vessel Trip Report Contract—*Andy Loftus*

l—Review findings and consider next steps

2:30 p.m.

Council Meeting With the Atlantic States Marine Fisheries Commission's Bluefish Board

2:30 p.m.–5 p.m.

Bluefish Specifications

l—Review SSC, Bluefish Monitoring Committee, and Advisory Panel recommendations regarding 2016, 2017, and 2018 harvest levels and associated management measures

l—Adopt recommendations for 2016, 2017, and 2018 harvest levels and associated management measures

Wednesday, August 12th

9 a.m.

Council Meeting With the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup and Black Sea Bass Board

9 a.m.–11:30 a.m.

Summer Flounder Specifications

—Review SSC, Summer Flounder Monitoring Committee, and Advisory Panel recommendations for 2016, 2017, and 2018

—Adopt recommendations for 2016, 2017, and 2018 commercial and recreational harvest levels and commercial management measures

—Update on ASMFC activities regarding summer flounder

11:30 a.m.–12 p.m.

Summer Flounder Amendment

—Update on amendment progress and action plan

—Discussion of FMP Goals and Objectives (with Fisheries Forum staff)

1 p.m.–3 p.m.

Black Sea Bass Specifications

—Review SSC, Black Sea Bass Monitoring Committee, and Advisory Panel recommendations for 2016 and 2017

—Adopt recommendations for 2016 and 2017 commercial and recreational harvest levels and commercial management measures

3 p.m.–4:30 p.m.

Scup Specifications

—Review SSC, Scup Monitoring Committee, and Advisory Panel recommendations for 2016, 2017 and 2018

—Adopt recommendations for 2016, 2017, and 2018 commercial and recreational harvest levels and commercial management measures

4:30 p.m.–5 p.m.

Scup Amendment

—Discuss development and scoping

Thursday, August 13th

9 a.m.

Council Convenes

9 a.m.–1 p.m.

Business Session

Organization Reports

—NMFS Greater Atlantic Regional Office

—NMFS Northeast Fisheries Science Center

—NOAA Office of General Counsel
—NOAA Office of Law Enforcement
—U.S. Coast Guard
—Atlantic States Marine Fisheries Commission

Liaison Reports

—New England Council
—South Atlantic Council

Executive Director Report, Chris Moore

Science Report, Rich Seagraves

Committee Reports

—Ecosystem and Ocean Planning
—SSC

Continuing and New Business

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: July 21, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18248 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE050

Fisheries of the South Atlantic; Southeast Data, Assessment and Review (SEDAR); Procedural Workshop 7 To Develop Best Practice Recommendations for SEDAR Data Workshops

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

ACTION: Notice of SEDAR Procedural Workshop 7: SEDAR Data Best Practices post-workshop webinar #2.

SUMMARY: A post workshop webinar #2 will be held, if necessary, following the June 22–26, 2015 SEDAR Procedural Workshop 7 in Atlanta, GA. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR Procedural Workshop 7 post-workshop webinar #2 will be held, if necessary, on Monday, August 10, 2015 from 10 a.m. until 12 p.m. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to procedural workshop. Such adjustments may result in the meeting being extended from, or completed prior to the time established by this notice.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator, phone: (843) 571–4366; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three step process including: (1) Data Workshop; (2) Assessment Process utilizing workshops and webinars; and (3) Review Workshop.

SEDAR also coordinates procedural workshops which provide an opportunity for focused discussion and deliberation on topics that arise in multiple assessments. They are structured to develop best practices for addressing common issues across assessments. The seventh procedural workshop will develop best practice recommendations for SEDAR Data Workshops.

Workshop objectives include developing an inventory of common or recurring data and analysis issues from SEDAR Data Workshops; documenting how the identified data and analysis issues were addressed in the past and identifying potential additional methods to address these issues; developing and selecting best practice procedures and approaches for addressing these issues in future, including procedures and approaches to follow when deviating from best practice recommendations; and identifying process to address future revision and evaluation of workshop recommendations, considering all unaddressed data and analysis issues. The post- workshop webinar #2 will be held, if necessary, to finalize best practice recommendations from the workshop.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SEDAR office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: July 21, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18247 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE051

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will convene a Tier 3 Stock Assessment Panel Review of the draft Stock Assessment Updates for the Bottomfish Management Unit Species of American Samoa, Guam and Commonwealth of

Northern Mariana Islands (CNMI) in 2015 Using Data through 2013. The Review Panel will review the soundness and reliability of the stock assessment results and conclusions for management use. The Council's Scientific and Statistical Committee will hold its 120th meeting to deliberate the results of the Tier 3 review and receive a presentation on the final stock assessment update as revised based on the Tier 3 panel recommendations. The SSC will make its determination of best available scientific information for the Council to consider in specifying Annual Catch Limits for the Territorial bottomfish fisheries. The Council will also convene a meeting of the Risk of Overfishing (denoted by P*) Working Group (P* WG) for the American Samoa, Guam and CNMI Bottomfish Fishery. The P* WG will review the P* dimensions and criteria, provide new scores (as appropriate), and recommend appropriate risk of overfishing levels. This will be the basis for the specification of Acceptable Biological Catch (ABC) levels for the Scientific and Statistical Committee (SSC) to consider at its 121st meeting.

DATES: The Tier 3 Stock Assessment Peer-Review Panel will be on August 11 to 12, 2015. The 120th SSC meeting will be on September 16, 2015. The P* WG meeting will be on September 23 to 24, 2015. For specific times and agendas, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The Tier 3 Stock Assessment Peer-Review Panel, P* WG meeting and 120th SSC meeting will be held at the Council office, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813; telephone (808) 522–8220. WebEx and teleconference facilities will be provided for the P* WG meeting and the 120th SSC meeting for participants from American Samoa, Guam, and CNMI. The teleconference numbers are: U.S. toll-free: 1–888–482–3560 or International Access: +1 647 723–3959, and Access Code: 5228220; The web conference can be accessed at *https://wprfmc.webex.com/join/info.wpcouncilnoaa.gov*.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: Public comment periods will be provided. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for the Tier 3 Stock Assessment Panel Review

August 11, 2015—9 a.m.–4 p.m.

1. Introduction
2. Background information
   A. Objectives and Terms of Reference
   B. Fishery Operation
   C. Management
3. Review of Stock Assessment Update
4. Questions to presenters
5. Panel discussions (closed)

August 12, 2015—9 a.m.–4 p.m.

6. Panel discussions, continued (closed)
7. Present results of review and recommendations
8. Adjourn

Schedule and Agenda for the 120th SSC Meeting

September 16, 2015—1 p.m.–5 p.m.

1. Introductions
2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Insular Fisheries
   A. Report on the Tier 3 Panel Review of the Bottomfish Stock Assessment Updates for American Samoa, Guam, and CNMI
   B. Report on the final Bottomfish Stock Assessment Updates for American Samoa, Guam, and CNMI
   C. Public Comment
   D. SSC Discussion and Recommendations
4. Other Business
   A. 121st SSC Meeting
5. Summary of SSC Recommendations to the Council

Schedule and Agenda for the P* Working Group Meeting

September 23, 2015—1 p.m.–5 p.m.

1. Introductions
2. Recommendations from previous Council meetings
3. Overview of the P* process
4. State of the Science for the Territory Bottomfish
   A. Report on the Tier 3 panel review comments
   B. Report on 2015 draft Territorial Bottomfish stock assessment updates
5. Review of the P* Dimensions and Criteria
   A. Assessment information
   B. Uncertainty characterization
   C. Stock status
   D. Productivity and susceptibility
6. Public comment

September 24, 2015—1 p.m.–5 p.m.

7. Working group re-scoring session
   A. Assessment information
   B. Uncertainty characterization
   C. Stock status
   D. Productivity and susceptibility
8. Discussion on potential changes to the P* dimensions and criteria
9. General Discussion
10. Public comment
11. Summary of scores and P* recommendations

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: July 22, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18322 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE066

Gulf of Mexico Fishery Management Council (Council); Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The Gulf of Mexico Fishery Management Council (GMFMC) will hold meetings of the: Joint Administrative Policy and Budget/Personnel, Mackerel, Shrimp, Data Collection, and Reef Fish Management Committees; in conjunction with a meeting of the Full Council. The Council will also hold a formal public comment session.

DATES: The Council meeting will be held August 10–13, 2015. The meeting will begin at 8:30 a.m. on Monday,

August 10, 2015 and recess at 5 p.m. The meeting will reconvene at 8:30 a.m. on Tuesday, August 11, 2015 and recess at 5 p.m. The meeting will reconvene at 8:30 a.m. on Wednesday, August 12, 2015 and recess at 5:30 p.m. The meeting will convene on the final day at 8:30 a.m. on Thursday, August 13, 2015 and adjourn by 3 p.m. or when business is complete.

ADDRESSES:

Meeting address: The meeting will be held at the Hilton Riverside hotel, Two Poydras Street, New Orleans, LA 70130; telephone: (504) 561–0500.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Mr. Douglas Gregory, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630; fax: (813) 348–1711; email: *doug.gregory@gulfcouncil.org.*

SUPPLEMENTARY INFORMATION: The Council items of discussion for each individual management committee, and Council's agenda are as follows:

Monday, August 10, 2015, 8:30 a.m., Until 5 p.m.

8:30 a.m.–12 noon: Joint Administrative Policy and Budget/Personnel Committees

- Discuss Combining Administrative Policy and Budget/Personnel Committees
- Discuss Historical Performance of Council Scoping Meetings
- Review of Advisory Panel (AP) Staggered Terms
- Discuss Procedures for AP Appointments and Fishing Violations
- Review of Statement Organization Practices and Procedures (SOPPs) Revisions
- Review of Magnuson-Stevens Act (MSA) Reauthorization Bills
- Discuss Recent NOAA Essential Fish Habitat (EFH) 5-year Review Budget Enhancement

—Recess—

1:30 p.m.–3 p.m.: Mackerel Management Committee

- Joint Draft Options Paper for Coastal Migratory Pelagics (CMP) Amendment 26: Modifications to Allocations, Stock Boundaries, and Sale Provisions for Gulf of Mexico and Atlantic Migratory Groups of *King Mackerel.*
- Options Paper for CMP Amendment 28: Separating Permits for Gulf of Mexico and Atlantic Migratory Groups of *King Mackerel* and *Spanish Mackerel.*

3 p.m.–4 p.m.: Shrimp Management Committee

- Draft Options Paper for Shrimp Amendment 17—Addressing the Expiration of the Shrimp Permit Moratorium
- Other Business—Update on Changes in Turtle Excluder Devices (TED) Regulations in Louisiana

4 p.m.–5 p.m.: Data Collection Management Committee

- Review of Public Hearing Draft—Joint Electronic Charter Vessel Reporting Amendment

—Adjourn for the day—

Tuesday, August 11, 2015, 8:30 a.m. Until 5 p.m.

8:30 a.m.–5 p.m.: Reef Fish Management Committee

- Review Public Hearing Draft Amendment 39—Regional Management of Recreational *Red Snapper*
- Updated Options Paper—Framework Action to Set *Gag* Recreational Season and *Gag* and *Black Grouper* Minimum Size Limits
- Final Action—Amendment 28—*Red Snapper* Allocation
- Final Action—Framework Action to Allow NMFS to Withhold a Portion of the Commercial *Red Snapper* Quota in 2016
- Draft Framework Action—Modify Gear Restrictions for *Yellowtail Snapper*
- Options Paper—Amendment 42—Federal Reef Fish Headboat Management
- Options Paper—Amendment 41—Federal Charter-for-Hire *Red Snapper* Management
- Discussion—Ad Hoc Private Recreational Advisory Panel

—Adjourn for the day—

Wednesday, August 12, 2015, 8:30 a.m. Until 11 a.m.: Council Session

- Call to Order, Announcements, and Introductions
- Induction of New Council Members
- Adoption of Agenda, Approval of Minutes, and Review of Exempted Fishing Permits (EFPs) Applications—*Lionfish* Trap Proposal
- Summary of the Council Coordination Committee meeting
- Review of White Paper Evaluating Potential Artificial Reef Siting Criteria in the Gulf of Mexico
- Receive committee report from the Joint Administrative Policy and Budget/Personnel Management Committee

—Recess—

The Council will receive public testimony from 1 p.m.–5:30 p.m.:

- Final Action on Reef Fish Amendment 28—Red Snapper Allocation
- Final Action on *Red Snapper* Commercial Quota Retention for 2016
- Open Testimony on any Other Fishery Issues or Concerns

People wishing to speak before the Council should complete a public comment card prior to the comment period.

—Adjourn for the day—

Thursday, August 13, 2015, 8:30 a.m.–3 p.m.: Council Session

- The Council will receive reports from the Mackerel, Shrimp, Reef Fish, and Data Collection Management Committees
- Vote on Exempted Fishing Permits (EFPs), if any
- Other Business
- Election of Chair and Vice Chair

—Meeting Adjourns—

The timing and order in which agenda items are addressed may change as required to effectively address the issue. The latest version will be posted on the Council's file server, which can be accessed by going to the Council's Web site at *http://www.gulfcouncil.org* and clicking on FTP Server under Quick Links. For meeting materials, select the ''Briefing Books/Briefing Book 2015–08'' folder on Gulf Council file server. The username and password are both ''gulfguest''. The meetings will be webcast over the internet. A link to the webcast will be available on the Council's Web site, *http://www.gulfcouncil.org.*

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES)**, at least 5 working days prior to the meeting.

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

Dated: July 21, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18253 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE049

Fisheries of the South Atlantic; South Atlantic Fishery Management Council (SAFMC); Public Meetings

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

ACTION: The South Atlantic Fishery Management Council (Council) will hold a public scoping meeting for Amendment 37 and Regulatory Amendment 23 to the Fishery Management Plan for the Snapper Grouper Fishery of the South Atlantic Region.

SUMMARY: The Council will hold a scoping meeting via webinar on August 10, 2015 to solicit public input on management actions affecting the snapper grouper fishery.

Snapper Grouper Amendment 37 (Hogfish)

The Florida Fish and Wildlife Conservation Commission completed a stock assessment for hogfish in 2014 with data through 2012 (SEDAR 37 2014). The assessment took into account recent genetic evidence indicating that hogfish in the South Atlantic comprise two distinct stocks: Georgia through North Carolina (GA-NC) and Florida Keys & East Florida (FLK/EFL). Each assessment was then evaluated with regard to fishing level recommendations. The Council's Scientific and Statistical Committee developed catch level recommendations for the GA-NC stock using the Only Reliable Catch Stocks (ORCS) approach, as outlined in Level 4 of the Council's Acceptable Biological Catch (ABC) control rule. This approach is applied when there are not sufficient data on a stock or species to conduct a formal stock assessment. Consequently the approach relies only on landings data. For the FLK/EFL stock, the SSC considered the stock assessment to represent the best available science and recommended it for use in management. The assessment results indicate the FLK/EFL stock is undergoing overfishing and is overfished and, therefore, in need of a rebuilding plan.

Amendment 37 would address specifying the boundary between the FLK/EFL stock, managed by the South Atlantic Council, and the West Florida stock, managed by the Gulf of Mexico Council. This demarcation is necessary to manage the stocks separately and to aid in enforcing regulations. Amendment 37 also includes actions to specify Acceptable Biological Catch (ABC), Annual Catch Limits (ACLs), Annual Catch Targets (ACTs), and Optimum Yield (OY) for both the NC-GA and FLK/EFL stocks, establish a rebuilding plan for the FLK/EFL stock, and implement or modify management measures for both stocks to attain the desired level of harvest.

Snapper Grouper Regulatory Amendment 23 (Golden Tilefish, Black Sea Bass and the Jacks Complex)

Regulatory Amendment would include actions pertaining to management of the commercial golden tilefish fishery, recreational management measures for black sea bass, and commercial management measures for the Jacks Complex. The Council has indicated that the following items should be included in the amendment: (1) Modification to the fishing year start date for the hook-and-line component of the commercial golden tilefish fishery; (2) establishment of a commercial trip limit for the Jacks Complex; and (3) adjustment to the bag limit for black sea bass.

DATES: The scoping webinar will be held on Monday, August 10, 2015, beginning at 6 p.m. Registration is required. Information for registration, along with copies of the Scoping Documents for each amendment will be posted on the Council's Web site at *www.safmc.net* as it becomes available.

ADDRESSES: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Myra Brouwer, Fishery Biologist, SAFMC; phone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *myra.brouwer@safmc.net.*

SUPPLEMENTARY INFORMATION: During the Webinar, Council staff will present an overview of each amendment and answer questions. Written comments may be mailed to Bob Mahood, Executive Director, SAFMC (see **ADDRESSES**); emailed to *Mike.Collins@safmc.net* (please indicate appropriate amendment in subject line); or faxed (see **ADDRESSES**). Comments on Amendment 37 and Regulatory Amendment 23 will be accepted until 5 p.m. on August 17, 2015.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: July 21, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–18265 Filed 7–24–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2015–OS–0070]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Office of the Secretary of Defense proposes to alter a system of records, DWHS E01 DoD, entitled ''DoD Federal Docket Management System (DoD FDMS).'' The purpose of this system of records is to permit the Department of Defense to identify individuals who have submitted comments in response to DoD rule making documents or notices so that communications or other actions, as appropriate and necessary, can be effected, such as a need to seek clarification of the comment, a direct response is warranted, and for such other needs as may be associated with the rule making or notice process.

DATES: Comments will be accepted on or before August 26, 2015. This proposed action will be effective the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.*Follow the instructions for submitting comments.

* *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Service, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy and Civil Liberties Division Web site at *http://dpcld.defense.gov/*.The proposed system report, as required by U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on July 17, 2015, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 21, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DWHS E01 DoD

SYSTEM NAME:

DoD Federal Docket Management System (DoD FDMS) (March 17, 2014, 79 FR 14677)

CHANGES:

Delete entry and replace with ''DCMO 01 DoD''

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Primary: U.S. Environmental Protection Agency, Research Triangle Park, Durham, NC 27711–0001.

SECONDARY LOCATIONS:

Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010.

Washington Headquarters Services, Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Alexandria, VA 22350–3100.

Defense Acquisition Regulation Systems, 241 18th Street, Suite 200A, Arlington, VA 22202–3409.

United States Army Corps of Engineers, 441 G Street, Northwest, 3G81, Washington, DC 20314–1000.

Records also may be located in a designated office of the DoD Component that is the proponent of the rule making or notice. The official mailing address for the Component can be obtained from the DoD FDMS system manager.''

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with ''In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 552a(b)(3) as follows:

CONGRESSIONAL INQUIRIES DISCLOSURE ROUTINE USE:

Disclosure from a system of records maintained by a DoD Component may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

DISCLOSURE TO THE DEPARTMENT OF JUSTICE FOR LITIGATION ROUTINE USE:

A record from a system of records maintained by a DoD Component may be disclosed as a routine use to any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department in pending or potential litigation to which the record is pertinent.

DISCLOSURE OF INFORMATION TO THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION ROUTINE USE:

A record from a system of records maintained by a DoD Component may be disclosed as a routine use to the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

DATA BREACH REMEDIATION PURPOSES ROUTINE USE:

A record from a system of records maintained by a Component may be disclosed to appropriate agencies, entities, and persons when (1) The Component suspects or has confirmed that the security or confidentiality of the information in the system of records has been compromised; (2) the Component has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Component or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Components efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices may apply to this system. A complete list of DoD blanket routine uses can be found online at: *http://dpcld.defense.gov/Privacy/SORNsIndex/BlanketRoutineUses.aspx*.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010.

Requests should contain full name, address, and telephone number.

Note: FDMS permits an individual, as well as a member of the public, to search the public comments received by the name of the individual submitting the comment. Unless the individual submits the comment anonymously, a name search will result in the comment being displayed for view. If the comment is submitted electronically using

the FDMS system, the viewed comment will not include the name of the submitter or any other identifying information about the individual except that which the submitter has opted to include as part of his or her general comments. However, a comment submitted in writing that has been scanned and uploaded into the FDMS system will display the submitter's identifying information that has been included as part of the written correspondence.''

* * * * *

[FR Doc. 2015–18266 Filed 7–24–15; 8:45 am]

BILLING CODE 5001–06–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Notice

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice of public hearing and meeting.

SUMMARY: Pursuant to the provisions of the Government in the Sunshine Act, notice is hereby given of the Defense Nuclear Facilities Safety Board's (Board) public meeting and hearing described below. The Board invites any interested persons or groups to present any comments, technical information, or data concerning safety issues related to the matters to be considered.

DATES: Session I (Hearing): 5:00 p.m.–7:30 p.m., Session II (Meeting): 8:00 p.m.–9:30 p.m., August 26, 2015.

ADDRESSES: Three Rivers Convention Center, 7016 West Grandbridge Boulevard, Kennewick, Washington 99352.

Status: Open. The Board has determined that an open meeting furthers the public interest underlying both the Government in the Sunshine Act and the Board's enabling legislation. The proceeding is being noticed as both a meeting under the Government in the Sunshine Act and a hearing under the Board's enabling legislation. At the conclusion of Session II, the Board is expected to deliberate and then potentially vote on a staff proposal. Deliberations and voting will proceed in accordance with the Board's operating procedures concerning the conduct of meetings.

Matters To Be Considered: In the Session I hearing, the Board will receive testimony from senior officials from the Department of Energy (DOE) Headquarters, from the Manager for DOE's Office of River Protection (ORP), and from the Federal Project Director for the Waste Treatment and Immobilization Plant (WTP) regarding the current status of DOE efforts to improve safety culture at WTP. The Board will consider several topics related to safety culture. DOE's Office of Independent Enterprise Assessment will be given the opportunity to discuss the concerns identified in the WTP independent safety culture assessments. DOE's Office of Environmental Management and ORP are expected to discuss actions to strengthen and sustain a healthy safety culture at WTP. Testimony will also address actions taken by DOE to assess the effectiveness of their improvements in safety culture and the tools being used to track future progress. After a brief recess, the Board will convene the Session II meeting. The Board will receive testimony from a senior Board technical staff employee concerning DOE's efforts to improve safety culture at WTP and a staff proposal for possible approaches to closing Recommendation 2011–1, Safety Culture at the Waste Treatment and Immobilization Plant. The Board is then expected to conduct deliberations concerning the staff's proposal.

FOR FURTHER INFORMATION CONTACT: Mark Welch, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

SUPPLEMENTARY INFORMATION: Public participation in the hearing and meeting is invited. The Board is setting aside time in each Session for presentations and comments from the public. Requests to speak may be submitted in writing or by telephone. The Board asks that commenters describe the nature and scope of their oral presentations. Those who contact the Board prior to close of business on August 21, 2015, will be scheduled to speak at the Session most relevant to their presentations. At the beginning of Session I, the Board will post a schedule for speakers at the entrance to the hearing room. Anyone who wishes to comment or provide technical information or data may do so in writing, either in lieu of, or in addition to, making an oral presentation. The Board Members may question presenters to the extent deemed appropriate. Documents will be accepted at the hearing or may be sent to the Board's Washington, DC office. The Board will hold the hearing record open until September 26, 2015, for the receipt of additional materials. The meeting record will close when the meeting adjourns. The hearing and meeting will be presented live through Internet video streaming. A link to the presentation will be available on the Board's Web site (*www.dnfsb.gov*). A transcript of the hearing and meeting, along with a DVD video recording, will be made available by the Board for inspection and viewing by the public at the Board's Washington office and at DOE's public reading room at the DOE Federal Building, 1000 Independence Avenue SW., Washington, DC 20585. The Board specifically reserves its right to further schedule and otherwise regulate the course of the hearing and meeting, to recess, reconvene, postpone, or adjourn the hearing and meeting, conduct further reviews, and otherwise exercise its power under the Atomic Energy Act of 1954, as amended.

Dated: July 22, 2015.

Jessie H. Roberson,

Vice Chairman.

[FR Doc. 2015–18405 Filed 7–23–15; 11:15 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2015–OESE–0047]

Final Waiver and Extension of the Project Period; Territories and Freely Associated States Education Grant Program

[Catalog of Federal Domestic Assistance (CFDA) Number: 84.256A.]

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final waiver and extension of the project period.

SUMMARY: For the 36-month projects funded in fiscal year (FY) 2012 under the Territories and Freely Associated States Education Grant (T&FASEG) program, the Secretary waives the requirement that prohibits the extension of project periods involving the obligation of additional Federal funds. The Secretary also extends the project period of these grants for up to an additional 24 months. The waiver and extension enables the five current T&FASEG grantees to continue to receive Federal funding annually for project periods through FY 2016 and possibly through FY 2017. In addition, during this period, the Pacific Regional Educational Laboratory (Pacific REL) will continue to receive funds set aside for technical assistance under the T&FASEG program. Further, the waiver and extension mean that we will not announce a new competition or make new awards in FY 2015.

DATES: The waiver and extension of the project period are effective July 27, 2015.

FOR FURTHER INFORMATION CONTACT: Collette Fisher. Telephone: (202) 401–0039 or by email at: *collette.fisher@ed.gov.*

If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On April 23, 2015, we published a notice in the **Federal Register** (80 FR 22729) proposing an extension of the project period for up to an additional 24 months and a waiver of the requirement in 34 CFR 75.261(c)(2) that prohibits the extension of project periods involving the obligation of additional Federal funds in order to—

(1) Enable the five current T&FASEG grantees to continue to receive Federal funding annually for project periods through FY 2016 and possibly through FY 2017; and

(2) Allow the Pacific REL to continue to receive funds set aside for technical assistance under the T&FASEG program.

There are no substantive differences between the proposed waiver and extension and the final waiver and extension.

Public Comment

In response to our invitation in the notice of proposed waiver and extension of the project period, we received two comments.

Analysis of Comments and Changes: An analysis of the comments received in response to the proposed waiver and extension of the project period follows.

Comments: The comments expressed support for the proposed waiver and extension of the project period. The commenters supported a continuation of service that allows for sustaining the work of the grant projects and building upon current services that have improved schools and local educational agency (LEA) infrastructure.

Discussion: We appreciate the commenters' support and note the importance of the assistance provided by the T&FASEG program to the five current grantees in the U.S. Territories and the Republic of Palau for teacher training, curriculum development, and general school improvement and reform. We agree that it would be more effective to maintain the continuity of current projects without disruption than to hold a new competition at this time.

Changes: None.

Background

The T&FASEG program is authorized under section 1121(b) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). Under this program, the Secretary is authorized to award grants, on a competitive basis, to LEAs in the U.S. Territories—American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands—and one eligible Freely Associated State, the Republic of Palau. Through these grants, the T&FASEG program supports projects to raise student achievement through direct educational services.

T&FASEG program grant funds may be used for activities authorized under the ESEA, including teacher training, curriculum development, development or acquisition of instructional materials, and general school improvement and reform. More specifically, under the T&FASEG program, grant funds may be used to—

(a) Conduct activities consistent with the programs described in the ESEA, including the types of activities authorized under—

(1) Title I—Improving the Academic Achievement of the Disadvantaged;

(2) Title II—Preparing, Training, and Recruiting Highly-Quality Teachers and Principals;

(3) Title III—Language Instruction for Limited English Proficient and Immigrant Students;

(4) Title IV—21st Century Schools; and

(5) Title V—Promoting Informed Parental Choice and Innovative Programs; and

(b) Provide direct educational services that assist all students with meeting challenging State academic content standards.

In addition, section 1121(b)(3)(d) of the ESEA authorizes the Secretary to provide up to five percent of the amount reserved for T&FASEG program grants to pay the administrative costs of the Pacific REL, which provides technical assistance to grant recipients regarding the administration and implementation of their projects.

On April 30, 2012, we published in the **Federal Register** (77 FR 25452) a notice inviting applications for new awards under the FY 2012 T&FASEG program competition (2012 Notice Inviting Applications).

In FY 2012, the Department made three-year awards to five T&FASEG projects. The project period for these T&FASEG program grants is currently scheduled to end on September 30, 2015.

We have concluded that it is not in the public interest to incur a disruption in the services associated with holding a new T&FASEG competition in FY 2015. Rather, it will be more effective to maintain the continuity of current projects by allowing grantees the opportunity to continue to provide high-quality direct educational services in support of the Secretary's priorities to students and teachers in the U.S. Territories and the Republic of Palau without interruption. Consistent with the scope, goals, and objectives of the current projects, grantees will continue to support initiatives on standards and assessments, effective teachers and leaders, and projects that are designed to improve student achievement or teacher effectiveness through the use of high-quality digital tools or materials. Such initiatives and projects include preparing teachers to use technology to improve instruction, as well as developing, implementing, and evaluating digital tools and materials. Moreover, we believe that a longer project period will better enable grantees to carry out project objectives and anticipate providing for longer project periods in future competitions. Additionally, given that all eligible applicants currently receive grant awards under the T&FASEG program, this waiver and extension will have limited impact on those entities.

For these reasons, for the five current T&FASEG grant recipients, the Secretary waives the requirement in 34 CFR 75.261(c)(2), which prohibits the extension of project periods involving the obligation of additional Federal funds, and extends the project period for these grant recipients for up to 24 months. This will allow the grantees to continue to receive Federal funding annually for project periods through FY 2016 and possibly FY 2017.

We will fund the extended project period by using funds Congress appropriates under the current statutory authority, including FY 2014 funds available for awards made in FY 2015 and, if the grants are extended for two years, FY 2015 funds available for awards made in FY 2016.

Under this waiver and extension of the project period—

(1) Current grantees will be authorized to receive T&FASEG continuation awards annually for up to two years through FY 2017;

(2) We will not announce a new T&FASEG competition or make new T&FASEG grant awards in FY 2015;

(3) During the extension period, any activities carried out would be consistent with, or a logical extension of, the scope, goals, and objectives of each grantee's approved application from the 2012 T&FASEG program competition;

(4) The requirements established in the program regulations and the 2012 Notice Inviting Applications will continue to apply to each grantee that receives a continuation award; and

(5) All requirements applicable to continuation awards for current T&FASEG grantees and the requirements in 34 CFR 75.253 will apply to any continuation awards received by current T&FASEG grantees.

We will make decisions regarding annual continuation awards based on grantee performance as demonstrated through program narratives, budgets and budget narratives, and performance reports, and based on the regulations in 34 CFR 75.253. We intend to award continuation grants based on information provided to us annually by each grantee, indicating that it is making substantial progress performing its T&FASEG program activities based on substantial performance and progress.

Regulatory Flexibility Act Certification

The Secretary certifies that the waiver and extension and the activities required to support additional years of funding will not have a significant economic impact on a substantial number of small entities. The only entities that will be affected by this waiver and extension are the five current T&FASEG program grantees receiving Federal funds. There are no other potential applicants.

The Secretary certifies that this waiver and extension will not have a significant economic impact on these entities because the extension of an existing project imposes minimal compliance costs, and the activities required to support the additional years of funding will not impose additional regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

This waiver and extension does not contain any information collection requirements.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance. This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Delegation of Authority: The Secretary of Education has delegated authority to Ann Whalen, Senior Advisor to the Secretary, to perform the functions and duties of the Assistant Secretary for the Office of Elementary and Secondary Education.

Program Authority: 20 U.S.C. 6331.

Dated: July 22, 2015.

Ann Whalen,

Senior Advisor to the Secretary.

[FR Doc. 2015–18414 Filed 7–24–15; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 803–106]

Pacific Gas and Electric Company; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Application for Temporary Variance of Minimum Flow Requirements.

b. *Project No.:* 803–106.

c. *Date Filed:* June 25, 2015.

d. *Applicant:* Pacific Gas and Electric Company (licensee).

e. *Name of Project:* DeSabla-Centerville Project.

f. *Location:* Butte Creek, West Branch Feather River, and tributaries in Butte County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Matthew Joseph, License Coordinator, Pacific Gas and Electric Company, Mail Code: N13E, P.O. Box 770000, San Francisco, CA 94177, Phone: (415) 973–8616.

i. *FERC Contact:* Mr. John Aedo, (415) 369–3335, or *john.aedo@ferc.gov.*

j. Deadline for filing comments, motions to intervene, protests, and recommendations is 15 days from the issuance date of this notice by the Commission (August 5, 2015). The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, or recommendations using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project numbers (P–803–106) on any comments, motions to intervene, protests, or recommendations filed.

k. *Description of Request:* The licensee requests a temporary variance of the minimum flow requirements in the West Branch Feather River below Hendricks Head Dam (gage BW40) and in Butte Creek below Butte Head Dam (gage BW98). The licensee requests that the instantaneous dry year minimum flow requirement of 7 cubic feet per second (cfs) at both locations be temporarily modified to a 7 cfs, 48-hour average minimum flow. The licensee states that the temporary variance would eliminate the need to release additional buffer flows of 4 to 5 cfs and instead, allocate those flows to the lower reaches of Butte Creek, where spring-run Chinook salmon are currently holding. The licensee requests the variance until the natural resource agencies determine that it is no longer necessary to support the spring-run Chinook salmon.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number

excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents: Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of proposed action. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: July 21, 2015.

Kimberly D. Bose,

Secretary.

[FR Doc. 2015–18300 Filed 7–24–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP15–527–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Application

Take notice that on July 8, 2015, Transcontinental Gas Pipe Line Company, LLC (Transco), filed in Docket No. CP15–527–000 an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) requesting authorization to construct and operate its New York Bay Expansion Project. Transco proposes to: (i) Add a total of 15,740 horsepower at three existing compressor stations in Middlesex and Essex Counties, New Jersey and Chester County, Pennsylvania; (ii) modify three meter and regulating stations in Middlesex County, New Jersey, Richmond County, New York, and Chester County, Pennsylvania; (iii) replace approximately 0.25 miles of pipe in Middlesex County, New Jersey; and (iv) install related appurtenances. The project is designed to deliver 115,000 dekatherms per day of firm transportation capacity to Brooklyn Union Gas Company, d/b/a National Grid NY in New York City. Transco estimates the cost of the project to be approximately $112 million, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning these applications may be directed to Marg Camardello, Regulatory Analyst, Lead, Transcontinental Gas Pipe Line Company, LLC, P.O. Box 1396, Houston, Texas 77251–1396, by telephone at (713) 215–3380.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project

provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on July August 11, 2015.

Dated: July 21, 2015.

Kimberly D. Bose,

Secretary.

[FR Doc. 2015–18297 Filed 7–24–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Pick-Sloan Missouri Basin Program—Eastern Division—Rate Order No. WAPA–170

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Final Transmission and Ancillary Services Formula Rates.

SUMMARY: The Deputy Secretary of Energy confirmed and approved Rate Order No. WAPA–170 and Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7. Through this notice, the Western Area Power Administration (Western), places formula transmission and ancillary services rates for Western's Pick-Sloan Missouri Basin Program—Eastern Division (P–SMBP—ED) into effect on an interim basis. The provisional rates will be in effect until the Federal Energy Regulatory Commission (FERC) confirms, approves, and places them into effect on a final basis, or until they are superseded. The provisional formula rates will provide sufficient revenue to pay all associated annual costs, including interest expense, and repay required investment within the allowable periods.

DATES: Formula rates for Transmission and Ancillary Services under Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7 are effective on the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-Upper Great Plains Region (Western-UGP) transmission facilities to Southwest Power Pool, Inc. (SPP) and will remain in effect until September 30, 2020, pending approval by FERC on a final basis or until superseded. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Lloyd Linke, Operations Manager, Upper Great Plains Region, Western Area Power Administration, 1330 41st Street, Watertown, SD 57201; telephone: (605) 882–7500; email: *Lloyd@wapa.gov;* or Ms. Linda Cady-Hoffman, Rates Manager, Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266; telephone: (406) 255–2920; email: *cady@wapa.gov.*

SUPPLEMENTARY INFORMATION: Western published a **Federal Register** Notice on November 3, 2014, (79 FR 65205) announcing the proposed formula rates for transmission service, initiating a public consultation and comment period, and setting forth the dates and locations of public information and public comment forums. Western held a public information forum in Omaha, Nebraska on November 19, 2014, and a public information forum in Fargo, North Dakota, on November 20, 2014. Western explained the proposed formula rates, answered questions, and provided Rate Brochures and presentation handouts. Western held a public comment forum in Omaha, Nebraska, on December 17, 2014, and a public comment forum in Fargo, North Dakota, on December 18, 2014. These forums provided the public with opportunity to comment for the record.

On December 19, 2014, Western notified all P–SMBP—ED customers and interested parties of an updated Rate Brochure that was available on the Web site at *www.wapa.gov/ugp/rates/default.htm.* This Web site also contained information about this formula rate adjustment process.

Western followed the Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions, 10 CFR part 903, as described above, in developing these formula rates. No individuals commented at either of the public comment forums, and Western received no comments during the consultation and comment period.

Western-UGP has signed a Membership Agreement with SPP. Upon achieving final FERC approval of membership within SPP, Western will transfer functional control of Western-UGP's P–SMBP—ED eligible transmission facilities located in the Upper Missouri Zone (UMZ or Zone 19) to SPP. Western-UGP will then merge its Western Area Power Administration, Upper Great Plains East Balancing Authority Area (WAUE) in the Eastern Interconnection into SPP's Balancing Authority Area and place its transmission system located in the Eastern Interconnection into SPP's Integrated Marketplace. Western-UGP will retain operation of its Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW) in the Western Interconnection as the Balancing Authority, and will not place its transmission system located in the Western Interconnection into SPP's Integrated Marketplace. Even though SPP's Integrated Marketplace will not extend into the Western Interconnection, Western-UGP's eligible transmission facilities in the Western Interconnection will be included under SPP's Tariff to allow SPP to provide transmission service over all of Western-UGP's eligible transmission facilities in the UMZ regardless of whether they are located in the Eastern or Western Interconnection. The UMZ is a single SPP rate zone that includes Western-UGP's transmission facilities located in the Eastern and Western Interconnections. Therefore, one formula rate schedule WAUGP–ATRR will calculate the Annual Transmission Revenue Requirement (ATRR) for all of Western-UGP's eligible transmission facilities that are transferred to the functional control of SPP and used by SPP to provide transmission service under the SPP Tariff. For 2015, the Western-UGP estimated ATRR is $123,816,622 based on facilities that Western-UGP has proposed to be included per Attachment AI of SPP's

Tariff and feedback from SPP regarding Attachment AI qualifying criteria. The list of Western-UGP facilities proposed for inclusion is available on the Web site at *www.wapa.gov/ugp/rates/default.htm.*

Western-UGP has also developed a formula rate schedule WAUGP–AS1 for Scheduling, System Control, and Dispatch Service (SSCD), which will include Western-UGP's costs associated with providing this service in the UMZ, and formula rate schedules to calculate charges for ancillary services associated with WAUW. These ancillary services formula rate schedules are necessary because the Western-UGP transmission facilities in WAUW are not included within SPP's Integrated Marketplace, and SPP's standard market-based ancillary services will not be available. As a result, when SPP provides transmission service in the WAUW, the associated ancillary services will need to be provided by Western-UGP as the Balancing Authority, if it is capable of doing so. These ancillary service formula rate schedules include WAUW–AS3 for Regulation and Frequency Response Service, WAUW–AS4 for Energy Imbalance Service, WAUW–AS5 for Operating Reserve—Spinning Reserve Service, WAUW–AS6 for Operating Reserve—Supplemental Reserve Service and WAUW–AS7 for Generator Imbalance Service.

The provisional transmission and ancillary service rate schedules contain formula-based rates that will be recalculated annually and submitted to SPP to provide and bill for services under the SPP Tariff. The formulas in these rate schedules use estimates for the upcoming year to calculate revenue requirements and have a true-up to actual costs in a subsequent year.

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to FERC. Existing Department of Energy procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Under Delegation Order Nos. 00–037.00A and 00–001.00E, and in compliance with 10 CFR part 903 and 18 CFR part 300, I hereby confirm, approve, and place Rate Order No. WAPA–170 and the proposed formula rates for transmission and ancillary services into effect on an interim basis. The new Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7 will be submitted promptly to FERC for confirmation and approval on a final basis.

Dated: July 17, 2015.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

DEPARTMENT OF ENERGY

DEPUTY SECRETARY

In the matter of: *Western Area Power Administration, Rate Adjustment for the Pick-Sloan, Missouri Basin Program—Eastern Division*

Rate Order No. WAPA–170

ORDER CONFIRMING, APPROVING, AND PLACING THE PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION TRANSMISSION AND ANCILLARY SERVICES FORMULA RATES INTO EFFECT ON AN INTERIM BASIS

These transmission and ancillary services formula rates are established in accordance with section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152). This Act transferred to and vested in the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)), and other Acts that specifically apply to the project involved.

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) the authority to develop power and transmission rates to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to the Federal Energy Regulatory Commission (FERC). Existing DOE procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Acronyms and Definitions

As used in this Rate Order, the following acronyms and definitions apply:

$/MW-year: Annual charge for capacity (*i.e.*, $ per megawatt (MW) per year).

A&GE: Administrative and General Expense.

ATRR: Annual Transmission Revenue Requirement.

Balancing Authority (BA): The responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a designated area, and supports interconnection frequency in real-time.

Balancing Authority Area: An electric system or systems, bounded by interconnection metering and telemetry, capable of controlling generation to maintain its interchange schedule with other Balancing Authorities and contributing to frequency regulation of the Interconnection.

Basin Electric: Basin Electric Power Cooperative.

Capacity: The electric capability of a generator, transformer, transmission circuit, or other equipment, expressed in kilowatts (kW).

Corps: U.S. Army Corps of Engineers.

DOE: United States Department of Energy.

Eastern Interconnection: A major alternating-current electrical grid in North America. The Eastern Interconnection reaches from Central Canada eastward to the Atlantic coast (excluding Quebec), south to Florida, and back west to the foot of the Rockies (excluding most of Texas).

Energy: Power produced or delivered over a period of time. Measured in terms of the work capacity over a period of time. It is expressed in kilowatt hours.

Energy Imbalance Service: A service that provides energy correction for any hourly mismatch between a Southwest Power Pool Transmission Customer's energy supply and the demand served.

FERC: Federal Energy Regulatory Commission.

FRN: **Federal Register** notice.

Generator Imbalance Service: A service that provides energy correction for any hourly mismatch between generator output and a delivery schedule from that generator to another Balancing Authority Area or to a load within the same Balancing Authority Area.

Heartland: Heartland Consumers Power District.

Integrated System (IS): Transmission system combining assets of Western-UGP, Basin Electric, and Heartland prior to Western-UGP's integration into SPP.

Intermittent Resource: An electric generator that is not dispatchable and cannot store its fuel source and, therefore, cannot respond to changes in demand or respond to transmission security restraints.

Kilowatt (kW): Electrical unit of capacity that equals 1,000 watts.

Kilowatt hour (kWh): Electrical unit of energy that equals 1,000 watts in 1 hour.

Load: The amount of electric power or energy delivered or required at any specified point(s) on a system.

Megawatt (MW): The electrical unit of capacity that equals 1 million watts or 1,000 kilowatts.

NEPA: National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347).

Open Access Same-Time Information System (OASIS): An electronic posting system that

a service provider maintains for transmission access data that allows all customers to view information simultaneously.

O&M: Operation and Maintenance.

P–SMBP: Pick-Sloan Missouri Basin Program.

P–SMBP ED: Pick-Sloan Missouri Basin Program—Eastern Division.

Provisional Rate: A rate that has been confirmed, approved, and placed into effect on an interim basis by the Deputy Secretary of Energy.

Rate Brochure: A document prepared for public distribution explaining the rationale and background for the rate proposal contained in this rate order.

Regulation and Frequency Response Service: A service that provides for following the moment-to-moment variations in the demand or supply in a Balancing Authority Area and maintaining scheduled interconnection frequency.

Reserve Services: Spinning Reserve Service and Supplemental Reserve Service.

Revenue Requirement: The revenue required to recover annual expenses (such as O&M, purchase power, transmission service expenses, interest expense, and deferred expenses) and repay Federal investments, and other assigned costs.

Schedule: An agreed-upon transaction size (megawatts), beginning and ending ramp times and rate, and type of service required for delivery and receipt of power between the contracting parties and the Balancing Authority(ies) involved in the transaction.

Scheduling, System Control and Dispatch Service: A service that provides for (a) scheduling, (b) confirming and implementing an interchange schedule with other balancing authorities, including intermediary balancing authorities providing transmission service, and (c) ensuring operational security during the interchange transaction.

Southwest Power Pool, Inc. (SPP): A Regional Transmission Organization.

SPP's Integrated Marketplace (Integrated Marketplace): The SPP Energy and Operating Reserve Markets and the Transmission Congestion Rights Markets.

Spinning Reserve Service: Generation capacity needed to serve load immediately in the event of a system contingency. Spinning Reserve Service may be provided by generating units that are on-line and loaded at less than maximum output.

Supplemental Reserve Service: Generation capacity needed to serve load in the event of a system contingency; however, it is not available immediately to serve load but rather within a short period of time. Supplemental Reserve Service may be provided by generation units that are on-line but unloaded, by quick start generation or by interruptible load.

System: An interconnected combination of generation, transmission and/or distribution components comprising an electric utility, independent power producer(s) (IPP), or group of utilities and IPP(s).

SPP Tariff: Southwest Power Pool, Open Access Transmission Tariff, approved by FERC.

SPP Transmission Customer: Any eligible customer (or its designated agent) that receives transmission service under the SPP Tariff.

Transmission Provider: Any utility that owns, operates, or controls facilities used to transmit electric energy in interstate commerce. SPP is the Transmission Provider under the SPP Tariff.

Transmission System: The facilities owned, controlled, or operated by the transmission owner or Transmission Provider that are used by the Transmission Provider to provide transmission service.

Upper Missouri Zone (UMZ): Multi-owner zone in SPP in which Western-UGP will participate as a Transmission Owner; also defined as Zone 19 under the SPP Tariff. The UMZ includes transmission facilities located in both the Eastern and Western Interconnections.

WAUE: Western Area Power Administration, Upper Great Plains East Balancing Authority Area. WAUE is located in the Eastern Interconnection, and will cease to exist when it is merged into the SPP Balancing Authority Area.

WAUW: Western Area Power Administration, Upper Great Plains West Balancing Authority Area. WAUW is located in the Western Interconnection.

Watertown Operations Office: Western Area Power Administration, Upper Great Plains Region, Operations Office, 1330 41st Street SE., Watertown, South Dakota.

Western: United States Department of Energy, Western Area Power Administration.

Western Interconnection: A major alternating current power grid in North America. The Western Interconnection stretches from Western Canada south to Baja California in Mexico, reaching eastward over the Rockies to the Great Plains. Western Interconnection is comprised of the states of Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, Colorado, Wyoming, portions of Montana, South Dakota, Nebraska, New Mexico and Texas in the United States, the Provinces of British Columbia and Alberta in Canada, and a portion of the Comisión Federal de Electricidad's system in Baja California in Mexico.

Western-UGP: United States Department of Energy, Western Area Power Administration, Upper Great Plains Region. Western-UGP is the definition for Western's Upper Great Plains Region in the SPP Tariff.

Effective Date

Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6, and WAUW–AS7 are effective on the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and will remain in effect until September 30, 2020, pending approval by FERC on a final basis or until superseded. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

Public Notice and Comment

Western followed the Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions, 10 CFR part 903, in developing these formula rates. The steps Western took to involve interested parties in the rate process were:

1. A FRN was published on November 3, 2014, (79 FR 65205) announcing the proposed rates for transmission service, initiating a public consultation and comment period, and setting forth the dates and locations of public information and public comment forums.

2. On November 3, 2014, Western notified all P–SMBP—ED customers and interested parties of the proposed rates and provided a copy of the published FRN.

3. On November 19, 2014, Western held a public information forum in Omaha, Nebraska; and on November 20, 2014, Western held a public information forum in Fargo, North Dakota. Western explained the proposed rates, answered questions, and provided Rate Brochures and presentation handouts.

4. On December 17, 2014, Western held a public comment forum in Omaha, Nebraska; and on December 18, 2014, Western held a public comment forum in Fargo, North Dakota. This provided the public with opportunity to comment for the record. No individuals commented at either of these forums.

5. On December 19, 2014, Western notified all P–SMBP—ED customers and interested parties of an updated Rate Brochure that was available on the Web site at *www.wapa.gov/ugp/rates/default.htm.*

6. Western did not receive any oral or written comments during the consultation and comment period.

7. Western provided a Web site for information about this rate adjustment process. The Web site is located at *www.wapa.gov/ugp/rates/default.htm.*

Comments

No oral or written comments were received during the consultation and comment period.

Project Description

The initial stages of the Missouri River Basin Project were authorized by section 9 of the Flood Control Act of 1944 (58 Stat. 887, 890, Pub. L. 78–534). It was later renamed the P–SMBP. The P–SMBP is a comprehensive program with the following authorized functions: Flood control, navigation improvement, irrigation, municipal and industrial water development, and hydroelectric production for the entire Missouri River

Basin. Multipurpose projects have been developed on the Missouri River and its tributaries in Colorado, Montana, Nebraska, North Dakota, South Dakota, and Wyoming.

Western-UGP markets significant quantities of Federally-generated hydroelectric power from the P–SMBP—ED. This power is generated by eight power plants located in Montana, North Dakota, and South Dakota. Western-UGP owns and operates from its Watertown Operations Office an extensive system of high-voltage transmission facilities that Western-UGP uses to market approximately 2,400 MW of capacity from Federal projects within the Missouri River Basin to customers located within the P–SMBP—ED. This marketing area includes Montana, east of the Continental Divide, all of North and South Dakota, eastern Nebraska, western Iowa, and western Minnesota.

Historically, the Western-UGP transmission facilities in the P–SMBP—ED have been integrated with transmission facilities of Basin Electric and Heartland to provide transmission services over the IS. The IS included approximately 9,848 miles of transmission lines, with transmission and ancillary services provided under Western's Open Access Transmission Tariff, and Western-UGP serving as the IS administrator. The IS included transmission facilities located in both the Eastern and Western Interconnections separated by the Miles City direct current (DC) tie and the Fort Peck Power Plant substation. Western-UGP also has operated two Balancing Authority Areas within the IS—WAUW and WAUE—that were also separated by the Miles City DC tie and the Fort Peck Power Plant substation. Western-UGP's historic rate schedules for the IS consisted of separate rates for firm and non-firm transmission service and ancillary services rates for the transmission facilities in the P–SMBP—ED.

On November 1, 2013, Western published a Notice of Recommendation to Pursue Regional Transmission Organization Membership (78 FR 65641). Subsequently, Western-UGP has signed a Membership Agreement with SPP. Upon achieving final FERC approval of membership within SPP, Western-UGP will transfer functional control of all eligible Western-UGP P–SMBP—ED facilities in the Eastern and Western Interconnections, which include nearly 100 substations and 7,800 miles of transmission lines, to SPP. Subsequently, P–SMBP—ED transmission and ancillary services will no longer be available on the IS under Western's Open Access Transmission Tariff, but instead will be available from SPP as the Transmission Provider under SPP's Tariff.

P–SMBP—ED Transmission and Ancillary Services Rate Study

Existing IS Rate Schedules UGP–NT1, UGP–FPT1, UGP–NFPT1, UGP–AS1, UGP–AS2, UGP–AS3, UGP–AS4, UGP–AS5, UGP–AS6, UGP–AS7, and UGP–TSP1 were approved under Rate Order Nos. WAPA–144 and WAPA–148 for a 5-year period beginning on January 1, 2010, and ending December 31, 2014. These rates were extended through December 31, 2016, under Rate Order No. WAPA–168. When Western-UGP transfers functional control of its eligible P–SMBP—ED facilities to SPP, the existing Rate Schedules UGP–NT1, UGP–FPT1, UGP–NFPT1, UGP–AS1, UGP–AS2, UGP–AS3, UGP–AS4, UGP–AS5, UGP–AS6, UGP–AS7, and UGP–TSP1 will not be applicable.

When Western-UGP transfers functional control of P–SMBP—ED eligible transmission facilities located in the Upper Missouri Zone (UMZ or Zone 19) to SPP, Western-UGP will merge its WAUE in the Eastern Interconnection into SPP's Balancing Authority Area and place its transmission system located in the Eastern Interconnection into SPP's Integrated Marketplace. Western-UGP will retain operation of its WAUW in the Western Interconnection as the Balancing Authority, and will not place its transmission system located in the Western Interconnection into SPP's Integrated Marketplace. Even though SPP's Integrated Marketplace will not extend into the Western Interconnection, Western-UGP's eligible transmission facilities in the Western Interconnection will be included under SPP's Tariff to allow SPP to provide transmission service over all of Western-UGP's eligible transmission facilities in the UMZ regardless of whether they are located in the Eastern or Western Interconnection. The UMZ is a single SPP rate zone that includes Western-UGP's transmission facilities located in the Eastern and Western Interconnections. Therefore, one formula rate schedule, WAUGP–ATRR, will calculate the Annual Transmission Revenue Requirement (ATRR) for all of Western-UGP's eligible transmission facilities that are transferred to the functional control of SPP and used by SPP to calculate charges for transmission service under the SPP Tariff. Western-UGP will utilize a formula template to calculate its ATRR.

Western-UGP has also developed formula rate schedule WAUGP–AS1 for Scheduling, System Control, and Dispatch Service (SSCD), which will include Western-UGP's costs associated with providing this service in the UMZ, and formula rate schedules to calculate charges for ancillary services associated with its WAUW. These ancillary services formula rate schedules are necessary because the Western-UGP transmission facilities in its WAUW are not included within SPP's Integrated Marketplace, and SPP's standard market-based ancillary services will not be available. Therefore, when SPP provides transmission service in the WAUW, the associated ancillary services will need to be provided by Western-UGP as the Balancing Authority. These ancillary service formula rate schedules include WAUW–AS3 for Regulation and Frequency Response Service, WAUW–AS4 for Energy Imbalance Service, WAUW–AS5 for Operating Reserve—Spinning Reserve Service, WAUW–AS6 for Operating Reserve—Supplemental Reserve Service and WAUW–AS7 for Generator Imbalance Service.

The provisional formula rates for use under SPP's Tariff include Transmission and Ancillary Service Rates as described in Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6, and WAUW–AS7. These rates will be submitted to SPP as the Transmission Provider in order for SPP to bill SPP Transmission Customers for transmission and ancillary services that SPP provides over Western-UGP's transmission facilities under the SPP Tariff. The costs under the formulas in these rate schedules will be recalculated annually and those utilizing estimates for the upcoming year to calculate revenue requirements will include a true-up to actual costs in a subsequent year. The annual revenue requirements include O&M expenses, A&GE, interest expense, and depreciation expense and are offset by appropriate estimated revenue credits. Annual audited financial data will be used to true-up the cost estimates and credit estimates used to project these forward-looking rates to the actual expenses and credits. Western-UGP will true-up the estimates it used in the calculation of its calendar year 2013, 2014, and 2015 IS rate charges that were in place prior to joining SPP when calculating these true-up rates. This IS true-up will only include Western-UGP's portion of the IS revenue requirement, and these provisional formula rates for use under the SPP Tariff will only include Western-UGP's IS true-up, if applicable. The IS true-up, if any, associated with the other IS owners' portion of the IS revenue requirement is outside the

scope of this rate process, and would be addressed by other IS owners.

Western prepared Transmission and Ancillary Services rates studies to ensure that the formula rates are based on the cost of service of the Western-UGP eligible transmission facilities that will be transferred to the functional control of SPP and the associated operation of the WAUW. These studies included all applicable expenses and associated offsetting revenues.

Provisional Rates

The revenue requirements for 2015 for the individual services are outlined in the following table.

PROVISIONAL WESTERN-UGP TRANSMISSION AND ANCILLARY SERVICES FORMULA RATES

Service	Rate schedule No.	Provisional 2015 annual revenue requirement [1]
Transmission	WAUGP–ATRR	[2] $123,816,622
Scheduling, System Control, and Dispatch	WAUGP–AS1	[2] 11,384,293
Regulation and Frequency Response	WAUW–AS3	294,308
Operating Reserves—Spinning and Supplemental Reserves.	WAUW–AS5 and WAUW–AS6	232,291
Energy Imbalance	WAUW–AS4	N/A
Generator Imbalance	WAUW–AS7	N/A

[1] The new provisional formula rates and rate schedules will take effect on the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP.

[2] ATRR estimate based upon facilities that Western-UGP has proposed to be included per Attachment AI of SPP's Tariff and feedback from SPP regarding Attachment AI qualifying criteria. The list of Western-UGP facilities proposed for inclusion is available on the Web site at *www.wapa.gov/ugp/rates/default.htm.*

Certification of Rates

Western's Administrator certified that the provisional formula rates for Transmission and Ancillary Services are the lowest possible rates consistent with sound business principles. The provisional formula rates were developed following administrative policies and applicable laws.

Transmission Rate Discussion

Formula Rate for Transmission Service

Western-UGP will recover its transmission system related expenses and investments on a forward-looking basis by using projections to estimate transmission costs for the upcoming year, with a true-up in a subsequent year. For transmission service provided by SPP as the Transmission Provider under SPP's Tariff, Western-UGP will provide its ATRR to SPP for determination of charges. SPP will use zonal and regional load and other applicable information, including additional annual transmission revenue requirements from other transmission owners with transmission facilities in the multi-owner UMZ to determine the applicable charges for SPP transmission service in the UMZ. The ATRR is derived by annualizing Western-UGP's transmission investment and adding transmission-related annual costs, which consist of O&M, interest expense, and depreciation. Western-UGP cost data will be submitted to SPP in standard revenue requirement templates. The annual costs are reduced by revenue credits received by Western-UGP under the SPP Tariff.

Data used in the annual recalculation of the costs under the formula for WAUGP–ATRR effective on January 1 each year will be made available to SPP and interested parties for review and comment on or shortly after September 1 each preceding year. Data used and the revenue requirement resulting from using these formulas will be posted on the applicable SPP Web site and/or SPP OASIS. Western-UGP will provide interested parties the opportunity to discuss and comment on the recalculated WAUGP–ATRR on or before October 31, 2015, and October 31 of subsequent years. This procedure will ensure that interested parties are aware of the data used to calculate the WAUGP–ATRR. This will also provide interested parties the opportunity to comment before the costs are collected through the formula rate.

Formula Rate for Scheduling, System Control, and Dispatch Service

Western-UGP will use a formula-based rate methodology to calculate its annual revenue requirement for SSCD on a forward-looking basis by using projections to estimate applicable transmission-related costs associated with SSCD for the upcoming year, with a true-up in a subsequent year, to be provided to SPP for inclusion in Schedule 1 under the SPP Tariff. A single SSCD rate applies for Western-UGP's costs associated with providing SSCD in both the Eastern and Western Interconnections under the SPP Tariff. Western-UGP's annual revenue requirement for SSCD will be used by SPP to determine the regional SPP Schedule 1 rate for SPP through and out transactions, and also to determine the zonal SPP Schedule 1 rate for the UMZ. SSCD is required to schedule the movement of power through, out of, within, or into the SPP Balancing Authority Area and/or the WAUW. Therefore, Western's SSCD will also be charged by SPP for transmission service within the Western Interconnection. Western-UGP's annual revenue requirement for SSCD is derived by calculating Western-UGP's applicable transmission-related annual costs associated with SSCD service, including O&M, interest expense, A&GE, and depreciation.

Western-UGP will true-up the cost estimates with Western-UGP's actual costs. Revenue collected in excess of Western-UGP's actual net revenue requirement will be returned through a credit in a subsequent year. Actual revenues that are less than the net revenue requirement would likewise be recovered in a subsequent year. The true-up procedure will ensure that Western-UGP will recover no more and no less than the actual costs for the year.

Formula Rate for Regulation and Frequency Response Service

Western-UGP will use a formula-based rate methodology for Regulation and Frequency Response Service for the WAUW as described below. Given the SPP Integrated Marketplace will not be extended into the Western Interconnection, Western-UGP as the BA will need to provide Regulation and Frequency Response Service in the WAUW, which will be billed by SPP, as the Transmission Provider, to a SPP Transmission Customer along with the associated transmission service provided by SPP under the SPP Tariff. Regulation and Frequency Response Service in the WAUW is provided primarily by Corps facilities. The Corps'

generation calculated fixed charge rate (in percent) is applied to the net plant investment of the Corps generation to derive an annual Corps generation cost. This cost is divided by the capacity at the plants to derive a dollar-per-megawatt amount for Corps installed capacity ($/MW-year). This dollar-per-megawatt amount is applied to the capacity of Corps generation reserved for Regulation and Frequency Response Service in the WAUW, producing the annual Corps generation cost for this service. Western-UGP's annual revenue requirement for Regulation and Frequency Response Service is then determined by taking the annual Corps generation cost to provide this service and adding costs associated with the purchase of power resources to provide Regulation and Frequency Response Service to support intermittent renewable resources as described below. Western-UGP's annual revenue requirement will be recovered under the SPP Tariff under Rate Schedule WAUW–AS3.

Western-UGP will true-up the cost estimates with Western-UGP's actual costs. Revenue collected in excess of Western-UGP's actual net revenue requirement will be returned through a credit in a subsequent year. Actual revenues that are less than the net revenue requirement would likewise be recovered in a subsequent year. The true-up procedure will ensure that Western-UGP will recover no more and no less than the actual costs for the year.

Western-UGP supports the installation of renewable sources of energy but recognizes that certain operational constraints exist in managing the significant fluctuations that are a normal part of their operation. Western-UGP has marketed the maximum practical amount of power from each of its projects, leaving little or no flexibility for provision of additional power services. Consequently, provided that Western-UGP is able to purchase additional power resources delivered into WAUW to provide Regulation and Frequency Response Service to intermittent renewable generation resources serving load within the WAUW, costs for these regulation resources will become part of Western-UGP's Regulation and Frequency Response Service. However, Western-UGP will not regulate for the difference between the output of an Intermittent Resource located within the WAUW and a delivery schedule from that generator serving load located outside of the WAUW. Intermittent Resources serving load outside the WAUW will be required to be pseudo-tied or dynamically scheduled to another Balancing Authority Area.

Formula Rate for Energy Imbalance Service

Energy Imbalance Service is provided when a difference occurs between the scheduled and the actual delivery of energy to a load located within the WAUW over a single hour. Given the SPP Integrated Marketplace will not be extended into the Western Interconnection, Western-UGP as the BA will need to provide Energy Imbalance Service in the WAUW, which will be billed by SPP, as the Transmission Provider, to a SPP Transmission Customer along with the associated transmission service provided by SPP under the SPP Tariff. Western-UGP will offer this service, if it is capable of doing so, from its own resources or from resources available to it when transmission service is provided by SPP and used to serve load within the WAUW. The SPP Transmission Customer must either purchase this service from SPP or make alternative comparable arrangements pursuant to the SPP Tariff to satisfy its Energy Imbalance Service obligation. A SPP Transmission Customer may incur a charge for either hourly energy imbalances under this Rate Schedule, WAUW–AS4, or hourly generator imbalances under Rate Schedule WAUW–AS7 for imbalances occurring during the same hour, but not both, unless the imbalances aggravate rather than offset each other.

The rate for service within the WAUW will be based on deviation bands as follows: (i) deviations within ± 1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of the average incremental cost for the month; (ii) deviations greater than ± 1.5 percent up to 7.5 percent (or greater than 2 MW up to 10 MW) of the scheduled transaction(s) to be applied hourly to any energy imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month, at 110 percent of incremental cost when energy taken by the SPP Transmission Customer in a schedule hour is greater than the energy scheduled or 90 percent of incremental cost when energy taken by a SPP Transmission Customer in a schedule hour is less than the scheduled amount; and (iii) deviations greater than ± 7.5 percent (or 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month, at 125 percent of the highest incremental cost that occurs that day for energy taken by the SPP Transmission Customer in a schedule hour that is greater than the energy scheduled, or 75 percent of the lowest incremental cost that occurs that day when energy taken by a SPP Transmission Customer is less than the scheduled amount.

Western-UGP's incremental cost will be based on a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's OASIS at least 30 days before use for determining the Western-UGP incremental cost and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index.

Formula Rates for Operating Reserves Service—Spinning and Supplemental

Given the SPP Integrated Marketplace will not be extended into the Western Interconnection, Western-UGP as the BA will need to provide Operating Reserve—Spinning Reserve Service and Operating Reserve—Supplemental Reserve Service (together referred to as Reserve Services) in the WAUW, which will be billed by SPP, as the Transmission Provider, to a SPP Transmission Customer along with the associated transmission service provided by SPP under the SPP Tariff. Western-UGP will offer these services under the formula-based rate methodologies for Spinning Reserve Service and Supplemental Reserve Service and will use the reserve requirement of the reserve sharing program under which Western-UGP is currently a member for its transmission system in the Western Interconnection.

Western-UGP's annual cost of generation for Reserve Services is determined by multiplying the Corps' generation fixed charge rate (in percent) by the net plant investment of the Corps generation producing an annual Corps generation cost. This cost is divided by the capacity at the plants to derive a dollar-per-megawatt amount for Corps installed capacity ($/MW-year). This dollar-per-megawatt amount is then applied to the capacity of Corps generation reserved for Reserve Services in the WAUW, producing the annual Corps generation cost to provide this service. Western-UGP's annual revenue requirement for Reserve Services is

derived by taking the annual Corps generation cost to provide this service and adding costs associated with the current reserve sharing program. Western-UGP's annual revenue requirement will be recovered under the SPP Tariff under Rate Schedules WAUW–AS5 and WAUW–AS6.

Western-UGP will true-up the cost estimates with Western-UGP's actual costs. Revenue collected in excess of Western-UGP's actual net revenue requirement will be returned through a credit in a subsequent year. Actual revenues that are less than the net revenue requirement would likewise be recovered in a subsequent year. The true-up procedure will ensure that Western-UGP will recover no more and no less than the actual costs for the year.

Western-UGP has no long-term reserves available beyond its own internal requirements. At SPP's request as the Transmission Provider, and if it is capable of doing so, Western-UGP will acquire needed resources and pass the costs, plus an amount for administration, on to SPP for the requesting SPP Transmission Customer. The SPP Transmission Customer is responsible to provide the transmission to deliver these reserves. In the event that Reserve Services are called upon for emergency use, the SPP Transmission Customer will be assessed a charge for energy used at the prevailing market energy rate in the WAUW. The prevailing market energy rate will be based on a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's OASIS at least 30 days prior to use for determining the prevailing market energy rate and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index.

Formula Rate for Generator Imbalance Service

Generator Imbalance Service is provided when a difference occurs between the output of a generator located within the WAUW and a delivery schedule from that generator to: (1) another Balancing Authority Area or (2) a load within the WAUW over a single hour. Given the SPP Integrated Marketplace will not be extended into the Western Interconnection, Western-UGP as the BA must provide Generator Imbalance Service in the WAUW, which will be billed by SPP, as the Transmission Provider, to a SPP Transmission Customer along with the associated transmission service provided by SPP under the SPP Tariff. Western-UGP will offer this service, if it is capable of doing so, from its own resources or from resources available to it, when SPP transmission service is used to deliver energy from a generator located within the WAUW. The SPP Transmission Customer must either purchase this service from SPP, or make alternative comparable arrangements pursuant to the SPP Tariff, to satisfy its Generator Imbalance Service obligation. A SPP Transmission Customer may incur a charge for either hourly generator imbalances under this Rate Schedule, WAUW–AS7, or hourly energy imbalances under Rate Schedule WAUW–AS4 for imbalances occurring during the same hour, but not both, unless the imbalances aggravate rather than offset each other.

Western-UGP supports the installation of renewable sources of energy but recognizes that certain operational constraints exist in managing the significant fluctuations that are a normal part of their operation. Western-UGP has marketed the maximum practical amount of power from each of its projects, leaving little or no flexibility for provision of additional power services. Consequently, Western-UGP will not regulate for the difference between the output of an Intermittent Resource located within the WAUW and a delivery schedule from that generator serving load located outside of the WAUW. Intermittent Resources serving load outside the WAUW will be required to be pseudo-tied or dynamically scheduled to another Balancing Authority Area.

The rate for service within the WAUW will be based on deviation bands as follows: (i) deviations within ± 1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any generator imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of the average incremental cost; (ii) deviations greater than ± 1.5 percent up to 7.5 percent (or greater than 2 MW up to 10 MW) of the scheduled transaction to be applied hourly to any generator imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month. When energy delivered in a schedule hour from the generation resource is less than the energy scheduled, the charge is 110 percent of incremental cost. When energy delivered from the generation resource is greater than the scheduled amount, the credit is 90 percent of the incremental cost; and (iii) deviations greater than ± 7.5 percent (or 10 MW) of the scheduled transaction to be applied hourly to any generator imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled at 125 percent of Western-UGP's highest incremental cost for the day when energy delivered in a schedule hour is less than the energy scheduled or 75 percent of Western-UGP's lowest daily incremental cost when energy delivered from the generation resource is greater than the scheduled amount. An Intermittent Resource will be exempt from this deviation band and will pay the deviation band charges for all deviations greater than the larger of 1.5 percent or 2 MW.

Deviations from scheduled transactions in order to respond to directives by SPP as the Transmission Provider, a Balancing Authority, or a reliability coordinator shall not be subject to the deviation bands identified above and, instead, shall be settled financially at the end of the month at 100 percent of incremental cost. Such directives may include instructions to correct frequency decay, respond to a reserve sharing event, or change output to relieve congestion.

Western-UGP's incremental cost will be based on a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's OASIS at least 30 days before use for determining the Western-UGP incremental cost and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index.

Availability of Information

All documents related to this action are available for inspection and copying at the Upper Great Plains Regional Office, located at 2900 4th Avenue North, Billings, Montana. These documents are also available on Western's Web site located at *http://www.wapa.gov/ugp/rates.*

RATEMAKING PROCEDURE REQUIREMENTS

Environmental Compliance

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508), and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined that this action is

categorically excluded from preparing an environmental assessment or an environmental impact statement. A copy of the categorical exclusion determination is available on Western-UGP's Web site located at *http://www.wapa.gov/ugp/Environment.*

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Submission to the Federal Energy Regulatory Commission

The formula rates herein confirmed, approved, and placed into effect on an interim basis, together with supporting documents, will be submitted to FERC for confirmation and final approval.

ORDER

In view of the foregoing and under the authority delegated to me, I confirm and approve on an interim basis, effective on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, formula rates for Transmission and Ancillary Services under Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7 for the Pick-Sloan Missouri Basin Program—Eastern Division Project of the Western Area Power Administration. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**. The rate schedules shall remain in effect on an interim basis, pending the Federal Energy Regulatory Commission's confirmation and approval of the rate schedules or substitute rates on a final basis through September 30, 2020, or until the rate schedules are superseded.

Dated: July 17, 2015

Elizabeth Sherwood-Randall

Deputy Secretary of Energy

Rate Schedule WAUGP–ATRR

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

ANNUAL TRANSMISSION REVENUE REQUIREMENT FOR TRANSMISSION SERVICE

Effective

On the first full day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

Applicable

Western Area Power Administration-Upper Great Plains Region's (Western-UGP) formula based Annual Transmission Revenue Requirement (ATRR) for its eligible transmission related facilities included under the Southwest Power Pool, Inc. (SPP) Tariff shall be calculated using the formula outlined below.

Formula Rate

Define:

A = Operation & Maintenance allocated to transmission ($)
B = Depreciation allocated to transmission ($)
C = Interest Expense allocated to transmission ($)
D = Revenue Credits ($)
E = Scheduling, System Control, and Dispatch costs ($)
F = Prior Period True-up ($)

ATRR = A + B + C − D − E + F

Note: Western-UGP will identify any portion of the ATRR eligible for SPP Region-wide cost sharing pursuant to the SPP Tariff in its Rate Formula Template submitted under Attachment H of the SPP Tariff.

A recalculated annual revenue requirement will go into effect every January 1 based on the above formula and updated financial data. Western-UGP will annually notify SPP and make data and information available to interested parties for review and comment related to the recalculated annual revenue requirement on or shortly after September 1 of the preceding year. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP Open Access Same-Time Information System.

Rate Schedule WAUGP–AS1

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

SCHEDULING, SYSTEM CONTROL, AND DISPATCH SERVICE

Effective

On the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

Applicable

Scheduling, System Control, and Dispatch Service (SSCD) is required to schedule the movement of power through, out of, within, or into the Southwest Power Pool, Inc. (SPP) Balancing Authority Area and/or the Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW). Western Area Power Administration-Upper Great Plains Region's (Western-UGP) annual revenue requirement for SSCD will be used by SPP to calculate the regional SPP Schedule 1 rate for SPP through and out transactions, and also to calculate the zonal SPP Schedule 1 rate for the Upper Missouri Zone (UMZ or Zone 19). This rate will also be charged by SPP for SPP Transmission Service provided within the Western Interconnection.

Formula Rate

Define:

A = Operation & Maintenance for SSCD ($)
B = Administrative and General Expense for SSCD ($)
C = Depreciation for SSCD ($)
D = Taxes Other than Income Taxes for Transmission ($)
E = Allocation of General Plant for SSCD ($)
F = Cost of Capital for SSCD ($)
G = SSCD Revenue from non-Transmission facilities ($)
H = Prior Period True-up ($)

SSCD Annual Revenue Requirement = A + B + C + D + E + F—G + H

A recalculated annual revenue requirement will go into effect every January 1 based on the above formula and updated financial data. Western-UGP will annually notify SPP and make data and information available to interested parties for review and comment related to the recalculated annual revenue requirement on or shortly after September 1 of the preceding year. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP Open Access Same-Time Information System.

Rate Schedule WAUW–AS3

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

REGULATION AND FREQUENCY RESPONSE SERVICE—WAUW

Effective

On the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register.**

Applicable

This Rate Schedule applies to the Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW). Regulation and Frequency Response Service (Regulation) is necessary to provide for the continuous balancing of resources, generation, and interchange with load and for maintaining scheduled interconnection frequency at 60 cycles per second (60 Hz). Regulation is accomplished by committing on-line generation whose output is raised or lowered, predominantly through the use of automatic generating control equipment, as necessary, to follow the moment-by-moment changes in load. The obligation to maintain this balance between resources and load lies with the Western Area Power Administration-Upper Great Plains Region (Western-UGP) as the WAUW operator. The SPP Transmission Customer must either purchase this service from SPP or make alternative comparable arrangements pursuant to the SPP Tariff to satisfy its Regulation obligation. Western-UGP's annual revenue requirement for Regulation (outlined below) will be used by SPP to calculate the WAUW charges for Regulation.

Western-UGP supports the installation of renewable sources of energy but recognizes that certain operational constraints exist in managing the significant fluctuations that are a normal part of their operation. When Western-UGP purchases power resources to provide Regulation to intermittent resources serving load within Western-UGP's WAUW, costs for these regulation resources will become part of Western's Regulation revenue requirement, which will be billed by SPP, as the Transmission Provider, to a SPP Transmission Customer along with the associated transmission service provided by SPP under the SPP Tariff. However, Western-UGP will not regulate for the difference between the output of an intermittent resource located within Western-UGP's WAUW and a delivery schedule from that generator serving load located outside of Western-UGP's WAUW. Intermittent resources serving load outside Western-UGP's WAUW will be required to be pseudo-tied or dynamically scheduled to another Balancing Authority Area.

An intermittent resource, for the limited purpose of this Rate Schedule, is an electric generator that is not dispatchable and cannot store its fuel source and, therefore, cannot respond to changes in demand or respond to transmission security constraints.

Formula Rate

Define:

A = U.S. Army Corps of Engineers (Corps) Fixed Charge Rate (%)
B = Corps Generation Net Plant Costs ($)
C = Plant Capacity (kW)
D = Capacity Used for Regulation (kW-year)
E = Capacity Purchases for Regulation ($)
F = Prior Period True-up

Regulation Annual Revenue Requirement = (A * B/C) * D + E + F

A recalculated revenue requirement will go into effect every January 1 based on the above formula and updated financial data. Western-UGP will annually notify SPP and make data and information available to interested parties for review and comment related to the recalculated annual revenue requirement on or shortly after September 1 of the preceding year. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP Open Access Same-Time Information System.

Rate Schedule WAUW–AS4

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

ENERGY IMBALANCE SERVICE—WAUW

Effective

On the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register.**

Applicable

This Rate Schedule applies to the Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW). Energy Imbalance Service is provided when a difference occurs between scheduled and actual delivery of energy to a load located within Western Area Power Administration-Upper Great Plains Region's (Western-UGP) WAUW over a single hour. Given the Southwest Power Pool, Inc. (SPP) Integrated Marketplace will not be extended into the Western Interconnection, Western-UGP, as the Balancing Authority, will offer to provide Energy Imbalance Service in the WAUW, if it is capable of doing so, from its own resources or from resources available to it, at the request of SPP, as the Transmission Provider, when transmission service is provided by SPP and used to serve load within the WAUW. Energy Imbalance Service in the WAUW will be billed by SPP to the SPP Transmission Customer along with the associated transmission service provided by SPP. The SPP Transmission Customer must either purchase this service from SPP, or make alternative comparable arrangements pursuant to the SPP Tariff to satisfy its Energy Imbalance Service obligation.

The SPP Transmission Customer will incur a charge for either hourly energy imbalances under this Schedule, WAUW–AS4, or hourly generator imbalances under Rate Schedule WAUW–AS7 for imbalances occurring during the same hour, but not both, unless the imbalances aggravate rather than offset each other.

Formula Rate

For deviations within ± 1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of the average incremental cost.

Deviations greater than ± 1.5 percent up to 7.5 percent (or greater than 2 MW up to 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month. When energy taken in a schedule hour is greater than the energy scheduled, the charge is 110 percent of incremental cost. When energy taken is less than the scheduled amount, the credit is 90 percent of the incremental cost.

Deviations greater than ± 7.5 percent (or 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled at 125 percent of Western-UGP's incremental cost when energy taken in a schedule hour is greater than the energy scheduled or 75 percent of Western-UGP's incremental cost when energy taken by a SPP Transmission Customer is less than the scheduled amount.

Western-UGP's incremental cost will be based upon a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's Open Access Same-Time Information System (OASIS) at least 30 days before use for determining the Western-UGP incremental cost and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index.

The pricing and charge for deviations in the above deviation bandwidths is as specified above. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP OASIS.

Rate Schedule WAUW–AS5

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

OPERATING RESERVE—SPINNING RESERVE SERVICE—WAUW

Effective

On the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

Applicable

This Rate Schedule applies to the Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW). Operating Reserve-Spinning Reserve Service (Spinning Reserves) is needed to serve load immediately in the event of a system contingency. Spinning Reserves may be provided by generating units that are on-line and loaded at less than maximum output. Given the Southwest Power Pool, Inc. (SPP) Integrated Marketplace will not be extended into the Western Interconnection, Western Area Power Administration-Upper Great Plains Region (Western-UGP), as the Balancing Authority, will offer to provide Spinning Reserves, if available, at the request of SPP as the Transmission Provider in the WAUW. Operating Reserve-Spinning Reserve Service in the WAUW will be billed by SPP to the SPP Transmission Customer along with the associated transmission service provided by SPP. The SPP Transmission Customer must either purchase this service from SPP or make alternative comparable arrangements pursuant to the SPP Tariff to satisfy its Spinning Reserves obligation. Western-UGP's annual revenue requirement for Spinning Reserves (outlined below) will be utilized by SPP to calculate the WAUW charges for Spinning Reserves.

Formula Rate

Define:

A = U.S. Army Corps of Engineers (Corps) Fixed Charge Rate (%)
B = Corps Generation Net Plant Costs ($)
C = Plant Capacity (kW)
D = Maximum Load in the WAUW (kW)
E = Maximum Generation in the WAUW (kW)
F = Reserve Sharing Program Requirement based upon Load (%)—See Note 1
G = Reserve Sharing Program Requirement based upon Generation (%)—See Note 2
H = Prior Period True-up

Note 1: Currently 3% in the Northwest Power Pool (NWPP) Reserve Sharing Program
Note 2: Currently 3% in the NWPP Reserve Sharing Program

Spinning Reserves Annual Revenue Requirement = (A * B/C) * ((D * F) + (E * G)) + H

A recalculated revenue requirement will go into effect every January 1 based on the above formula and updated financial, load/generation, and Reserve Sharing Program requirements data. Western-UGP will annually notify SPP and make data and information available to interested parties for review and comment related to the recalculated annual revenue requirement on or shortly after September 1 of the preceding year. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP Open Access Same-Time Information System (OASIS).

If resources are not available from a Western-UGP resource, Western-UGP, at the request of SPP as the Transmission Provider, will offer to purchase the Spinning Reserves and pass through the costs, plus an amount for administration, to SPP for the SPP Transmission Customer.

In the event that Spinning Reserves are called upon for emergency use, the SPP Transmission Customer will be assessed a charge for energy used at the prevailing market energy rate in the WAUW. The prevailing market energy rate will be based upon a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's OASIS at least 30 days before use for determining the prevailing market energy rate and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index. The SPP Transmission Customer would be responsible for providing transmission service to get the Spinning Reserves to its destination.

Rate Schedule WAUW–AS6

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

OPERATING RESERVE—SUPPLEMENTAL RESERVE SERVICE—WAUW

Effective

On the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

Applicable

This Rate Schedule applies to the Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW). Operating Reserve-Supplemental Reserve Service (Supplemental Reserves) is needed to serve load in the event of a system contingency: however, it is not available immediately to serve load but rather within a short period of time. Supplemental Reserves may be provided by generating units that are on-line but unloaded, by quick-start generation, or by interruptible load. Given the Southwest Power Pool, Inc. (SPP) Integrated Marketplace will not be extended into the Western Interconnection, Western Area Power Administration-Upper Great Plains Region (Western-UGP), as the Balancing Authority, will offer to provide Supplemental Reserves, if available, at the request of SPP as the Transmission Provider, in the WAUW. Operating Reserve-Supplemental Reserve Service in the WAUW will be billed by SPP to the SPP Transmission Customer along with the associated transmission service provided by SPP. The SPP Transmission Customer must either purchase this service from SPP or make alternative comparable arrangements pursuant to the SPP Tariff to satisfy its Supplemental Reserves obligation. Western-UGP's annual revenue requirement for Supplemental Reserves (outlined below) will be utilized by SPP to calculate the WAUW charges for Supplemental Reserves.

Formula Rate

Define:

A = U.S. Army Corps of Engineers (Corps) Fixed Charge Rate (%)
B = Corps Generation Net Plant Costs ($)
C = Plant Capacity (kW)
D = Maximum Load in the WAUW (kW)
E = Maximum Generation in the WAUW (kW)
F = Reserve Sharing Program Requirement based upon Load (%)—See Note 1
G = Reserve Sharing Program Requirement based upon Generation (%)—See Note 2
H = Prior Period True-up

Note 1: Currently 3% in the Northwest Power Pool (NWPP) Reserve Sharing Program
Note 2: Currently 3% in the NWPP Reserve Sharing Program

Supplemental Reserves Annual Revenue Requirement = (A * B/C) * ((D * F) + (E * G)) + H

A recalculated revenue requirement will go into effect every January 1 based on the above formula and updated financial, load/generation, and Reserve Sharing Program requirements data. Western-UGP will annually notify SPP and make data and information available to interested parties for review and comment related to the recalculated annual revenue requirement on or shortly after September 1 of the preceding year. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP Open Access Same-Time Information System (OASIS).

If resources are not available from a Western-UGP resource, Western-UGP, at the request of SPP as the Transmission Provider, will offer to purchase the Supplemental Reserves and pass through the costs, plus an amount for administration, to SPP for the SPP Transmission Customer.

In the event Supplemental Reserves are called upon for emergency use, the SPP Transmission Customer will be assessed a charge for energy used at the prevailing market energy rate in the WAUW. The prevailing market energy rate will be based upon a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's OASIS at least 30 days before use for determining the prevailing market energy rate and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index. The SPP Transmission Customer would be responsible for providing transmission service to get the Supplemental Reserves to its destination.

Rate Schedule WAUW–AS7

October 1, 2015

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

UPPER GREAT PLAINS REGION PICK–SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION

GENERATOR IMBALANCE SERVICE—WAUW

Effective

On the first day of the first full billing period beginning on or after October 1, 2015, upon transfer of functional control of eligible Western-UGP facilities to SPP, and shall remain in effect through September 30, 2020, or until superseded by another rate schedule, whichever occurs earlier. Notification of the transfer of functional control and the effective date of the formula rates will be published in the **Federal Register**.

Applicable

This Rate Schedule applies to the Western Area Power Administration, Upper Great Plains West Balancing Authority Area (WAUW). Generator Imbalance Service is provided when a difference occurs between the output of a generator located within Western Area Power Administration-Upper Great Plains Region's (Western-UGP) WAUW and a delivery schedule from that generator to (1) another Balancing Authority Area or (2) a load within Western-UGP's WAUW over a single hour. Western-UGP, as the Balancing Authority, will offer to provide this service, if it is capable of doing so, from its own resources or from resources available to it, at the request of the Southwest Power Pool, Inc. (SPP) as the Transmission Provider, when transmission service is used to deliver energy from a generator located within the WAUW. Generator Imbalance Service in the WAUW will be billed by SPP to the SPP Transmission Customer along with the associated transmission service provided by SPP. The SPP Transmission Customer must either purchase this service from SPP or make alternative comparable arrangements pursuant to the SPP Tariff, to satisfy its Generator Imbalance Service obligation. The SPP Transmission Customer will incur a charge for either hourly generator imbalances under this Schedule, WAUW–AS7, or hourly energy imbalances under Rate Schedule WAUW–AS4 for imbalances occurring during the same hour, but not both, unless the imbalances aggravate rather than offset each other.

Western-UGP supports the installation of renewable sources of energy but recognizes that certain operational constraints exist in managing the significant fluctuations that are a normal part of their operation. Western-UGP has marketed the maximum practical amount of power from each of its projects, leaving little or no flexibility for provision of additional power services. Consequently, Western-UGP will not regulate for the difference between the output of an intermittent resource located within the WAUW and a delivery schedule from that generator serving load located outside of the WAUW. Intermittent resources serving load outside Western-UGP's WAUW will be required to be pseudo-tied or dynamically scheduled to another Balancing Authority Area.

An intermittent resource, for the limited purpose of this Rate Schedule, is an electric generator that is not dispatchable and cannot store its fuel source and, therefore, cannot respond to changes in demand or respond to transmission security constraints.

Formula Rate

For deviations within ± 1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any generator imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of the average incremental cost.

Deviations greater than ± 1.5 percent up to 7.5 percent (or greater than 2 MW up to 10 MW) of the scheduled transaction to be applied hourly to any generator imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month. When energy delivered in a schedule hour from the generation resource is less than the energy scheduled, the charge is 110 percent of incremental cost. When energy delivered from the generation resource is greater than the scheduled amount, the credit is 90 percent of the incremental cost.

Deviations greater than ± 7.5 percent (or 10 MW) of the scheduled transaction to be applied hourly to any generator imbalance that occurs as a result of the SPP Transmission Customer's scheduled transaction(s) will be settled at 125 percent of Western-UGP's highest incremental cost for the day when energy delivered in a schedule hour is less than the energy scheduled or 75 percent of Western-UGP's lowest daily incremental cost when energy delivered from the generation resource is greater than the scheduled amount. As an exception, an intermittent resource will be exempt from this deviation band and will pay the deviation band charges for all deviations greater than the larger of 1.5 percent or 2 MW.

Deviations from scheduled transactions responding to directives by the Transmission Provider, a Balancing Authority, or a reliability coordinator shall not be subject to the deviation bands identified above and, instead, shall be settled financially, at the end of the month, at 100 percent of incremental cost. Such directives may include instructions to correct frequency decay, respond to a reserve sharing event, or change output to relieve congestion.

Western-UGP's incremental cost will be based upon a representative hourly energy index or combination of indexes. The index to be used will be posted on the applicable SPP Web site and/or SPP's Open Access Same-Time Information System (OASIS) at least 30 days before use for determining the Western-UGP incremental cost and will not be changed more often than once per year unless Western-UGP determines that the existing index is no longer a reliable price index.

The pricing and charge for deviations in the deviation bandwidths is as specified above. Data used and the charges resulting from using this formula will be posted on the applicable SPP Web site and/or SPP OASIS.

[FR Doc. 2015–18240 Filed 7–24–15; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2004–0019; FRL–9931–21–OW]

Request for Scientific Views: Draft Recommended Aquatic Life Ambient Water Quality Chronic Criterion for Selenium—Freshwater 2015

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) is opening the comment period for the Agency's draft recommended aquatic life water quality chronic criterion for selenium in freshwater. EPA released a previous draft entitled ''External Peer Review Draft Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater, 2014'' for public comment on May 14, 2014. EPA received scientific views from the public and stakeholders, and convened a contractor-led expert external peer review. EPA considered the results from the expert peer review and scientific views and comments from the public and stakeholders to develop the current draft document, which is now available for comment. Following closure of this public comment period, EPA will consider scientific views from the public on this draft document as well as any new data or information received. EPA will then publish **Federal Register** notice(s) announcing the availability of the final selenium criterion.

DATES: Comments must be received on or before September 25, 2015.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2004–0019, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: ow-docket@epa.gov.* Attention Docket No. EPA–HQ–OW–2004–0019.
- *Fax:* 202–566–1140.
- *Mail:* EPA Water Docket, Environmental Protection Agency, Mailcode 2822–IT 1200 Pennsylvania Ave. NW., Washington, DC 20640, Attention Docket No. EPA–HQ–OW–2004–0019. Please include a total of two copies (including references).
- *Hand Delivery:* EPA Water Docket, EPA Docket Center, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004, Docket No. EPA–HQ–OW–2004–0019. 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–2004–0019]. 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 *ow-docket@epa.gov.* 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 FURTHER INFORMATION CONTACT:

Kathryn Gallagher, Ph.D., Office of Water, Health and Ecological Criteria Division (4304T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: (202) 564–1398; fax: 202–566–1140, or email: *gallagher.kathryn@epa.gov.*

SUPPLEMENTARY INFORMATION:

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 EPA–HQ–OW–2004–0019 Docket, 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 EPA–HQ–OW–2004–0019 is (202) 566–2426. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

GENERAL INFORMATION:

I. What are recommended water quality criteria?

EPA's recommended water quality criteria are scientifically derived numeric values that protect aquatic life or human health from the deleterious effects of pollutants in ambient water. Section 304(a)(1) of the Clean Water Act (CWA) requires EPA to develop and publish and, from time to time, revise, criteria for protection of aquatic life and human health that accurately reflect the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. Section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water.

EPA's recommended section 304(a) criteria provide technical information to states and authorized tribes in adopting water quality standards (WQS) that ultimately provide a basis for assessing water body health and controlling discharges or releases of pollutants. Under the CWA and its implementing regulations, states and authorized tribes are to adopt water quality criteria to protect designated uses (*e.g.,* public water supply, aquatic life, recreational use, or industrial use). EPA's recommended water quality criteria do not substitute for the CWA or regulations, nor are they regulations themselves. EPA's recommended criteria do not impose legally binding requirements. States and authorized tribes have the discretion to adopt, where appropriate, other scientifically defensible water quality criteria that differ from these recommendations.

II. What is Selenium and why is EPA concerned about it?

Selenium is a naturally occurring chemical element that is nutritionally essential in small amounts, but toxic at higher concentrations. Selenium can be released to the environment by a number of anthropogenic sources, such as coal mining, coal-fired power plants (fly ash), irrigated agriculture, and phosphate mining. Selenium is a bioaccumulative pollutant. Fish and other aquatic organisms are exposed to and accumulate selenium primarily through their diet, and not directly through water. Selenium toxicity in fish occurs primarily through maternal transfer to the eggs and subsequent reproductive effects. Consequently, EPA is updating its national recommended chronic aquatic life criterion for selenium in freshwater to reflect the latest scientific information, which indicates that selenium toxicity to aquatic life is primarily driven by organisms consuming selenium-contaminated food rather than by being directly exposed to selenium dissolved in water.

III. Information on the Draft Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2015

EPA prepared a draft aquatic life criterion document for selenium based on the latest scientific information and current EPA policies and methods, including EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (1985) (EPA/R–85–100) and *Guidelines for Ecological Risk Assessment* (1998) (EPA/630/R–95/002F). Toxicity data and other information on the effects of selenium were obtained from reliable sources and subjected to both internal and, in some cases, external peer review. EPA considered public comments previously collected in response to EPA's 2004 notice of availability (published on December 17, 2004 at 69 FR 75541) and new toxicity data for selenium developed in response to those comments (EPA–822–F–08–005) in the development of the external peer review draft criterion document. EPA also considered information submitted in 2014 during the external peer review and public comment on the ''External Peer Review Draft,'' including additional toxicity data, in developing the current draft criterion.

The draft criterion has four elements (Table 1), consisting of two fish tissue-based and two water column-based elements. The draft criterion document contains a recommendation that states and authorized tribes adopt into their WQS a selenium criterion that includes all four elements. Because fish tissue-based concentration is a more direct measure of selenium toxicity to aquatic life than water column concentrations, EPA recommends that fish tissue elements be given precedence over the water column elements when both types of data are available, except in certain situations.

The available data indicate that freshwater aquatic life would be protected from the toxic effects of selenium by applying the following four-element criterion:

1. The concentration of selenium in the eggs or ovaries of fish does not exceed 15.8 mg/kg, dry weight;

2. The concentration of selenium (a) in whole-body of fish does not exceed 8.0 mg/kg dry weight, or (b) in muscle tissue of fish (skinless, boneless fillet) does not exceed 11.3 mg/kg dry weight;

3. The 30-day average concentration of selenium in water does not exceed 3.1 µg/L in lotic (flowing) waters and 1.2 µg/L in lentic (standing) waters more than once in three years on average;

4. The intermittent concentration of selenium in water does not exceed

$$WQC_{int} = \frac{WQC_{30\text{-}day} - C_{bckgrnd}(1 - f_{int})}{f_{int}}$$ more than once in three years on average.

Table 1. 2015 Draft Selenium Chronic Criterion (Freshwater)				
Media Type	**Fish Tissue**		**Water Column**[3]	
Criterion Element	**Egg/Ovary**[1]	**Fish Whole Body or Muscle**[2]	**Chronic**	**Intermittent Exposure**[4]
Magnitude	15.8 mg/kg	8.0 mg/kg whole body or 11.3 mg/kg muscle (skinless, boneless filet)	1.2 µg/L in lentic aquatic systems 3.1 µg/L in lotic aquatic systems	$WQC_{int} = \frac{WQC_{30-day} - C_{bkgrnd}(1 - f_{int})}{f_{int}}$
Duration	Instantaneous measurement[5]	Instantaneous measurement[5]	30 days	Number of days/month with an elevated concentration
Frequency	Never to be exceeded	Never to be exceeded	Not more than once in three years on average	Not more than once in three years on average

[1] Overrides any whole-body, muscle, or water column element when egg/ovary concentrations are measured, except in certain situations. See footnote 3.
[2] Overrides any water column element when both fish tissue and water concentrations are measured, except in certain situations. See footnote 3.
[3] Water column values are based on dissolved total selenium (includes all oxidation states, i.e., selenite, selenate, organic selenium and any other forms) in water. Water column values have primacy over fish tissue values under two circumstances: (1) "Fishless waters" (waters where fish have been extirpated, or where physical habitat and/or flow regime cannot sustain fish); and (2) New or increased inputs of selenium until equilibrium is reached.
[4] Where $WQC_{30\text{-}day}$ is the water-column chronic element, C_{bkgrnd} is the average background selenium concentration, and f_{int} is the fraction of any 30-day period during which elevated selenium concentrations occur, with f_{int} assigned a value ≥0.033 (corresponding to 1 day).
[5] Instantaneous measurement. Fish tissue data provide point measurements that reflect integrative accumulation of selenium over time and space in the fish at a given site. Selenium concentrations in fish tissue are expected to change only gradually over time in response to environmental fluctuations.

The draft criterion document does not include a draft acute criterion (based on water-only exposure) because selenium is bioaccumulative and toxicity primarily occurs through dietary exposure. EPA will consider the public comments, revise the document as necessary, and issue a final updated selenium criterion document. This draft criterion document does not represent and should not be construed to represent any final EPA policy, viewpoint, or determination.

IV. What is the relationship between the Draft Chronic Water Quality Criterion and Your State or Tribal Water Quality Standards?

As part of the WQS triennial review process defined in section 303(c)(1) of the CWA, the states and authorized tribes are responsible for maintaining and revising WQS. Standards consist of

designated uses, water quality criteria to protect those uses, a policy for antidegradation, and may include general policies for application and implementation. Section 303(c)(1) requires states and authorized tribes to review and modify, if appropriate, their WQS at least once every three years.

States and authorized tribes must adopt water quality criteria that protect designated uses. Protective criteria are based on a sound scientific rationale and contain sufficient parameters or constituents to protect the designated uses. Criteria may be expressed in either narrative or numeric form. States and authorized tribes have four options when adopting water quality criteria for which EPA has published section 304(a) criteria. They can:

(1) Establish numerical values based on recommended section 304(a) criteria;

(2) Adopt section 304(a) criteria modified to reflect site-specific conditions;

(3) Adopt criteria derived using other scientifically defensible methods; or

(4) Establish narrative criteria where numeric criteria cannot be established or to supplement numerical criteria (40 CFR 131.11(b)).

It is important for states and authorized tribes to consider any new or updated section 304(a) criteria as part of their triennial review to ensure that state or tribal WQS reflect current science and protect applicable designated uses. The recommendations in the draft selenium criterion document may change based on scientific views shared in response to this notice. Upon finalization, the updated selenium criterion would supersede EPA's previous 304(a) freshwater criteria for selenium.

Consistent with 40 CFR 131.21, new or revised water quality criteria adopted into law or regulation by states and authorized tribes on or after May 30, 2000 are in effect for CWA purposes only after EPA approval.

To support EPA's upcoming CWA section 304(a) ambient water quality criteria recommendations for selenium, EPA is developing informational materials to aid state and tribal adoption. These informational materials will be released when the final selenium criterion is published.

V. Solicitation of Scientific Views

EPA is soliciting additional scientific views, data, and information regarding the science and technical approach used by the Agency in the derivation of this draft freshwater chronic criterion for selenium. The Agency has identified two particular issues (detailed below), for which additional data and information are solicited.

1. Request for Additional Data and Information Related to the Sensitivity of Cyprinids (Minnow Species) to Selenium

During the 2014 public comment process, EPA received comments that included data on zebrafish (*Danio rerio*) toxicity testing with selenium. (Public comment EPA–HQ–OW–2004–0019–0354; *http://www.regulations.gov/*). The commenters suggested that the data be used by the EPA in its revision of the egg-ovary criterion element, since the zebrafish study was a maternal transfer study similar to those used in the external peer review draft. In response to the comments, EPA solicited the study and all underlying data from the authors of the study referenced by the commenters (Thomas and Janz, 2014). EPA undertook a comprehensive data review of the study and data.

During its review, EPA identified concerns regarding the concentration response curve of the zebrafish toxicity test compared to the other fish species toxicity tests that EPA used in derivation of the 2014 draft criterion. The zebrafish data showed an anomalously shallow concentration response curve compared to data from all other tested fish species. Further, high control mortality (47%) at the end of the study raised concerns about the study design as well as the health of the fish at the time of testing. In addition, since the zebrafish is a non-native cyprinid species, EPA assessed the information available on zebrafish sensitivity to selenium compared to the sensitivity of native cyprinid (minnow) species across the United States (Appendix D in the criteria document), including several studies where native cyprinids were investigated in selenium-impacted waters. Data from these studies suggest that native cyprinids are likely less sensitive to selenium than the currently available non-native zebrafish data suggest. The results of the study, particularly a comparison of the concentration response relationships of zebrafish vs. all of the other fish species for which we have similar data, raises a concern.

Given these concerns, EPA has not used the zebrafish data quantitatively in the derivation of the revised criterion. EPA seeks additional information on cyprinid taxa sensitivity to selenium, and particularly additional data on zebrafish. These studies should be submitted to the docket in similar fashion as scientific views on the criterion document. EPA will then consider this information in finalizing the selenium criterion document.

2. Request for Additional Data and Information on the Dynamics of Selenium Equilibrium in Lentic and Lotic Waters Related to New or Increased Selenium Inputs

EPA's draft selenium water quality criterion recommends that elements based on fish tissue (egg-ovary, whole body, and/or muscle) data should override the criterion elements based on selenium water column data. The criterion is structured this way because fish tissue concentrations generally provide the most robust and direct information on potential selenium effects in fish. However, because selenium concentrations in fish tissue are a result of selenium bioaccumulation via dietary exposure, there are specific circumstances where the fish tissue concentrations are not expected to fully represent potential effects on fish and the aquatic ecosystem: Waters with new or increased selenium inputs, prior to equilibrium within the food web; and ''fishless waters'' (waters where fish have been extirpated or where physical habitat and/or flow regime cannot sustain fish).

For the purposes of EPA's draft recommendations, EPA considers new inputs to be new activities resulting in selenium being released into a lentic or lotic waterbody. Increased inputs are increases from a current activity in which selenium is being released into a lentic or lotic waterbody. New or increased inputs of selenium into the water and hence into the food web, likely will result in increased bioaccumulation of selenium in fish over a period of time until the selenium from the new or increased selenium release achieves a quasi-''steady state'' balance within the food web. EPA estimates that concentrations of selenium in fish tissue will not represent a ''steady state'' for up to several months in lotic systems, and longer time periods (*e.g.,* 2 to 3 years) in lentic systems, dependent upon the size and bathymetry of a given system; the location of the selenium input related to the shape and internal circulation of the waterbody, particularly in reservoirs with multiple riverine inputs; and the particular food web. EPA recommends that in implementing a selenium water quality criterion to protect aquatic life, fish tissue concentrations of selenium not override water column concentrations until sufficient time has passed to allow equilibrium to be attained in the food web of lotic and lentic systems.

Estimates of steady state under new or increased selenium input situations are expected to be site dependent. Local information should be used to better refine an estimate of time to steady state for a particular waterbody. EPA seeks data and information that EPA can include in its final recommendations on time intervals during which fish tissue concentrations should not override water column concentrations.

SUPPLEMENTARY INFORMATION: EPA will make the external peer review and public comments, as well as Agency responses to these comments on the previously published External Peer Review Draft Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2014 (EPA 822–P–14–001) (External Peer Review Draft), available in the docket with the revised draft selenium criteria document at *www.regulations.gov.*

Dated: July 17, 2015.

Kenneth J. Kopocis,

Deputy Assistant Administrator, Office of Water.

[FR Doc. 2015–18348 Filed 7–24–15; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2014–0101; FRL–9930–21–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Polyvinyl Chloride and Copolymers Production (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''NESHAP for Polyvinyl Chloride and Copolymers Production (40 CFR part 63, subpart HHHHHHH) (Renewal)'' (EPA ICR No. 2432.03, OMB Control No. 2060–0666), 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 proposed extension of the ICR, which is currently approved through July 31, 2015. Public comments were previously requested via the **Federal Register** (79 FR 30117) on May 27, 2014, during a 60-day comment period. 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 August 26, 2015.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2014–0101, 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, 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: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@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, WJC 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 affected entities are subject to the General Provisions of the NESHAP (40 CFR part 63, subpart A), and any changes, or additions to the General Provisions, which are specified at 40 CFR part 63, subpart HHHHHHH. 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, at a minimum, are required semiannually.

Form Numbers: None.

Respondents/affected entities: Polyvinyl chloride and copolymer production facilities that are major sources of HAP.

Respondent's obligation to respond: Mandatory (40 CFR part 63, Subpart HHHHHHH).

Estimated number of respondents: 17 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 378,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $43,150,000 (per year), includes $5,150,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is an adjustment increase in the estimated burden as currently identified in the OMB Inventory of Approved Burdens. In consulting with the Vinyl Institute during the renewal of this ICR, EPA received comprehensive comments on the burden associated with specific reporting and recordkeeping requirements, including, but not limited to, performance test, monitor installation, resin and wastewater sampling, equipment leak and process vent monitoring. We have updated the burden items to more accurately reflect the costs incurred by the industry. The update results in a substantial increase in the respondent labor hours, labor costs, and capital/O&M costs. There is also an increase in the number of responses as we have updated the number of subject major sources from 15 to 17 based on data provided by the Vinyl Institute.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015–18243 Filed 7–24–15; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal

Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 11, 2015.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Happy Bancshares, Inc., Employee Stock Ownership Plan with 401(k) Provisions, Vicki Wilmarth,* Trustee, Amarillo, Texas; to acquire voting shares of Happy Bancshares, Inc., Canyon, Texas, and thereby indirectly acquire voting shares of Happy State Bank, Happy, Texas.

Board of Governors of the Federal Reserve System, July 22, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–18310 Filed 7–24–15; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 21, 2015.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Heartland Financial USA, Inc.,* Dubuque, Iowa; to acquire 100 percent of the voting shares of Premier Valley Bank, Fresno, California.

B. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Stearns Financial Services, Inc., Employee Stock Ownership Plan,* Saint Cloud, Minnesota, to retain and acquire additional voting shares, for a total up to 32.48 percent of the voting shares of Stearns Financial Services, Inc., Saint Cloud, Minnesota, and thereby indirectly increase its control of Stearns Bank National Association, Saint Cloud, Minnesota, Stearns Bank of Upsala, National Association, Upsala, Minnesota, and Stearns Bank of Holdingford, National Association, Holdingford, Minnesota.

Board of Governors of the Federal Reserve System, July 22, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–18312 Filed 7–24–15; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the notices must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 21, 2015.

A. Federal Reserve Bank of Boston (Prabal Chakrabarti, Senior Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02210–2204:

1. *South Shore Mutual Holding Company,* Weymouth, Massachusetts; to acquire Satuit MHC, and indirectly acquire Scituate Federal Savings Bank, both in Scituate, Massachusetts, and thereby engage in operating a savings and loan association, pursuant to section 225.28(b)(4)(ii).

Board of Governors of the Federal Reserve System, July 22, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–18311 Filed 7–24–15; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–15–15AWV; Docket No. CDC–2015–0060]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on an information collection pertaining to the collection of tuberculosis-related information from United States Panel Physicians.

DATES: Written comments must be received on or before September 25, 2015.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2015–0060 by any of the following methods:

- *Federal eRulemaking Portal: Regulation.gov.* Follow the instructions for submitting comments.

• *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov.*

Please note: *All public comment should be submitted through the Federal eRulemaking portal (Regulations.gov) or by U.S. mail to the address listed above.*

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Information Collection for Tuberculosis Data from Panel Physicians—An Existing Collection in Use Without an OMB Control Number—National Center for Emerging and Zoonotic Infections Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention's (CDC), National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Division of Global Migration and Quarantine (DGMQ), Immigrant, Refugee, and Migrant Health Branch (IRMH), requests approval for a new information collection to request quarterly reports on certain tuberculosis data from U.S. panel physicians.

The respondents are panel physicians. More than 760 panel physicians perform overseas pre-departure medical examinations in accordance with requirements, referred to as technical instructions, provided by the Centers for Disease Control and Prevention's Division of Global Migration and Quarantine, Quality Assessment Program (QAP). The role of QAP is to assist and guide panel physicians in the implementation of the Technical Instructions; evaluate the quality of the overseas medical examination for U.S.-bound immigrants and refugees; assess potential panel physician sites; and provide recommendations to the U.S. Department of State in matters of immigrant medical screening.

To achieve DGMQ's mission, the Immigrant, Refugee and Migrant Health branch (IRMH) works with domestic and international programs to improve the health of U.S.-bound immigrants and refugees to protect the U.S. public by preventing the importation of infectious disease. These goals are accomplished through IRMH's oversight of medical exams required for all U.S.-bound immigrants and refugees who seek permanent residence in the U.S. IRMH is responsible for assisting and training the international panel physicians with the implementation of medical exam Technical Instructions (TI). Technical Instructions are detailed requirements and national policies regarding the medical screening and treatment of all U.S.-bound immigrants and refugees.

Screening for tuberculosis (TB) is a particularly important component of the immigration medical exam and allows panel physicians to diagnose active TB disease prior to arrival in the United States. As part of the Technical Instructions requirements, panel physicians perform chest x-rays and laboratory tests that aid in the identification of tuberculosis infection (Class B1 applicants) and diagnosis of active tuberculosis disease (Class A, inadmissible applicants). CDC uses these classifications to report new immigrant and refugee arrivals with a higher risk of developing TB disease to U.S. state and local health departments for further follow-up. Some information that panel physicians collect as part of the medical exam is not reported on the standard Department of State forms (DS-forms), thereby preventing CDC from evaluating TB trends in globally mobile populations and monitoring program effectiveness.

Currently, CDC is requesting this data to be sent by panel physicians once per year. The consequences of reducing this frequency would be the loss of monitoring program impact and TB burdens in mobile populations and immigrants and refugees coming to the United States on an annual basis. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
International Panel Physicians (All sites).	TB Indicators Excel Spreadsheet.	353	1	7.5	2,648
TOTAL					2,648

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2015–18301 Filed 7–24–15; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0987]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled, ''Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: On December 10, 2014, the Agency submitted a proposed collection of information entitled, ''Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications'' to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0796. The approval expires on June 30, 2018. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: July 22, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–18295 Filed 7–24–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–0103]

Analytical Procedures and Methods Validation for Drugs and Biologics; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Analytical Procedures and Methods Validation for Drugs and Biologics.'' This guidance supersedes the draft of the same name that published on February 19, 2014, and replaces the 2000 draft guidance for industry on ''Analytical Procedures and Methods Validation'' and the 1987 FDA guidance for industry on ''Submitting Samples and Analytical Data for Methods Validation.'' This guidance discusses how to submit analytical procedures and methods validation data to support the documentation of the identity, strength, quality, purity, and potency of drug substances and drug products.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Office of Communications, Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Bldg., 4th Floor, Silver Spring, MD 20993, or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–7800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Room 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Lucinda Buhse, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2130, Silver Spring, MD 20993–0002, 240–402–4595, or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Analytical Procedures and Methods Validation for Drugs and Biologics.'' This guidance supersedes the draft of the same name that published on February 19, 2014, and replaces the 2000 draft guidance for industry on ''Analytical Procedures and Methods Validation'' and the 1987 FDA guidance for industry on ''Submitting Samples and Analytical Data for Methods Validation.'' It discusses how to submit analytical procedures and methods validation data to support the documentation of the identity, strength, quality, purity, and potency of drug substances and drug products, and how to assemble information and present

data to support analytical methodologies. The recommendations in this guidance apply to new drug applications, abbreviated new drug applications, biologics license applications, and supplements to these applications. The principles in this guidance also apply to Type II drug master files. This guidance does not address investigational new drug application (IND) methods validation specifically, but the principles being discussed may be helpful to sponsors preparing INDs.

This guidance complements the International Conference on Harmonisation guidance ''Q2(R1) Validation of Analytical Procedures: Text and Methodology.''

In the **Federal Register** of February 19, 2014 (79 FR 9467), this guidance was published as a draft guidance. We have carefully reviewed and considered the comments that were received on the draft guidance and have made changes for clarification.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on analytical procedures and methods validation. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 211, 21 CFR part 314, and 21 CFR part 601 have been approved under OMB control numbers 0910–0139, 0910–0001, and 0910–0338.

III. Comments

Interested persons may submit either electronic comments regarding this document 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.*

IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/Drugs/GuidanceCompliance RegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceCompliance RegulatoryInformation/default.htm,* or *http://www.regulations.gov.*

Dated: July 21, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–18270 Filed 7–24–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions and Delegations of Authority

This notice amends part R of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA) (60 FR 56605, as amended November 6, 1995; as last amended at 80 FR 37639–37640 dated July 1, 2015).

This notice reflects organizational changes in the Health Resources and Services Administration (HRSA), Maternal and Child Health Bureau (RM). Specifically, this notice: (1) Establishes the Office of Policy and Planning (RMA); (2) transfers the current Office of Policy Coordination (RM10) function to the newly established Office of Policy and Planning (RMA); and (3) abolishes the Office of Policy and Coordination (RM10).

Chapter RM—Maternal and Child Health Bureau

Section RM—00, Mission

To provide national leadership, in partnership with key stakeholders, to improve the physical and mental health, safety and well-being of the maternal and child health (MCH) population which includes all of the nation's women, infants, children, adolescents, and their families, including fathers and children with special health care needs.

Section RM–10, Organization

Delete the organization for the Maternal and Child Health Bureau (RM) in its entirety and replace with the following:

The Maternal and Child Health Bureau (RM) is headed by the Associate Administrator, who reports directly to the Administrator, Health Resources and Services Administration. The Maternal and Child Health Bureau includes the following components:

(1) Office of the Associate Administrator (RM);

(2) Office of Operations and Management (RM1);

(3) Office of Policy and Planning (RMA);

(4) Division of Services for Children with Special Health Needs (RM2);

(5) Division of Child, Adolescent and Family Health (RM3);

(6) Division of MCH Workforce Development (RM4);

(7) Division of Healthy Start and Perinatal Services (RM5);

(8) Division of State and Community Health (RM6);

(9) Division of Home Visiting and Early Childhood Systems (RM8); and

(10) Office of Epidemiology and Research (RM9).

Section RM–20, Functions

This notice reflects organizational changes in the Health Resources and Services Administration (HRSA), Maternal and Child Health Bureau (RM). Specifically, this notice: (1) Establishes the Office of Policy and Planning (RMA); (2) transfers the Office of Policy Coordination (RM10) function to the newly established Office of Policy and Planning (RMA); and (3) abolishes the Office of Policy and Coordination (RM10).

Delete the function for the Office of Policy Coordination (RM10), and replace in its entirety.

Office of Policy and Planning (RMA)

The Office of Policy and Planning (OPP) serves as the Maternal and Child Health Bureau (MCHB) focal point for the development of MCHB policy and program planning. Specifically, the Office: (1) Supports the Office of the Associate Administrator in identifying, planning, and implementing policy and program priorities across MCHB; (2) works closely with the Office of the Associate Administrator to develop strategic plans, facilitate program alignment, and support special initiatives; (3) advises and assists in the development, coordination and management of program and policy documents, and responses to departmental and HRSA initiatives; and (4) coordinates with other components within HRSA and HHS, federal agencies, state and local governments, and other public and private organizations on issues affecting MCHB programs and policies.

Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

This reorganization is effective upon date of signature.

Dated: July 15, 2015.

James Macrae,

Acting Administrator.

[FR Doc. 2015–18415 Filed 7–24–15; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel Validation of Pediatric Patient Reported Outcomes in Chronic Diseases.

Date: August 13–14, 2015

Time: 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.

Contact Person: Kan Ma, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard, Suite 814, Bethesda, MD 20892, 301–451–4838, *mak2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: July 21, 2015.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–18244 Filed 7–24–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable 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 Neurological Disorders and Stroke Special Emphasis Panel; E01 Parkinson's Disease Biomarker Samples.

Date: July 30, 2015.

Time: 1:00 p.m. to 3:00 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: Joel A. Saydoff, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Boulevard, Suite 3205, MSC 9529, Bethesda, MD 20892–9529, 301–435–9223, *joel.saydoff@nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; K99/R00 Review.

Date: July 31, 2015.

Time: 2:00 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: Elizabeth A Webber, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–1917, *webbere@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 21, 2015.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–18245 Filed 7–24–15; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Drug Abuse.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Drug Abuse.

Date: September 1–2, 2015.

Closed: September 1, 2015, 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Open: September 2, 2015, 8:00 a.m. to 2:00 p.m.

Agenda: This portion of the meeting will be open to the public for announcements and reports of administrative, legislative, and program developments in the drug abuse field.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Susan R.B. Weiss, Ph.D., Director, Division of Extramural Research, Office of the Director, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Boulevard, NSC, Room 5274, MSC 9591, Rockville, MD 20892, 301–443–6487, *sweiss@nida.nih.gov*.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.drugabuse.gov/NACDA/NACDAHome.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 21, 2015.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–18242 Filed 7–24–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Support for the National Institute of Environmental Health Sciences (NIEHS) Clinical Research Program.

Date: August 20–21, 2015.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Hilton Garden Inn Durham Southpoint, 7007 Fayetteville Road, Durham, NC 27713.

Contact Person: RoseAnne M. McGee, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–0752, *mcgee1@niehs.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: July 21, 2015.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–18250 Filed 7–24–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Extension of the Air Cargo Advance Screening (ACAS) Pilot Program and Reopening of Application Period for Participation

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: On October 24, 2012, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register** that announced the formalization and expansion of the Air Cargo Advance Screening (ACAS) pilot program that would run for six months. CBP subsequently published several notices extending the pilot period and/or reopening the application period to new participants for limited periods. The most recent notice extended the pilot period through July 26, 2015. This document announces that CBP is extending the pilot period for an additional year and reopening the application period for new participants for 90 days. The ACAS pilot is a voluntary test in which participants submit a subset of required advance air cargo data to CBP at the earliest point practicable prior to loading of the cargo onto the aircraft destined to or transiting through the United States.

DATES: CBP is extending the ACAS pilot program through July 26, 2016, and reopening the application period to accept applications for new ACAS pilot participants through October 26, 2015. Comments concerning any aspect of the announced test may be submitted at any time during the test period.

ADDRESSES: Applications to participate in the ACAS pilot must be submitted via email to *CBPCCS@cbp.dhs.gov.* In the subject line of the email, please use ''ACAS Pilot Application''. Written comments concerning program, policy, and technical issues may also be submitted via email to *CBPCCS@cbp.dhs.gov.* In the subject line of the email, please use ''Comment on ACAS pilot''.

FOR FURTHER INFORMATION CONTACT: Craig Clark, Cargo and Conveyance Security, Office of Field Operations, U.S. Customs & Border Protection, via email at *craig.clark@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On October 24, 2012, CBP published a general notice in the **Federal Register** (77 FR 65006, corrected in 77 FR 65395 [1]) announcing that CBP is formalizing and expanding the ACAS pilot to include other eligible participants in the air cargo environment. The notice provides a description of the ACAS pilot, sets forth eligibility requirements for participation, and invites public comments on any aspect of the test. In brief, the ACAS pilot revises the time frame for pilot participants to transmit a subset of mandatory advance electronic information for air cargo. CBP regulations implementing the Trade Act of 2002 specify the required data elements and the time frame for submitting them to CBP. Pursuant to title 19, Code of Federal Regulations (19 CFR) 122.48a, the required advance information for air cargo must be submitted no later than the time of departure of the aircraft for the United States (from specified locations) or four hours prior to arrival in the United States for all other locations.

The ACAS pilot is a voluntary test in which participants agree to submit a

[1] This **Federal Register** notice, published on October 26, 2012, corrected the email address under the **ADDRESSES** heading for submitting applications or comments. The correct email address is *CBPCCS@cbp.dhs.gov.*

subset of the required 19 CFR 122.48a data elements (ACAS data) at the earliest point practicable prior to loading of the cargo onto the aircraft destined to or transiting through the United States. The ACAS data is used to target high-risk air cargo. CBP is considering possible amendments to the regulations regarding advance information for air cargo. The results of the ACAS pilot will help determine the relevant data elements, the time frame within which data must be submitted to permit CBP to effectively target, identify and mitigate any risk with the least impact practicable on trade operations, and any other related procedures and policies.

Extension of the ACAS Pilot Period and Reopening of the Application Period

The October 2012 notice announced that the ACAS pilot would run for six months. The notice provided that if CBP determined that the pilot period should be extended, CBP would publish another notice in the **Federal Register**. The October 2012 notice also stated that applications for new ACAS pilot participants would be accepted until November 23, 2012. CBP subsequently published several notices extending the pilot period and/or reopening the application period to new participants for limited periods. On December 26, 2012, CBP published a notice in the **Federal Register** (77 FR 76064) reopening the application period for new participants until January 8, 2013. On January 3, 2013, the **Federal Register** published a correction (78 FR 315) stating that the correct date of the close of the reopened application period was January 10, 2013. On April 23, 2013, CBP published a notice in the **Federal Register** (78 FR 23946) extending the ACAS pilot period through October 26, 2013, and reopening the application period through May 23, 2013. On October 23, 2013, CBP published a notice in the **Federal Register** (78 FR 63237) extending the ACAS pilot period through July 26, 2014, and reopening the application period through December 23, 2013. Finally, on July 28, 2014, CBP published a notice in the **Federal Register** (79 FR 43766) extending the ACAS pilot period through July 26, 2015, and reopening the application period through September 26, 2014.

Each extension of the pilot period and reopening of the application period has allowed for a significant increase in the diversity and number of pilot participants. CBP continues to receive a number of requests to participate in the pilot. CBP would like to extend the pilot further and reopen the application period for participants in order to provide sufficient opportunity to the broader air cargo community to participate and prepare for a potential regulatory regime in a pilot environment. CBP would also like to ensure continuity in the flow of advance air cargo security information as the rulemaking process progresses.

For these reasons, CBP is extending the ACAS pilot period through July 26, 2016, and reopening the application period through October 26, 2015.

Anyone interested in participating in the ACAS pilot should refer to the notice published in the **Federal Register** on October 24, 2012, for additional application information and eligibility requirements.

Dated: July 21, 2015.

Todd C. Owen,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 2015–18287 Filed 7–24–15; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0064]

Agency Information Collection Activities: Importer ID Input Record

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Importer ID Input Record (CBP Form 5106). CBP is proposing that this information collection be revised with a change to the burden hours, a change of the form's name to read, ''Create/Update Importer Identity Form,'' and a change to the information collected on Form 5106. This is a proposed revision of an information collection that was previously approved. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before August 26, 2015 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at (202) 325–0265.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (79 FR 61091) on October 9, 2014, allowing for a 60-day comment period. CBP received 27 comment letters in response to the 60-day notice. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Importer ID Input Record.

OMB Number: 1651–0064.

Form Number: CBP Form 5106.

Abstract: The collection of the information on the Importer ID Input Record (CBP Form 5106) is the basis for establishing bond coverage, release and entry of merchandise, liquidation, and the issuance of bills and refunds. Each person, business firm, government

agency, or other organization that intends to file an import entry shall file CBP Form 5106 with the first formal entry or request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection. This form is also filed for the ultimate consignee for whom an entry is being made.

CBP proposes to revise the CBP Form 5106 by changing the name of this form to be clearer as to its intended purpose, and by gathering additional information about the company and its officers. This will enhance CBP's ability to make an informative assessment of risk prior to the initial importation, and will provide CBP with improved awareness regarding the company and its officers who have chosen to conduct business with CBP. CBP is also requesting that the company officers whose information will be submitted on this form have importing and financial business knowledge of the company, and that they have the legal authority to make decisions on behalf of the company.

The revised form will capture more detailed company information which is in alignment with other U.S. Government data standards and business standards. In addition to collecting information about the business structure and its officers, this detailed information will provide CBP with a greater knowledge about the company and its previous business practices. The new data elements that CBP proposes to collect are:

If you are an importer, how many entries do you plan on filing in a year?
How will the identification number be utilized?
Program Code (Indicates membership in ISA or C–TPAT)
Type of address (for mailing address)
Type of address (for physical location)
Phone Number and extension
Fax number
Email address
Web site
A brief business description.
The 6-digit North American Industry Classification System (NAICS) code for this business.
The D–U–N–S Number for the Importer.
The filer code if submitting as a broker/self-filer.
Year established
Primary Banking Institution
Certificate or Articles of Incorporation—(Locator I.D.)
Certificate or Articles of Incorporation—(Reference Number)
Business Structure/Company Officers
  Company Position Title
  Name
  Direct Phone Number and extension
  Direct Email
  Social Security Number
  Passport Number
  Passport Country of Issuance
  Passport Expiration Date
  Passport Type
Broker Name
Broker Telephone Number

CBP also proposes to rename this form ''Create/Update Importer Identity Form'' to make the form's purpose clearer to respondents.

Based on public comments received on the 60-day **Federal Register** Notice (79 FR 61091) of October 9, 2014, CBP also made the following changes to the proposed, new version of Form 5106:

(1) The estimated average time to complete this form was increased from 30 minutes to 45 minutes.

(2) The Quick Response (QR) Code was placed in the upper left corner of the document to provide users with a quick link to the form on the Internet.

(3) In the Type of Action section of the form, the statement, ''If a continuous bond is on file, a rider must accompany this change document'' was removed because it is no longer necessary with e-Bonds.

(4) In section 1E of Form 5106 which involves CBP-Assigned numbers, the instructions were clarified to include the statement, ''If you have elected to request a CBP-Assigned Number in lieu of your SSN, you must provide your SSN in Section 3J of this form.''

(5) In section 1I of Form 5106, which involves how the identification number will be utilized, a statement was added in the instructions to clarify that if the role of the party is not listed, respondents can select ''Other'' and then list the specific role for the party. (ex., Transportation carrier, Licensed Customs Brokerage Firm, Container Freight Station, Commercial Warehouse/Foreign Trade Zone Operator, Container Examination Station or Deliver to Party).

(6) In section 1J thru 1M (Program Codes) of Form 5106, a statement was added in the instructions to clarify that current, active participants in CBP Partnership Program(s) (C–TPAT, ISA, etc.) must provide the program code in Block 1J thru Block 1M, and the information that is contained in section 3 will not be required.

(7) In section 3, Company Information, the instructions were amended to clarify that the following fields are optional:

- In section 3C DUNS Number for the Importer;
- In section 3F Related Business Information- the IRS number is optional if this number is not available;
- In section 3J Business Structure/Beneficial Owner/Company Officers, the following fields are optional:

Social Security Number

Passport Number

Country Issuance

Expiration Date

Passport Types

Since the publication of the 60-day FRN, CBP also made the following revisions:

(1) Added an extension for all telephone numbers that are requested on the form.

(2) In section 3J, added ''Beneficial Owner'' to title of that section to make it now ''Business Structure/Beneficial Owner/Company Officers'' Also, the instructions for section 3J were amended to clarify what information is needed.

CBP Form 5106 is authorized by 19 U.S.C. 1484 and provided for by 19 CFR 24.5. The current version of this form is accessible at: *http://www.cbp.gov/sites/default/files/documents/CBP%20Form%205106%20%2805-13%29.pdf*. The proposed new version of this form, the public comments that were received, and a summary and response to these comments may be viewed at: *http://www.cbp.gov/trade/trade_community/cbp-publishes-federal-register-notice-proposing-revisions-cbp-form-5106.*

Current Actions: CBP proposes to revise the information being collected by adding data elements to CBP Form 5106. This revision will result in an increase in the estimated time to complete this form, from 15 minutes to 45 minutes, and will also increase the burden hours from 75,000 to 225,000. CBP also proposes to rename this form ''Create/Update Importer Identity Form'' and to make the changes described above in the ''Abstract'' section.

Type of Review: Revision.

Affected Public: Businesses and Individuals.

Estimated Number of Respondents: 300,000.

Estimated Time per Respondent: 45 minutes.

Estimated Total Annual Burden Hours: 225,000.

Dated: July 21, 2015.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2015–18306 Filed 7–24–15; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2015–0001]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective date for each LOMR is indicated in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

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

Dated: June 25, 2015.

Roy E. Wright,

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

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Connecticut: New Haven (FEMA Docket No.: B–1473)	Town of Branford (15–01–0490P).	Mr. James B. Cosgrove, First Selectman, Town of Branford, 1019 Main Street, Branford, CT 06405.	1019 Main Street, Branford, CT 06405.	April 22, 2015	090073
Illinois:					
Adams (FEMA Docket No.: B–1473).	City of Quincy (14–05–9049P).	The Honorable Kyle Moore, Mayor, City of Quincy, 730 Main Street, Quincy, IL 62301.	730 Main Street, Quincy, IL 62301	May 22, 2015	170003
Adams (FEMA Docket No.: B–1473).	Unincorporated Areas of Adams County (14–05–9049P).	The Honorable Les Post, Chairman, Adams County, 101 North 54th Street, Quincy, IL 62305.	101 North 54th Street, Quincy, IL 62305.	May 22, 2015	170001
Kane (FEMA Docket No.: B–1473).	City of Elgin (14–05–4054P).	The Honorable Dave Kaptain, Mayor, City of Elgin, 150 Dexter Court, Elgin, IL 60120.	150 Dexter Court, Elgin, IL 60120	May 6, 2015	170087
Indiana:					
Clark (FEMA Docket No.: B–1473).	City of Jefferson (14–05–9401P).	The Honorable Mike Moore, Mayor, City of Jeffersonville, 500 Quartermaster Court, Suite 250, Jeffersonville, IN 47130.	500 Quartermaster Court, Jeffersonville, IN 47130.	April 17, 2015	180027
Clark (FEMA Docket No.: B–1473).	Town of Utica (14–05–9401P).	The Honorable Hank Dorman, Board President, Town of Utica, 736 Utica Charlestown Road, Utica, IN 47130.	736 Utica Charlestown Road, Utica, IN 47130.	April 17, 2015	180487
Clark (FEMA Docket No.: B–1473).	Unincorporated Areas of Clark County (14–05–9401P).	The Honorable Jack Coffman, President, County Commissioners, 501 East Court Avenue, Room 404, Jeffersonville, IN 47130.	501 East Court Avenue, Jeffersonville, IN 47130.	April 17, 2015	180426
Missouri: Jasper (FEMA Docket No.: B–1473)	City of Joplin (14–07–0736P).	The Honorable Michael Seibert, Mayor, City of Joplin, 602 South Main Street, Joplin, MO 64801.	602 South Main Street, Joplin, MO 64801.	May 26, 2015	290183
Ohio:					

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Delaware (FEMA Docket No.: B–1473).	Unincorporated Areas of Delaware County (14–05–3856P).	The Honorable Gary Merrell, President, Delaware County, Board of Commissioners, 101 North Sandusky Street, Delaware, OH 43015.	101 North Sandusky Street, Delaware, OH 43015.	May 13, 2015	390146
Franklin (FEMA Docket No.: B–1473).	City of Columbus (15–05–0192X).	The Honorable Michael B. Coleman, Mayor, City of Columbus, 90 West Broad Street, 2nd Floor, Columbus, OH 43215.	90 West Broad Street, Columbus, OH 43215.	May 14, 2015	390170
Marion (FEMA Docket No.: B–1473).	Unincorporated Areas of Marion County (14–05–3856P).	The Honorable Daniel L. Russell, Marion County Board of Commissioners, 222 West Center Street, Marion, OH 43302.	222 West Center Street, Marion, OH 43302.	May 13, 2015	390774
Oregon:					
Washington (FEMA Docket No.: B–1473).	City of Hillsboro (14–10–1501P).	The Honorable Jerry Willey, Mayor, City of Hillsboro, 150 East Main Street, Hillsboro, OR 97123.	150 East Main Street, Hillsboro, OR 97123.	May 18, 2015	410243
Washington (FEMA Docket No.: B–1473).	Unincorporated Areas of Washington County (14–10–1501P).	The Honorable Andy Duyck, Chairman, Board of Directors, Washington County, 155 North 1st Avenue, Suite 300, Hillsboro, OR 97124.	155 North 1st Avenue, Hillsboro, OR 97124.	May 18, 2015	410238
Wisconsin: Portage (FEMA Docket No.: B–1473)	City of Stevens Point (14–05–4844P).	The Honorable Gary Wescott, Mayor, City of Steven Point, 1515 Strongs Avenue, Stevens Point, WI 54481.	1515 Strongs Avenue, Stevens Point, WI 54481.	May 15, 2015	550342

[FR Doc. 2015–18281 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2015–0001]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective date for each LOMR is indicated in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

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

Dated: June 25, 2015.

Roy E. Wright,

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

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Oregon:					
Baker (FEMA Docket No.: B–1503).	City of Baker (15–10–0084P).	The Honorable Kim Mosier, Mayor, City of Baker, P.O. Box 650, 1655 First Street Baker, OR 97814.	City Hall, 1655 1st Street Baker, OR 97814.	May 26, 2015	410002
Baker (FEMA Docket No.: B–1503).	Unincorporated areas of Baker County (15–10–0084P).	The Honorable Bill Harvey, Commission Chair, Baker County, 1995 Third Street, Baker, OR 97814.	Court House, 1995 3rd Street, Baker, OR 97814.	May 26, 2015	410001
Virginia: Loudoun. (FEMA Docket No.: B–1503).	Unincorporated areas of Loudoun County (15–03–0229P).	Mr. Scott K. York, Chairman, Board of Supervisors, P.O. Box 7000, 1 Harrison Street, S.E., 5th Floor, Leesburg, VA 20177.	Loudoun County Building, Building and Development Department, 1 Harrison Street, S.E., Leesburg, VA 20177.	May 15, 2015	510090

[FR Doc. 2015–18280 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4228–DR; Docket ID FEMA–2015–0002]

Louisiana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–4228–DR), dated July 13, 2015, and related determinations.

DATES: *Effective Date:* July 13, 2015.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 13, 2015, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Louisiana resulting from severe storms and flooding during the period of May 18 to June 20, 2015, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Louisiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, William J. Doran III, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Louisiana have been designated as adversely affected by this major disaster:

Bossier, Caddo, Grant, Natchitoches, and Red River Parishes for Public Assistance.

All areas within the State of Louisiana are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2015–18271 Filed 7–24–15; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2015–0001]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective date for each LOMR is indicated in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov*.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA,

500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

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

Dated: June 25, 2015.

Roy E. Wright,

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

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Maine: Cumberland (FEMA Docket No.: B–1465).	Town of Harpswell (14–01–3296P).	Ms. Elinor Multer, Chair, Board of Selectmen, Town of Harpswell, P.O. Box 39, Harpswell, ME 04079.	Code Enforcement Building, 263 Mountain Road, Harpswell, ME 04079.	June 3, 2015	230169
Oregon: Jackson (FEMA Docket No.: B–1503).	City of Medford (15–10–0236X).	The Honorable Gary Wheeler, Mayor, City of Medford, 411 West 8th Street, Medford, OR 97501.	Building Department, 200 South Ivy Street, Medford, OR 97301.	June 4, 2015	410096

[FR Doc. 2015–18267 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2015–0001]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective date for each LOMR is indicated in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov*; or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be

construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

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

Dated: June 25, 2015.

Roy E. Wright,

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

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Alabama: Shelby (FEMA Docket No.: B–1505).	Unincorporated areas of Shelby County (14–04–A927P).	The Honorable Rick Shepherd, Chairman, Shelby County Board of Commissioners, 200 West College Street, Columbiana, AL 35051.	Shelby County Engineer's Office, 506 Highway 70, Columbiana, AL 35051.	June 1, 2015	010191
Colorado:					
Douglas (FEMA Docket No.: B–1508).	Unincorporated areas of Douglas County (14–08–0892P).	The Honorable Jill Repella, Chair, Douglas County Board of Commissioners, 100 3rd Street, Castle Rock, CO 80104.	Douglas County Public Works Department, Engineering Division, 100 3rd Street, Castle Rock, CO 80104.	June 12, 2015	080049
Ouray (FEMA Docket No.: B–1505).	Town of Ridgway (14–08–1315P).	The Honorable John Clark, Mayor, Town of Ridgway, P.O. Box 10, Ridgway, CO 81432.	Town Hall, 201 North Railroad Street, Ridgway, CO 81432.	May 29, 2015	080138
Florida					
Manatee (FEMA Docket No.: B–1505).	Unincorporated areas of Manatee County (14–04–8724P).	The Honorable Larry Bustle, Chairman, Manatee County Board of Commissioners, 1112 Manatee Avenue West, 9th Floor, Bradenton, FL 34205.	Manatee County Building and Development Services Department, 1112 Manatee Avenue, West Bradenton, FL 34205.	June 5, 2015	120153
Monroe (FEMA Docket No.: B–1508).	City of Key West (14–04–A505P).	The Honorable Craig Cates, Mayor, City of Key West, 3126 Flagler Avenue, Key West, FL 33040.	Planning Department, 605A Simonton Street, Key West, FL 33040.	June 5, 2015	120168
Georgia: Columbia (FEMA Docket No.: B–1505).	Unincorporated areas of Columbia County (15–04–1887P).	The Honorable Ron C. Cross, Chairman, Columbia County Board of Commissioners, P.O. Box 498, Evans, GA 30809.	Columbia County Planning Department, 603 Ronald Reagan Drive, Building B, 1st Floor, Evans, GA 30809.	May 28, 2015	130059
Kentucky:					
Scott (FEMA Docket No.: B–1505).	City of Georgetown (14–04–4874P).	The Honorable Everett Varney, Mayor, City of Georgetown, 100 Court Street, Georgetown, KY 40324.	Planning Commission, 230 East Main Street, Georgetown, KY 40324.	May 29, 2015	210208
Scott (FEMA Docket No.: B–1505).	Unincorporated areas of Scott County (14–04–4874P).	The Honorable George Lusby, Scott County Judge, 101 East Main Street, Georgetown, KY 40324.	Scott County Building Inspections Department, 100 Court Street, Georgetown, KY 40324.	May 29, 2015	210207
Louisiana: Rapides (FEMA Docket No.: B–1509).	City of Alexandria (14–06–4775P).	The Honorable Jacques M. Roy, Mayor, City of Alexandria, P.O. Box 71, Alexandria, LA 71309.	City Hall, 915 3rd Street, Alexandria, LA 71301.	May 21, 2015	220146
Montana: Ravalli (FEMA Docket No.: B–1505).	Unincorporated areas of Ravalli County (15–08–0109P).	The Honorable Jeff Burrows, Chairman, Ravalli County Board of Commissioners, 215 South 4th Street, Suite A, Hamilton, MT 59840.	Floodplain Map Repository, 215 South 4th Street, Suite A, Hamilton, MT 59840.	June 8, 2015	300061
New Mexico: Bernalillo (FEMA Docket No.: B–1509).	Unincorporated areas of Bernalillo County (14–06–0924P).	The Honorable Maggie Hart Stebbins, Chair, Bernalillo County Board of Commissioners, 1 Civic Plaza Northwest, Albuquerque, NM 87102.	Bernalillo County Planning and Development Division, 111 Union Square Southeast, Suite 100, Albuquerque, NM 87102.	May 12, 2015	350001
North Carolina:					
Cabarrus (FEMA Docket No.: B–1505).	City of Harrisburg (14–04–6011P).	The Honorable Steve Sciascia, Mayor, Town of Harrisburg, 4100 Mail Street, Harrisburg, NC 28075.	Planning Department, 4100 Main Street, Harrisburg, NC 28075.	February 26, 2015	370038
Durham (FEMA Docket No.: B–1505).	City of Durham (14–04–4200P).	The Honorable William V. Bell, Mayor, City of Durham, 101 City Hall Plaza, Durham, NC 27701.	Public Works Department, 101 City Hall Plaza, Durham, NC 27701.	February 17, 2015	370086
Guilford (FEMA Docket No.: B–1508).	City of Greensboro (14–04–9100P).	The Honorable Nancy Vaughan, Mayor, City of Greensboro, P.O. Box 3136, Greensboro, NC 27402.	Central Library, 219 North Church Street, Greensboro, NC 27401.	June 26, 2015	375351
Iredell (FEMA Docket No.: B–1464).	Town of Mooresville (14–04–4151P).	The Honorable Miles Atkins, Mayor, Town of Mooresville, 413 North Main Street, Mooresville, NC 28115.	Planning Department, 413 North Main Street, Mooresville, NC 28115.	March 5, 2015	370314
Union (FEMA Docket No.: B–1508).	Town of Weddington (14–04–7777P).	The Honorable Bill Deter, Mayor, Town of Weddington, 1924 Weddington Road, Weddington, NC 28104.	Planning Department, 1924 Weddington Road, Weddington, NC 28104.	June 22, 2015	370518
Union (FEMA Docket No.: B–1508).	Unincorporated areas of Union County (14–04–7777P).	The Honorable Richard Helms, Chairman, Union County Board of Commissioners, 500 North Main Street, Room 921, Monroe, NC 28112.	Union County Planning Department, 500 Main Street, Monroe, NC 28112.	June 22, 2015	370234
Ohio:					
Franklin (FEMA Docket No.: B–1509).	City of Columbus (14–05–8003P).	The Honorable Michael B. Coleman, Mayor, City of Columbus, 90 West Broad Street, 2nd Floor, Columbus, OH 43215.	Department of Public Utilities, 1250 Fairwood Avenue, Columbus, OH 43206.	April 22, 2015	390170

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Franklin (FEMA Docket No.: B–1509).	City of Hilliard (14–05–8003P).	The Honorable Don Schonhardt, Mayor, City of Hilliard, 5171 Northwest Parkway, Hilliard, OH 43026.	City Hall, 3800 Municipal Way, Hilliard, OH 43026.	April 22, 2015	390175
Franklin (FEMA Docket No.: B–1509).	Unincorporated areas of Franklin County (14–05–8003P).	The Honorable Marilyn Brown, President, Franklin County Board of Commissioners, 373 South High Street, 26th Floor, Columbus, OH 43215.	Franklin County Economic Development and Planning Department, 150 South Front Street, Suite 10, Columbus, OH 43215.	April 22, 2015	390167
South Carolina:					
Beaufort (FEMA Docket No.: B–1505).	Town of Bluffton (15–04–2707P).	The Honorable Lisa Sulka, Mayor, Town of Bluffton, 20 Bridge Street, Bluffton, SC 29910.	Growth Management Customer Service Center, 20 Bridge Street, Bluffton, SC 29910.	June 5, 2015	450251
Charleston (FEMA Docket No.: B–1505).	Town of Mount Pleasant (15–04–0360P).	The Honorable Linda Page Mayor, Town of Mount Pleasant, 100 Ann Edwards Lane, Mount Pleasant, SC 29464.	Town Hall, 100 Ann Edwards Lane, Mount Pleasant, SC 29464.	June 1, 2015	455417
Texas:					
Bexar (FEMA Docket No.: B–1506).	City of San Antonio (14–06–0780P).	The Honorable Ivy R. Taylor, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	May 6, 2015	480045
Bexar (FEMA Docket No.: B–1506).	City of San Antonio (15–06–0882X).	The Honorable Ivy R. Taylor, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	May 6, 2015	480045
Dallas (FEMA Docket No.: B–1506).	City of Lancaster (14–06–3046P).	The Honorable Marcus E. Knight, Mayor, City of Lancaster, P.O. Box 940, Lancaster, TX 75146.	City Hall, 211 North Henry Street, Lancaster, TX 75146.	June 1, 2015	480182
Denton (FEMA Docket No.: B–1506).	City of Frisco (14–06–3421P).	The Honorable Maher Maso, Mayor, City of Frisco, 6101 Frisco Square Boulevard, Frisco, TX 75034.	City Hall, 6101 Frisco Square Boulevard, Frisco, TX 75034.	May 4, 2015	480134
Denton (FEMA Docket No.: B–1506).	Town of Little Elm (14–06–3421P).	The Honorable David Hillock, Mayor, Town of Little Elm, 100 West Eldorado Parkway, Little Elm, TX 75068.	Town Hall, 100 West Eldorado Parkway, Little Elm, TX 75068.	May 4, 2015	481152
Caldwell (FEMA Docket No.: B–1506).	City of Martindale (13–06–3462P).	The Honorable Doyle Mosier, Mayor, City of Martindale, P.O. Box 365, Martindale, TX 78655.	City Hall, 409 Main Street, Martindale, TX 78655.	May 15, 2015	481587
Caldwell (FEMA Docket No.: B–1506).	Unincorporated areas of Caldwell County (13–06–3462P).	The Honorable Ken Schawe, Caldwell County Judge, 110 South Main Street, Room 201, Lockhart, TX 78644.	Caldwell County, Emergency Management Office, 110 South Main Street, Lockhart, TX 78644.	May 15, 2015	480094
Guadalupe (FEMA Docket No.: B–1506).	Unincorporated areas of Guadalupe County (13–06–3462P).	The Honorable Kyle Kutscher, Guadalupe County Judge, 211 West Court Street, Seguin, TX 78155.	Guadalupe County, Emergency Management Office, 415 East Donegan Street, Seguin, TX 78155.	May 15, 2015	480266
Harris (FEMA Docket No.: B–1506).	Unincorporated areas of Harris County (15–06–0108P).	The Honorable Ed M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County, Emergency Management Office, 1001 Preston Street, Houston, TX 77002.	May 18, 2015	480287
Tarrant (FEMA Docket No.: B–1506).	City of Fort Worth (14–06–4247P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	Public Works Department, 1000 Throckmorton Street, Fort Worth, TX 76102.	May 22, 2015	480596
Tarrant (FEMA Docket No.: B–1506).	City of Keller (14–06–4310P).	The Honorable Mark Mathews, Mayor, City of Keller, P.O. Box 770, Keller, TX 76244.	Public Works Department, 1100 Bear Creek Parkway, Keller, TX 76248.	June 6, 2015	480602
Utah:					
Davis (FEMA Docket No.: B–1508).	City of Fruit Heights (14–08–1211P).	The Honorable Don Carroll, Mayor, City of Fruit Heights, 910 South Mountain Road, Fruit Heights, UT 84037.	City Hall, 910 South Mountain Road, Fruit Heights, UT 84307.	June 5, 2015	490045
Davis (FEMA Docket No.: B–1508).	City of Kaysville (14–08–1178P).	The Honorable Steve A. Hiatt, Mayor, City of Kaysville, 23 East Center Street, Kaysville, UT 84037.	City Hall, 23 East Center Street, Kaysville, UT 84037.	June 5, 2015	490046
Davis (FEMA Docket No.: B–1508).	City of Kaysville (14–08–1211P).	The Honorable Steve A. Hiatt, Mayor, City of Kaysville, 23 East Center Street, Kaysville, UT 84037.	City Hall, 23 East Center Street, Kaysville, UT 84037.	June 5, 2015	490046
Virginia:					
Albemarle (FEMA Docket No.: B–1506).	Unincorporated areas of Albemarle County (14–03–0864P).	The Honorable Thomas C. Foley, Albemarle County Executive, 401 McIntire Road, Charlottesville, VA 22902.	Albemarle County Department of Community Development, 401 McIntire Road, Charlottesville, VA 22902.	June 3, 2015	510006
Fairfax (FEMA Docket No.: B–1506).	Unincorporated areas of Fairfax County (15–03–0079P).	The Honorable Edward L. Long, Jr., Fairfax County Executive, 12000 Government Center Parkway, Fairfax, VA 22035.	Fairfax County, Stormwater Planning Division, 12000 Government Center Parkway, Fairfax, VA 22035.	June 5, 2015	510525
Frederick (FEMA Docket No.: B–1506).	City of Winchester (14–03–2926P).	The Honorable Eden Freeman, Manager, City of Winchester, 15 North Cameron Street, Winchester, VA 22601.	Department of Public Services, 15 North Cameron Street, Winchester, VA 22601.	May 21, 2015	510173
Loudoun (FEMA Docket No.: B–1506).	Town of Leesburg (14–03–1706P).	The Honorable Kristen C. Umstattd, Mayor, Town of Leesburg, 25 West Market Street, Leesburg, VA 20176.	Town Hall, 25 West Market Street, Leesburg, VA 20176.	May 14, 2015	510091
Loudoun (FEMA Docket No.: B–1506).	Unincorporated areas of Loudoun County (14–03–1706P).	The Honorable Scott K. York, Chairman-at-Large, Loudoun County Board of Supervisors, P.O. Box 7000, Leesburg, VA 20177.	Loudoun County Building and Development, Department 1 Harrison Street Southeast, Leesburg, VA 20175.	May 14, 2015	510090

[FR Doc. 2015–18283 Filed 7–24–15; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2015–0001; Internal Agency Docket No. FEMA–B–1510]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency; DHS.

ACTION: Notice; correction.

SUMMARY: On May 6, 2015, FEMA published in the **Federal Register** a proposed flood hazard determination notice that contained erroneous tables. This notice provides corrections to those tables, to be used in lieu of the information published at 80 FR 26068–26070. The tables provided here represent the proposed flood hazard determinations and communities affected for Lee County, Florida, and Incorporated Areas and San Patricio County, Texas, and Incorporated Areas.

DATES: Comments are to be submitted on or before October 26, 2015.

ADDRESSES: The Preliminary Flood Insurance Rate Map (FIRM), and where applicable, the Flood Insurance Study (FIS) report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–1510, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed in the table below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP may only be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *http://floodsrp.org/pdfs/srp_fact_sheet.pdf.*

The communities affected by the flood hazard determinations are provided in the table below. Any request for reconsideration of the revised flood hazard determinations shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations will also be considered before the FIRM and FIS report are made final.

Correction

In the proposed flood hazard determination notice published at 80 FR 26068–26070 in the May 6, 2015, issue of the **Federal Register**, FEMA published tables titled ''Lee County, Florida, and Incorporated Areas'' and ''San Patricio County, Texas, and Incorporated Areas''. These tables contained inaccurate information as to the community name for the Unincorporated Areas of Lee County and the community map repository address for the City of San Patricio. In this document, FEMA is publishing the tables containing the accurate information. The information provided below should be used in lieu of that previously published.

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

Dated: July 17, 2015.

Roy E. Wright,

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

Community	Community map repository address
Lee County, Florida, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Project: 14–04–A039S Preliminary Date: December 15, 2014	
City of Fort Myers	Development Department, 1825 Hendry Street, Suite 101, Fort Myers, FL 33901.
Unincorporated Areas of Lee County	Lee County Community Development Department, 1500 Monroe Street, Second Floor, Fort Myers, FL 33901.

Community	Community map repository address
San Patricio County, Texas, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Project: 07–06–0112S Preliminary Dates: August 29, 2014 and January 16, 2015	
City of Aransas Pass	City Hall, 600 West Cleveland Boulevard, Aransas Pass, TX 78336.
City of Gregory	City Hall, 204 West 4th Street, Gregory, TX 78359.
City of Ingleside	City Hall Annex, 2665 San Angelo Street, Ingleside, TX 78362.
City of Ingleside On The Bay	Ingleside On The Bay City Hall, 475 Starlight Drive, Ingleside, TX 78362.
City of Lake City	City Hall, 132 Cox Drive, Lake City, TX 78368.
City of Lakeside	Community Center, 101 Weber Lane, Lakeside, TX 78368.
City of Mathis	City Hall, 411 East San Patricio Avenue, Mathis, TX 78368.
City of Odem	City Hall, 514 Voss Avenue, Odem, TX 78370.
City of Portland	Public Works, 1101 Moore Drive, Portland, TX 78374.
City of San Patricio	City Hall, 4516 Main Street, San Patricio, TX 78368.
City of Sinton	City Hall, 301 East Market Street, Sinton, TX 78387.
City of Taft	City Hall, 501 Green Avenue, Taft, TX 78390.
Unincorporated Areas of San Patricio County	San Patricio County Civic Center, 219 West 5th Street, Sinton, TX 78387.

[FR Doc. 2015–18279 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2015–0010; OMB No. 1660–0070]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; National Fire Department Census

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed extension, without change, of a currently approved collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the use of a form to collect data for the development and continuation of the National Fire Department Census.

DATES: Comments must be submitted on or before August 26, 2015.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 500 C Street SW., Washington, DC 20472–3100, or email address *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on May 6, 2015 at 80 FR 26071 with a 60 day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: National Fire Department Census.

Type of information collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0070.

Form Titles and Numbers: FEMA Form 070–0–0–1, National Fire Department Census.

Abstract: This collection seeks to identify fire departments in the United States to compile and update a database related to their demographics, capabilities, and activities. The database is used to guide programmatic decisions and provide information to the public and the fire service.

Affected Public: State, Local, or Tribal Government.

Estimated Number of Respondents: 8,280.

Estimated Total Annual Burden Hours: 2,093 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $10,072. The estimated annual cost to respondents operations and maintenance costs for technical services is $0. There are no annual start-up or capital costs. The cost to the Federal government is $88,866.

Dated: July 16, 2015.

Janice Waller,

Acting, Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2015–18273 Filed 7–24–15; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2015–0001]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance

Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective date for each LOMR is indicated in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

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

Dated: June 25, 2015.

Roy E. Wright,

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

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Arizona:					
Maricopa (FEMA Docket No.: B–1505).	City of Phoenix (14–09–3346P).	The Honorable Greg Stanton, Mayor, City of Phoenix, 200 West Washington Street, 11th Floor, Phoenix, AZ 85003.	Street Transportation Department, 200 West Washington Street, 5th Floor, Phoenix, AZ 85003.	May 28, 2015	040051
Maricopa (FEMA Docket No.: B–1474).	City of Surprise (14–09–4439P).	The Honorable Sharon Wolcott, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Community Development Services, 12425 West Bell Road, Suite D–100, Surprise, AZ 85374.	April 24, 2015	040053
Maricopa (FEMA Docket No.: B–1474).	Unincorporated areas of Maricopa County (14–09–4439P).	The Honorable Denny Barney, Chairman, Maricopa County Board of Supervisors, 301 West Jefferson, 10th Floor, Phoenix, AZ 85003.	Maricopa County Flood Control District, 2801 West Durango Street, Phoenix, AZ 85009.	April 24, 2015	040037
Mojave (FEMA Docket No.: B–1505).	City of Bullhead City (14–09–3576P).	The Honorable Tom Brady, Mayor, City of Bullhead City, 2355 Trane Road, Bullhead City, AZ 86442.	Emergency Management Department, 1255 Marina Boulevard, Bullhead City, AZ 86442.	May 14, 2015	040125
Pinal (FEMA Docket No.: B–1474).	City of Maricopa (14–09–3623P).	The Honorable Christian Price, Mayor, City of Maricopa, 39700 West Civic Center Plaza, Maricopa, AZ 85139.	City Hall, 44624 West Garvey Avenue, Maricopa, AZ 85239.	April 27, 2015	040052
Yavapai (FEMA Docket No.: B–1505).	Town of Clarkdale (14–09–3026P).	The Honorable Doug Von Gausig, Mayor, Town of Clarkdale, P.O. Box 308, Clarkdale, AZ 86324.	Public Works Department, 890 Main Street, Clarkdale, AZ 86324.	May 14, 2015	040095
Yavapai (FEMA Docket No.: B–1505).	Unincorporated areas of Yavapai County (14–09–3026P).	The Honorable Rowle P. Simmons, Chairman, Yavapai County Board of Supervisors, 1015 Fair Street, Prescott, AZ 86305.	Yavapai County Flood Control District, 500 South Marina Street, Prescott, AZ 86303.	May 14, 2015	040093
California:					
Contra Costa (FEMA Docket No.: B–1474).	City of Orinda (14–09–0967P).	The Honorable Sue Severson, Mayor, City of Orinda, 22 Orinda Way, Orinda, CA 94563.	Public Works Department, 22 Orinda Way, Orinda, CA 94563.	April 23, 2015	060722
Riverside (FEMA Docket No.: B–1505).	Unincorporated areas of Riverside County (14–09–2663P).	The Honorable Marion Ashley, Chairman, Riverside County Board of Supervisors, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	May 28, 2015	060245
Sacramento (FEMA Docket No.: B–1505).	City of Folsom (15–09–0527P).	The Honorable Andy Morin, Mayor, City of Folsom, 50 Natoma Street, Folsom, CA 95630.	Public Works Department, 50 Natoma Street, Folsom, CA 95630.	May 28, 2015	060263
San Joaquin (FEMA Docket No.: B–1474).	Unincorporated areas of San Joaquin County (14–09–2962P).	The Honorable Bob Elliott, Chairman, San Joaquin County Board of Supervisors, 44 North San Joaquin Street, Suite 627, Stockton, CA 95202.	San Joaquin County Department of Public Works, 1810 East Hazelton, Avenue, Stockton, CA 95205.	May 7, 2015	060299

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Santa Clara (FEMA Docket No.: B–1474).	City of Santa Clara (15–09–0127P).	The Honorable Jamie L. Matthews, Mayor, City of Santa Clara, 1500 Warburton Avenue, Santa Clara, CA 95050.	Planning and Inspection Department, 1500 Warburton Avenue, Santa Clara, CA 95050.	April 16, 2015	060350
Solano (FEMA Docket No.: B–1474).	City of Dixon (14–09–2494P).	The Honorable Jack Batchelor, Jr., Mayor, City of Dixon, 600 East A Street, Dixon, CA 95620.	Engineering Department, 600 East A Street, Dixon, CA 95620.	April 2, 2015	060369
Nevada:					
Douglas (FEMA Docket No.: B–1505).	Unincorporated areas of Douglas County (14–09–4114P).	The Honorable Doug N. Johnson, Chairman, Douglas County Board of Commissioners, P.O. Box 218, Minden, NV 89423.	Douglas County Public Works Department, 1615 8th Street, Minden, NV 89423.	May 28, 2015	320008
Washoe (FEMA Docket No.: B–1474).	Unincorporated areas of Washoe County (14–09–2693P).	The Honorable David Humke, Chairman, Washoe County Board of Commissioners, P.O. Box 11130, Reno, NV 89512.	Washoe County, Public Works Department, 1001 East 9th Street, Reno, NV 89512.	April 27, 2015	320019

[FR Doc. 2015–18282 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4227–DR; Docket ID FEMA–2015–0002]

Wyoming; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Wyoming (FEMA–4227–DR), dated July 7, 2015, and related determinations.

DATES: *Effective Date:* July 15, 2015.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Wyoming is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 7, 2015.

Albany and Platte Counties for Public Assistance.

Johnson and Niobrara Counties for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2015–18268 Filed 7–24–15; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2015–0040]

Privacy Act of 1974; Department of Homeland Security Office of the Inspector General-002 Investigative Records System of Records

AGENCY: Department of Homeland Security, Privacy Office.

ACTION: Notice of Privacy Act System of Records.

SUMMARY: In accordance with the Privacy Act of 1974 the Department of Homeland Security proposes to update and reissue a current Department of Homeland Security system of records titled, ''Department of Homeland Security/Office of Inspector General-002 Investigative Records System of Records.'' This system of records was previously titled, ''Department of Homeland Security Office of Inspector General-002 Investigations Data Management System of Records.'' As a result of a biennial review of this system and changes to the application software, the Department of Homeland Security is proposing changes to the system name, category of individuals, and category of records in the system. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice. There will be no change to the Privacy Act exemptions currently in place for this system of records. This updated system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before August 26, 2015. This updated system will be effective August 26, 2015.

ADDRESSES: You may submit comments, identified by Docket Number DHS–2015–0040, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Karen L. Neuman, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Melinda D. Holliday McDonald, Esq. (202) 254–4284, Department of Homeland Security, Office of Inspector General, Mail Stop 2600, 245 Murray Drive SW., Building 410, Washington, DC 20528; or by facsimile (202) 254–4299. For privacy issues please contact: Karen L. Neuman (202) 343–1717, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Homeland Security (DHS) Office of Inspector General (OIG) is revising a system of records under the Privacy Act of 1974 (5 U.S.C. 552a), for its investigative files.

The DHS Inspector General is responsible for conducting and supervising independent and objective audits, inspections, and investigations of the programs and operations of DHS. The OIG promotes economy, efficiency, and effectiveness within the Department and prevents and detects employee corruption, fraud, waste, and abuse in its programs and operations. The OIG's Office of Investigations (OI) investigates allegations of criminal, civil, and administrative misconduct involving DHS employees, contractors, grantees, and Departmental programs and activities. These investigations can result in criminal prosecutions, fines, civil monetary penalties, and administrative sanctions. Additionally, OI provides oversight and monitors the investigative activity of DHS's various internal affairs offices.

The DHS/OIG–002 Investigative Records System of Records assists the OIG with receiving and processing allegations of violations of criminal and civil law as well as administrative policies and regulations relating to DHS employees, contractors, grantees, and other individuals and entities associated with DHS. The system includes both paper complaint and investigation-related files as well as the Enterprise Data System (EDS). The OIG uses EDS to: Manage information received concerning allegations (*i.e.,* complaints) provided during the course of its investigations; create records showing dispositions of allegations; audit actions taken by DHS management regarding employee misconduct; audit legal actions taken following referrals to the U.S. Department of Justice (DOJ) for criminal prosecution or civil action; calculate and report statistical information; manage OIG investigators' training; and manage Government-issued investigative property and other resources used in investigative activities. This system of records notice makes several changes to the existing system of records. DHS/OIG is updating this system of records notice to: (1) Rename this system of records notice ''DHS/OIG–002 Investigative Records System of Records'' and (2) include DHS OIG employees as a category of individuals covered by the system.

Consistent with DHS's information sharing mission, information stored in the DHS/OIG–002 Investigative Records System of Records may be shared with other DHS Components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, information may be shared with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine law enforcement related uses set forth in this system of records notice.

In accordance with the Privacy Act of 1974, DHS proposes to revise a system of records titled, Department of Homeland Security Office of Inspector General-002 Investigations Data Management System of Records and rename the system of records DHS/OIG–002 Investigative Records System of Records. There will be no change to the Privacy Act exemptions currently in place for this system of records. This revised system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/OIG–002 Investigative Records System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to Congress.

System of Records

Department of Homeland Security (DHS)/Office of the Inspector General (OIG)–002

SYSTEM NAME:

DHS/OIG–002 Investigative Records System of Records.

SECURITY CLASSIFICATION:

Classified, sensitive, unclassified.

SYSTEM LOCATION:

Records are maintained at the OIG Headquarters in Washington, DC and in OIG offices nationwide. Generally, OIG maintains electronic records in EDS.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals in this system include:

- Individuals filing complaints of criminal, civil, or administrative violations, including, employee corruption, fraud, waste, or mismanagement;
- Individuals alleged to have been involved in such violations;
- Individuals identified as having been adversely affected by matters investigated by the OIG;
- Individuals who have been identified as possibly relevant to, or who are contacted as part of, an OIG investigation, including:
- Current and former employees of DHS, other federal agencies, and DHS contractors, grantees, and persons whose association with current and former employees relate to alleged violations under investigation; and
- Witnesses, complainants, sources of information, suspects, defendants, or parties who have been identified by DHS OIG, other DHS Components, other agencies, or members of the general public in connection with authorized OIG audits, inspections, and/or investigations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Individual's name and aliases;
- Date of birth;
- Social Security number;
- Telephone and cell phone numbers;
- Physical and mailing addresses;
- Electronic mail addresses;
- Physical description;
- Citizenship;
- Biometrics;
- Photographs;
- Education;
- Medical history;
- Travel history including passport information;
- Financial data;
- Criminal history;
- Work experience;
- Relatives and associates;
- Any other personal information relevant to the subject matter of an OIG investigation;
- Investigative files containing allegations and complaints; witness statements; transcripts of electronic

monitoring; subpoenas and legal opinions and advice; reports of investigation; reports of criminal, civil, and administrative actions taken as a result of the investigation; and other relevant evidence;

- Training records and firearms qualification records of employees responsible for performing investigative functions; and
- Government owned and issued investigative property records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 6 U.S.C. 113(b); the Inspector General Act of 1978, as amended.

PURPOSE(S):

DHS OIG uses records and information collected and maintained in this system to receive and adjudicate allegations of violations of criminal, civil, and administrative laws and regulations relating to DHS programs, operations, and employees, as well as contractors and other individuals and entities associated with DHS; monitor complaint and investigation assignments, status, disposition, and results; manage investigations and information provided during the course of such investigations; audit actions taken by DHS management regarding employee misconduct and other allegations; audit legal actions taken following referrals to DOJ for criminal prosecution or litigation; provide information relating to any adverse action or other proceeding that may occur as a result of the findings of an investigation; and provide a system for calculating and reporting statistical information.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To DOJ, including Offices of the U.S. Attorneys, or other federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any Component thereof;
2. Any employee or former employee of DHS in his/her official capacity;
3. Any employee or former employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or,
4. the United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;
2. The Department has determined that as a result of the suspected or confirmed compromise, there is a risk of identity theft or fraud, harm to economic or property interests, harm to an individual, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and
3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To a federal, state, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive when the security of the borders which DHS is tasked with maintaining are at risk of being compromised.

I. To international and foreign governmental authorities in accordance with law and formal or informal international agreements.

J. To an appropriate federal, state, local, tribal, foreign, or international agency, pursuant to a request, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

K. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

L. To the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and other federal agencies, as necessary, if the records respond to an audit, investigation, or review conducted pursuant to an authorizing law, rule, or regulation, and in particular those conducted at the request of the CIGIE's Integrity Committee pursuant to statute.

M. To complainants and victims to the extent necessary to provide such persons with information and explanations concerning the progress or results of the investigation arising from the matters of which they complained or of which they were a victim.

N. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the

information or when disclosure is necessary to preserve confidence in the integrity of DHS, or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

DHS OIG stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door. The electronic records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

DHS OIG retrieves paper media alphabetically by name of subject or complainant, by complaint or investigation number, or by investigator's name and/or employee identifying number. DHS OIG retrieves electronic media by the name or identifying number for a complainant, subject, victim, or witness; by case complaint or investigation number; by investigator's name or other personal identifier; or by investigating office designation.

SAFEGUARDS:

DHS OIG safeguards information in this system in accordance with applicable laws, rules, and policies, including all applicable DHS automated systems security and access policies. DHS imposes strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Complaint and investigative record files that involve substantive information relating to national security or allegations against senior DHS officials, that attract national media or congressional attention, or that result in substantive changes in DHS policies or procedures are permanent and are transferred to the National Archives and Records Administration 20 years after completion of the investigation and all actions based thereon. All other complaint and investigative record files are destroyed 20 years after completion of the investigation and all actions based thereon. Government issued investigative property records and management reports are destroyed when no longer needed for business purposes.

SYSTEM MANAGER(S) AND ADDRESS:

The System Manager is the Policy Specialist, Office of Investigations, DHS OIG, Mail Stop 2600, 245 Murray Drive SW., Building 410, Washington, DC 20528.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, the Office of Inspector General will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content may submit a request in writing to the Headquarters or Office of Inspector General's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive SW., Building 410, STOP–0655, Washington, DC 20528–0655.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which Component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records. If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the Component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification Procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from sources including the individual record subjects; DHS officials and employees; employees of federal, state, local, and foreign agencies; and other persons and entities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), and (e)(8); (f); and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5), has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H); and (f).

Dated: July 10, 2015.

Karen L. Neuman,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2015–18385 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2015–0031]

President's National Security Telecommunications Advisory Committee

AGENCY: National Protection and Programs Directorate, Department of Homeland Security (DHS).

ACTION: Committee Management; Notice of an Open Federal Advisory Committee Meeting.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will meet via teleconference on Wednesday, August 12, 2015. The meeting will be open to the public.

DATES: The NSTAC will meet on Wednesday, August 12, 2015, from 2:00 p.m. to 2:45 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held via conference call. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance to attend, please email *NSTAC@hq.dhs.gov* by 5:00 p.m. on Friday, August 7, 2015.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the **SUPPLEMENTARY INFORMATION** section below. Associated briefing materials that will be discussed at the meeting will be available at *www.dhs.gov/nstac* for review as of Friday, August 7, 2015. Comments may be submitted at any time and must be identified by docket number DHS–2015–0031. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting written comments.
- *Email: NSTAC@hq.dhs.gov.* Include the docket number in the subject line of the email message.
- *Fax:* 703–235–5962, Attn: Julia Madison.
- *Mail:* Designated Federal Officer, Stakeholder Engagement and Critical Infrastructure Resilience Division, National Protection and Programs Directorate, Department of Homeland Security, 245 Murray Lane, Mail Stop 0604, Arlington, VA 20598–0604.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *www.regulations.gov,* including any personal information provided.

Docket: For access to the docket and comments received by the NSTAC, go to *www.regulations.gov* and enter docket number DHS–2015–0031.

A public comment period will be held during the conference call on Wednesday, August 12, 2015, from 2:35 p.m. to 2:45 p.m. Speakers who wish to participate in the public comment period must register in advance by no later than Monday, August 10, 2015, at 5:00 p.m. by emailing NSTAC at *NSTAC@hq.dhs.gov.* Speakers are requested to limit their comments to three minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, following the last request for comments.

FOR FURTHER INFORMATION CONTACT: Ms. Helen Jackson, NSTAC Designated Federal Officer, Department of Homeland Security, telephone (703) 235–5321.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the *Federal Advisory Committee Act* (FACA), 5 U.S.C. Appendix. The NSTAC advises the President on matters related to national security and emergency preparedness telecommunications policy.

Agenda: In February 2015, the Executive Office of the President requested that the NSTAC examine how the utilization of Big Data Analytics could enhance National Security/Emergency Preparedness functions for the Nation. During the conference call, the NSTAC members will discuss their recent scoping phase on big data analytics and their approach or methodology for the research phase of the study. Following the discussion, the members will deliberate and vote on the Big Data Analytics Scoping Report.

Dated: July 21, 2015.

Helen Jackson,

Designated Federal Officer for the NSTAC.

[FR Doc. 2015–18383 Filed 7–24–15; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[156A2100DD/AAKC001030/A0A501010.999900 253G]

Pascua Yaqui Tribe of Arizona—2015 Liquor Control Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Pascua Yaqui Tribe of Arizona's 2015 Liquor Control Ordinance. The ordinance regulates and controls the possession, sale and consumption of liquor within the Pascua Yaqui Tribe of Arizona's Indian country. This ordinance allows for the possession and sale of alcoholic beverages within the jurisdiction of the Pascua Yaqui Tribe of Arizona, will increase the ability of the tribal government to control the distribution and possession of liquor within their Indian country, and at the same time, will provide an important source of revenue, the strengthening of the tribal government, and the delivery of tribal services.

DATES: *Effective Date:* This law is effective August 27, 2015.

FOR FURTHER INFORMATION CONTACT: Sharlot Johnson, Tribal Government Services Officer, Western Regional Office, Bureau of Indian Affairs, 2600 North Central Avenue, Phoenix, AZ 85004; Phone: (602) 379–6786; Fax: (602) 379–379–4100, or Laurel Iron Cloud, Chief, Division of Tribal Government Services, Office of Indian Services, Bureau of Indian Affairs, 1849 C Street NW., MS–4513–MIB, Washington, DC 20240; Telephone: (202) 513–7641.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. Pascua Yaqui Tribal Council duly adopted this law by Resolution No. C06–103–15 on June 10, 2015.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the Pascua Yaqui Tribe of Arizona duly adopted the 2015 Liquor Control Ordinance 07–15 by Resolution No. C06–103–15 on June 10, 2015.

Dated: July 21, 2015.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

The Pascua Yaqui Liquor Control Ordinance of 2015 shall read as follows:

Section 10 Short Title: Codification (8 PYTC § 6–5–10)

(A) This Ordinance is an Ordinance of the Pascua Yaqui Tribe of Arizona, and shall be known as the Pascua Yaqui Liquor Control Ordinance of 2015.

(B) This Ordinance shall be codified pursuant to the Pascua Yaqui Tribe Codification Ordinance as **Title 8, Part VI, Chapter 6–5**.

Section 20 General (8 PYTC § 6–5–20)

(A) This Ordinance is for the purpose of regulating the sale, possession and use of alcoholic liquor on the Pascua Yaqui Reservation and adjacent Trust Lands held by the United States for the benefit of the Pascua Yaqui Tribe of

Arizona. The enactment of this Ordinance will enable the Pascua Yaqui Tribe of Arizona and its Tribal Government to regulate liquor distribution and possession on the Pascua Yaqui Reservation, as defined in Subsection **8 PYTC § 6–5–30 (C)** below.

(B) Subject to certain limitations, **Article VI, Sections 1(l), 1(0) 1(t), and 1(w)** of the **Constitution of the Pascua Yaqui Tribe of Arizona**, adopted on January 26, 1988 and approved by the Secretary of the Interior on February 8, 1988 pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), vests the Pascua Yaqui Tribal Council with legislative and executive authority, including the authority to adopt this Ordinance.

(C) Jurisdiction. This Ordinance is adopted in accordance with the **18 U.S.C.§ 1161**, and conforms with all requisite laws of the State of Arizona in accordance with the requirements of **18 U.S.C.§ 1161.**

Section 30 Definitions (8 PYTC § 6–5–30)

To the extent that definitions are consistent with tribal or federal laws, terms used herein shall have the same meaning as defined in **Arizona Revised Statutes (''ARS'') Title 4,** and as defined in Administrative Rules of the Arizona Department of Liquor Licenses and Control to administer **ARS, Title 4**.

(A) ''Alcoholic Liquor'' shall mean any alcoholic beverage containing more than one-half of one percent alcohol by volume, and every liquid or solid, patented or not, containing alcohol and capable of being consumed by a human being.

(B) ''Land Assignment'' means a Land Assignment as defined in the Pascua Yaqui Tribal Code.

(C) ''Pascua Yaqui Reservation'' shall mean all lands held in trust by the United States for the Pascua Yaqui Tribe of Arizona or its members. It also includes any roads or rights-of-way located within the external boundaries of the Pascua Yaqui Reservation.

(D) Whenever the words ''sell'' or ''to sell'' refer to anything forbidden by this Chapter and related to alcoholic liquor, they include:

(1) To solicit or receive and order;

(2) To keep or expose for sale;

(3) To deliver for value or in any way other than purely gratuitously;

(4) To peddle;

(5) To keep with intent to sell;

(6) To traffic in;

(7) To engage in a transaction for any consideration or promise obtained directly or indirectly under any pretext or by any means or to procure or allow to be procured for any other person;

(8) The word ''sale'' includes every act of selling as defined in this Subsection (D) of Section 8 PYTC § 6–5–30;

(9) The word ''person'' includes a human being or any entity that is recognized by law as having the rights and/or duties of a human being.

(E) ''Tribal'' refers to the Pascua Yaqui Tribe of Arizona.

(F) ''Tribe'' shall mean the Pascua Yaqui Tribe of Arizona.

Section 40 Civil Violation (8 PYTC § 6–6–40)

Any of the following shall be a civil violation in prosecutable in the Pascua Yaqui Tribal Court under this Ordinance:

(A) For any person to sell, trade or manufacture any alcoholic liquor on the Pascua Yaqui Reservation, except as provided for in this Ordinance.

(B) For any business establishment or person on the Pascua Yaqui Reservation to possess, transport or keep with intent to sell, barter or trade to another, any liquor, except for those commercial liquor establishments on the Pascua Yaqui Reservation licensed by the Arizona Department of Liquor Licenses and Control and approved by the Pascua Yaqui Tribal Council by resolution, provided however that a person may transport liquor from a licensed establishment consistent with the terms of the license.

(C) For any person to consume alcoholic liquor on a public road on the Pascua Yaqui Reservation.

(D) For any person to publicly consume any alcoholic liquor at any community function, or at or near any place of business, celebration grounds, recreational areas, including ballparks, Tribal government facilities, and any other public area where minors gather for meetings or recreation, except within a licensed establishment where alcohol is sold.

(E) For any person under the age of 21 years to buy, attempt to buy or to misrepresent their age in attempting to buy alcoholic liquor.

(F) For any person under the age of 21 years to transport, possess or consume any alcoholic liquor on the Pascua Yaqui Reservation, or to be under the influence of alcohol or to be at an established commercial liquor establishment, except as authorized under this Ordinance.

(G) For any person to sell or furnish alcoholic liquor to any person under 21 years of age.

(H) For alcoholic liquor to be given as a prize, premium or consideration for a lottery, contest, game of chance or skill, or competition of any kind.

Section 50 Criminal Violations (8 PYTC § 6–5–50)

(A) Except as set forth in subsections (B), (C), and (D) below, it shall be a violation of **18 U.S.C. § 1154(a)** for any person not having a license issued by the State of Arizona for the sale alcohol on the Pascua Yaqui Reservation to sell or distribute alcohol on the Pascua Yaqui Reservation, and the criminal penalties therefore shall be as established in **18 U.S.C. § 1154(a).**

(B) It shall be permissible, and shall not be a criminal violation of **18 U.S.C. § 1154(a)**, for a person who is 21 years of age or older to distribute, but not sell, alcohol to any other person 21 years of age or older, who are both lawfully present on a residential Land Assignment of the Pascua Yaqui Tribe with the consent of the Land Assignment holder.

(C) It shall be permissible, and shall not be a criminal violation of **18 U.S.C. § 1154(a)**, for a person who is 21 years of age or older to distribute, but not sell, alcohol to any other person 21 years of age or older, who are both lawfully present at a rental residence, or its surrounding land, owned by the Pascua Yaqui Tribe with the consent of the authorized tenant.

(D) It shall be permissible, and shall not be a criminal violation of **18 U.S.C. § 1154(a)**, for a person or entity having a liquor license issued by the State of Arizona for sale of liquor on the Pascua Yaqui Reservation, or for any employee of a person or entity having a liquor license issued by the State of Arizona for sale of liquor on the Pascua Yaqui Reservation, to sell or distribute alcohol on the Pascua Yaqui Reservation.

Section 60 Licensing Procedure (8 PYTC § 6–5–60)

(A) Requests, issuances of, and renewals of, licenses under this Ordinance shall be made to the State of Arizona in accordance with the standards set forth by the State of Arizona in **ARS Title 4** and the regulations established by the Arizona Liquor License Control Board to administer **ARS Title 4**.

(B) The Pascua Yaqui Tribal Council shall be the ''local governing body,'' as set out in **ARS § 4–201**, for license applications, issuances, and renewals for locations on the Pascua Yaqui Reservation.

(C) Licensees shall not conduct operations under those licenses, nor activities related thereto, on Tribal Land Assignments or rental properties, which are reserved for residential purposes only.

(D) Licenses may be terminated by the Arizona Department of Liquor Licenses

and Control and/or Arizona Liquor License Control Board in accordance with their respective laws, regulations, policies and procedures. The laws, rules and regulations of the Arizona Department of Liquor Licenses and Control and/or the Arizona Liquor License Control Board with regard to liquor license enforcement, review, and revocation proceedings shall be applicable to Liquor Licenses on the Pascua Yaqui Reservation.

Section 70 Warning Signs Required (8 PYTC § 6–5–70)

Licensees on the Pascua Yaqui Reservation shall comply with the requirements of **ARS § 4–261**, and shall post the signs required by that section in accordance with the requirements of that section.

Section 80 Jurisdiction & Violations of this Ordinance (8 PYTC § 6–5–80)

(A) The Pascua Yaqui Tribal Court shall have exclusive jurisdiction over enforcement of all provision of this Ordinance, except for violations of **8 PYTC § 6–5–50 (A)** committed by non-Indians. This shall not preclude any of the United States of America, the Arizona Department of Liquor Licenses and Control and/or the Arizona Liquor License Control Board from administering and enforcing their respective laws, regulations, policies and procedures, including, but not limited to, unlawful distribution of alcohol, licensing requirements, the issuance of liquor licenses, liquor license violations, licensee disciplinary proceedings, and license revocation proceedings.

(B) Any person present on the Pascua Yaqui Reservation shall be deemed to have consented to the civil jurisdiction of the Pascua Yaqui Tribal Court, and any Indian present on the Pascua Yaqui Reservation shall be deemed to have consented to criminal jurisdiction of the Pascua Yaqui Tribal Court, and may be subject to a civil or criminal penalty as applicable in the Pascua Yaqui Tribal Court for a civil or criminal violations of this Ordinance. The Indian Civil Rights Act shall be applicable to Indians charged with criminal violations of this Ordinance.

(C) For any violation of **8 PYTC § 6–6–40** the Pascua Yaqui Tribal Court may impose a civil penalty in an amount not to exceed $1,000 per violation.

(D) The Pascua Yaqui Prosecutor's Office shall bring enforcement actions of alleged violations of **8 PYTC § 6–6–40.**

(E) The burden of proof for alleged violations of **8 PYTC § 6–6–40** shall be a preponderance of the evidence.

(F) There shall be no right of jury trial or court-appointed legal counsel for alleged violations of **8 PYTC § 6–6–40.**

(G) Alleged violations of **8 PYTC § 6–6–40** above may be brought jointly with a criminal violation of Pascua Yaqui Tribal law, or may be brought separately.

(H) The Tribal Council hereby specifically finds that civil penalties imposed for violations of **8 PYTC § 6–6–40** are payable to the Pascua Yaqui Tribe, and are reasonably necessary and related to the expense of governmental administration necessary in maintaining law and order and public safety, and in managing, protecting and developing the natural resources on the Reservation. It is the legislative intent of the Tribal Council that all violations of **8 PYTC § 6–6–40,** whether committed by tribal members, non-member Indians, or non-Indians, shall be considered civil in nature, rather than criminal.

Section 90 Severability (8 PYTC § 6–5–90)

If a court of competent jurisdiction finds any provision of this Ordinance to be invalid or illegal under applicable Federal or Tribal law, such provision shall be severed from the Ordinance and the remainder of this Ordinance shall remain in full force and effect.

Section 100 Compliance with 18 U.S.C. 1154(a) and 18 U.S.C. 1161 (8 PYTC § 6–5–100)

The Tribe will comply with **18 U.S.C. § 1154(a) and 18 U.S.C. 1161,** and other laws of the United States regarding distribution of alcohol on the Pascua Yaqui Reservation, and will comply with the laws and regulations of the State of Arizona regarding licenses to sell alcohol to the extent they are applicable to the Tribe under **18 U.S.C. 1161,** other laws of the United States, or the laws of the State of Arizona.

Section 110 Effective Date (8 PYTC § 6–5–110)

This Ordinance shall be effective on the **THIRTY FIRST DAY AFTER** approval by the Secretary of Interior, and publication in the **Federal Register** as provided by **18 U.S.C. 1161.**

Section 120 Sovereign Immunity (8 PYTC § 6–5–120)

Nothing in this Ordinance either waives or shall be deemed or construed as a waiver of the sovereign immunity of the Tribe, nor any of its elected officials, officers, directors, employees or governmental enterprises, entities, departments or components and any respective officers, directors or employees thereof.''

[FR Doc. 2015–18286 Filed 7–24–15; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[15XL LLIDB00100 LF1000000.HT0000 LXSS024D0000 241A 4500081550]

Notice of Public Meeting: Resource Advisory Council to the Boise District, Bureau of Land Management, U. S. Department of the Interior

AGENCY: Bureau of Land Management.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Boise District Resource Advisory Council (RAC), will hold a meeting as indicated below.

DATES: The meeting will be held August 19, 2015, at the Boise District Office, 3948 Development Avenue, Boise, Idaho 83705 beginning at 9:00 a.m. and adjourning at 3:00 p.m. Members of the public are invited to attend. A public comment period will be held at 11:00 a.m.

FOR FURTHER INFORMATION CONTACT: Marsha Buchanan, Supervisory Administrative Specialist and RAC Coordinator, BLM Boise District, 3948 Development Ave., Boise, Idaho 83705, Telephone (208) 384–3364.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in southwestern Idaho. During the August meeting the Boise District Council will receive updates on the Bruneau Owyhee Sage-grouse Habitat Project (BOSH) and Tri-State planning process. New members will be introduced and the RAC will organize for the upcoming term, to include election of Council leadership. BLM staff will update RAC members on the travel plan process and upcoming landscape projects. Agenda items and location may change due to unforeseen circumstances. The public may present written or oral comments to members of the Council. At each full RAC meeting, time is provided in the agenda for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be

limited. Individuals who plan to attend and need special assistance should contact the BLM Coordinator as provided above. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

Jenifer L. Arnold,

Acting District Manager.

[FR Doc. 2015–18305 Filed 7–24–15; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR0810000, 15XR0680A1, RY.1541CH20.1430001]

Announcement of Requirements and Registration for a Prize Competition Seeking: New Concepts for Remote Fish Detection

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation, in collaboration with other Federal agencies (U.S. Geological Survey, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration-National Marine Fisheries Service, and U.S. Army Corps of Engineers) are announcing a prize competition looking for detailed concepts for the next generation of fish tracking methods, beyond what is available and in the literature today. Emphasis is on accurate tracking of many fish, ease of use, longevity, and low cost.

DATES: Listed below are the specific dates pertaining to this prize competition:

1. Submission period begins on July 27, 2015.
2. Submission period ends on August 26, 2015.
3. Judging period ends on October 26, 2015.
4. Winners announced by November 9, 2015.

ADDRESSES: The *New Concepts for Remote Fish Detection* Prize Competition will be posted on the following crowd-sourcing platforms where Solvers can register for this prize competition:

1. The Water Pavilion located at the InnoCentive Challenge Center: *https://www.innocentive.com/ar/challenge/browse.*
2. U.S. Federal Government Challenge Platform: *www.Challenge.gov.*
3. The Nature Open Innovation Pavilion at *http://www.nature.com/openinnovation/index.html.*
4. The Scientific American Citizen Science Center at *http://www.scientificamerican.com/citizen-science/.*

InnoCentive, Inc. is administering this challenge under a challenge support services contract with the Bureau of Reclamation. These Web sites will re-direct the Solver community to the InnoCentive Challenge Center as the administrator for this prize competition. Additional details for this prize competition, including the Challenge Agreement specific for this prize competition, can be accessed through any of these prize competition web addresses. The Challenge Agreement contains more details of the prize competition rules and terms that Solvers must agree with to be eligible to compete.

FOR FURTHER INFORMATION CONTACT: Challenge Manager: Dr. Levi Brekke, Chief, Research and Development, Bureau of Reclamation, (303) 445–2494, *lbrekke@usbr.gov;* Mr. Chuck Hennig, (303) 445–2134, *chennig@usbr.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Reclamation is announcing the following prize competition in compliance with 15 U.S. Code 3719, Prize Competitions. The ability to track individual or groups of fish is central to efforts to recover threatened and endangered fish species, and to reduce impacts to at-risk species. Reliable, affordable detection and tracking provides vital information about how many fish are present, where and why mortality occurs, and where and why species thrive. This enables fish recovery program managers to pursue targeted and more effective actions that can reduce mortality rates, improve habitat, and increase survival rates while continuing to meet the mission of the agency—delivery of water and power in the case of Reclamation. A successful solution will significantly reduce costs and dramatically increase the effectiveness and efficiency of various fish recovery efforts led by Federal, state, local, and/or other organizations.

Challenge Summary: There are a number of methods in use today to track fish. Common electronic methods include use of acoustic tags, radio-telemetry tags, and passive integrated transponder (PIT) tags. Different technologies have pros and cons. Tags accurate over long distances are often costly and need to be surgically implanted in the fish. Low cost tags have long lifetimes, but work over short distances and signals are subject to electromagnetic interference, which may result in no or inaccurate detections. Since there is no universal or ''best'' method, the option that best meets the specific needs of the fish tracking program objectives is typically selected (*e.g.* accuracy, lifetime of the study, working environments, species being tagged, number of and size of fish, available funding, etc.). Current methods rely on capture and handling of fish to implant or attach tags, with subsequent recaptures or resightings involving elaborate capture or corralling methods, which can be complex, costly, and stressful to the fish.

The goal of this Challenge is to generate new concepts for tracking fish that advance technologies that meet fish recovery program management needs at a reasonable cost. A solution is being pursued through a prize competition because the Bureau of Reclamation and the collaborating Federal agencies view it beneficial to seek innovative solutions from those beyond the usual sources of potential solvers and experts that commonly work in the fish recovery management domain. We find ourselves often wondering if somebody, somewhere may know a better way of tracking and monitoring fish for our purposes than the methods we currently use. The prize competition approach enables us to reach a new source of potential Solvers to generate new and timely solutions that would not likely be accomplished by standard contractual methods.

This is an Ideation Challenge, which has the following unique features:

- There is a guaranteed award. The awards will be paid to the best submission(s) as solely determined by the Bureau of Reclamation (The Seeker). The total payout will be $20,000, with at least one award being no smaller than $5,000 and no award being smaller than $2,500.
- ALL INTELLECTUAL PROPERTY RIGHTS, IF ANY, IN THE IDEA OR CONCEPT DEMONSTRATED BY THE PROPOSED SOLUTION WILL REMAIN WITH THE SOLVER. *UPON SUBMISSION OF A PROPOSED SOLUTION* TO THIS CHALLENGE, EACH SOLVER AGREES TO GRANT TO THE SEEKER A ROYALTY–FREE, PERPETUAL, IRREVOCABLE, NON–EXCLUSIVE LICENSE TO USE BY OR ON–BEHALF OF THE U.S. FEDERAL GOVERNMENT ANY INFORMATION INCLUDED IN THIS PROPOSAL IN ANY FORUM, OR SUBSEQUENT

EFFORTS TO FURTHER DEVELOP THE CONCEPT INTO A VIABLE SOLUTION AND TO ALLOW OTHERS TO DO SO. NOTWITHSTANDING GRANTING THE SEEKER A PERPETUAL, NON–EXCLUSIVE LICENSE FOR THE PROPOSED SOLUTION, THE SOLVER RETAINS OWNERSHIP OF THE IDEA OR CONCEPT DEMONSTRATED BY THE PROPOSED SOLUTION.

• The Seeker believes there might be a potential for future collaboration with awarded Solver(s), although such collaboration is not guaranteed. The Seeker may also encourage Solver(s) to further develop and test their winning submissions through subsequent round(s) of competition. Solvers should make it clear if they have the ability for subsequent design and development phases and would be willing to consider future collaborations and/or subsequent competitions.

Background: The Bureau of Reclamation and other Federal and non-Federal resource managers require the ability to identify and monitor fish and other aquatic animals. Fish, in particular, use different habitats, from small streams to deep fast-flowing rivers, and large lakes and oceans. A common challenge faced by fish recovery managers is the need to monitor movements of free-swimming individual fish without repeated capture and handling.

Telemetry systems currently used to detect and/or track individual fish include PIT tag systems (or radio frequency identification) and two types of active (battery powered) systems: radio tag and acoustic tag.

• PIT tag systems are limited to detecting fish at short distances (generally <40 inches for 12 mm tags) and they require antennas that must withstand large hydraulic forces. These systems transmit and receive very rapidly (*e.g.* 10–25 milliseconds, depending on the system), which means that they are able to detect fish traveling quickly (*i.e.,* >40 feet/second) through or over stationary antennas in dams, fish ladders, canals, and streams. PIT tags are relatively inexpensive (~ $2.00/fish) and can be inserted in fish as small as 2 inches in length. Because PIT tags do not have a battery and are glass-encapsulated, they can function and persist throughout the lifetime of long-lived fish (10–100 years or more).

• Radio and acoustic telemetry systems have the ability to detect fish over large distances (100 feet-1 mile), but transmitters are expensive (>$150 each) and most but not all require surgical procedures to implant. The battery within the telemetry system determines both their size and lifetime. Transmission rate is a function of technology—some acoustic tags transmit unique codes in <0.1 seconds, while others take close to 10 seconds. Radio tags typically transmit codes of 0.2 seconds duration. The duration of codes, combined with battery size and power output, limit the life expectancy of the tag. This, combined with the greater broadcast range, can make it difficult to observe rapid or fine-scale fish movements using these tags. In addition, radio and acoustic tags are generally limited by environmental conditions, *e.g.,* water depth of tag location, salinity, ambient noise from entrained air bubbles, sediment in water, and other water quality conditions.

Information is easily found on the internet concerning state of the art fish tagging techniques. A few references are provided in the prize competition posting for your information; however, please realize this is what is known today, and that the Seeker is looking for new ideas and mechanisms beyond the known literature.

The Challenge: New technology is needed to enable resource managers to address important problems at a reasonable cost. Our Challenge is to find the next fish monitoring and tracking system. The Solver is not limited to the mechanical and physical systems described above. The answer could be biological, chemical, physical, mechanical, etc.

A successful solution significantly reduces costs and dramatically increases the effectiveness and efficiency of fish detecting and tracking efforts. For the sake of clarity and simplicity, we will designate the rainbow trout (*Oncorhynchus mykiss*) as the representative fish species for this Challenge. If the Solvers need to make assumptions about a generalized fish, they can use data for this particular representative fish, which can be found on the internet.

The question is not, ''How do we track a single fish for its lifetime'', but ''How do we track thousands of individually identifiable fish for extended periods of time cheaply and effectively''. Note that there are many criteria that need to be considered for tracking fish such as:

• Lifetime of a tag or device (longer is better)

• Size and invasiveness (smaller is better)

• Detection distance (longer is better)

• Quality of detection (high accuracy and high speed is better)

• Cost (low is better)

Solvers need not meet every technical requirement with one new concept. Concepts that meet some requirements, but not all, will still be eligible for competing for an award. New and novel approaches to the tracking of individual identifiable aquatic organisms will be given special consideration.

Things to avoid:

1. The Seeker is not interested in marginal improvements to current fish tagging techniques such as PIT tags, acoustic and radio tags as well as other known marking methods, but novel and major improvement in any of these would be of interest.

2. The Seeker is not looking for a review article on fish tagging. Only new methods/techniques/technology will be considered that are not currently in use for fish tagging.

Submissions should try to meet the following Technical Requirements:

1. The best device/method/technique would be able to:

a. Be used for freshwater fish as small as 4 inches in total length (if a physical tag is used, it must be less than 5% of the fish's body weight).

b. Detect and identify individual fish from a minimum of 30 feet away from detector device throughout the entire water column (up to 30 feet in depth or laterally).

c. Detect and identify rapidly moving individual fish with detection efficiency >95%, even when in a school or assemblage of like or different species that may or may not be similarly tagged or marked.

d. Be used on a large scale (*e.g.,* if tags used, should be able to tag > 1,000 fish/day using two people) and scalable to use in a field setting where fish would be marked after capture from rafts, small boats, or from banks of water bodies in remote field locations.

e. Reduce capturing or handling of fish to an original marking or tagging event.

2. The system should not modify the behavior, physiology, genetic, phenotypic, growth, survival, or edibility of the fish of interest, or other fish and aquatic animals near the fish of interest.

3. Detection devices should not be susceptible to normal electromagnetic interference, which would include overhead power lines, turbine motors such as those found at dams, water pumps, outboard and inboard motors, transformers, etc.

4. The method must have performance characteristics as good as or better than existing 12-mm PIT tags and existing active acoustic and radio tags. These performance characteristics are:

a. Shedding rates are < 5%.

b. Durability is defined as capable of being dropped from a height of 4 feet and submersible to a water depth over 300 feet without damage.

c. Longevity > 10 years while in service, but should be > 50 years.

The following are not required for an award but would be ''nice to have''.

5. The detection device should be portable (*i.e.,* < 50 pounds) and capable to be operated by one person.

6. Detection devices should not be susceptible to any electromagnetic interference.

7. If tags are used (one device per fish), they should be capable of mass production to meet demand at a reasonable cost and show promise for future miniaturization.

8. The method is capable of successfully identifying individual fish in both freshwater and seawater.

9. The method is capable of detecting and identifying individual fish from a minimum of 100 feet away from the detector device throughout the entire water column (up to 100 feet in depth or laterally).

10. The solution is capable of identifying fish as small as 2 inches in total length, and if a physical tag is used, it should be no more than 2% of the fish's body weight.

Project Deliverables: This is an Ideation Challenge that requires only a written proposal to be submitted. At least one solution will be deemed the winner.

The submission should include:

1. Detailed description of a fish tracking method that is unknown in the literature today. The method or system should minimize handling and recapture of fish.

2. Rationale for why the processes/material can meet the Technical Requirements listed in the Challenge description. Note: A general concept is needed, but is not considered a solution by itself. The Solver must describe with a high level of technical detail how the system would meet or not meet each of the ''must have'' and ''nice to have'' attributes described above. The Solver should expect that their submittal will be reviewed by experts in the field of telemetry, biology, and multiple fields of engineering. Examples and literature references of where similar techniques are used will be helpful as evidence.

3. A list of equipment and material required. Discussion should include lifetime of any equipment; size and invasiveness to the fish; detection speed, accuracy, and distance; and estimated costs.

4. Details of any process associated with the tracking system (*e.g.,* tagging fish, setting up detectors, etc.) and the time and effort required to accomplish tasks.

5. The Solver needs to describe how deployable and workable the system would be under a wide variety of environmental conditions including water depths, turbidity, salinity, velocities, and turbulence such as those found in small to large streams in the western United States.

Submitted proposals should not include any personal identifying information or any information the Solvers do not want to make public or consider as their Intellectual Property they do not want to share.

Judging: After the Challenge deadline, the Seeker will evaluate the submissions and make a decision with regards to the winning solution(s). All Solvers that submitted a proposal will be notified on the status of their submissions. However, no detailed evaluation of individual submissions will be provided. Decisions by the Seeker cannot be contested.

Submitted solutions will be evaluated by a Judging Panel composed of scientists, engineers, and telemetry experts. The Judging Panel will also have consultation access to technical experts outside of their expertise, as determined necessary, to evaluate specific submissions. The Judging Panel will assess the merits of the solution by the degree that they meet the Technical Requirements listed in the Challenge description, by the potential utility (*i.e.,* adaptability, scalability, readiness for development), and by originality (*i.e.,* novel extension of current knowledge).

Eligibility Rules: To be able to win a prize under this competition, an individual or entity must:

1. Agree to the rules of the competition (15 U.S. Code § 3719(g)(1));

2. Be an entity that is incorporated in and maintains a primary place of business in the United States, or (b) in the case of an individual, a citizen or permanent resident of the United States (15 U.S. Code § 3719(g)(3));

3. Not be a Federal entity or Federal employee acting within the scope of their employment; (15 U.S. Code § 3719(g)(4));

4. Assume risks and waive claims against the Federal Government and its related entities (15 U.S. Code § 3719(i)(1)(B)); and,

5. Not use Federal facilities, or consult with Federal employees *during the competition* unless the facilities and employees are made available to all individuals and entities participating in the competition on an equitable basis.

The following individuals or entities are not eligible regardless of whether they meet the criteria set forth above:

1. Any individual who employs an evaluator on the Judging Panel or otherwise has a material business relationship or affiliation with any Judge.

2. Any individual who is a member of any Judge's immediate family or household.

3. The Seeker, participating organizations, and any advertising agency, contractor or other individual or organization involved with the design, production, promotion, execution, or distribution of the prize competition; all employees, representatives and agents thereof; and all members of the immediate family or household of any such individual, employee, representative, or agent.

4. Any individual or entity that uses Federal funds to develop the proposed solution now or any time in the past, unless such use is consistent with the grant award, or other applicable Federal funds awarding document. NOTE: Submissions that propose to improve or adapt existing federally funded technologies for the solution sought in this prize competition are eligible.

Consultation: Fish recovery program managers and technical specialists from across the Bureau of Reclamation, U.S. Geological Survey, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration-National Marine Fisheries Service, and U.S. Army Corps of Engineers were consulted in identifying and selecting the topic of this prize competition. Direct and indirect input from various stakeholders and partners associated with the fish recovery program efforts by these agencies were also considered. In addition, the Bureau of Reclamation maintains an open invitation to the public to suggest prize competition topics at *www.usbr.gov/research/challenges.*

Public Disclosure: InnoCentive, Inc. is administering this challenge under a challenge support services contract with the Bureau of Reclamation. Participation is conditioned on providing the data required on InnoCentive's online registration form. Personal data will be processed in accordance with InnoCentive's Privacy Policy which can be located at *http://www.innocentive.com/privacy.php.* Before including your address, phone number, email address, or other personal identifying information in your proposal, you should be aware that the Seeker is under no obligation to withhold such information from public disclosure, and it may be made publicly available at any time. Neither InnoCentive nor the Seeker is responsible for human error, theft,

destruction, or damage to proposed solutions, or other factors beyond its reasonable control. Solver assumes any and all risks and waives any and all claims against the Seeker and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from participation in this competition, whether the injury, death, damage, or loss arises through negligence or otherwise.

Dated: June 10, 2015.

Levi Brekke,

Chief, Research and Development.

[FR Doc. 2015–18157 Filed 7–24–15; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Windscreen Wipers and Components Thereof, DN 3078;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *EDIS*,[1] and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *USITC*.[2]. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *EDIS*.[3] Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Trico Products Corporation on July 20, 2015. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain windscreen wipers and components thereof. The complaint names as respondents Valeo North America, Inc. of Troy, MI and Delmex je Juarez S. de R.L. de C.V. of Mexico. The complainant requests that the Commission issue a limited exclusion order and cease and desist orders.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register.** There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3078'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *Electronic Filing Procedures*[4]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on *EDIS*.[5].

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: July 21, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015–18278 Filed 7–24–15; 8:45 am]

BILLING CODE 7020–02–P

[1] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

[2] United States International Trade Commission (USITC): *http://edis.usitc.gov.*

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

[4] Handbook for Electronic Filing Procedures: *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf.*

[5] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–539 and 731–TA–1280–1282 (Preliminary)]

Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From Korea, Mexico, and Turkey

Institution of antidumping and countervailing duty investigations and scheduling of preliminary phase investigations.

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–539 and 731–TA–1280–1282 (Preliminary) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of heavy walled rectangular welded carbon steel pipes and tubes from Korea, Mexico, and Turkey, provided for in subheading 7306.61.10 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and that are alleged to be subsidized by the Government of Turkey. Unless the Department of Commerce extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by September 4, 2015. The Commission's views must be transmitted to Commerce within five business days thereafter, or by September 14, 2015.

DATES: *Effective Date:* July 21, 2015.

FOR FURTHER INFORMATION CONTACT: Carolyn Carlson (202–3002), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to a petition filed on July 21, 2015, by Atlas Tube, a division of JMC Steel Group (Chicago, Illinois), Bull Moose Tube Company (Chesterfield, Missouri), EXLTUBE (North Kansas City, Missouri), Hannibal Industries, Inc. (Los Angeles, California), Independence Tube Corporation (Chicago, Illinois), Maruichi American Corporation (Santa Fe Springs, California), Searing Industries (Rancho Cucamonga, California), and Southland Tube (Birmingham, Alabama).

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with these investigations for 9:30 a.m. on Tuesday, August 11, 2015, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be emailed to *William.bishop@usitc.gov* and *Sharon.bellamy@usitc.gov* (DO NOT FILE ON EDIS) on or before August 7, 2015. Parties in support of the imposition of countervailing and antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before August 14, 2015, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please consult the Commission's rules, as amended, 76 FR 61937 (Oct. 6, 2011) and the Commission's Handbook on Filing Procedures, 76 FR 62092 (Oct. 6, 2011), available on the Commission's Web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.
Issued: July 21, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015–18288 Filed 7–24–15; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–823]

Certain Kinesiotherapy Devices and Components Thereof; Commission Decision To Rescind a General Exclusion Order and Cease and Desist Orders

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has rescinded the general exclusion order and cease and desist orders issued at the conclusion of the above-captioned investigation. The general exclusion order was directed against infringing kinesiotherapy devices and components thereof, and the cease and desist orders were directed against certain respondents.

FOR FURTHER INFORMATION CONTACT: Michael K. Haldenstein, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3041. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on January 10, 2012, based on a complaint filed by Standard Innovation Corporation of Ottawa, ON, Canada and Standard Innovation (US) Corp. of Wilmington, Delaware (collectively, ''Standard Innovation''). 77 FR 1504–05 (Jan. 10, 2012). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of United States Patent Nos. 7,931,605 (''the '605 patent'') and D605,779 (''the D'779 patent''). The complaint named twenty-one business entities as respondents, several of which have since been terminated from the investigation based upon consent orders or withdrawal of the complaint. On July 25, 2012, the Commission determined not to review an ID (Order No. 25) granting Standard Innovation's motion to withdraw the D'779 patent from the investigation. An evidentiary hearing was held from August 21, 2012, to August 24, 2012.

On January 8, 2013, the ALJ issued a final ID finding no violation of Section 337. The ALJ also issued a recommended determination on remedy and bonding on January 22, 2013. Specifically, the ALJ found that Standard Innovation had not satisfied the economic prong of the domestic industry requirement. The ALJ found, however, that the accused products infringe the asserted claims, that the asserted claims were not shown to be invalid, and that the technical prong of the domestic industry requirement was shown to be satisfied.

On January 22, 2013, Standard Innovation and the Commission investigative attorney filed petitions for review of the final ID, and the remaining respondents in the investigation filed a contingent petition for review. On January 30, 2013, each party filed a response.

On March 25, 2013, the Commission determined to review the ID in its entirety and posed questions to the parties concerning the satisfaction of the economic prong of the domestic industry and remedy, the public interest, and bonding. The parties and the IA submitted briefs on April 8, 2013, and briefs in reply on April 15, 2013. The target date for completion of the investigation was also extended until June 17, 2013.

On June 17, 2013, the Commission issued its final determination finding that Standard Innovation had satisfied the economic prong of the domestic industry requirement and that Standard Innovation had proven a violation of Section 337 by reason of infringement of the '605 patent. Based on evidence of a pattern of violation and difficulty ascertaining the source of the infringing products, the Commission issued a general exclusion order against certain kinesiotherapy devices that infringe the '605 patent. The Commission also issued cease and desist orders against the following respondents: LELO Inc. of San Jose, California; PHE, Inc. d/b/a Adam & Eve of Hillsborough, North Carolina; Nalpac Enterprises, Ltd. of Ferndale, Michigan; E.T.C. Inc. (d/b/a Eldorado Trading Company, Inc.) of Broomfield, Colorado; Williams Trading Co., Inc. of Pennsauken, New Jersey; Honey's Place Inc. of San Fernando, California; and Lover's Lane & Co. of Plymouth, Michigan. The Commission's remedial orders allowed entry under bond during the Presidential review period.

On August 20, 2013, respondents LELO, Inc. and Leloi AB filed a notice of appeal with the U.S. Court of Appeals for the Federal Circuit seeking review of the Commission's final determination. Standard Innovation intervened in the appeal and the parties filed briefs with the Court. On May 11, 2015, the Federal Circuit issued its opinion in *Lelo Inc.* v. *International Trade Commission,* 786 F.3d 879 (Fed. Cir. 2015). The Court indicated that the Commission had erred in relying solely upon qualitative factors to find ''significant investment in plant and equipment'' and ''significant employment of labor or capital'' under prongs (A) and (B) of the domestic industry requirement. Accordingly, the Court reversed the Commission's finding of a violation of 19 U.S.C. 1337. The Court issued its mandate on July 2, 2015.

As the U.S. Court of Appeals for the Federal Circuit has reversed the Commission's finding of violation, the Commission has determined that there is no longer a basis for the general exclusion order or the cease and desist orders previously issued in this investigation. The Commission has therefore rescinded the orders.

This action is taken under the authority of Section 337 of the Tariff Act of 1930, 19 U.S.C. 1337(k) and Commission rule 210.76, 19 CFR 210.76.

By order of the Commission.

Issued: July 21, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015–18269 Filed 7–24–15; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0043]

TÜV SÜD America, Inc.: Grant of Expansion of Recognition

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

ACTION: Notice.

SUMMARY: In this notice, OSHA announces its final decision to expand the scope of recognition for TÜV SÜD America, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on July 27, 2015.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3647, Washington, DC 20210; telephone: (202) 693–1999; email: *Meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov.* OSHA's Web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of TÜV SÜD America, Inc. (TUVAM), as an NRTL. TUVAM's expansion covers the addition of one test standard to its scope of recognition.

OSHA recognition of an NRTL signifies that the organization meets the requirements specified by 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition, and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification of the products.

The Agency processes applications by an NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational Web page for each NRTL that details its scope of recognition. These pages are available from the Agency's Web site at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

TUVAM submitted an application, dated October 6, 2014 (OSHA–2007–0043–0011, Exhibit 15–1—TUVAM Expansion Letter), to expand its recognition to include two additional test standards. In response for requests for additional information from NRTL staff, TUVAM withdrew one of the proposed test standards, reducing their request for expansion to one test standard. OSHA staff performed a comparability analysis and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

OSHA published the preliminary notice announcing TUVAM's expansion application in the **Federal Register** on May 6, 2015 (80 FR 26096). The Agency requested comments by May 21, 2015, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of TUVAM's scope of recognition.

To obtain or review copies of all public documents pertaining to TUVAM's application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210. Docket No. OSHA–2007–0043 contains all materials in the record concerning TUVAM's recognition.

II. Final Decision and Order

OSHA staff examined TUVAM's expansion application, its capability to meet the requirements of the test standards, and other pertinent information. Based on its review of this evidence, OSHA finds that TUVAM meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitation and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant TUVAM's scope of recognition expansion. OSHA limits the expansion of TUVAM's recognition to testing and certification of products for demonstration of conformance to the test standard listed in Table 1 below.

TABLE 1—APPROPRIATE TEST STANDARD FOR INCLUSION IN TUVAM'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 8750	Light Emitting Diode (LED) Equipment for Use in Lighting.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, an NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standard listed above as an American National Standard. However, for convenience, we may use the designation of the standards-developing organization for the standard as opposed to the ANSI designation. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, TUVAM must abide by the following conditions of the recognition:

1. TUVAM must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as an NRTL, and provide details of the change(s);

2. TUVAM must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVAM must continue to meet the requirements for recognition, including all previously published conditions on TUVAM's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of TUVAM, subject to the limitation and conditions specified above.

III. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on July 22, 2015.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2015–18320 Filed 7–24–15; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0035]

Traylor Bros., Inc., Application for Permanent Variance and Interim Order; Grant of Interim Order; Request for Comments

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

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the application of Traylor Bros., Inc., for a permanent variance and interim order from the provisions of OSHA standards that regulate work in compressed-air environments at 29 CFR 1926.803 and presents the Agency's preliminary finding to grant the permanent variance. OSHA also announces its grant of an interim order in this notice. OSHA invites the public to submit comments on the variance application to assist the Agency in determining whether to grant the applicant a permanent variance based on the conditions specified in this application.

DATES: Submit comments, information, documents in response to this notice, and request for a hearing on or before August 26, 2015. The interim order specified by this notice becomes effective on July 27, 2015, and shall remain in effect until the interim order is modified or revoked.

ADDRESSES: Submit comments by any of the following methods:

1. *Electronically:* Submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

2. *Facsimile:* If submissions, including attachments, are not longer than 10 pages, commenters may fax them to the OSHA Docket Office at (202) 693–1648.

3. *Regular or express mail, hand delivery, or messenger (courier) service:* Submit comments, requests, and any attachments to the OSHA Docket Office, Docket No. OSHA–2012–0035, Technical Data Center, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210; telephone: (202) 693–2350 (TDY number: (877) 889–5627). Note that security procedures may result in significant delays in receiving comments and other written materials by regular mail. Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express mail, hand delivery, or messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m.–4:45 p.m., e.t.

4. *Instructions:* All submissions must include the Agency name and the OSHA docket number (OSHA–2012–0035). OSHA places comments and other materials, including any personal information, in the public docket without revision, and these materials will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

5. *Docket:* To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site.[1] All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

6. *Extension of Comment Period:* Submit requests for an extension of the comment period on or before August 26, 2015 to the Office of Technical Programs and Coordination Activities, Variance Program, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3647, Washington, DC 20210; telephone: (202) 693–1999; email: *Meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210; telephone: (202) 693–2110; email: *Robinson.kevin@dol.gov.* OSHA's Web page includes information about the Variance Program (see *http://www.osha.gov/dts/otpca/variances/index.html*).

SUPPLEMENTARY INFORMATION:

*Copies of this **Federal Register** notice.* Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This **Federal Register** notice, as well as news releases and other relevant information, also are available at OSHA's Web page at *http://www.osha.gov.*

Hearing Requests. According to 29 CFR 1905.15, hearing requests must include: (1) A short and plain statement detailing how the proposed variance would affect the requesting party; (2) a specification of any statement or representation in the variance application that the commenter denies, and a concise summary of the evidence adduced in support of each denial; and (3) any views or arguments on any issue of fact or law presented in the variance application.

I. Notice of Application

On April 26, 2012, Traylor Bros., Inc., 835 N. Congress Ave., Evansville, IN 47715, and Traylor/Skanska/Jay Dee Joint Venture, Blue Plains Tunnel, 5000 Overlook SW., Washington, DC 20032, submitted under Section 6(d) of the Occupational Safety and Health Act of 1970 (''OSH Act''; 29 U.S.C. 655) and 29 CFR 1905.11 (''Variances and other relief under section 6(d)''), an application for a permanent variance from several provisions of the OSHA standard that regulates work in compressed air at 29 CFR 1926.803. OSHA is addressing this request as two separate applications: (1) Traylor Bros., Inc. (''Traylor'' or ''the applicant'') request for a permanent variance for future tunneling projects; and (2) Traylor/Skanska/Jay Dee Joint Venture, Blue Plains Tunnel (''Traylor JV''). This notice only addresses the Traylor application for an interim order and permanent variance for future tunneling projects. This notice does not address

[1] Traylor indicated that the decompression tables it intends to use for decompression with trimix are proprietary. Therefore, these tables are not available in the docket.

the Traylor JV application for the Blue Plains Tunnel Project, which OSHA granted on March 27, 2015 (80 FR 16440).

Specifically, this notice addresses Traylor's application for a permanent variance and interim order, applicable to future tunneling projects, from the provisions of the standard that: (1) Prohibit compressed-air worker (CAW) exposure to pressures exceeding 50 pounds per square inch (p.s.i.) except in an emergency (29 CFR 1926.803(e)(5)); [2] (2) require the use of the decompression values specified in decompression tables in Appendix A of the compressed-air standard for construction (29 CFR 1926.803(f)(1)); and (3) require the use of automated operational controls and a special decompression chamber (29 CFR 1926.803(g)(1)(iii) and .803(g)(1)(xvii), respectively).

The applicant is a contractor that works on complex tunnel projects using recently developed equipment and procedures for soft-ground tunneling. The applicant's workers engage in the construction of tunnels using advanced shielded mechanical excavation techniques in conjunction with an earth pressure balanced tunnel boring machine (EPBTBM).

According to its application, Traylor is likely to be the sole contractor, as well as the general contractor in association with future Joint Venture partners for the construction of future tunnels at various sites throughout the nation. Traylor asserts that generally, it bores tunnels (*i.e.,* Blue Plains, as well as future tunnels) below the water table through soft soils consisting of clay, silt, and sand.

Traylor employs specially trained personnel for the construction of the tunnel, and states that this construction will use shielded mechanical-excavation techniques. Traylor asserts that its workers perform hyperbaric interventions at pressures greater than 50 p.s.i.g. in the excavation chamber of the EPBTBM; these interventions consist of conducting inspections and maintenance work on the cutter-head structure and cutting tools of the EPBTBM.

Traylor asserts that innovations in tunnel excavation, specifically with EPBTBMs, have, in most cases, eliminated the need to pressurize the entire tunnel. This technology negates the requirement that all members of a tunnel-excavation crew work in compressed air while excavating the tunnel. These advances in technology modified substantially the methods used by the construction industry to excavate subaqueous tunnels compared to the caisson work regulated by the current OSHA compressed-air standard for construction at 29 CFR 1926.803. Such advances reduce the number of workers exposed, and the total duration of exposure to hyperbaric pressure during tunnel construction.

Using shielded mechanical-excavation techniques, in conjunction with precast concrete tunnel liners and backfill grout, EPBTBMs provide methods to achieve the face pressures required to maintain a stabilized tunnel face through various geologies, and isolate that pressure to the forward section (the working chamber) of the EPBTBM. Interventions in the working chamber (the pressurized portion of the EPBTBM) take place only after halting tunnel excavation and preparing the machine and crew for an intervention. Interventions occur to inspect or maintain the mechanical-excavation components located in the working chamber. Maintenance conducted in the working chamber includes changing replaceable cutting tools and disposable wear bars, and, in rare cases, repairing structural damage to the cutter head.

In addition to innovations in tunnel-excavation methods, Traylor asserts that innovations in hyperbaric medicine and technology improve the safety of decompression from hyperbaric exposures. According to Traylor, the use of decompression protocols incorporating oxygen is more efficient, effective, and safer for tunnel workers than compliance with the decompression tables specified by the existing OSHA standard (29 CFR 1926, subpart S, Appendix A decompression tables). These hyperbaric exposures are made safe by advances in technology, a better understanding of hyperbaric medicine, and the development of a project-specific Hyperbaric Operations Manual (HOM) that requires specialized medical support and hyperbaric supervision to provide assistance to a team of specially trained man lock attendants and hyperbaric workers or CAWs.

OSHA initiated a technical review of the Traylor's variance application and developed a set of follow-up questions that it sent to Traylor on September 17, 2012 (Ex. OSHA–2012–0035–0003). On October 26, 2012, Traylor submitted its response and a request for an interim order for the Blue Plains Tunnel Project, as well as future projects (Ex. OSHA–2012–0035–0013). In its response to OSHA's follow-up questions, Traylor indicated that the maximum pressure to which it is likely to expose workers during future project interventions is 75 p.s.i.g and may involve the use of trimix breathing gas (composed of a mixture of oxygen, nitrogen, and helium in varying concentrations used for breathing by divers and CAWs for compression and decompression when working at pressures exceeding 73 p.s.i.g.). Therefore, to work effectively on future projects, Traylor must perform hyperbaric interventions in compressed air at pressures higher than the maximum pressure specified by the existing OSHA standard, 29 CFR 1926.803(e)(5), which states: ''No employee shall be subjected to pressure exceeding 50 p.s.i.g. except in emergency'' (see footnote 2).

On July 11, 2013, OSHA granted Traylor JV a project-specific interim order for the completion of the Blue Plains Tunnel in order to permit the applicant to begin work while OSHA continued to consider its application for a permanent variance (for Traylor JV's completion of the Blue Plains Tunnel, as well as Traylor's future tunneling projects). On December 11, 2014, OSHA published a **Federal Register** notice announcing Traylor JV's application for permanent variance and interim order, grant of an interim order, and request for comments (79 FR 73631). The comment period expired on January 12, 2015. OSHA did not receive any comments on the proposed variance. As noted above, on March 27, 2015, OSHA published the **Federal Register** notice announcing the grant of a permanent variance to Traylor JV for completion of the Blue Plains Tunnel (80 FR 16440).

During its consideration of the Blue Plains variance, OSHA continued its technical review of the Traylor's variance application focusing on the proposed use of trimix breathing gas (proposed for use in future tunneling projects at pressures exceeding 73 p.s.i.g.) and developed a second set of follow-up questions that it sent to Traylor on December 18, 2013 (Ex. OSHA–2012–0035–0002). On January 21, 2014, Traylor submitted its response (Ex. OSHA–2012–0035–0009). In its response to OSHA's follow-up questions, Traylor provided additional technical and scientific information concerning successful trimix use on tunneling projects throughout the United States, as well as in Europe and Asia. Additionally, Traylor reaffirmed that the maximum pressure to which it is likely to expose workers during interventions for future tunneling

[2] The decompression tables in Appendix A of subpart S express the maximum working pressures as pounds per square inch gauge (p.s.i.g.), with a maximum working pressure of 50 p.s.i.g. Therefore, throughout this notice, OSHA expresses the 50 p.s.i. value specified by § 1926.803(e)(5) as 50 p.s.i.g., consistent with the terminology in Appendix A, Table 1 of subpart S.

projects is 75 p.s.i.g. and may involve the use of trimix breathing gas.

In reviewing Traylor's application for future tunneling projects, OSHA focused on the following important considerations:

- Variances are granted only to specific employers that submitted a properly completed and executed variance application. Traylor has met this requirement (for the single employer application);
- This notice announces only Traylor's (single employer) application for a variance dealing with future projects. It does not address Traylor's future hyperbaric tunneling projects in association with unnamed joint venture partners;
- Proposed variance conditions require Traylor to submit for OSHA's review and approval a project-specific HOM at least one year prior to the start of work on any future project;
- The proposed variance conditions require the HOM to demonstrate that the EPBTBM to be used on the project is designed, fabricated, inspected, tested, marked, and stamped in accordance with the requirements of ASME PVHO–1.2012 (or most recent edition of Safety Standards for Pressure Vessels for Human Occupancy) for the TBM's hyperbaric chambers.
- This condition ensures that each proposed future tunneling project can be comprehensively reviewed on a case-by-case basis prior to OSHA granting its approval to Traylor to proceed with its new project;
- Traylor may not begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. until OSHA completes its review of the project-specific HOM and determines that the safety and health instructions and measures it specifies would be appropriate, would comply with the conditions of the variance, would adequately protect the safety and health of CAWs, and so notifies the applicant; and
- Traylor will be required to submit new applications requesting modification of its single employer variance and approval of its project-specific HOM [with sufficient lead time (at least one year prior to start of work on any future project), to allow OSHA to complete the variance modification process], upon forming any future joint ventures.

Further, on December 6, 2012, OSHA published a **Federal Register** notice (77 FR 72781) announcing a request for information (RFI) for its continuing regulatory reviews named standards improvement projects (SIPs). The Agency conducted similar regulatory reviews of its existing standards previously and issued this latest RFI to initiate another of these regulatory reviews, and naming this review the Standards Improvement Project—Phase IV (SIP–IV). The purpose of SIP–IV is to improve and streamline OSHA standards by removing or revising requirements that are confusing or outdated, or that duplicate, or are inconsistent with other standards. Additionally, the regulatory review also is designed to reduce regulatory burden while maintaining or enhancing employees' safety and health. SIP–IV will focus primarily on OSHA's construction standards.

As part of SIP–IV, OSHA is considering updating the decompression tables in Appendix A (1926.803(f)(1)) (77 FR 72783). This proposed action would permit employers to use decompression procedures and updated decompression tables that take advantage of new hyperbaric technologies used widely in extreme hyperbaric exposures. If the planned SIP–IV revises Appendix A, Traylor (and similar tunneling contractors previously granted a variance) will still require hyperbaric tunneling variances to address portions of the standard not covered by SIP–IV (*i.e.,* 29 CFR 1926.803(e)(5); .803(g)(1)(iii) and .803(g)(1)(xvii)).

If SIP–IV is completed (including the update of the decompression tables in Appendix A (1926.803(f)(1)), OSHA will modify Traylor's (single employer) and similar variances granted to other employers to include the applicable SIP–IV provisions as appropriate.

OSHA considered Traylor's application for a permanent variance and interim order for future tunneling projects. OSHA determined that Traylor proposed an alternative that will provide a workplace at least as safe and healthful as that provided by the standard.

II. The Variance Application

A. Background

Traylor asserts that the advances in tunnel excavation technology described in Section I of this notice modified significantly the equipment and methods used by contractors to construct subaqueous tunnels, thereby making several provisions of OSHA's compressed-air standard for construction at 29 CFR 1926.803 inappropriate for this type of work. These advances reduce both the number of workers exposed, and the total duration of exposure to the hyperbaric conditions associated with tunnel construction.

Using shielded mechanical-excavation techniques, in conjunction with pre-cast concrete tunnel liners and backfill grout, EPBTBMs provide methods to achieve the face pressures required to maintain a stabilized tunnel face, through various geologies, while isolating that pressure to the forward section (working or excavation chamber) of the EPBTBM.

Interventions involving the working chamber (the pressurized chamber at the head of the EPBTBM) take place only after the applicant halts tunnel excavation and prepares the machine and crew for an intervention. Interventions occur to inspect or maintain the mechanical-excavation components located in the forward portion of the working chamber. Maintenance conducted in the forward portion of the working chamber includes changing replaceable cutting tools, disposable wear bars, and, in rare cases, repairs to the cutter head due to structural damage.

In addition to innovations in tunnel-excavation methods, research conducted after OSHA published its compressed-air standard for construction in 1971, resulted in advances in hyperbaric medicine. In this regard, the applicant asserts that the use of decompression protocols incorporating oxygen and trimix is more efficient, effective, and safer for tunnel workers than compliance with the existing OSHA standard (29 CFR 1926, subpart S, Appendix A decompression tables). According to the applicant, contractors routinely and safely expose employees performing interventions in the working chamber of EPBTBMs to hyperbaric pressures up to 75 p.s.i.g., which is 50% higher than maximum pressure specified by the existing OSHA standard (see 29 CFR 1926.803(e)(5)).

The applicant contends that the alternative safety measures included in its application provide its workers with a place of employment that is at least as safe and healthful as they would obtain under the existing provisions of OSHA's compressed-air standard for construction. The applicant certifies that it provided employee representatives of affected workers with a copy of the variance application.[3] The applicant also certifies that it notified its workers of the variance application by posting at prominent locations where it normally posts workplace notices, a summary of the application and information specifying where the workers can examine a copy of the application. In addition, the applicant informed its workers and their representatives of their rights to petition the Assistant Secretary of Labor for Occupational Safety and Health for a hearing on the variance application.

B. Variance From Paragraph (e)(5) of 29 CFR 1926.803, Prohibition of Exposure to Pressure Greater Than 50 p.s.i.g. (see Footnote 1)

The applicant states that it may perform hyperbaric interventions at

[3] See the definition of ''Affected employee or worker'' in section III. D.

pressures greater than 50 p.s.i.g. in the working chamber of the EPBTBM; this pressure exceeds the pressure limit of 50 p.s.i.g. specified for nonemergency purposes by 29 CFR 1926.803(e)(5). The EPBTBM has twin man locks, with each man lock having two compartments. This configuration allows workers to access the man locks for compression and decompression, and medical personnel to access the man locks if required in an emergency.

EPBTBMs are capable of maintaining pressure at the tunnel face, and stabilizing existing geological conditions, through the controlled use of propel cylinders, a mechanically driven cutter head, bulkheads within the shield, ground-treatment foam, and a screw conveyor that moves excavated material from the working chamber. As noted earlier, the forward-most portion of the EPBTBM is the working chamber, and this chamber is the only pressurized segment of the EPBTBM. Within the shield, the working chamber consists of two sections: the staging chamber and the forward working chamber. The staging chamber is the section of the working chamber between the man lock door and the entry door to the forward working chamber. The forward working chamber is immediately behind the cutter head and tunnel face.

The applicant will pressurize the working chamber to the level required to maintain a stable tunnel face. Pressure in the staging chamber ranges from atmospheric (no increased pressure) to a maximum pressure equal to the pressure in the working chamber. The applicant asserts that most of the hyperbaric interventions will be around 14.7 p.s.i.g. However, the applicant maintains that they may have to perform interventions at pressures up to 75 p.s.i.g.

During interventions, workers enter the working chamber through one of the twin man locks that open into the staging chamber. To reach the forward part of the working chamber, workers pass through a door in a bulkhead that separates the staging chamber from the forward working chamber. The maximum crew size allowed in the forward working chamber is three. At certain hyperbaric pressures (*i.e.,* when decompression times are greater than work times), the twin man locks allow for crew rotation. During crew rotation, one crew can be compressing or decompressing while the second crew is working. Therefore, the working crew always has an unoccupied man lock at its disposal.

Further, the applicant asserts that it will develop a project-specific HOM for each future tunnel project that describes in detail the hyperbaric procedures and required medical examinations used during the planned tunnel-construction project. The HOM will be project-specific, and will discuss standard operating procedures and emergency and contingency procedures. The procedures will include using experienced and knowledgeable man-lock attendants who have the training and experience necessary to recognize and treat decompression illnesses and injuries. The attendants will be under the direct supervision of the hyperbaric supervisor and attending physician. In addition, procedures will include medical screening and review of prospective CAWs. The purpose of this screening procedure is to vet prospective CAWs with medical conditions (*e.g.,* deep vein thrombosis, poor vascular circulation, and muscle cramping) that could be aggravated by sitting in a cramped space (*e.g.,* a man lock) for extended periods or by exposure to elevated pressures and compressed gas mixtures. A transportable recompression chamber (shuttle) will be available to extract workers from the hyperbaric working chamber for emergency evacuation and medical treatment; the shuttle attaches to the topside medical lock, which is a large recompression chamber. The applicant believes that the procedures included in the variance application and in its project-specific HOM will provide safe work conditions when interventions are necessary, including interventions above 50 p.s.i.g. OSHA will comprehensively review the project-specific HOM for each of Traylor's future projects prior to granting its approval for Traylor to proceed with its new project. Therefore, Traylor may not begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. until OSHA completes its review of the project-specific HOM and determines that the safety and health instructions and measures it specifies would be appropriate, would conform with the conditions in the variance, and would adequately protect the safety and health of the CAWs. OSHA will notify the applicant that: (1) Its project-specific HOM was found to be acceptable; and (2) the applicant may begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. by complying fully with the conditions of the interim order or proposed variance (as an alternative to complying with the requirements of the standard).

C. Variance From Paragraph (f)(1) of 29 CFR 1926.803, Requirement To Use OSHA Decompression Tables

OSHA's compressed-air standard for construction requires decompression in accordance with the decompression tables in Appendix A of 29 CFR 1926, subpart S (see 29 CFR 1926.803(f)(1)). As an alternative to the OSHA decompression tables, the applicant proposes to use newer decompression schedules that supplement breathing air used during decompression with air, nitrox, or trimix (as appropriate). The applicant asserts decompression protocols using the 1992 French Decompression Tables for air, nitrox, or trimix as specified by the HOM are safer for tunnel workers than the decompression protocols specified in Appendix A of 29 CFR 1926, subpart S.

Accordingly, the applicant proposes to use the 1992 French Decompression Tables to decompress CAWs after they exit the hyperbaric conditions in the working chamber. Also, Traylor proposes to decompress with trimix gas, under certain conditions specific to and described in detail in the project-specific HOM associated with each future tunneling project. Depending on the maximum working pressure and exposure times, the 1992 French Decompression Tables provide for air decompression with or without oxygen or trimix. Traylor asserts that using the 1992 French Decompression Tables for air, nitrox, or trimix decompression has many benefits, including (1) keeping the partial pressure of nitrogen in the lungs as low as possible; (2) keeping external pressure as low as possible to reduce the formation of bubbles in the blood; (3) removing nitrogen from the lungs and arterial blood and increasing the rate of elimination of nitrogen; (4) improving the quality of breathing during decompression stops so that workers are less tired and to prevent bone necrosis; (5) reducing decompression time by about 33 percent as compared to air decompression; and (6) reducing inflammation. Traylor asserts that the 1992 French Decompression Tables, Appendix B provide for air decompression with trimix supplementation for staged decompression for pressures ranging from 58 to 75 p.s.i.g. As described in Section IV of this notice, OSHA's review of the use of air, nitrox, or trimix in several major tunneling projects completed in the past indicates that it contributed significantly to the reduction of decompression illness (DCI) and other associated adverse effects observed and reported among CAWs.

In addition, the project-specific HOM will require a physician certified in hyperbaric medicine to manage the medical condition of CAWs during hyperbaric exposures and decompression. A trained and experienced man-lock attendant also will be present during hyperbaric exposures and decompression. This man lock attendant will operate the hyperbaric system to ensure compliance with the specified decompression table. A hyperbaric supervisor (competent person), trained in hyperbaric operations, procedures, and safety, will directly oversee all hyperbaric interventions, and ensures that staff follow the procedures delineated in the HOM or by the attending physician.

The applicant asserts that at higher hyperbaric pressures, decompression times exceed 75 minutes. The variance application and the project-specific HOMs will establish protocols and procedures that provide the basis for alternate means of protection for CAWs under these conditions. Accordingly, based on these protocols and procedures, the applicant requests to use the 1992 French Decompression Tables for hyperbaric interventions up to 75 p.s.i.g. for future projects. The applicant is committed to follow the decompression procedures described in its application and the project-specific HOM during these interventions.

D. Variance From Paragraph (g)(1)(iii) of 29 CFR 1926.803, Automatically Regulated Continuous Decompression

According to the applicant, breathing air under hyperbaric conditions increases the amount of nitrogen gas dissolved in a CAW's tissues. The greater the hyperbaric pressure under these conditions, and the more time spent under the increased pressure, the greater the amount of nitrogen gas dissolved in the tissues. When the pressure decreases during decompression, tissues release the dissolved nitrogen gas into the blood system, which then carries the nitrogen gas to the lungs for elimination through exhalation. Releasing hyperbaric pressure too rapidly during decompression can increase the size of the bubbles formed by nitrogen gas in the blood system, resulting in DCI, commonly referred to as ''the bends.'' This description of the etiology of DCI is consistent with current scientific theory and research on the issue (see footnote 12 in this notice discussing a 1985 NIOSH report on DCI).

The 1992 French Decompression Tables proposed for use by the applicant provide for stops during worker decompression (*i.e.,* staged decompression) to control the release of nitrogen gas from tissues into the blood system. Studies show that staged decompression, in combination with other features of the 1992 French Decompression Tables such as the use of oxygen, result in a lower incidence of DCI than the OSHA decompression requirements of 29 CFR 1926.803, which specify the use of automatically regulated continuous decompression (see footnotes 10 through 18 in this notice for references to these studies).[4] In addition, the applicant asserts that staged decompression is at least as effective as an automatic controller in regulating the decompression process because:

1. A hyperbaric supervisor (a competent person experienced and trained in hyperbaric operations, procedures, and safety) directly supervises all hyperbaric interventions and ensures that the man-lock attendant, who is a competent person in the manual control of hyperbaric systems, follows the schedule specified in the decompression tables, including stops; and

2. The use of the 1992 French Decompression Tables for staged decompression offers an equal or better level of management and control over the decompression process than an automatic controller and results in lower occurrences of DCI.

Accordingly, the applicant is applying for a permanent variance from the OSHA standard at 29 CFR 1926.803(g)(1)(iii), which requires automatic controls to regulate decompression. As noted above, the applicant is committed to conduct the staged decompression according to the 1992 French Decompression Tables under the direct control of the trained man-lock attendant and under the oversight of the hyperbaric supervisor.

E. Variance From Paragraph (g)(1)(xvii) of 29 CFR 1926.803, Requirement of Special Decompression Chamber

The OSHA compressed-air standard for construction requires employers to use a special decompression chamber of sufficient size to accommodate all CAWs being decompressed at the end of the shift when total decompression time exceeds 75 minutes (see 29 CFR 1926.803(g)(1)(xvii)). Use of the special decompression chamber enables CAWs to move about and flex their joints to prevent neuromuscular problems during decompression.

As an alternative to using a special decompression chamber, the applicant notes that since only the working chamber of the EPBTBM is under pressure, and only a few workers out of the entire crew are exposed to hyperbaric pressure, the man locks (which, as noted earlier, connect directly to the working chamber) and the staging chamber are of sufficient size to accommodate the exposed workers during decompression. In addition, space limitations in the EPBTBM do not allow for the installation and use of an additional special decompression lock or chamber. Again, the applicant uses the existing man locks, each of which adequately accommodates a three-member crew for this purpose when decompression lasts up to 75 minutes. When decompression exceeds 75 minutes, crews can open the door connecting the two compartments in each man lock (during decompression stops) or exit the man lock and move into the staging chamber where additional space is available. The applicant asserts that this alternative arrangement is as effective as a special decompression chamber in that it has sufficient space for all the CAWs at the end of a shift and enables the CAWs to move about and flex their joints to prevent neuromuscular problems.

F. Previous Tunnel Construction Variances

OSHA notes that on May 23, 2014, it granted a sub-aqueous tunnel construction permanent variance to Tully/OHL USA Joint Venture (79 FR 29809) from the same provisions of the standard that regulates work in compressed air (at 29 CFR 1926.803(e)(5), (f)(1), (g)(1)(iii), and (g)(1)(xvii)) that are the subject of the present application. Additionally, as previously stated in this notice, on March, 27, 2015, OSHA also granted a sub-aqueous tunnel construction permanent variance to Traylor JV for the

[4] In the study cited in footnote 10, starting at page 338, Dr. Eric Kindwall notes that the use of automatically regulated continuous decompression in the Washington State safety standards for compressed-air work (from which OSHA derived its decompression tables) was at the insistence of contractors and the union, and against the advice of the expert who calculated the decompression table and recommended using staged decompression. Dr. Kindwall then states, ''Continuous decompression is inefficient and wasteful. For example, if the last stage from 4 psig . . . to the surface took 1 h, at least half the time is spent at pressures less than 2 psig . . ., which provides less and less meaningful bubble suppression . . . .'' In addition, the report referenced in footnote 5 under the section titled, ''Background on the Need for Interim Decompression Tables'' addresses the continuous-decompression protocol in the OSHA compressed-air standard for construction, noting that ''[a]side from the tables for saturation diving to deep depths, no other widely used or officially approved diving decompression tables use straight line, continuous decompressions at varying rates. Stage decompression is usually the rule, since it is simpler to control.''

completion of the Blue Plains Tunnel (80 FR 16440).

Generally, the proposed alternate conditions in this notice are based on and very similar to the alternate conditions of the previous permanent variances.

G. Multi-State Variance

Traylor stated that it performs construction of sub-aqueous tunnels using EPBTBM in compressed-air environments in a number of states that operate safety and health plans that have been approved by OSHA under Section 18 of the Occupational Safety and Health (OSH) Act of 1970 (29 U.S.C. 651 *et seq.*) and 29 CFR part 1952 (''Approved State Plans for Enforcement of State Standards''). Because Traylor performs tunnel construction work nationwide, OSHA will process Traylor's application as one for a permanent, multi-state variance covering all states.

Twenty-seven state safety and health plans have been approved by OSHA under Section 18 of the OSH Act.[5] As part of the permanent variance process, the Directorate of Cooperative and State Programs will notify the State Plans of Traylor's variance application and grant of the interim order, and the states will have the opportunity to comment.

Additionally, in consideration of Traylor's application for a permanent multi-state variance and interim order, OSHA noted that four states have previously granted sub-aqueous tunnel construction variances and imposed different or additional requirements and conditions (California, Nevada, Oregon, and Washington). California also promulgated a new standard[6] for similar sub-aqueous tunnel construction work. In these states that previously granted variances, Traylor would have to continue to meet state-specific requirements, should OSHA grant Traylor a permanent multi-state variance. Traylor must be prepared to apply separately to these states for a variance for tunnel construction work addressing the conditions specified by this proposed variance.

Five State Plans (Connecticut, Illinois, New Jersey, New York, and the U.S. Virgin Islands) cover only public-sector workers and have no authority over the private-sector workers addressed in this variance application (*i.e.,* that authority continues to reside with Federal OSHA).

III. Description of the Conditions Specified by the Application for a Permanent Variance

This section describes the alternative means of compliance with 29 CFR 1926.803(e)(5), (f)(1), (g)(1)(iii), and (g)(1)(xvii) and provides additional detail regarding the proposed conditions that form the basis of Traylor's application for a permanent variance.

Proposed Condition A: Scope

The scope of the permanent variance would limit coverage to the work situations specified under this proposed condition. Clearly defining the scope of the proposed permanent variance provides Traylor, Traylor's employees, potential future applicants, other stakeholders, the public, and OSHA with necessary information regarding the work situations in which the proposed permanent variance would apply.

As previously indicated in this notice, according to 29 CFR 1905.11, an employer (or class or group of employers[7]) may request a permanent variance for a specific workplace or workplaces (multiple sites). If granted, the variance would apply to the specific employer(s) that submitted the application. In this instance, if OSHA were to grant a permanent variance, it would apply to the applicant only. As a result, it is important to understand that if OSHA were to grant Traylor a permanent variance, the interim order and proposed variance **would not apply** to any other employers such as other joint ventures the applicant may undertake in the future. However, the variance rules of practice do contain provisions for future modification of permanent variances. Under the provisions of 29 CFR 1905.13, an applicant may submit an application to modify or amend a permanent variance to add or include additional employers (*i.e.,* when future joint ventures are established).

Proposed Condition B: Application

The proposed condition specifies the circumstances under which the proposed permanent variance would be in effect, notably only for hyperbaric work performed during interventions. The proposed condition places clear limits on the circumstances under which the applicant can expose its employees to hyperbaric pressure.

Proposed Condition C: List of Abbreviations

This proposed condition defines a number of abbreviations used in the proposed permanent variance. OSHA believes that defining these abbreviations serves to clarify and standardize their usage, thereby enhancing the applicant's and its employees' understanding of the conditions specified by the proposed permanent variance.

Proposed Condition D: Definitions

The proposed condition defines a series of terms, mostly technical terms, used in the permanent variance to standardize and clarify their meaning. Defining these terms serves to enhance the applicant's and its employees' understanding of the conditions specified by the proposed permanent variance.

Proposed Condition E: Safety and Health Practices

The proposed condition requires the applicant to develop and submit to OSHA a project-specific HOM at least one year before using the EPBTBM for tunneling operations. The HOM will have to demonstrate that the EPBTBM planned for use in tunneling operations is designed, fabricated, inspected, tested, marked, and stamped in accordance with the requirements of ASME PVHO–1.2012 (or most recent edition of Safety Standards for Pressure Vessels for Human Occupancy) for the TBM's hyperbaric chambers. These requirements ensure that the applicant develops hyperbaric safety and health procedures suitable for each specific project. The HOM enables OSHA to determine that the safety and health instructions and measures it specifies would be appropriate to the field conditions of the proposed tunnel (including expected geological conditions), would conform to the conditions of the variance, and will adequately protect the safety and health of the CAWs. It also enables OSHA to enforce these instructions and measures. Additionally, the proposed condition includes a series of related hazard prevention and control requirements and methods (*e.g.,* decompression tables, job hazard analysis (JHA), operations and inspections checklists, investigation, recording and notification to OSHA of recordable hyperbaric injuries and illnesses, etc.) designed to

[5] Five State Plans (Connecticut, Illinois, New Jersey, New York, and the Virgin Islands) limit their occupational safety and health authority to state and local employers only. State Plans that exercise their occupational safety and health authority over both public- and private-sector employers are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

[6] See California Code of Regulations, Title 8, Subchapter 7, Group 26, Article 154, available at *http://www.dir.ca.gov/title8/sb7g26a154.html.*

[7] A class or group of employers (such as members of a trade alliance or association) may apply jointly for a variance provided an authorized representative for each employer signs the application and the application identifies each employer's affected facilities.

ensure the continued effective functioning of the hyperbaric equipment and operating system.

Review of the project-specific HOM would enable OSHA to: (1) Determine that the safety and health instructions and measures it specifies would be appropriate, would conform to the conditions of the variance, and would adequately protect the safety and health of CAWs; and (2) request the applicant to revise or modify the HOM if it finds that the hyperbaric safety and health procedures are not suitable for the specific project and would not adequately protect the safety and health of the CAWs. The applicant may not begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. until OSHA completes its review of the project-specific HOM and determines that the safety and health instructions and measures it specifies would be appropriate, would conform to the conditions of the variance, and will adequately protect the safety and health of the CAWs. OSHA will notify the applicant that: (1) Its project-specific HOM was found to be acceptable; and (2) the applicant may begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. by complying fully with the conditions of the interim order or proposed permanent variance (if, or until the permanent variance is granted as an alternative to complying with the requirements of the standard).

Once approved, the project-specific HOM would become part of the variance, thus enabling OSHA to enforce its safety and health procedures and measures.

Proposed Condition F: Communication

The proposed condition would require the applicant to develop and implement an effective system of information sharing and communication. Effective information sharing and communication ensures that affected workers receive updated information regarding any safety-related hazards and incidents, and corrective actions taken, prior to the start of each shift. The proposed condition also requires the applicant to ensure that reliable means of emergency communications are available and maintained for affected workers and support personnel during hyperbaric operations. Availability of such reliable means of communications would enable affected workers and support personnel to respond quickly and effectively to hazardous conditions or emergencies that may develop during EPBTBM operations.

Proposed Condition G: Worker Qualification and Training

The proposed condition would require the applicant to develop and implement an effective qualification and training program for affected workers. The proposed condition specifies the factors that an affected worker must know to perform safely during hyperbaric operations, including how to enter, work in, and exit from hyperbaric conditions under both normal and emergency conditions. Having well-trained and qualified workers performing hyperbaric intervention work ensures that they recognize, and respond appropriately to, hyperbaric safety and health hazards. These qualification and training requirements enable affected workers to cope effectively with emergencies, as well as the discomfort and physiological effects of hyperbaric exposure, thereby preventing injury, illness, and fatalities.

Paragraph (2)(e) of this proposed condition also would require the applicant to provide affected workers with information they can use to contact the appropriate healthcare professionals if it is suspected that they are developing hyperbaric-related health effects. This requirement provides for early intervention and treatment of DCI and other health effects resulting from hyperbaric exposure, thereby reducing the potential severity of these effects.

Proposed Condition H: Inspections, Tests, and Accident Prevention

The proposed condition would require the applicant to develop, implement, and operate a program of frequent and regular inspections of the EPBTBM's hyperbaric equipment and support systems, and associated work areas. This proposed condition would help to ensure the safe operation and physical integrity of the equipment and work areas necessary to conduct hyperbaric operations. The proposed condition would also enhance worker safety by reducing the risk of hyperbaric-related emergencies.

Paragraph (3) of this proposed condition would require the applicant to document tests, inspections, corrective actions, and repairs involving the EPBTBM, and maintain these documents at the job site for the duration of the job. This requirement would provide the applicant with information needed to schedule tests and inspections to ensure the continued safe operation of the equipment and systems, and to determine that the actions taken to correct defects in hyperbaric equipment and systems were appropriate, prior to returning them to service.

Proposed Condition I: Compression and Decompression

The proposed condition would require the applicant to consult with its designated medical advisor regarding special compression or decompression procedures appropriate for any unacclimated CAW. This proposed provision would ensure that the applicant consults with the medical advisor, and involves the medical advisor in the evaluation, development, and implementation of compression or decompression protocols appropriate for any CAW requiring acclimation to the hyperbaric conditions encountered during EPBTBM operations. Accordingly, CAWs requiring acclimation would have an opportunity to acclimate prior to exposure to these hyperbaric conditions. OSHA believes this proposed condition would prevent or reduce adverse reactions among CAWs to the effects of compression or decompression associated with the intervention work they perform in the EPBTBM.

Proposed Condition J: Recordkeeping

The proposed condition would require the applicant to maintain records of specific factors associated with each hyperbaric intervention. The information gathered and recorded under this provision, in concert with the information provided under proposed condition K (using OSHA 301 Incident Report form to investigate, record, and provide notice to OSHA of hyperbaric recordable injuries as defined by 29 CFR 1904.4, 1904.7, 1904.8 through 1904.12), would enable the applicant and OSHA to determine the effectiveness of the permanent variance in preventing DCI and other hyperbaric-related effects.[8]

Proposed Condition K: Notifications

Under the proposed condition, the applicant would be required, within specified periods, to notify OSHA of: (1) Any recordable injury, illness, in-patient hospitalization, amputation, loss of an eye, or fatality that occurs as a result of hyperbaric exposures during EPBTBM operations; (2) provide OSHA with a copy of the hyperbaric exposures incident investigation report (using

[8] See 29 CFR 1904 Recording and Reporting Occupational Injuries and Illnesses (*http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9631*); recordkeeping forms and instructions (*http://www.osha.gov/recordkeeping/RKform300pkg-fillable-enabled.pdf*); and updates to OSHA's recordkeeping rule and Web page ((79 FR 56130); *http://www.osha.gov/recordkeeping2014/index.html*).

OSHA 301 form) of these events within 24 hours of the incident; (3) include on the 301 form information on the hyperbaric conditions associated with the recordable injury or illness, the root-cause determination, and preventive and corrective actions identified and implemented; (4) provide its certification that it informed affected workers of the incident and the results of the incident investigation; (5) notify the Office of Technical Programs and Coordination Activities (OTPCA) and the OSHA Area Office closest to the tunnel project site within 15 working days should the applicant need to revise its HOM to accommodate changes in its compressed-air operations that affect its ability to comply with the conditions of the proposed permanent variance; and (6) provide OTPCA and the OSHA Area Office closest to the tunnel project site, at the end of the project, with a report evaluating the effectiveness of the decompression tables.

It should be noted that the requirement of completing and submitting the hyperbaric exposure-related (recordable) incident investigation report (OSHA 301 form) would be more restrictive than the current recordkeeping requirement of completing the OSHA 301 form within 7 calendar days of the incident (1904.29(b)(3)). This modified and more stringent incident investigation and reporting requirement would be restricted to intervention-related hyperbaric (recordable) incidents only. Providing notification would be essential because time is a critical element in OSHA's ability to determine the continued effectiveness of the variance conditions in preventing hyperbaric incidents, and the applicant's identification and implementation of appropriate corrective and preventive actions.

Further, these notification requirements also would enable the applicant, its employees, and OSHA to determine the effectiveness of the permanent variance in providing the requisite level of safety to the applicant's workers and, based on this determination, whether to revise or revoke the conditions of the proposed permanent variance. Timely notification would permit OSHA to take whatever action may be necessary and appropriate to prevent further injuries and illnesses. Providing notification to employees would inform them of the precautions taken by the applicant to prevent similar incidents in the future.

Additionally, this proposed condition also would require the applicant to notify OSHA if it ceases to do business, has a new address or location for its main office, or transfers the operations covered by the proposed permanent variance to a successor company. In addition, the condition specifies that OSHA must approve the transfer of the permanent variance to a successor company. These requirements would allow OSHA to communicate effectively with the applicant regarding the status of the proposed permanent variance, and expedite the Agency's administration and enforcement of the permanent variance. Stipulating that an applicant would be required to have OSHA's approval to transfer a variance to a successor company would provide assurance that the successor company has knowledge of, and will comply with, the conditions specified by proposed permanent variance, thereby ensuring the safety of workers involved in performing the operations covered by the proposed permanent variance.

IV. Grant of Interim Order

As noted earlier, the applicant requested an interim order. Based on Traylor's assertions in its application, the interim order addresses CAWs performing interventions in hyperbaric conditions exceeding 50 p.s.i.g. that involve proposed use of the 1992 French Decompression Tables for air, nitrox, or trimix as specified by the HOM for staged decompression with pressures ranging from 58 to 75 p.s.i.g. During the period starting with the publication of this notice until the Agency modifies or revokes the interim order or makes a decision on its application for a permanent variance, the applicant is required to comply fully with the conditions of the interim order (as an alternative to complying with the requirements of 29 CFR 1926.803 (hereafter, ''the standard'')) that:

A. Prohibit employers using compressed air under hyperbaric conditions from subjecting workers to pressure exceeding 50 p.s.i.g., except in an emergency (29 CFR 1926.803(e)(5));

B. Require the use of decompression values specified by the decompression tables in Appendix A of the compressed-air standard (29 CFR 1926.803(f)(1)); and

C. Require the use of automated operational controls and a special decompression chamber (29 CFR 1926.803(g)(1)(iii) and .803(g)(1)(xvii), respectively).

After reviewing the proposed alternatives OSHA preliminarily determined that:

A. Traylor developed, and proposed to implement, effective alternative measures to the prohibition of using compressed air under hyperbaric conditions exceeding 50 p.s.i.g. The alternative measures include use of engineering and administrative controls of the hazards associated with work performed in compressed-air conditions exceeding 50 p.s.i.g. while engaged in the construction of a subaqueous tunnel using advanced shielded mechanical-excavation techniques in conjunction with an EPBTBM. Prior to conducting interventions in the EPBTBM's pressurized working chamber, the applicant halts tunnel excavation and prepares the machine and crew to conduct the interventions. Interventions involve inspection, maintenance, or repair of the mechanical-excavation components located in the working chamber.

B. Traylor developed, and proposed to implement, safe hyperbaric work procedures, emergency and contingency procedures, and medical examinations for future tunneling projects' CAWs. The applicant will compile these standard operating procedures into a project-specific HOM. The HOM will discuss the procedures and personnel qualifications for performing work safely during the compression and decompression phases of interventions. The HOM will also specify the decompression tables the applicant proposes to use. Depending on the maximum working pressure and exposure times during the interventions, the tables provide for decompression using the 1992 French Decompression Tables for air, nitrox, or trimix as specified by the HOM. The decompression tables also include delays or stops for various time intervals at different pressure levels during the transition to atmospheric pressure (*i.e.,* staged decompression). In all cases, a physician certified in hyperbaric medicine will manage the medical condition of CAWs during decompression. In addition, a trained and experienced man-lock attendant, experienced in recognizing decompression sickness or illnesses and injuries will be present. Of key importance, a hyperbaric supervisor (competent person), trained in hyperbaric operations, procedures, and safety, will directly supervise all hyperbaric operations to ensure compliance with the procedures delineated in the project-specific HOM or by the attending physician.

C. Traylor developed, and proposed to implement, a training program to instruct affected workers in the hazards associated with conducting hyperbaric operations.

D. Traylor developed, and proposed to implement, an effective alternative to the use of automatic controllers that continuously decrease pressure to

achieve decompression in accordance with the tables specified by the standard. The alternative includes using: (1) The 1992 French Decompression Tables for guiding staged decompression to achieve lower occurrences of DCI; (2) decompression protocols of air, nitrox, or trimix again to achieve lower occurrences of DCI; (3) a trained and competent attendant for implementing appropriate hyperbaric entry and exit procedures, and (4) a competent hyperbaric supervisor and attending physician certified in hyperbaric medicine, to oversee all hyperbaric operations.

E. Traylor developed, and proposed to implement, an effective alternative to the use of the special decompression chamber required by the standard. EPBTBM technology permits the tunnel's work areas to be at atmospheric pressure, with only the face of the EPBTBM (*i.e.,* the working chamber) at elevated pressure during interventions. The applicant would limit interventions conducted in the working chamber to performing required inspection, maintenance, and repair of the cutting tools on the face of the EPBTBM. The EPBTBM's man lock and working chamber provide sufficient space for the maximum crew of three CAWs to stand up and move around, and safely accommodate decompression times up to 360 minutes. Therefore, OSHA preliminarily determined that the EPBTBM's man lock and working chamber function as effectively as the special decompression chamber required by the standard.

OSHA conducted a review of the scientific literature regarding decompression to determine whether the alternative decompression method (*i.e.,* the 1992 French Decompression Tables) Traylor proposed would provide a workplace as safe and healthful as that provided by the standard. Based on this review, OSHA determined that tunneling operations performed with these tables [9] resulted in a lower occurrence of DCI than the decompression tables specified by the standard.[10] [11] [12]

The review conducted by OSHA focused on the use of the 1992 French Decompression Tables with air, nitrox, or trimix and found several research studies supporting the determination that such use resulted in a lower rate of DCI than the decompression tables specified by the standard. For example, H. L. Anderson studied the occurrence of DCI at maximum hyperbaric pressures ranging from 4 p.s.i.g. to 43 p.s.i.g. during construction of the Great Belt Tunnel in Denmark (1992–1996); [13] this project used the 1992 French Decompression Tables to decompress the workers during part of the construction. Anderson observed 6 decompression sickness (DCS) cases out of 7,220 decompression events, and reported that switching to the 1992 French Decompression tables reduced the DCI incidence to 0.08%. The DCI incidence in the study by H. L. Andersen is substantially less than the DCI incidence reported for the decompression tables specified in Appendix A. OSHA found no studies in which the DCI incidence reported for the 1992 French Decompression Tables were higher than the DCI incidence reported for the OSHA decompression tables, nor did OSHA find any studies indicating that the 1992 French Decompression Tables were more hazardous to employees than the OSHA decompression tables.[14]

OSHA also reviewed the use of trimix in tunneling operations. In compressed-air atmospheres greater than 73 p.s.i.g., it becomes increasingly more difficult to work due to increased breathing resistance, increased risk of DCI, and the adverse effects of the increased partial pressures of nitrogen and oxygen. Nitrogen narcosis occurs when a diver or CAW breathes a gas mixture with a nitrogen partial pressure greater than 2.54 ATA (*i.e.,* 73 p.s.i.g.). Nitrogen narcosis compromises judgment, performance, and reaction time of divers and CAWs and can lead to loss of consciousness.[15] There is concern that nitrogen narcosis may impair CAWs leading to possible safety issues.[16] Exposure to oxygen at partial pressures greater than normal daily living may be toxic to the lungs and central nervous system under certain conditions. The higher the partial pressure of oxygen and the longer the exposure, the more severe the toxic effects. One way to reduce oxygen exposure is to alter the percentage of oxygen in the breathing mixture (see footnote 15). Trimix is a mixture of the inert gas helium, oxygen and nitrogen. Because helium is less dense than air, use of helium in compressed atmospheres decreases breathing resistance and allows for adjustment of the partial pressures of oxygen and nitrogen to reduce the incidence of nitrogen narcosis and oxygen toxicity.

Trimix has been successfully used in deep caisson work and tunneling projects including the construction of the Meiko West Bridge,[17] the Western Scheldt Tunnel (see footnote 16), and in the Seattle Brightwater Tunneling Project.[18] During the construction of the Western Scheldt Tunnel, there were fewer reported cases of DCIs in CAWs using trimix than in other CAWs using just compressed air, despite working at higher pressures (see footnotes 16 and 17). Additionally, the use of compressed air during the construction of the Western Scheldt Tunnel was also

[9] In 1992, the French Ministry of Labour replaced the 1974 French Decompression Tables with the 1992 French Decompression Tables, which differ from OSHA's decompression tables in Appendix A by using: (1) Staged decompression as opposed to continuous (linear) decompression; (2) decompression tables based on air or both air and pure oxygen; and (3) emergency tables when unexpected exposure times occur (up to 30 minutes above the maximum allowed working time).

[10] Kindwall, EP (1997). Compressed-air tunneling and caisson work decompression procedures: Development, problems, and solutions. *Undersea and Hyperbaric Medicine,* 24(4), pp. 337–345. This article reported 60 treated cases of DCI among 4,168 exposures between 19 and 31 p.s.i.g. over a 51-week contract period, for a DCI incidence of 1.44% for the decompression tables specified by the OSHA standard.

[11] Sealey, JL (1969). Safe exit from the hyperbaric environment: Medical experience with pressurized tunnel operations. *Journal of Occupational Medicine,* 11(5), pp. 273–275. This article reported 210 treated cases of DCI among 38,600 hyperbaric exposures between 13 and 34 p.s.i.g. over a 32-month period, for an incidence of 0.54% for the decompression tables specified by the Washington State safety standards for compressed-air work, which are similar to the tables in the OSHA standard. Moreover, the article reported 51 treated cases of DCI for 3,000 exposures between 30 and 34 p.s.i.g., for an incidence of 1.7% for the Washington State tables.

[12] In 1985, the National Institute for Occupational Safety and Health (NIOSH) published a report entitled ''Criteria for Interim Decompression Tables for Caisson and Tunnel Workers;'' this report reviewed studies of DCI and other hyperbaric-related injuries resulting from use of OSHA's tables. This report is available on NIOSH's Web site: *http://www.cdc.gov/niosh/topics/decompression/default.html.*

[13] Anderson HL (2002). Decompression sickness during construction of the Great Belt Tunnel, Denmark. *Undersea and Hyperbaric Medicine,* 29(3), pp. 172–188.

[14] Le Péchon JC, Barre P, Baud JP, Ollivier F (September 1996). Compressed-air work—French Tables 1992—operational results. *JCLP Hyperbarie Paris, Centre Medical Subaquatique Interentreprise, Marseille: Communication a l'EUBS,* pp. 1–5 (see Ex. OSHA–2012–0036–0005).

[15] United States Navy. (2011) U.S. Navy Diving Manual, Revision 6. Department of the Navy.

[16] Van Rees, Vellinga T, Verhoevan A, Jan Dijk F, Sterk W (November-December 2006) Health and efficiency in trimix versus air breathing in CAWs. *Undersea Hyperbaric Medicine* 33 (6), pp 419–427. This article reported that during construction of the Western Scheldt Tunneling Project, there were 52 exposures to trimix at 81.2–84.1 p.s.i. with no reported cases of DCI. Three of 318 exposures to compressed air resulted in DCI in this study.

[17] Takishima R, Sterk W, Nashimoto T (1996) Trimix breathing in deep caisson work for the construction of Pier (P2) for the Meiko West Bridge. Undersea and Hyperbaric Medical Society Meeting Abstract. During construction of the Meiko West Bridge, there were 11 cases of DCI in 2059 trimix exposures for a reported DCI rate of 1%.

[18] Hamilton R, Kay E (November 2008) Boring deep tunnels. Proceedings, 3rd of U.S.-Japan Panel on Aerospace-Diving Physiology and Technology, and Hyperbaric Medicine.

associated with a slower working pace and operational errors that the authors associated with the adverse effects of nitrogen at high pressure ((*i.e.,* nitrogen narcosis) (see footnote 16)). Trimix decompression tables are proprietary so large studies of workers with specific pressure exposure for specific trimix schedules are not available. Additional concerns include the lack of a defined recompression protocol in the case of DCI and some studies have found evidence of cardiopulmonary strain in divers using trimix but at pressures greater than those submitted for this variance (see footnote 15).

Review of the literature and reports from presentations to professional societies support that the incidence of DCI with this technique is lower than the incidence of DCIs reported with the use of OSHA tables. In addition, use of trimix reduces the risk of impairment from nitrogen narcosis and allows for the adjustment of oxygen partial pressure to reduce exposure to elevated oxygen partial pressures (see footnotes 16 and 18). Therefore, OSHA preliminarily concludes that the proposed use of the 1992 French Decompression Tables would protect workers at least as effectively as the OSHA decompression tables.

Based on a review of available evidence, the experience of State Plans that either granted variances (Nevada, Oregon, and Washington) [19] or promulgated a new standard (California) [20] for hyperbaric exposures occurring during similar subaqueous tunnel-construction work, and the information provided in the applicant's variance application, OSHA is granting an interim order for future tunneling projects and announces the application for the permanent variance.

Under section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(d)), and based on the record discussed above, the Agency preliminarily finds that when the employer complies with the conditions of the proposed variance, the working conditions of the employer's workers would be at least as safe and healthful as if the employer complied with the working conditions specified by paragraphs (e)(5), (f)(1), (g)(1)(iii), and (g)(1)(xvii) of 29 CFR 1926.803. Therefore, Traylor will: (1) Comply with the conditions listed in the future tunnel projects interim order for the period starting with the grant of the interim order until the Agency modifies or revokes the interim order or makes a decision on its application for a permanent variance); (2) comply fully with the specific conditions of the variance, if granted; (3) comply fully with all other applicable provisions of 29 CFR part 1926; and (4) provide a copy of this **Federal Register** notice to all employees affected by the proposed conditions, including the affected employees of other employers, using the same means it used to inform these employees of its application for a permanent variance.

V. Specific Conditions of the Interim Order and the Application for a Permanent Variance

The following conditions apply to the interim order OSHA is granting to Traylor. These conditions specify the alternative means of compliance with the requirements of paragraphs 29 CFR 1926.803(e)(5), (f)(1), (g)(1)(iii), and (g)(1)(xvii). In addition, these conditions are the conditions that specify the alternative means of compliance with the requirements of paragraphs 29 CFR 1926.803(e)(5), (f)(1), (g)(1)(iii), and (g)(1)(xvii) that OSHA is proposing for Traylor's permanent variance. The conditions/proposed conditions would apply to all employees of Traylor exposed to hyperbaric conditions. These conditions/proposed conditions would be: [21]

A. Scope

The permanent variance would apply only to work:

1. That occurs in conjunction with construction of future subaqueous tunnels using advanced shielded mechanical-excavation techniques and involving operation of an EPBTBM;
2. Performed under compressed-air and hyperbaric conditions up to 75 p.s.i.g;
3. In the EPBTBM's forward section (the working chamber) and associated hyperbaric chambers used to pressurize and decompress employees entering and exiting the working chamber;
4. Except for the requirements specified by 29 CFR 1926.803(e)(5), (f)(1), (g)(1)(iii), and (g)(1)(xvii), Traylor would be required to comply fully with all other applicable provisions of 29 CFR part 1926; and
5. The interim order granted to Traylor for future tunnel projects will remain in effect until OSHA modifies or revokes this interim order or grants Traylor's request for a permanent variance in accordance with 29 CFR 1905.13.

B. Application

The permanent variance would apply only when Traylor stops the tunnel-boring work, pressurizes the working chamber, and the CAWs either enter the working chamber to perform interventions (*i.e.,* inspect, maintain, or repair the mechanical-excavation components), or exit the working chamber after performing interventions.

C. List of Abbreviations

Abbreviations used throughout this proposed permanent variance would include the following:

1. ATA—Atmosphere Absolute
2. CAW—Compressed-air worker
3. CFR—Code of Federal Regulations
4. DCI—Decompression Illness
5. DCS—Decompression Sickness (or the bends)
6. EPBTBM—Earth Pressure Balanced Tunnel Boring Machine
7. HOM—Hyperbaric Operations and Safety Manual
8. JHA—Job hazard analysis
9. OSHA—Occupational Safety and Health Administration
10. OTPCA—Office of Technical Programs and Coordination Activities

D. Definitions

The following definitions would apply to this proposed permanent variance. These definitions would supplement the definitions in each project-specific HOM.

1. *Affected employee or worker*—an employee or worker who is affected by the conditions of this proposed permanent variance, or any one of his or her authorized representatives. The term ''employee'' has the meaning defined and used under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*).

2. *Atmospheric pressure*—the pressure of air at sea-level, generally, 14.7 p.s.i.a., 1 atmosphere absolute, or 0 p.s.i.g.

3. *Compressed-air worker*—an individual who is specially trained and medically qualified to perform work in a pressurized environment while breathing air at pressures up to 75 p.s.i.g.

4. *Competent person*—an individual who is capable of identifying existing and predictable hazards in the surroundings or working conditions that are unsanitary, hazardous, or dangerous to employees, and who has

[19] These state variances are available in the docket: Exs. OSHA–2012–0035–0006 (Nevada), OSHA–2012–0035–0007 (Oregon), and OSHA–2012–0035–0008 (Washington).

[20] See California Code of Regulations, Title 8, Subchapter 7, Group 26, Article 154, available at *http://www.dir.ca.gov/title8/sb7g26a154.html.*

[21] In these conditions, OSHA is using the future conditional form of the verb (*e.g.,* ''would''), which pertains to the application for a permanent variance (designated as ''permanent variance'') but the conditions also apply to the interim order.

authorization to take prompt corrective measures to eliminate them.[22]

5. *Decompression illness*—an illness (also called decompression sickness (DCS) or the bends) caused by gas bubbles appearing in body compartments due to a reduction in ambient pressure. Examples of symptoms of decompression illness include (but are not limited to): Joint pain (also known as the 'bends' for agonizing pain or the 'niggles' for slight pain); areas of bone destruction (termed dysbaric osteonecrosis); skin disorders (such as cutis marmorata, which causes a pink marbling of the skin); spinal cord and brain disorders (such as stroke, paralysis, paresthesia, and bladder dysfunction); cardiopulmonary disorders, such as shortness of breath; and arterial gas embolism (gas bubbles in the arteries that block blood flow).[23]

Note: Health effects associated with hyperbaric intervention but not considered symptoms of DCI can include: Barotrauma (direct damage to air-containing cavities in the body such as ears, sinuses and lungs); nitrogen narcosis (reversible alteration in consciousness that may occur in hyperbaric environments and is caused by the anesthetic effect of certain gases at high pressure); and oxygen toxicity (a central nervous system condition resulting from the harmful effects of breathing molecular oxygen (O_2) at elevated partial pressures).

6. *Earth Pressure Balanced Tunnel Boring Machine*—the machinery used to excavate the tunnel.

7. *Hot work*—any activity performed in a hazardous location that may introduce an ignition source into a potentially flammable atmosphere.[24]

8. *Hyperbaric*—at a higher pressure than atmospheric pressure.

9. *Hyperbaric intervention*—a term that describes the process of stopping the EPBTBM and preparing and executing work under hyperbaric pressure in the working chamber for the purpose of inspecting, replacing, or repairing cutting tools and/or the cutterhead structure.

10. *Hyperbaric Operations Manual*—a detailed, project-specific health and safety plan developed and implemented by Traylor for working in compressed air during future hyperbaric tunnel projects.

11. *Job hazard analysis*—an evaluation of tasks or operations to identify potential hazards and to determine the necessary controls.

12. *Man lock*—an enclosed space capable of pressurization, and used for compressing or decompressing any employee or material when either is passing into or out of a working chamber.

13. *Nitrox*—a mixture of oxygen and air and refers to mixtures which are more than 21% oxygen.

14. *Pressure*—a force acting on a unit area. Usually expressed as pounds per square inch (p.s.i.).

15. *p.s.i.*—pounds per square inch, a common unit of measurement of pressure; a pressure given in p.s.i. corresponds to absolute pressure.

16. *p.s.i.a*—pounds per square inch absolute, or absolute pressure, is the sum of the atmospheric pressure and gauge pressure. At sea-level, atmospheric pressure is approximately 14.7 p.s.i. Adding 14.7 to a pressure expressed in units of p.s.i.g. will yield the absolute pressure, expressed as p.s.i.a.

17. *p.s.i.g.*—pounds per square inch gauge, a common unit of pressure; pressure expressed as p.s.i.g. corresponds to pressure relative to atmospheric pressure. At sea-level, atmospheric pressure is approximately 14.7 p.s.i. Subtracting 14.7 from a pressure expressed in units of p.s.i.a. yields the gauge pressure, expressed as p.s.i.g.

18. *Qualified person*—an individual who, by possession of a recognized degree, certificate, or professional standing, or who, by extensive knowledge, training, and experience, successfully demonstrates an ability to solve or resolve problems relating to the subject matter, the work, or the project.[25]

19. *Trimix*—a mixture of oxygen, nitrogen and helium that is used in hyperbaric environments instead of air to reduce nitrogen narcosis and the hazards of oxygen toxicity.

20. *Working chamber*—an enclosed space in the EPBTBM in which CAWs perform interventions, and which is accessible only through a man lock.

E. Safety and Health Practices

1. Traylor would have to develop and implement a project-specific HOM, and submit the HOM to OSHA at least one year before using the EPBTBM on the project for which the HOM applies. The HOM would provide the governing requirements regarding expected safety and health hazards (including anticipated geological conditions) and hyperbaric exposures during the tunnel-construction project.

2. The HOM would be required to demonstrate that the EPBTBM to be used on the project is designed, fabricated, inspected, tested, marked, and stamped in accordance with the requirements of ASME PVHO–1.2012 (or most recent edition of Safety Standards for Pressure Vessels for Human Occupancy) for the EPBTBM's hyperbaric chambers.

3. When submitting the project-specific HOM to OSHA for approval, Traylor must demonstrate that it informed its employees of the proposed HOM and their right to petition the Assistant Secretary for a variance by:

a. giving a copy of the proposed project-specific HOM to the authorized employee representatives;

b. posting a statement giving a summary of the proposed project-specific HOM and specifying where its employees may examine a copy of the permanent variance application (at the place(s) where the applicant normally posts notices to employees or, instead of a summary, posting the application itself); or

c. using other appropriate means.

4. Traylor may not begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. until OSHA completes its review of the project-specific HOM and determines that the safety and health instructions and measures it specifies would be appropriate, would comply with the conditions of the variance, and would adequately protect the safety and health of CAWs. Traylor would have to receive a written acknowledgement from OSHA stating that: (1) OSHA found its project-specific HOM acceptable; and (2) OSHA determined that it may begin hyperbaric interventions at pressures exceeding 50 p.s.i.g. by complying fully with the conditions of the interim order or proposed permanent variance (as an alternative to complying with the requirements of the standard). Once approved by OSHA, the HOM would become part of this variance for the purposes of the project for which it was developed.

5. Traylor would have to implement the safety and health instructions included in the manufacturer's operations manuals for the EPBTBM, and the safety and health instructions provided by the manufacturer for the operation of decompression equipment.

6. Traylor would have to use air or trimix as the only breathing gas in the working chamber.

7. Traylor would have to use the 1992 French Decompression Tables for air, nitrox, and trimix decompression specified in the HOM, specifically, the extracted portions of the 1992 French

[22] Adapted from 29 CFR 1926.32(f).

[23] See Appendix 10 of ''A Guide to the Work in Compressed-Air Regulations 1996,'' published by the United Kingdom Health and Safety Executive available from NIOSH at *http://www.cdc.gov/niosh/docket/archive/pdfs/NIOSH-254/compReg1996.pdf.*

[24] Also see 29 CFR 1910.146(b).

[25] Adapted from 29 CFR 1926.32(m).

Decompression tables titled, ''French Regulation Air Standard Tables.''

8. Traylor would have to equip man locks used by its employees with an air, nitrox, or trimix-delivery system as specified by the HOM approved by OSHA for the project. Traylor would be required to not store oxygen or other compressed gases used in conjunction with hyperbaric work in the tunnel.

9. Workers performing hot work under hyperbaric conditions would have to use flame-retardant personal protective equipment and clothing.

10. In hyperbaric work areas, Traylor would have to maintain an adequate fire-suppression system approved for hyperbaric work areas.

11. Traylor would have to develop and implement one or more JHAs for work in the hyperbaric work areas, and review, periodically and as necessary (*e.g.,* after making changes to a planned intervention that affects its operation), the contents of the JHAs with affected employees. The JHAs would have to include all the job functions that the risk assessment [26] indicates are essential to prevent injury or illness.

12. Traylor would have to develop a set of checklists to guide compressed-air work and ensure that employees follow the procedures required by this proposed permanent variance (including all procedures required by the HOM approved by OSHA for the project, which this proposed variance would incorporate by reference). The checklists would have to include all steps and equipment functions that the risk assessment indicates are essential to prevent injury or illness during compressed-air work.

13. Traylor would have to ensure that the safety and health provisions of each HOM adequately protect the workers of all contractors and subcontractors involved in hyperbaric operations for the project to which the HOM applies.[27]

F. Communication

1. Prior to beginning a shift, Traylor would have to implement a system that informs workers exposed to hyperbaric conditions of any hazardous occurrences or conditions that might affect their safety, including hyperbaric incidents, gas releases, equipment failures, earth or rock slides, cave-ins, flooding, fires, or explosions.

2. Traylor would have to provide a power-assisted means of communication among affected workers and support personnel in hyperbaric conditions where unassisted voice communication is inadequate.

a. Traylor would have to use an independent power supply for powered communication systems, and these systems would have to operate such that use or disruption of any one phone or signal location will not disrupt the operation of the system from any other location.

b. Traylor would have to test communication systems at the start of each shift and as necessary thereafter to ensure proper operation.

G. Worker Qualifications and Training

Traylor would have to:

1. Ensure that each affected worker receives effective training on how to safely enter, work in, exit from, and undertake emergency evacuation or rescue from, hyperbaric conditions, and document this training.

2. Provide effective instruction, before beginning hyperbaric operations, to each worker who performs work, or controls the exposure of others, in hyperbaric conditions, and document this instruction. The instruction would include:

a. The physics and physiology of hyperbaric work;

b. Recognition of pressure-related injuries;

c. Information on the causes and recognition of the signs and symptoms associated with decompression illness, and other hyperbaric intervention-related health effects (*e.g.,* barotrauma, nitrogen narcosis, and oxygen toxicity).

d. How to avoid discomfort during compression and decompression;

e. Information the workers can use to contact the appropriate healthcare professionals should the workers have concerns that they may be experiencing adverse health effects from hyperbaric exposure; and

f. Procedures and requirements applicable to the employee in the project-specific HOM.

3. Repeat the instruction specified in paragraph (G)(2) of this proposed condition periodically and as necessary (*e.g.,* after making changes to its hyperbaric operations).

4. When conducting training for its hyperbaric workers, make this training available to OSHA personnel and notify the OTPCA at OSHA's National Office and OSHA's nearest affected Area Office before the training takes place.

H. Inspections, Tests, and Accident Prevention

1. Traylor would have to initiate and maintain a program of frequent and regular inspections of the EPBTBM's hyperbaric equipment and support systems (such as temperature control, illumination, ventilation, and fire-prevention and fire-suppression systems), and hyperbaric work areas, as required under 29 CFR 1926.20(b)(2) by:

a. Developing a set of checklists to be used by a competent person in conducting weekly inspections of hyperbaric equipment and work areas; and

b. Ensuring that a competent person conducts daily visual checks and weekly inspections of the EPBTBM.

2. If the competent person determines that the equipment constitutes a safety hazard, Traylor would have to remove the equipment from service until it corrects the hazardous condition and has the correction approved by a qualified person.

3. Traylor would have to maintain records of all tests and inspections of the EPBTBM, as well as associated corrective actions and repairs, at the job site for the duration of the job.

I. Compression and Decompression

Traylor would have to consult with its attending physician concerning the need for special compression or decompression exposures appropriate for CAWs not acclimated to hyperbaric exposure.

J. Recordkeeping

Traylor would have to maintain a record of any recordable injury, illness, in-patient hospitalization, amputation, loss of an eye, or fatality (as defined by 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses), resulting from exposure of an employee to hyperbaric conditions by completing the OSHA 301 Incident Report form and OSHA 300 Log of Work Related Injuries and Illnesses.

Note: Examples of important information to include on the OSHA 301 Incident Report form (along with the corresponding question on the form) would have to address the following: the task performed (Question (Q) 14); an estimate of the CAW's workload (Q 14); the composition of the gas mixture (*e.g.,* air or trimix (Q 14)); the pressure worked at (Q 14); temperature in the work and decompression environments (Q 14); did something unusual occur during the task or decompression (Q 14); time of symptom onset (Q 15); duration of time between decompression and onset of symptoms (Q 15); nature and duration of symptoms (Q 16); a medical summary of the illness or injury (Q 16); duration of the hyperbaric intervention (Q 17); any possible contributing factors (Q 17); the number of prior interventions completed by injured or ill CAW (Q 17); the number of prior interventions completed by injured or ill CAW at that pressure (Q 17); the contact information for the treating

[26] See ANSI/AIHA Z10–2012, American National Standard for Occupational Health and Safety Management Systems, for reference.

[27] See ANSI/ASSE A10.33–2011, American National Standard for Construction and Demolition Operations—Safety and Health Program Requirements for Multi-Employer Projects, for reference.

healthcare provider (Q 17); and the date and time of last hyperbaric exposure for this CAW.

In addition to completing the OSHA 301 Incident Report form and OSHA 300 Log of Work Related Injuries and Illnesses, Traylor would have to maintain records of:

1. The date, times (*e.g.,* began compression, time spent compressing, time performing intervention, time spent decompressing), and pressure for each hyperbaric intervention.

2. The name of each individual worker exposed to hyperbaric pressure and the decompression protocols and results for each worker.

3. The total number of interventions and the amount of hyperbaric work time at each pressure.

4. The post-intervention physical assessment of each individual CAW for signs and symptoms of decompression illness, barotrauma, nitrogen narcosis, oxygen toxicity or other health effects associated with work in compressed air or mixed gasses for each hyperbaric intervention.

K. Notifications

1. To assist OSHA in administering the conditions specified herein, Traylor would have to:

a. Notify the OTPCA and the nearest affected Area Office of any recordable injury, illness, in-patient hospitalization, amputation, loss of an eye, or fatality (by submitting the completed OSHA 301 Incident Report form [28]) resulting from exposure of an employee to hyperbaric conditions including those that do not require recompression treatment (*e.g.,* nitrogen narcosis, oxygen toxicity, barotrauma), but still meet the recordable injury or illness criteria (of 29 CFR 1904). The notification would have to be made within 8 hours of the incident, or after becoming aware of a recordable injury or illness, and a copy of the incident investigation (OSHA 301) would have to be provided within 24 hours of the incident, or after becoming aware of a recordable injury or illness. In addition to the information required by the OSHA 301, the incident-investigation report would have to include a root-cause determination, and the preventive and corrective actions identified and implemented.

b. Provide certification within 15 days of the incident that it informed affected workers of the incident and the results of the incident investigation (including the root-cause determination and preventive and corrective actions identified and implemented).

c. Notify the OTPCA and the nearest affected Area Office within 15 working days and in writing, of any change in the compressed-air operations that affects Traylor's ability to comply with the proposed conditions specified herein.

d. Upon completion of each hyperbaric tunnel project, evaluate the effectiveness of the decompression tables used throughout the project, and provide a written report of this evaluation to the OTPCA and the neared affected Area Office.

Note: The evaluation report would have to contain summaries of: (1) the number, dates, durations, and pressures of the hyperbaric interventions completed; (2) decompression protocols implemented (including composition of gas mixtures (air, oxygen, nitrox, and trimix), and the results achieved; (3) the total number of interventions and the number of hyperbaric incidents (decompression illnesses and/or health effects associated with hyperbaric interventions as recorded on OSHA 301 and 300 forms, and relevant medical diagnoses and treating physicians' opinions); and (4) root-causes, and preventive and corrective actions identified and implemented.

e. To assist OSHA in administering the proposed conditions specified herein, inform the OTPCA and the nearest affected Area Office as soon as possible after it has knowledge that it will:

i. Cease to do business;

ii. Change the location and address of the main office for managing the tunneling operations specified by the project-specific HOM; or

iii. Transfer the operations specified herein to a successor company.

f. Notify all affected employees of this interim order/proposed permanent variance by the same means required to inform them of its application for a variance.

2. OSHA would have to approve the transfer of the proposed permanent variance to a successor company.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to Section 29 U.S.C. 655(6)(d), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1905.11.

Signed at Washington, DC, on July 22, 2015.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2015–18319 Filed 7–24–15; 8:45 am]

BILLING CODE 4510–26–P

[28] See footnote 8.

LEGAL SERVICES CORPORATION

Notice of Availability of Calendar Year 2016 Competitive Grant Funds for the Veterans Pro Bono Program

AGENCY: Legal Services Corporation.

ACTION: Solicitation of proposals for the provision of pro bono legal services to veterans.

SUMMARY: The Legal Services Corporation (LSC) provides grants of federally-appropriated funds for civil legal services to low-income individuals and families.

Pursuant to Public Law 102–229, LSC administers the process of awarding grant funds for the Veterans Pro Bono Program for the purpose of furnishing effective, efficient and high quality pro bono legal services to eligible veterans appearing before the United States Court of Appeals for Veterans Claims (Court). LSC hereby announces the availability of competitive grant funds for the Veterans Pro Bono Program for calendar year 2016 and solicits grant proposals from interested parties. The exact amount of available funds and the date, terms, and conditions of their availability for calendar year 2016 will be determined through the congressional appropriations process for FY 2016. For the past three years, Congress has appropriated approximately $2.5 million each year.

DATES: The deadline to submit a Notice of Intent to Compete is Friday, August 28, 2015, at 5 p.m. Eastern Time. Notices must be submitted by email to *veteransprobono@lsc.gov.*

ADDRESSES: Office of Program Performance, Veterans Pro Bono Program Competition, Legal Services Corporation, 3333 K Street NW., Third Floor, Washington, DC 20007–3522.

FOR FURTHER INFORMATION CONTACT: For questions about the application process, please contact Meredith Horton, Office of Program Performance, by email at *veteransprobono@lsc.gov.*

SUPPLEMENTARY INFORMATION: Funds for the Veterans Pro Bono Program are authorized by and subject to Public Law 102–229, title I, ch. II, 105 Stat. 1701, 1710, as incorporated by reference in subsequent appropriations for the United States Court of Appeals for

Veterans Claims (Court). That law requires the Court to provide the funds to LSC to award grants or contracts for the provision of ''legal or other assistance, without charge, to veterans and other persons who are unable to afford the cost of legal representation in connection with decisions'' of, or other proceedings in, the Court.

Public Law 102–229 requires this assistance to be provided through ''a program that furnishes case screening and referral, training and education for attorney and related personnel, and encouragement and facilitation of pro bono representation by members of the bar and law school clinical and other appropriate programs, such as veterans service organizations, and through defraying expenses incurred in providing representation to such persons. . . .''

LSC seeks proposals from: (1) Non-profit organizations that have as a purpose the provision of free legal assistance to low-income individuals or the provision of free services to veterans; or (2) private attorneys or law firms that seek to establish such a non-profit for these purposes.

Applicants must file a Notice of Intent to Compete (NIC) with LSC to participate in the competitive grants process. The NIC must include the following information:

(1) Organization name;

(2) organization type (*e.g.,* non-profit or law firm);

(3) name and title of primary contact;

(4) primary contact mailing address, phone number, and email address;

(5) names and brief description of relevant experience of principals and key staff;

(6) names and brief description of relevant experience of current governing board; and

(7) if the non-profit organization has not yet been established, names and brief description of relevant experience of prospective members of a governing board.

''Relevant experience'' includes experience with:

(a) Veterans benefits law;

(b) recruiting, training, supervising, and assigning cases to volunteer attorneys;

(c) practice before the Court or supervision of attorneys practicing before the Court;

(d) reviewing and evaluating veterans benefits cases;

(e) outreach and education for veterans and dependents regarding veterans benefits rights and procedures.

The NIC must not exceed seven (7) single-spaced pages and must be submitted as a single PDF document. The NIC must be submitted by email to *veteransprobono@lsc.gov.*

The submission deadline is Friday, August 28, 2015, at 5 p.m. EDT.

The Request for Proposals, containing the grant application, guidelines, proposal content requirements and specific selection criteria, will be available the week of September 14, 2015, at *www.lsc.gov* under ''Meetings & Events.''

For more information about the current grantee, The Veterans Consortium Pro Bono Program, please visit *www.vetsprobono.org.*

Dated: July 22, 2015.

Stefanie K. Davis,

Assistant General Counsel.

[FR Doc. 2015–18309 Filed 7–24–15; 8:45 am]

BILLING CODE 7050–01–P

LEGAL SERVICES CORPORATION

Agricultural Worker Population Data for Basic Field—Migrant Grants

AGENCY: Legal Services Corporation.

ACTION: Notice.

SUMMARY: The Legal Services Corporation (LSC) provides special population grants to effectively and efficiently fund civil legal aid services to address the legal needs of agricultural workers and their dependents through grants entitled ''Basic Field—Migrant.'' The funding for these grants is based on data regarding the eligible client population to be served. LSC has obtained from the U.S. Department of Labor new data regarding this population that are more current than the data LSC has been using and that better reflect the population to be served. On February 3, 2015, LSC sought comments on the use of that data for grants beginning in January 2016 and related issues. Based on the comments received, LSC will not use the data for 2016 grants. LSC will make public additional information underlying the new data, contract with the Department of Labor for assistance addressing issues raised in the comments, consider development of revised data, and seek public comment on any revised data and a revised implementation plan. Implementation would begin January 2017.

FOR FURTHER INFORMATION CONTACT: Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation, 3333 K St. NW., Washington, DC 20007; 202–295–1623 (phone); 202–337–6519 (fax); *mfreedman@lsc.gov.*

SUPPLEMENTARY INFORMATION: The Legal Services Corporation (''LSC'' or ''Corporation'') was established through the LSC Act ''for the purpose of providing financial support for legal assistance in noncriminal matters or proceedings to persons financially unable to afford such assistance.'' 42 U.S.C. 2996b(a). LSC performs this function primarily through distributing funding appropriated by Congress to independent civil legal aid programs that provide legal services to low-income persons throughout the United States and its possessions and territories. 42 U.S.C. 2996e(a)(1)(A). LSC designates geographic service areas and structures grants to support services to the entire eligible population in a service area or to a specified subpopulation of eligible clients. 45 CFR 1634.2(c) and (d), 1634.3(b). LSC awards these grants through a competitive process. 45 CFR part 1634. Congress has mandated that LSC ''insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas.'' 42 U.S.C. 2996f(a)(3).

Throughout the United States and U.S. territories, LSC provides Basic Field—General grants to support legal services for eligible clients. LSC provides funding for those grants on a per-capita basis using the poverty population as determined by the U.S. Census Bureau every three years. Sec. 501(a), Public Law 104–134, 110 Stat. 1321, 1321–50, as amended by Public Law 113–6, div. B, title IV, 127 Stat. 198, 268 (LSC funding formula adopted in 1996, incorporated by reference in LSC's appropriations thereafter, and amended in 2013). Since its establishment in 1974, LSC has also provided subpopulation grants to support legal services for the needs of agricultural workers through Basic Field—Migrant grants under the authority of the LSC Act to structure grants for the most economic and effective delivery of legal assistance. 42 U.S.C. 2996f(a)(3). Congress amended the LSC Act in 1977 to require that LSC conduct a study of the special legal needs of various subpopulations, including migrant or seasonal farm workers, and develop and implement appropriate means of addressing those needs. 42 U.S.C. 2996f(h). LSC's study, issued in 1979, concluded that specialized legal expertise and knowledge were needed to address the distinctive ''unmet special legal problems'' that migrant and seasonal farmworkers shared because of their status as farmworkers. Legal Services Corporation, *Special Legal Problems and Problems of Access to Legal*

Services of Veterans, Migrant and Seasonal Farm Workers, Native Americans, People, with Limited English-Speaking Ability, and Individuals in Sparsely Populated Areas, 1979.

LSC provides funding for Basic Field—Migrant grants on a per-capita basis by determining the size of the subpopulation and separating that population from the overall poverty population for the applicable geographic area or areas. LSC expects programs receiving these grants to serve the legal needs of a broad range of eligible agricultural workers and their dependents who have specialized legal needs that are most effectively and efficiently served through a dedicated grant program. LSC currently uses data regarding migrant and seasonal farmworkers, and their families, from the early 1990s, with some adjustments based on changes in the general poverty population. These data are no longer current and do not reflect the entire population served by these grants.

The United States Department of Labor, Employment and Training Administration (ETA), collects data regarding agricultural workers for federal grants serving the needs of the American agricultural worker population. The U.S. Census Bureau does not maintain data regarding agricultural workers. LSC has contracted with ETA to obtain more current data regarding the agricultural worker population served by these grants. ETA has provided LSC with these data, including state-by-state breakdowns. The changes in data will result in changes in funding levels for these grants.

In January of 2015, LSC management (Management) proposed to the LSC Board of Directors (Board) that LSC seek comments on using the new data for these grants as follows:

(1) Implementing the new data for calculation of these grants beginning in January 2016;

(2) phasing in the funding changes to provide intermediate funding halfway between the old and new levels for 2016 and to fully implement the new levels for 2017; and

(3) updating the data every three years on the same cycle as LSC updates poverty population data from the U.S. Census Bureau for the distribution of LSC's Basic Field—General grants.

Upon approval by the Board's Operations and Regulations Committee (Committee) on January 22, 2015, and the Board on January 24, 2015, LSC published a notice for comment on this proposal in the **Federal Register** on February 3, 2015, 80 FR 5791. LSC extended the comment period to April 20, 2015, via notice in the **Federal Register** on March 19, 2015, 80 FR 14413. Management's proposal, related documents and the comments submitted are available at: *http://www.lsc.gov/about/mattersforcomment.php.*

LSC received eleven comments from ten individuals or organizations. The National Legal Aid and Defender Association (NLADA) submitted two comments—one from the NLADA Civil Policy Group and one from the NLADA Farmworker Section.

The comments all supported the proposal to use more current data for apportioning funding to and among these grants. Some comments raised concerns about the source data and the methodology used. In particular, concerns were raised about the types of state groupings used for distribution of the data among the states. Those comments stated that the groupings did not accurately reflect the patterns of employment and residence for low-income agricultural workers and their dependents. Some comments identified additional sources of data for determining the relevant populations in some states. Comments also sought additional access to the source data and methodology used by the Department of Labor. Other issues raised by the comments included the scope of the definition of ''agricultural worker,'' implementation over two or three years, and adjustments to the data for aliens eligible under federal law for LSC services based on sexual abuse, domestic violence, trafficking, or other abusive or criminal activities. *See* 45 CFR 1626.4—Aliens eligible for assistance under anti-abuse laws.

Based on these comments, Management proposed to the Committee that LSC further investigate improvements to the data, postpone prospective implementation until January 2017, seek additional comments on revised options, and publish this notice. On July 16, 2015, the Committee approved Management's proposal. On July 18, 2015, the Board adopted the recommendation of Management and the Committee.

Management has contracted with ETA to obtain expert review of the issues regarding source data and methodology raised by the comments. Management will publish on the Matters for Comment page of *www.lsc.gov* additional information regarding the source data and methodology. Management will also determine whether ETA can provide revised data based on some of the considerations raised in the comments. Based on this review and any other relevant information, LSC will publish for comment any revised data and a proposal for implementation. Implementation would begin January 2017.

Dated: July 22, 2015.

Stefanie K. Davis,

Assistant General Counsel.

[FR Doc. 2015–18315 Filed 7–24–15; 8:45 am]

BILLING CODE 7050–01–P

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meetings

AGENCY: Mississippi River Commission.

TIME AND DATE: 9 a.m., 14 August, 2015.

PLACE: On board MISSISSIPPI V at City Front, Cape Girardeau, Missouri

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers; (2) District Commander's overview of current project issues within the St. Louis and Memphis Districts; and (3) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries.

TIME AND DATE: 9 a.m., August 17, 2015.

PLACE: On board MISSISSIPPI V at Mud Island Landing, Memphis, Tennessee

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers; (2) District Commander's overview of current project issues within the Memphis District; and (3) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries.

TIME AND DATE: 9 a.m., August 19, 2015.

PLACE: On board MISSISSIPPI V at Lake Village, Arkansas (Boat Ramp at Old Greenville Bridge)

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers; (2) District Commander's overview of current project issues within the Vicksburg

District; and (3) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries.

TIME AND DATE: 9 a.m., August 21, 2015.

PLACE: On board MISSISSIPPI V at City Dock above the USS Kidd in Baton Rouge, Louisiana

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers; (2) District Commander's overview of current project issues within the New Orleans District; and (3) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy S. Gambrell, telephone 601–634–5766.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2015–18509 Filed 7–23–15; 4:15 pm]

BILLING CODE 3720–58–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (15–065)]

NASA Advisory Council; Science Committee; Earth Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Earth Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the NAC Science Committee. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Friday, August 28, 2015, 2:00 p.m. to 4:30 p.m., Eastern Daylight Time (EDT).

ADDRESSES: The meeting will take place telephonically. Any interested person may call the USA toll free conference number 1–888–324–6864, passcode 4692140, to participate in this meeting by telephone.

FOR FURTHER INFORMATION CONTACT: Ms. Ann Delo, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–0750, fax (202) 358–2779, or *ann.b.delo@nasa.gov.*

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topics:

—Earth Science program annual performance review according to the Government Performance and Results Act Modernization Act.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2015–18321 Filed 7–24–15; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2015–0158]

Information Collection: ''Nuclear Material Events Database (NMED) for the Collection of Event Report, Response, Analyses, and Follow-up Data on Events Involving the Use of Atomic Energy Act (AEA) Radioactive Byproduct Material''

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Nuclear Material Events Database (NMED) for the Collection of Event Report, Response, Analyses, and Follow-up Data on Events Involving the Use of Atomic Energy Act (AEA) Radioactive Byproduct Material.''

DATES: Submit comments by September 25, 2015. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2015–0158. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Tremaine Donnell, Office of Information Services, Mail Stop: T–5 F53, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tremaine Donnell, Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258; email: *INFOCOLLECTS.Resource@NRC.GOV.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2015–0158 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2015–0158. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2015–0158 on this Web site.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML15169A162.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's

Clearance Officer, Tremaine Donnell, Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

Please include Docket ID NRC–2015–0158 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* ''Nuclear Material Events Database (NMED) for the Collection of Event Report, Response, Analyses, and Follow-up Data on Events Involving the Use of Atomic Energy Act (AEA) Radioactive Byproduct Material.''

2. *OMB approval number:* 3150–0178.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* N/A.

5. *How often the collection is required or requested:* On occasion. Agreement States are requested to provide copies of licensee nuclear material event reports electronically or by hard copy to the NRC within 30 days of receipt from their licensee. In addition, Agreement States are requested to report events that may pose a significant health and safety hazard to the NRC Headquarters Operations Officer within 24 hours of notification by an Agreement State licensee.

6. *Who will be required or asked to respond:* Current Agreement States and any State receiving Agreement State status in the future.

7. *The estimated number of annual responses:* 506.

8. *The estimated number of annual respondents:* 37.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 804 hours.

10. *Abstract:* The NRC's regulations require the NRC's licensees to report incidents and overexposures, leaking or contaminated sealed source(s), release of excessive contamination of radioactive material, lost or stolen radioactive material, equipment failures, abandoned well logging sources and medical events. Agreement State licenses are also required to report these events to their individual Agreement State regulatory authorities under compatible Agreement State regulations. The NRC is requesting that the Agreement States provide information to the NRC on the initial notification, response actions, and follow-up investigations on events involving the use (including suspected theft or terrorist activities) of nuclear materials regulated pursuant to the AEA. The event information should be provided in a uniform electronic format, for assessment and identification of any facilities/site specific or generic safety concerns that could have the potential to impact public health and safety. The identification and review of safety concerns may result in lessons learned, and may also identify generic issues for further study which could result in proposals for changes or revisions to technical or regulatory designs, processes, standards, guidance or requirements.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated at Rockville, Maryland, this 21st day of July, 2015.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2015–18291 Filed 7–24–15; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and purpose of information collection: Application for Survivor Death Benefits; OMB 3220–0031.

Under section 6 of the Railroad Retirement Act (RRA), lump-sum death benefits are payable to surviving widow(er)s, children, and certain other dependents. Lump-sum death benefits are payable after the death of a railroad employee *only* if there are no qualified survivors of the employee immediately eligible for annuities. With the exception of the residual death benefit, eligibility for survivor benefits depends on whether the deceased employee was ''insured'' under the RRA at the time of death. If the deceased employee was not insured, jurisdiction of any survivor benefits payable is transferred to the Social Security Administration and survivor benefits are paid by that agency instead of the RRB. The requirements for applying for benefits are prescribed in 20 CFR 217, 219, and 234.

The collection obtains the information required by the RRB to determine entitlement to and amount of the survivor death benefits applied for. To collect the information, the RRB uses Forms AA–11a, *Designation for Change of Beneficiary for Residual Lump-Sum*;

AA–21, *Application for Lump-Sum Death Payment and Annuities Unpaid at Death*; AA–21cert, *Application Summary and Certification*; G–131, *Authorization of Payment and Release of All Claims to a Death Benefit or Accrued Annuity Payment*; and G–273a, *Funeral Director's Statement of Burial Charges*. One response is requested of each respondent. Completion is required to obtain benefits. The RRB proposes the following changes to the forms in the information collection:

• Form AA–21—Add clarifying language to better define who qualifies for a child's annuity and other minor editorial changes;

• Form G–273a—Add clarifying language to Item 2, regarding the total amount of charges the funeral home should enter; and what the funeral home should list as types of payments received or expected to be received to Item 3.

• Form G–131—For clarity, add an Instructions section and space for the RRB to enter the applicant's name and the waived share amount.

• Form AA–11a—Remove from the information collection due to less than 10 responses a year.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

Form No.	Annual responses	Time (minutes)	Burden (hours)
AA–21cert (with assistance)	3,500	20	1,167
AA–21 (without assistance)	200	40	133
G–131	100	5	8
G–273a	4,000	10	667
Total	7,800		1,975

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Dana Hickman at (312) 751–4981 or *Dana.Hickman@RRB.GOV.* Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or emailed to *Charles.Mierzwa@RRB.GOV.* Written comments should be received within 60 days of this notice.

Charles Mierzwa,

Chief of Information Resources Management.

[FR Doc. 2015–18314 Filed 7–24–15; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–75501; File No. SR–CBOE–2015–050]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change To Expire CBOE Volatility Index Options Every Week

July 21, 2015.

I. Introduction

On June 1, 2015, Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to expire CBOE Volatility Index (''VIX'') options every week. The proposed rule change was published for comment in the **Federal Register** on June 12, 2015.[3] The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

In February 2006, CBOE began trading options that expire monthly on the VIX, which measures a 30-day period of implied volatility. Currently, standard VIX options expire once a month. CBOE now proposes to expire 30-day VIX options every week. According to CBOE, VIX options would continue to trade as they do today and they would be subject to all of the same rules that they are subject to today, except as proposed to be modified by the proposed rule change.[4]

CBOE notes that, in its capacity as the Reporting Authority, it enhanced the VIX Index (cash/spot value) to include P.M.-settled S&P 500 Index End-of-Week expirations (''SPXWs'') in 2014.[5] According to CBOE, the inclusion of SPXWs allows the VIX Index to be calculated with SPX option series that most precisely match the 30-day target timeframe for expected volatility that the VIX Index is intended to represent. CBOE further states that using SPX options with more than 23 days and less than 37 days to expiration ensures that the VIX Index will always reflect an interpolation of two points along the S&P 500 Index volatility term structure.[6]

The last trading day for expiring standard VIX options is the business day immediately prior to their expiration date. The expiration date for VIX options is pegged to the standard (third Friday) SPX option expiration in the subsequent month. According to CBOE, the expiration date is on the Wednesday that is 30 days prior to the third Friday of the calendar month immediately following the month in which the VIX option expires.[7] CBOE (as the Reporting Authority for VIX options) calculates the exercise settlement value for expiring VIX options on their expiration date.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 75120 (June 8, 2015), 80 FR 33574 (''Notice'').

[4] *See* Notice, *supra* note 3, at 33574.

[5] *See* Notice, *supra* note 3, at 33574–75. CBOE notes that this enhancement did not impact the exercise settlement value for VIX options and futures, which continue to use the same VIX Index formula and the opening prices of standard (*i.e.,* third Friday expiration) S&P 500 Index (''SPX'') option series with 30 days to expiration. *See id.* at 33575, n.5.

[6] *See* Notice, *supra* note 3, at 33574–75. *See also* the VIX White Paper available at *https://www.cboe.com/micro/vix/vixwhite.pdf* for a detailed description about the VIX Index methodology.

[7] *See* Notice, *supra* note 3, at 33575. If the Friday in the subsequent month is an Exchange holiday this standard Wednesday VIX option expiration is changed to be the business day that is thirty days prior to the Exchange business day immediately preceding that Friday. *See id.*

[8] *See* CBOE Rule 24.9(a)(5) (setting forth the method of determining the day on which the exercise settlement value will be calculated for VIX options and determining the expiration date and last trading day for VIX options). *See also* Notice, *supra* note 3, at 33575.

The Exchange now proposes to expire VIX options each Wednesday.[9] According to CBOE, the new VIX expirations would be series of the existing VIX option class. Similar to the CBOE Short-Term Volatility Index (''VXST''),[10] however, different types of SPX options would be used to calculate and settle VIX options. Specifically, CBOE states that, as today, the standard (monthly) VIX option expirations would be calculated using A.M.-settled SPX options that expire on the third Friday in the subsequent month and the period of implied volatility covered by these contracts would be exactly 30 days. The new weekly VIX option expirations would be calculated using P.M.-settled SPXWs that expire in 30 days and the period of implied volatility by these contracts would be 30 days, plus 390 minutes.[11]

In order to allow for the weekly expiration of 30-day VIX options, CBOE is also proposing to amend its rules relating to volatility index options in several ways. CBOE proposes to add new language relating to VIX options specifying that the exercise settlement value of a VIX option will be calculated on the specific date (usually a Wednesday) identified in the option symbol for the series. If that Wednesday or the Friday that is 30 days following that Wednesday is an Exchange holiday, the exercise settlement value shall be calculated on the business day immediately preceding that Wednesday.[12]

CBOE notes that expiring 30-day VIX options weekly would result in the Modified Opening Procedures being used more frequently for the constituent options series used to calculate the exercise settlement values for the proposed new 30-day VIX weekly expirations.[13]

The Exchange also proposes to add detailed information about the ''time to expiration'' input for VIX options volatility index options (including standard (monthly) and weekly VIX options) that will be used. Specifically, under the proposal, the ''time to expiration'' used to calculate the Special Opening Quotation will account for the actual number of days and minutes until expiration for the constituent options series.[14]

The Exchange also notes that it currently is permitted to list up to 12 standard (monthly) VIX expirations.[15] The Exchange proposes to retain the ability to list 12 standard (monthly) VIX expirations and proposes to permit the Exchange to list up to six weekly expirations in VIX options. According to the Exchange, the six weekly expirations would be for the nearest weekly expirations from the actual listing date and weekly expirations would not be permitted to expire in the same week in which standard (monthly) VIX options expire. Standard (monthly) expirations in VIX options would not be counted as part of the maximum six weekly expirations permitted for VIX options.[16]

The Exchange notes that currently it may list new series in VIX options up to the fifth business day prior to expiration. The Exchange proposes to amend CBOE Rule 24.9 to permit new series to be added up to and including on the last day of trading for an expiring VIX option contract. The Exchange notes that this listing ability is similar to the series setting schedule for other types of weekly expirations, including VXST options.[17]

Finally, the Exchange proposes to break out VIX options separately from other volatility index options under new subparagraph (ii) to CBOE Rule 24.9.01(1) and to specify that the interval between strike prices for CBOE Volatility Index (VIX) options will be $0.50 or greater where the strike price is less than $75, $1 or greater where the strike price is $200 or less and $5 or greater where the strike price is more than $200.

The Exchange notes that the strike setting parameters set forth in the proposed paragraph are already permitted for VIX options.[18] The Exchange believes that separating VIX options from other volatility index options in this section to the CBOE Rulebook would benefit market participants since it would be easier to identify the strike setting parameters for VIX options by breaking them out as proposed.

The Exchange proposes several clarifying changes to the rule titles and various subheadings to reflect the substantive changes the Exchange is proposing. In addition, the Exchange is proposing various clarifying non-substantive changes to ensure consistency and parallel structure among various Exchange rules.

CBOE represents that it has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle the additional traffic associated with the listing of new series that would result from the expiring VIX options weekly. CBOE further notes that because the proposal is limited to a single class, the Exchange believes that the additional traffic that would be generated from the introduction of weekly 30-Day VIX option series would be manageable.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[19] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[20] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the Commission believes that expiring VIX options weekly will

[9] CBOE notes that it is currently unable to list weekly VIX options under its other weekly option programs because those programs require that weekly options expire on Fridays and VIX options expire on Wednesdays. *See* Notice, *supra* note 3 at 33575, n.8.

[10] CBOE introduced weekly expiring options on the VXST, which measures a nine-day implied volatility period, in 2014. *See* Securities Exchange Act Release No. 71764 (March 21, 2014), 79 FR 17212 (March 27, 2014) (SR–CBOE–2014–003) (Order Granting Approval of Proposed Rule Change to List and Trade CBOE Short-Term Volatility Index Options).

[11] P.M.-settled, expiring SPXWs stop trading at 3:00 p.m. (Chicago time) on their last day of trading. *See* Rule 24.9(e)(4). The additional 390 minutes reflects that these constituent options trade for six and a half hours on their expiration date until 3:00 p.m. (Chicago time).

[12] *See* Notice, *supra* note 3, at 33575.

[13] *See id.*

[14] *See id.*

[15] The Exchange calculates the CBOE VVIX Index, which measures the expected volatility of the 30-day forward price of the VIX Index and is calculated using VIX options. Because CBOE calculates a volatility index using VIX options, the Exchange is permitted to list up to 12 expirations at any one time for VIX options. *See* Notice, *supra* note 3, at 33576, n.13.

[16] *See* Notice, *supra* note 3, at 33576 (providing a chart summarizing the maximum listing ability under the proposed rule change).

[17] *See* existing Rule 24.9.01(c). *See also* Rules 5.5(d)(4) and 24.9(a)(2)(A)(iv) which permit series to be added up to and including on their expiration date for short-term (weekly) options.

[18] *See* Rule 24.9(l) and Rule 24.9.12, which permits $0.50 and $1 strike price intervals for options that are used to calculate volatility indexes. The Exchange calculates the CBOE VVIX Index, which measures the expected volatility of the 30-day forward price of the VIX Index and is calculated using VIX options.

[19] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78f(b)(5).

provide investors with an additional trading and hedging mechanism and may provide investors with additional opportunities to manage 30-day volatility risk each week.

The Exchange has represented that it has many years of history and experience in conducting surveillance for volatility index options trading to draw from in order to detect manipulative trading in the proposed 30-day weekly VIX series.[21] In approving the proposed weekly expiring VIX options, the Commission has also relied on the Exchange's representation that it and OPRA have the necessary systems capacity to handle the additional traffic associated with the listing of new series that would result from the weekly expiration of VIX options.[22]

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–CBOE–2015–050) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–18274 Filed 7–24–15; 8:45 am]

BILLING CODE 8011–01–P

[21] *See* Notice, *supra* note 3, at 33577.

[22] *See id.*

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31721; 812–14413]

BPV Capital Management, LLC and BPV Family of Funds; Notice of Application

July 21, 2015.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements in rule 20a–1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and Sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements''). The requested exemption would permit an investment adviser to hire and replace certain sub-advisers without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the sub-advisers.

APPLICANTS: BPV Family of Funds (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and BPV Capital Management, LLC, a Delaware limited liability company registered as an investment adviser under the Investment Advisers Act of 1940 (''BPV'' or the ''Adviser,'' and, collectively with the Trust, the ''Applicants'').

DATES: *Filing Dates:* The application was filed January 8, 2015, and amended on June 10, 2015.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 17, 2015, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: Michael R. West, BPV Family of Funds, 9202 South Northshore Drive, Suite 300, Knoxville, TN 37922; and Jeffrey T. Skinner, Esq., Kirkpatrick, Townsend & Stockton LLP, 1001 W. Fourth Street, Winston-Salem, NC 27101.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Senior Counsel, at (202) 551–6868, or Daniele Marchesani, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. The Adviser will serve as the investment adviser to the Funds pursuant to an investment advisory agreement with the Trust (the ''Advisory Agreement'').[1] The Adviser will provide the Funds with continuous and comprehensive investment management services subject to the supervision of, and policies established by, each Fund's board of trustees (''Board''). The Advisory Agreement permits the Adviser, subject to the approval of the Board, to delegate to one or more sub-advisers (each, a ''Sub-Adviser'' and collectively, the ''Sub-Advisers'') the responsibility to provide the day-to-day portfolio investment management of each Fund, subject to the supervision and direction of the Adviser. The primary responsibility for managing the Funds will remain vested in the Adviser. The Adviser will hire, evaluate, allocate assets to and oversee the Sub-Advisers, including determining whether a Sub-Adviser should be terminated, at all times subject to the authority of the Board.

2. Applicants request an exemption to permit the Adviser, subject to Board approval, to hire certain Sub-Advisers pursuant to Sub-Advisory Agreements and materially amend existing Sub-Advisory Agreements without obtaining the shareholder approval required under section 15(a) of the Act and rule 18f–2 under the Act.[2] Applicants also seek an exemption from the Disclosure Requirements to permit a Fund to disclose (as both a dollar amount and a percentage of the Fund's net assets): (a) The aggregate fees paid to the Adviser and any Affiliated Sub-Adviser; and (b) the aggregate fees paid to Sub-Advisers other than Affiliated Sub-Advisers (collectively, ''Aggregate Fee Disclosure''). For any Fund that employs an Affiliated Sub-Adviser, the Fund will provide separate disclosure of

[1] Applicants request relief with respect to any existing and any future series of the Trust and any other registered open-end management company or series thereof that: (a) Is advised by BPV or its successor or by a person controlling, controlled by, or under common control with BPV or its successor (each, also an ''Adviser''); (b) uses the manager of managers structure described in the application; and (c) complies with the terms and conditions of the application (any such series, a ''Fund'' and collectively, the ''Funds''). For purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] The requested relief will not extend to any Sub-Adviser that is an affiliated person, as defined in section 2(a)(3) of the Act, of a Fund or the Adviser, other than by reason of serving as a sub-adviser to one or more of the Funds (''Affiliated Sub-Adviser'').

any fees paid to the Affiliated Sub-Adviser.

3. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the Application. Such terms and conditions provide for, among other safeguards, appropriate disclosure to Fund shareholders and notification about sub-advisory changes and enhanced Board oversight to protect the interests of the Funds' shareholders.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such relief is necessary or appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the Act. Applicants believe that the requested relief meets this standard because, as further explained in the Application, the Advisory Agreements will remain subject to shareholder approval, while the role of the Sub-Advisers is substantially similar to that of individual portfolio managers, so that requiring shareholder approval of Sub-Advisory Agreements would impose unnecessary delays and expenses on the Funds. Applicants believe that the requested relief from the Disclosure Requirements meets this standard because it will improve the Adviser's ability to negotiate fees paid to the Sub-Advisers that are more advantageous for the Funds.

For the Commission, by the Division of Investment Management, under delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–18324 Filed 7–24–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736.

Extension:

Rule 17f–1(c) and Form X–17F–1A; SEC File No. 270–29, OMB Control No. 3235–0037

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17f–1(c) and Form X–17F–1A (17 CFR 249.100) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17f–1(c) requires approximately 15,500 entities in the securities industry to report lost, stolen, missing, or counterfeit securities certificates to the Commission or its designee, to a registered transfer agent for the issue, and, when criminal activity is suspected, to the Federal Bureau of Investigation. Such entities are required to use Form X–17F–1A to make such reports. Filing these reports fulfills a statutory requirement that reporting institutions report and inquire about missing, lost, counterfeit, or stolen securities. Since these reports are compiled in a central database, the rule facilitates reporting institutions to access the database that stores information for the Lost and Stolen Securities Program.

We estimate that 15,500 reporting institutions will report that securities are either missing, lost, counterfeit, or stolen annually and that each reporting institution will submit this report 30 times each year. The staff estimates that the average amount of time necessary to comply with Rule 17f–1(c) and Form X–17F–1A is five minutes. The total burden is approximately 38,750 hours annually for respondents (15,500 times 30 times 5 divided by 60).

Written 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; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Rule 17f–1(c) is a reporting rule and does not specify a retention period. The rule requires an incident-based reporting requirement by the reporting institutions when securities certificates are discovered to be missing, lost, counterfeit, or stolen. Registering under Rule 17f–1(c) is mandatory to obtain the benefit of a central database that stores information about missing, lost, counterfeit, or stolen securities for the Lost and Stolen Securities Program. Reporting institutions required to register under Rule 17f–1(c) will not be kept confidential; however, the Lost and Stolen Securities Program database will be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: July 22, 2015.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–18323 Filed 7–24–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–75499; File No. SR–NASDAQ–2015–036]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendments Nos. 1 and 2 Thereto, Relating to the Listing and Trading of the Shares of 18 Eaton Vance NextShares ETMFs of Either the Eaton Vance ETMF Trust or the Eaton Vance ETMF Trust II

July 21, 2015.

I. Introduction

On April 10, 2015, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade the shares (''Shares'') of the following 18 exchange-traded managed funds: Eaton Vance Balanced NextShares™; Eaton Vance Global Dividend Income NextShares™; Eaton Vance Growth NextShares™; Eaton Vance Large-Cap Value NextShares™; Eaton Vance Richard Bernstein All Asset Strategy NextShares™; Eaton Vance Richard Bernstein Equity Strategy NextShares™; Eaton Vance Small-Cap

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

NextShares™; Eaton Vance Stock NextShares™; Parametric Emerging Markets NextShares™; Parametric International Equity NextShares™; Eaton Vance Bond NextShares™; Eaton Vance TABS 5-to-15 Year Laddered Municipal Bond NextShares™; Eaton Vance Floating-Rate & High Income NextShares™; Eaton Vance Global Macro Absolute Return NextShares™; Eaton Vance Government Obligations NextShares™; Eaton Vance High Income Opportunities NextShares™; Eaton Vance High Yield Municipal Income NextShares™; and Eaton Vance National Municipal Income NextShares™ (individually ''Fund,'' and collectively, ''Funds''). On April 21, 2015, the Exchange filed Amendments Nos. 1 and 2 to the proposal.[3] The proposed rule change, as modified by Amendments Nos. 1 and 2 thereto, was published for comment in the **Federal Register** on April 29, 2015.[4] On June 8, 2015, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendments Nos. 1 and 2 thereto.

II. Description of Proposed Rule Change

The Exchange proposes to list and trade the Shares pursuant to Nasdaq Rule 5745, which governs the listing and trading of Exchange-Traded Managed Fund Shares, as defined in Nasdaq Rule 5745(c)(1).[7] Each Fund is a series of either Eaton Vance ETMF Trust or Eaton Vance ETMF Trust II (individually ''Trust,'' and collectively, ''Trusts'').[8] Each Trust is registered with the Commission as an open-end investment company and has filed a registration statement on Form N–1A (''Registration Statements'') with the Commission.[9]

Eaton Vance Management will be the investment adviser (''Adviser'') to the Funds. Foreside Fund Services, LLC will be the principal underwriter and distributor of each Fund's Shares. State Street Bank and Trust Company will act as the administrator, accounting agent, custodian, and transfer agent to the Funds. Interactive Data Corporation will be the intraday indicative value calculator to the Funds.

The Exchange has made the following representations and statements in describing the Funds.[10]

A. Principal Investment Strategies of the Funds

According to the Exchange, each Fund will be actively managed and will pursue the various principal investment strategies described below.[11]

1. Eaton Vance Balanced NextShares™

The investment objective of this Fund is to provide current income and long-term growth of capital. The Fund normally will invest between 50% and 75% of its net assets in equity securities and between 25% and 50% of its net assets in fixed-income securities.

2. Eaton Vance Global Dividend Income NextShares™

The investment objective of this Fund is to provide current income and long-term growth of capital. The Fund normally will invest primarily in common stocks and, in the adviser's discretion, preferred stocks of U.S. and foreign companies that pay dividends.

3. Eaton Vance Growth NextShares™

The investment objective of this Fund is total return. The Fund will invest in a broadly diversified selection of equity securities, seeking companies with above-average growth and financial strength. Under normal market conditions, the Fund will invest primarily in large-cap companies.

4. Eaton Vance Large-Cap Value NextShares™

The investment objective of this Fund is total return. Under normal market conditions, the Fund will invest primarily in value stocks of large-cap companies.

5. Eaton Vance Richard Bernstein All Asset Strategy NextShares™

The investment objective of this Fund is total return. In seeking its investment objective, the Fund will have flexibility to allocate its assets in markets around the world and among various asset classes, including equity, fixed-income, commodity, currency and cash investments.

6. Eaton Vance Richard Bernstein Equity Strategy NextShares™

The investment objective of this Fund is total return. Under normal market conditions, the Fund will invest primarily in equity securities and derivative instruments that provide exposure to equity securities.

7. Eaton Vance Small-Cap NextShares™

The investment objective of this Fund is long-term capital appreciation. The Fund normally will invest primarily in equity securities of small-cap companies.

8. Eaton Vance Stock NextShares™

The investment objective of this Fund is to achieve long-term capital appreciation by investing in a diversified portfolio of equity securities. The Fund normally will invest primarily in a diversified portfolio of common stocks.

9. Parametric Emerging Markets NextShares™

The investment objective of this Fund is long-term capital appreciation. The Fund normally will invest primarily in equity securities of companies located in emerging market countries.

10. Parametric International Equity NextShares™

The investment objective of this Fund is long-term capital appreciation. The

[3] Amendment No. 1 amended and replaced the proposed rule change in its entirety. Amendment No. 2 subsequently amended the proposal to include a new footnote to reflect a Web site reference.

[4] *See* Securities Exchange Act Release No. 74797 (Apr. 23, 2015), 80 FR 23831 (''Notice'').

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 75121, 80 FR 34184 (Jun. 15, 2015). The Commission determined that it was appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the comments received. Accordingly, the Commission designated July 28, 2015 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[7] The Funds would be the first exchange-traded managed funds to be listed on the Exchange.

[8] According to the Exchange, the Trusts and affiliates of the Trusts have obtained exemptive relief under the Investment Company Act of 1940 (''1940 Act''). *See* Investment Company Act Release No. 31361 (Dec. 2, 2014) (File No. 812–14139). The Exchange represents that, in compliance with Nasdaq Rule 5745(b)(5), which applies to Shares based on an international or global portfolio, the application for exemptive relief under the 1940 Act states that the Funds will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933, as amended.

[9] *See* Registration Statements on Form N–1A for the Eaton Vance NextShares Trust dated April 9, 2015 (File Nos. 333–197733 and 811–22982) and for the Eaton Vance NextShares Trust II dated April 9, 2015 (File Nos. 333–197734 and 811–22983).

[10] The Commission notes that additional information regarding the Trusts, the Funds, and the Shares, including investment strategies, risks, creation and redemption procedures, calculation of net asset value (''NAV''), fees, distributions, and taxes, among other things, can be found in the Notice and Registration Statements, as applicable. *See supra* notes 4 and 9, respectively.

[11] According to the Exchange, additional information regarding the Funds also will be available on the public Web site for the Funds.

Fund normally will invest primarily in companies domiciled in developed markets outside of the United States, including securities trading in the form of depositary receipts.

11. Eaton Vance Bond NextShares™

The investment objective of this Fund is total return. The Fund normally will invest primarily in bonds and other fixed and floating-rate income instruments.

12. Eaton Vance TABS 5-to-15 Year Laddered Municipal Bond NextShares™

The investment objective of this Fund is to provide current income exempt from regular federal income tax. The Fund normally will invest primarily in municipal obligations with remaining maturities of between 5 and 15 years, the interest on which is exempt from regular federal income tax.

13. Eaton Vance Floating-Rate & High Income NextShares™

The investment objective of this Fund is to provide a high level of current income. The Fund normally will invest primarily in a combination of income-producing floating rate loans and other floating rate debt securities and high-yield corporate bonds.

14. Eaton Vance Global Macro Absolute Return NextShares™

The investment objective of this Fund is total return. The Fund will seek its investment objective by investing in securities, derivatives and other instruments to establish long and short investment exposures around the world.

15. Eaton Vance Government Obligations NextShares™

The investment objective of this Fund is to provide a high current return. The Fund normally will invest primarily in securities issued, backed or otherwise guaranteed by the U.S. Government, its agencies or instrumentalities.

16. Eaton Vance High Income Opportunities NextShares™

The primary investment objective of this Fund is to provide a high level of current income. The Fund will seek growth of capital as a secondary investment objective. The Fund normally will invest primarily in fixed-income securities, including preferred stocks, senior and subordinated floating rate loans, and convertible securities.

17. Eaton Vance High Yield Municipal Income NextShares™

The investment objective of this Fund is to provide high current income exempt from regular federal income tax. The Fund normally will invest primarily in municipal obligations, the interest on which is exempt from regular federal income tax.

18. Eaton Vance National Municipal Income NextShares™

The investment objective of this Fund is to provide current income exempt from regular federal income tax. The Fund normally will invest primarily in municipal obligations, the interest on which is exempt from regular federal income tax.

B. Portfolio Disclosure

Consistent with the disclosure requirements that apply to traditional open-end investment companies, a complete list of current Fund portfolio positions will be made available at least once each calendar quarter, with a reporting lag of not more than 60 days. Funds may provide more frequent disclosures of portfolio positions at their discretion.

C. Intraday Indicative Value

For each series of Shares, an estimated value of an individual Share, defined in Nasdaq Rule 5745(c)(2) as the ''Intraday Indicative Value,'' will be calculated and disseminated at intervals of not more than 15 minutes throughout the Regular Market Session [12] when Shares trade on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the Intraday Indicative Value will be calculated on an intraday basis and provided to Nasdaq for dissemination via the Nasdaq Global Index Service (''GIDS''). The Intraday Indicative Value will be based on current information regarding the value of the securities and other assets held by a Fund.[13] The purpose of the Intraday Indicative Value is to enable investors to estimate the next-determined NAV so they can determine the number of Shares to buy or sell if they want to transact in an approximate dollar amount (*e.g.,* if an investor wants to acquire approximately $5,000 of a Fund, how many Shares should the investor buy?).[14]

D. NAV-Based Trading

Shares will be purchased and sold in the secondary market at prices directly linked to the Fund's next-determined NAV using a new trading protocol called ''NAV-Based Trading.'' All bids, offers, and execution prices of Shares will be expressed as a premium/discount (which may be zero) to the Fund's next-determined NAV (*e.g.,* NAV − $0.01, NAV+$0.01).[15] A Fund's NAV will be determined each business day, normally as of 4:00 p.m. Eastern Time. Trade executions will be binding at the time orders are matched on Nasdaq's facilities, with the transaction prices contingent upon the determination of NAV. Nasdaq represents that all Shares listed on the Exchange will have a unique identifier associated with their ticker symbols, which will indicate that the Shares are traded using NAV-Based Trading.

According to the Exchange, member firms will utilize certain existing order types and interfaces to transmit Share bids and offers to Nasdaq, which will process Share trades like trades in shares of other listed securities.[16] In the systems used to transmit and process transactions in Shares, a Fund's next-determined NAV will be represented by a proxy price (*e.g.,* 100.00) and a premium/discount of a stated amount to the next-determined NAV to be represented by the same increment/decrement from the proxy price used to denote NAV (*e.g.,* NAV − $0.01 would be represented as 99.99; NAV+$0.01 as 100.01).

To avoid potential investor confusion, Nasdaq represents that it will work with

[12] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m. E.T.; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m. E.T.).

[13] The Intraday Indicative Value disseminated throughout each trading day would be based on the same portfolio as used to calculate that day's NAV. Funds will reflect purchases and sales of portfolio positions in their NAV the next business day after trades are executed.

[14] Because, in NAV-Based Trading, prices of executed trades are not determined until the reference NAV is calculated, buyers and sellers of Shares during the trading day will not know the final value of their purchases and sales until the end of the trading day. A Fund's Registration Statement, Web site and any advertising or marketing materials will include prominent disclosure of this fact. Although Intraday Indicative Values may provide useful estimates of the value of intraday trades, they cannot be used to calculate with precision the dollar value of the Shares to be bought or sold.

[15] According to the Exchange, the premium or discount to NAV at which Share prices are quoted and transactions are executed will vary depending on market factors, including the balance of supply and demand for Shares among investors, transaction fees and other costs in connection with creating and redeeming creation units of Shares, the cost and availability of borrowing Shares, competition among market makers, the Share inventory positions and inventory strategies of market makers, the profitability requirements and business objectives of market makers, and the volume of Share trading.

[16] According to the Exchange, all orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically cancelled as of the close of trading on such day. Prior to the commencement of trading in a Fund, the Exchange will inform its members in an Information Circular of the effect of this characteristic on existing order types.

member firms and providers of market data services to seek to ensure that representations of intraday bids, offers and execution prices of Shares that are made available to the investing public follow the ''NAV − $0.01/NAV+$0.01'' (or similar) display format. Specifically, the Exchange will use the NASDAQ Basic and NASDAQ Last Sale data feeds to disseminate intraday price and quote data for Shares in real time in the ''NAV − $0.01/NAV+$0.01'' (or similar) display format. Member firms may use the NASDAQ Basic and NASDAQ Last Sale data feeds to source intraday Share prices for presentation to the investing public in the ''NAV − $0.01/NAV+$0.01'' (or similar) display format. Alternatively, member firms may source intraday Share prices in proxy price format from the Consolidated Tape and other Nasdaq data feeds (*e.g.,* Nasdaq TotalView and Nasdaq Level 2) and use a simple algorithm to convert prices into the ''NAV − $0.01/NAV+$0.01'' (or similar) display format. Prior to the commencement of trading in a Fund, the Exchange will inform its members in an Information Circular of the identities of the specific Nasdaq data feeds from which intraday Share prices in proxy price format may be obtained.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[18] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Shares will be subject to Rule 5745, which sets forth the initial and continued listing criteria applicable to Exchange-Traded Managed Fund Shares. A minimum of 50,000 Shares and no less than two creation units of each Fund will be outstanding at the commencement of trading on the Exchange. The Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.

Nasdaq represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[19] The Exchange represents that its surveillance procedures are adequate to properly monitor Exchange trading of the Shares and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG'') regarding trading in Shares, and in exchange-traded securities and instruments held by the Funds (to the extent such exchange-traded securities and instruments are known through the publication of the Composition File and periodic public disclosures of a Fund's portfolio holdings), and FINRA may obtain trading information regarding such trading from other markets and other entities. In addition, the Exchange may obtain information regarding trading in Shares, and in exchange-traded securities and instruments held by the Funds (to the extent such exchange-traded securities and instruments are known through the publication of the Composition File and periodic public disclosures of a Fund's portfolio holdings), from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in creation units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) the dissemination of information regarding the Intraday Indicative Value and Composition File; (d) the requirement that members deliver a prospectus to investors purchasing Shares prior to or concurrently with the confirmation of a transaction; and (e) information regarding NAV-Based Trading protocols.

The Information Circular also will identify the specific Nasdaq data feeds from which intraday Share prices in proxy price format may be obtained. As noted above, all orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically cancelled as of the close of trading on such day. The Information Circular will discuss the effect of this characteristic on existing order types. In addition, Nasdaq intends to provide its members with a detailed explanation of NAV-Based Trading through a Trading Alert issued prior to the commencement of trading in Shares on the Exchange.

Nasdaq represents that the Adviser is affiliated with a broker-dealer and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to each Fund's portfolio. In the event (a) the Adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or a sub-adviser to a Fund is a registered broker-dealer or becomes affiliated with a broker-dealer, the applicable entity will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as the case may be, regarding access to information concerning the composition and/or changes to the relevant Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[20] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Information regarding NAV-based trading prices, best bids and offers for Shares, and volume of the Shares traded will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. All bids and offers for Shares and all Share trade executions will be

[17] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(5).

[19] The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

[20] 15 U.S.C. 78k–1(a)(1)(C)(iii).

reported intraday in real time by the Exchange to the Consolidated Tape and separately disseminated to member firms and market data services through the Exchange data feeds. Once a Fund's daily NAV has been calculated and disseminated, Nasdaq will price each Share trade entered into during the day at the Fund's NAV plus/minus the trade's executed premium/discount. Using the final trade price, each executed Share trade will then be disseminated to member firms and market data services via an FTP file [21] to be created for exchange-traded managed funds and confirmed to the member firms participating in the trade to supplement the previously provided information to include final pricing.

Prior to the commencement of market trading in Shares, each Fund will be required to establish and maintain a public Web site through which its current prospectus may be downloaded. The Web site will include the prior business day's NAV, and the following trading information for such business day expressed as premiums/discounts to NAV: (a) Intraday high, low, average and closing prices of Shares in Exchange trading; (b) the midpoint of the highest bid and lowest offer prices as of the close of Exchange trading, expressed as a premium/discount to NAV (the ''Closing Bid/Ask Midpoint''); and (c) the spread between highest bid and lowest offer prices as of the close of Exchange trading (the ''Closing Bid/Ask Spread.''). The Web site will also contain charts showing the frequency distribution and range of values of trading prices, Closing Bid/Ask Midpoints and Closing Bid/Ask Spreads over time.

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice,[22] and the Exchange's description of the Funds. The Commission notes that the Funds and the Shares must comply with the requirements of Nasdaq Rule 5745 to be listed and traded on the Exchange.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendments Nos. 1 and 2 thereto, is consistent with Section 6(b)(5) of the Act [23] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–NASDAQ–2015–036), as modified by Amendments Nos. 1 and 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–18275 Filed 7–24–15; 8:45 am]

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[21] According to Nasdaq, File Transfer Protocol (''FTP'') is a standard network protocol used to transfer computer files on the Internet. Nasdaq will arrange for the daily dissemination of an FTP file with executed Share trades to member firms and market data services.

[22] *See supra* note 4.

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78s(b)(2).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–616, OMB Control No. 3235–0671]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736

Extension:
Rule 613

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 613 (17 CFR 242.613). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 613 of Regulation NMS (17 CFR part 242) requires national securities exchanges and national securities associations (''self-regulatory organizations'' or ''SROs'') to jointly submit to the Commission a national market system (''NMS'') plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository for the collection of information for NMS securities. The NMS plan must require each SRO and its respective members to provide certain data to the central repository in compliance with Rule 613. When it adopted Rule 613, the Commission discussed the burden hours associated with the development and submission of the NMS plan.[1] In doing so, the Commission noted that the development and submission of the NMS plan is part of a multi-step process for developing the consolidated audit trail and that the Commission deferred its discussion of the burden hours associated with the other paperwork requirements required by Rule 613—such as the requirements to provide certain data to the central repository—until after the SROs submit an NMS plan and there has been an opportunity for public comment.[2]

The SROs submitted to the Commission the NMS plan on September 30, 2014 [3] and an amended and restated NMS Plan on February 27, 2015.[4] Although the existing collection of information pertains to the development and submission of an NMS plan, and such NMS plan has been developed and submitted, the Commission believes it is prudent to extend this collection of information during the pendency of the Commission's review of the NMS plan.

The Commission estimates that each of the 19 SROs would spend a total of 2,760 burden hours of internal legal, compliance, information technology, and business operations time to comply with the existing collection of information, calculated as follows: (880 programmer analyst hours) + (880 business analyst hours) + (700 attorney hours) + (300 compliance manager hours) = 2,760 burden hours to prepare and file an NMS plan, or approximately 52,440 burden hours in the aggregate, calculated as follows: (2,760 burden hours per SRO) × (19 SROs) = 52,440 burden hours. Amortized over three years, the annualized burden hours would be 920 hours per SRO, or a total of 17,480 for all 19 SROs.

The Commission further estimates that the aggregate one-time reporting burden for preparing and filing an NMS plan would be approximately $20,000 in external legal costs per SRO, calculated as follows: 50 legal hours × $400 per hour = $20,000, for an aggregate burden of $380,000, calculated as follows: ($20,000 in external legal costs per SRO) × (19 SROs) = $380,000. Amortized over three years, the annualized capital external cost would be $6,667 per SRO, or a total of $126,667 for all 19 SROs.

[1] *See* Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (''Adopting Release''), at 45804–45807.

[2] *Id.* at 45804.

[3] *See* Letter from the SROs, to Brent J. Fields, Secretary, Commission, dated September 30, 2014 (''CAT NMS Plan'').

[4] See Letter from the SROs, to Brent J. Fields, Secretary, Commission, dated February 27, 2015 (''Amended and Restated CAT NMS Plan'').

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: July 22, 2015.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–18325 Filed 7–24–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–75498; File No. SR–NASDAQ–2015–079]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to NOM Order Routing

July 21, 2015.

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 July 13, 2015, 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter VI (Trading Systems) at Section 11 (Order Routing), of the rules governing the NASDAQ Options Market (''NOM'' or ''Exchange''), to clarify the manner in which a SEEK Order will route again after an initial routing attempt to another market center.

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.

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 Exchange's rules at Chapter VI, Section 11 provide for the manner in which orders submitted to the System [3] will route to other market centers.[4] The System provides two routing options pursuant to which orders are sent to other available market centers for potential execution, per the entering firm's instructions. The routing options are SEEK and SRCH. Routing options may be combined with all available order types and times-in-force, with the exception of order types and times-in-force whose terms are inconsistent with the terms of a particular routing option. The Exchange is seeking to clarify the manner in which a SEEK order will route again, after it is initially routed (''re-route'').[5]

SEEK is a routing option pursuant to which an order will first check the System for available contracts for execution. After checking the System for available contracts, orders are sent to other available market centers for potential execution, per the entering firm's instructions. When checking the book, the System will seek to execute at the price at which it would send the order to a destination market center.

SRCH is a routing option pursuant to which an order will first check the System for available contracts for execution. After checking the System for available contracts, orders are sent to other available market centers for potential execution, per the entering firm's instructions. When checking the book, the System will seek to execute at the price at which it would send the order to a destination market center.

Both SEEK and SRCH eligible unexecuted orders will continue to be routed utilizing a route timer. The SEEK or SRCH order will post to the book and will be routed after a time period (''Route Timer'') not to exceed one second as specified by the Exchange on its Web site provided that the order's limit price would lock or cross other market center(s).[6] If, during the Route Timer, any new interest arrives opposite the order that is equal to or better than the ABBO [7] price, the order will trade against such new interest at the ABBO price. Eligible unexecuted orders will be routed at the end of the Route Timer provided the order was not filled and the order's limit price would continue to lock or cross the ABBO. If an order was routed with either the SEEK or SRCH routing option, and has size after such routing, it will execute against contra side interest in the book, post in the book, and route again pursuant to the process described above, if applicable, if the order's limit price would lock or cross another market center(s).

With respect to SRCH Orders, if contracts remain un-executed after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another market center, it will re-route. With SEEK orders, the rule currently states, if contracts remain un-executed after routing, they are posted on the book. Once on the book at the limit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''System'' is defined in NOM Rules at Chapter VI, Section 1(a).

[4] Participants can designate orders as either available for routing or not available for routing. *See* Chapter VI, Sec. 11(a).

[5] If an order is only partially routed the portion that was not routed will be posted to the book.

[6] Pursuant to Section 11(c) of Chapter VI, orders sent by the System pursuant to the SEEK and SRCH routing options to other markets would not retain time priority with respect to other orders in the System. If an order routed pursuant to SEEK or SRCH is subsequently returned, in whole or in part, that order, or its remainder, will receive a new time stamp reflecting the time of its return to the System.

[7] ABBO is the away market's best bid or offer.

price, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center.

The Exchange seeks to amend the rule text in Chapter VI, Section 11(a)(1)(A) to state, *while,* on the book at the limit price, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center. The purpose of this change is to make clear that the SEEK order will not re-route as long as that order is at the limit price. The SEEK order may re-route, after it has initially routed, when such order reprices.

Example #1: By way of example, if an order is subject to Acceptable Trade Range [8] (''ATR'') with a price band of 0.80 and the order book is as follows:

○ Order 1: Buy SEEK order 27(10)
○ Order 2: Sell SEEK order 31 (10)
○ Order 3: Sell DNR order 29 (10)

Further, if NASDAQ's BBO is 27(10) × 29(10) and the away market is 27(10) × 33 (10) with an NBBO of 27(20) × 29(10); then

An incoming Order 4: Buy DNR 30 (100) triggers ATR and the following takes place within the order book:

- Order 4 first executes with Order 3 at 29(10)
- ATR timer starts, with Order 4 re-priced and displayed at 29.80 (90)
- Exchange BBO becomes 29.80 (90) x 31 (10), offer 31 is non-firm
- Assume, during ATR timer, away market moves such that new away market is 31.10(10) x 33(10)
- After ATR processing concludes, Order 2 is repriced to be offered at 31.10 and displayed tick away at 31.20 to avoid locking/crossing the market
- Exchange BBO becomes 30(90) x 31.20(10)
- After route timer, Order 2 routes to away market at 31.10.

The Exchange proposes to add the following new sentence, ''SEEK orders will not be eligible for routing until the next time the option series is subject to a new opening or reopening.'' The purpose of this new sentence is to make clear that an opening and reopening will cause an order to be eligible for routing. The SEEK order will be treated as a new order and therefore will become subject to the routing process anew with an opening or reopening process, provided the order locks or crosses another market.

Example #2: By way of example, presume a halt occurred on NOM with the following order book:

- Order 1: Buy SEEK Order is on the book at its limit price, 2.00 (15).
- The related underlying is halted.
- Immediately following the halt, before NOM has re-opened the issue, the away market quotes at 1.95 (100) x 1.99 (100).
- Upon re-opening the issue on NOM, the SEEK order routes at 1.99 (15). The System comes out of a halt with a new opening process and treats all orders as if they were new orders thus the SEEK order will re-route.

The Exchange proposes to modify the existing sentence which states, ''[o]nce on the book at the limit price, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center'' to ''[w]hile on the book at the limit price, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center.'' The Exchange believes that this modification reflects more accurate rule text. The Exchange believes that market participants are aware of the manner in which the SEEK order operates as there has been no System change with respect to the function of the SEEK order. The proposed language serves to make clear that a SEEK order will not re-route while at its limit price, but once that order is re-priced, it may route again.[9]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is 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, and, in general to protect investors and the public interest, by amending the rule text to clarify the existing rule text and provide the circumstances when a SEEK order would be eligible to route, such as (1) when the order is repriced, after it is posted to the order book, at a price not at its limit price; and (2) when an opening or reopening (after a halt) occurs such that the System views these orders as new orders and they become subject to routing anew. The Exchange believes that these amendments provide transparency and specificity to the Rules and the corrected rule text protects investors and the public interest by reducing the potential for investor confusion.

The Exchange believes the additional language benefits other market participants who may not be currently familiar with the routing options on NOM to understand the difference between the two routing options offered by the Exchange. While the Exchange is modifying the rule text, it notes that the System will continue to operate as it does today. Rather, the proposed rule text seeks to bring additional clarity to the current rule text to clarify when a SEEK order will re-route to another market center after it has initially routed. The Exchange believes this language corrects the current rule text and more clearly differentiates an order routed pursuant to the SEEK routing option as compared to the SRCH routing option.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change does not create an undue burden on competition as the proposed rule change is not a substantive change in that the System will continue to operate as it does today. The Exchange desires to amend the current rule text to provide two circumstances when the SEEK order would re-route after it has initially routed to an away market center. The Exchange believes that this proposed rule text will clarify the current rule which states that SEEK order will not re-route once it is on the book at the limit price. The Exchange is seeking to provide greater transparency in its rules. The amendments would apply to all market participants in the same manner.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section

[8] The System will calculate an Acceptable Trade Range to limit the range of prices at which an order will be allowed to execute. The Acceptable Trade Range is calculated by taking the reference price, plus or minus a value to be determined by the Exchange. (*i.e.,* the reference price − (x) for sell orders and the reference price + (x) for buy orders). Upon receipt of a new order, the reference price is the national best bid (NBB) for sell orders and the national best offer (NBO) for buy orders or the last price at which the order is posted whichever is higher for a buy order or lower for a sell order. *See* NASDAQ Rules at Chapter VI, Section 10(7).

[9] *See* Example #1.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

19(b)(3)(A)(iii) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13] 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 [14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] 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 proposed rule change may become operative immediately. The Exchange states that the proposal would apply to all market participants in the same manner and believes that market participants would benefit from the additional clarity the Exchange asserts the proposal would provide in regard to the circumstances when a SEEK order is eligible to re-route. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal provides further clarity regarding the routing functionality of the Exchange's SEEK orders, which the Commission believes will benefit investors and market participants who use such orders to accomplish their trading objectives. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[18]

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 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–2015–079 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–NASDAQ–2015–079.* 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 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–NASDAQ–2015–079 and should be submitted on or before August 17, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2015–18276 Filed 7–24–15; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14383 and #14384]

Kansas Disaster #KS–00003

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kansas (FEMA–4230–DR), dated 07/20/2015.

Incident: Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

Incident Period: 05/04/2015 through 06/21/2015.

DATES: *Effective Date:* 07/20/2015.

Physical Loan Application Deadline Date: 09/18/2015.

Economic Injury (EIDL) Loan Application Deadline Date: 04/20/2016.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/20/2015, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Atchison, Barton, Brown, Butler, Chase, Chautauqua, Cherokee, Cheyenne, Clay, Cloud, Coffey, Cowley, Doniphan, Edwards, Elk, Ellsworth, Franklin, Gray, Greenwood, Harper, Haskell,

Hodgeman, Jackson, Jefferson, Jewell, Lyon, Marion, Marshall, Mcpherson, Meade, Miami, Morris, Nemaha, Neosho, Osage, Pottawatomie, Republic, Rice, Stevens, Sumner, Wabaunsee, Washington.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	2.625
Non-Profit Organizations Without Credit Available Elsewhere	2.625
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 14383B and for economic injury is 14384B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2015–18412 Filed 7–24–15; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14381 and #14382]

Colorado Disaster #CO–00016

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Colorado (FEMA–4229–DR), dated 07/16/2015.

Incident: Severe Storms, Tornadoes, Flooding, Landslides, and Mudslides.

Incident Period: 05/04/2015 through 06/16/2015.

DATES: *Effective Date:* 07/16/2015.

Physical Loan Application Deadline Date: 09/14/2015.

Economic Injury (EIDL) Loan Application Deadline Date: 04/18/2016.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/16/2015, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Baca, El Paso, Elbert, Fremont, Logan, Morgan, Pueblo, Saguache, Sedgwick, Washington, Yuma.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	2.625
Non-Profit Organizations Without Credit Available Elsewhere	2.625
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 14381B and for economic injury is 14382B

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2015–18406 Filed 7–24–15; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14334 and #14335]

Texas Disaster Number TX–00447

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 8.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Texas (FEMA–4223–DR), dated:05/29/2015.

Incident: Severe Storms, Tornadoes, Straight-Line Winds and Flooding.

Incident Period: 05/04/2015 through 06/19/2015.

DATES: *Effective Date:* 07/17/2015.

Physical Loan Application Deadline Date: 08/27/2015.

EIDL Loan Application Deadline Date: 02/29/2016.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Texas, dated 05/29/2015 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Hood, Madison, Shelby, Wharton.

Contiguous Counties: (Economic Injury Loans Only):

Texas: Brazos, Jackson, Leon, Sabine.

Louisiana: De Soto, Sabine.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2015–18409 Filed 7–24–15; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14330 and #14331]

Oklahoma Disaster Number OK–00092

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 7.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–4222–DR), dated 05/26/2015.

Incident: Severe Storms, Tornadoes, Straight Line Winds, and Flooding.

Incident Period: 05/05/2015 through 06/04/2015.

DATES: *Effective Date:* 07/15/2015.

Physical Loan Application Deadline Date: 08/26/2015.

EIDL Loan Application Deadline Date: 02/26/2016.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Oklahoma, dated 05/26/2015 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 08/26/2015.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2015–18411 Filed 7–24–15; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 9204; No. FMA–2015–01]

Designation and Determination Pursuant to the Foreign Missions Act; Development and Management of Approximately 32 Acres in the District of Columbia, on a Portion of the Former Walter Reed Army Medical Center

In order to facilitate the Department of State's acquisition abroad of real property on which to construct safe, secure, and modern facilities for American diplomatic and consular operations, and in light of the difficulties that a growing number of foreign missions in the United States have encountered with respect to identifying properties and locations in the District of Columbia suitable for the construction and operation of modern chancery facilities, the Department of State intends to establish a second location in the Nation's Capital that is dedicated to foreign mission operations.

Thus, pursuant to the Department of State's authority under 22 U.S.C. 4308(e)(1), which authorizes the head of any Federal agency to transfer property to the Department of State to further the purposes of the Foreign Missions Act (22 U.S.C. 4301–4316) (''FMA''), the Department of State has concluded an agreement with the Department of the Army concerning the transfer to the Department of State of approximately 32 acres of excess Federal property at the location of the former Walter Reed Army Medical Center (hereinafter referred to as the ''Foreign Missions Center'' or ''FMC''). The official metes and bounds of this property are in the process of being formally established.

In accordance with the authority vested in me under the FMA and under Delegation of Authority No. 147, dated September 13, 1982, and after due consideration of the need to exercise reciprocity to obtain certain benefits for the United States, I hereby designate the acquisition and use of property (including construction or renovation of facilities on the property) by foreign missions at the FMC, as well as access to and use of roads, sidewalks and other common areas, and other public services at the FMC, to be a benefit as defined in 22 U.S.C. 4302(a)(1). I hereby determine, under 22 U.S.C. 4304, that the Department of State's regulation of the acquisition and use of property in the FMC, as well as access to and use of roads, sidewalks and other common areas, and other public services at the FMC is reasonably necessary in order to: (1) Facilitate relations between the United States and a sending State; (2) protect the interests of the United States; and (3) adjust for costs and procedures of obtaining benefits for missions of the United States abroad. This action will enable the Office of Foreign Missions (OFM) of the Department of State to facilitate the secure and efficient operation of foreign missions in the United States.

Accordingly, the process through which foreign missions will be authorized to acquire, use, and dispose of property and to construct or renovate facilities will be subject to all terms and conditions established in this regard by the Director of the Office of Foreign Missions (OFM). At a minimum, such terms and conditions on which OFM will approve a request from a foreign mission for the acquisition of a lot at the FMC shall include due consideration of the related real property accommodations extended to missions of the United States in the country or territory represented by that foreign mission.

Pursuant to 22 U.S.C. 4306(b)(2)(B), because the FMC is in an area other than one referenced in § 4306(b)(1), the location, replacement, or expansion of chanceries at the FMC is permitted, subject only to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with the procedures and criteria set forth in 22 U.S.C. 4306.

To implement this determination, the Department of State intends to use the working capital fund, consistent with 22 U.S.C. 4308(h) and any terms, conditions, and procedures so established by the Chief Financial Officer, or designee, for all transactions associated with the Department of State's development and management of the FMC.

In particular, the funding needed to develop and manage the FMC shall be primarily obtained from the revenues generated as a result of the following actions:

1. The Department of State's execution of long-term land leases with foreign missions;

2. the Department of State's sale of existing buildings to foreign missions;

3. the transfer of funds in connection with an in-kind exchange of properties, as authorized under 22 U.S.C. 4304(f); and

4. the provision of services or benefits to or on behalf of foreign missions or other Federal agencies that are in furtherance of the Department of State's responsibilities and functions under the FMA.

Additionally, to the maximum extent and for the longest practical duration possible, the funding needed to cover the Department's obligations to manage and maintain the FMC's common areas, or those areas that are not assigned for the exclusive use of a foreign mission, shall also be generated as a result of the actions outlined above. In this regard, any proposed overall revenue generation and anticipated expenditure plan will cover all costs associated with the development of the FMC and as well projected costs associated with the maintenance of the non-public roads, sidewalks, and other common areas not assigned for the exclusive use of a foreign mission for a duration of at least a period of 25 years.

For purposes of this document, the terms ''chancery'' and ''foreign mission'' are defined respectively at 22 U.S.C. 4302(a)(2) and (3).

Dated: July 14, 2015.

Patrick F. Kennedy,

Under Secretary for Management.

[FR Doc. 2015–18333 Filed 7–24–15; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Submission Deadline To Amend Slot Records for LaGuardia Airport

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

ACTION: Notice of submission deadline.

SUMMARY: Under this notice, the FAA announces the submission deadline of August 5, 2015, for requests to amend slot records (adjust slot times and arrival/departure designations) at New York LaGuardia Airport (LGA).

DATES: Adjustment requests must be submitted no later than August 5, 2015.

ADDRESSES: Adjustment requests may be submitted by mail to the Slot Administration Office, AGC–200, Office of the Chief Counsel, 800 Independence Ave. SW., Washington, DC 20591 or by email to: *7-AWA-slotadmin@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Susan Pfingstler, System Operations

Services, Air Traffic Organization, Federal Aviation Administration, 600 Independence Avenue SW., Washington, DC 20591; telephone number: 202–267–6462; email: *susan.pfingstler@faa.gov.*

SUPPLEMENTARY INFORMATION: Scheduled operations at LGA currently are limited by FAA Order until a final Slot Management and Transparency Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport (RIN 2120–AJ89) becomes effective but not later than October 29, 2016.[1] The LGA Order permits the leasing or trading of slots through the expiration date of the Order, but this mechanism limits a carrier's ability to permanently adjust its slot base through trades with another carrier, as is common at Ronald Reagan Washington National Airport (DCA). Additionally, the LGA Order permanently allocates slots, unlike the EWR and JFK Orders, which allocate available slots and permit slot retimings on a seasonal basis, through a transparent process generally following the International Air Transport Association (IATA) Worldwide Slot Guidelines (WSG).[2]

The FAA previously announced a submission deadline for requests to amend LGA slot records (adjust slot times and arrival/departure designations) and evaluated those requests in anticipation of the Winter 2014 and Summer 2015 IATA scheduling seasons.[3] The FAA has received favorable feedback from carriers and interested parties on the adjustment process and believes continuing this process at LGA could facilitate slot adjustments in a fair and transparent manner in future scheduling seasons.

To evaluate LGA slot adjustments for the upcoming Winter 2015 IATA scheduling season, the FAA is establishing a deadline of August 5, 2015, for carriers to request retiming and changes to the arrival/departure designation of currently-held slots. Carriers should provide slot information in sufficient detail including, at a minimum, the operating carrier, slot number, the current and requested slot arrival or departure times, frequency, and effective dates. Consistent with past practice, the FAA will evaluate requests in light of the overall operational impact at LGA and whether the requests improve or have a neutral effect on operational performance. The FAA will consider both short-term adjustments and adjustments through the expiration of the LGA Order. In addition, if the FAA receives conflicting requests for retiming, the FAA will give priority to new entrants and limited incumbents, consistent with the LGA Order and FAA practice. The terms of the LGA Order prevent the FAA from allocating new slots in hours at or above the slot limit.

The FAA will evaluate requests received by August 5, 2015, and intends to respond to the requests no later than August 12, 2015. The FAA cannot guarantee that all requests to adjust slot holdings will be confirmed. Requests received after August 5, 2015, will be evaluated after timely requests in the order they are received. As permitted under paragraph A.5 of the LGA Order, carriers are encouraged to engage in slot trades, when possible, to achieve desired timings.

Issued in Washington, DC, on July 21, 2015.

Daniel Smiley,

Acting Vice President, System Operations Services.

[FR Doc. 2015–18336 Filed 7–24–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Draft Re-Evaluation of the O'Hare Modernization Environmental Impact Statement; Availability

AGENCY: Federal Aviation Administration, DOT

ACTION: Notice of Availability of the Draft Re-Evaluation of the O'Hare Modernization Environmental Impact Statement (Draft Re-Evaluation).

Location of Proposed Action: O'Hare International Airport, Des Plaines and DuPage River Watersheds, Cook and DuPage Counties, Chicago, Illinois (Sections 4, 5, 6, 7, 8, 9, 16, 17, and 18, Township 41 North, Range 10 East, 3rd P.M.).

SUMMARY: The Federal Aviation Administration (FAA) announces that the Draft Written Re-Evaluation of the O'Hare Modernization Environmental Impact Statement (Draft Re-Evaluation) for Chicago O'Hare International Airport, Chicago, Illinois is available for public review and comment.

The Draft Re-Evaluation identifies the potential environmental impacts associated with the construction schedule modification that alters the timing for commissioning new Runway 10R/28L, new Runway 9C/27C, and the extension of Runway 9R/27L at O'Hare International Airport pursuant to the National Environmental Policy Act.

The FAA will host Public Workshops on the Draft Re-Evaluation. The Public Workshops on the Draft Re-Evaluation will be held on the following dates: Monday, August 10, 2015, at White Eagle Banquets, 6839 North Milwaukee Avenue, Niles, Illinois 60714; Tuesday, August 11, 2015, at Taft High School, 6530 West Bryn Mawr Avenue, Chicago, Illinois 60631; Wednesday, August 12, 2015, at Monty's Elegant Banquets, 703 South York Road, Bensenville, Illinois 60106; Thursday, August 13, 2015, at Belvedere Events and Banquets, 1170 West Devon Avenue, Elk Grove Village, Illinois 60007. Each Public Workshops will start at 1 p.m. (Central Standard Time), and registration to participate in the Public Workshops will conclude by 9 p.m. (Central Standard Time). Representatives of FAA and its consultants will be available to provide information about the Draft Re-Evaluation. Spanish language translators will be available at the Public Workshops. If you need the assistance of a translator, other than Spanish, please call Ms. Amy Hanson at (847) 294–7354 by August 3, 2015.

The comment period is open as of Monday, July 27, 2015, and closes Wednesday, August 26, 2015. All comments are to be submitted to Amy Hanson of the FAA, at the address shown below. The comments must be postmarked and email must be sent by no later than midnight, Wednesday, August 26, 2015.

SUPPLEMENTARY INFORMATION: The Draft Re-Evaluation is available for review on line (*http://www.faa.gov/airports/airport_development/omp/eis_re-eval/*) and was provided to the following libraries:

Addison Public Library	4 Friendship Pl	Addison.
Albany Park Library	3401 W. Foster Ave	Chicago.
Arlington Heights Library	500 N. Dunton Ave	Arlington Heights.
Austin Irving Library	6100 E. Irving Park Rd	Chicago.

[1] Operating Limitations at New York LaGuardia Airport, 71 FR 77854 (Dec. 27, 2006) as amended by 79 FR 17222 (Mar. 27, 2014).

[2] *See* 79 FR 16857 (Mar. 26, 2014) (EWR Order); 79 FR 16854 (Mar. 26, 2014) (JFK Order).

[3] 79 FR 44088 (Jul. 29, 2014); 79 FR 75611 (Dec. 18, 2014).

Bartlett Public Library	800 South Bartlett Rd	Bartlett.
Bellwood Public Library	600 Bohland Ave	Bellwood.
Bensenville Community Public Library	200 S. Church Rd	Bensenville.
Berkeley Public Library	1637 Taft Ave	Berkeley.
Bezazian Library	1226 W. Ainslie St	Chicago.
Bloomingdale Public Library	101 Fairfield Way	Bloomingdale.
Bucktown-Wicker Park Library	1701 N. Milwaukee Ave	Chicago.
Budlong Woods Library	5630 N. Lincoln Ave	Chicago.
Carol Stream Public Library	616 Hiawatha Dr	Carol Stream.
College of DuPage Library	425 Fawell Blvd	Glen Ellyn.
Conrad Sulzer Regional Library	4455 N. Lincoln Ave	Chicago.
Des Plaines Public Library	1501 Ellinwood Ave	Des Plaines.
Dunning Library	7455 W. Cornelia Ave	Chicago.
Edgebrook Library	5331 W. Devon Ave	Chicago.
Edgewater Library	6000 N. Broadway	Chicago.
Eisenhower Public Library	4652 N. Olcott Ave	Harwood Heights.
Elk Grove Village Public Library	1001 Wellington Ave	Elk Grove Village.
Elmhurst Public Library	211 Prospect Ave	Elmhurst.
Elmwood Park Public Library	4 W. Conti Pkwy	Elmwood Park.
Evanston Public Library	1703 Orrington Ave	Evanston.
Forest Park Public Library	7555 Jackson Blvd	Forest Park.
Franklin Park Public Library	10311 Grand Ave	Franklin Park.
Galewood-Mont Clare Library	6871 W. Belden Ave	Chicago.
Glendale Heights Library	25 E. Fullerton Ave	Glendale Heights.
Glenview Public Library	1930 Glenview Rd	Glenview.
Glen Ellyn Public Library	400 Duane St	Glen Ellyn.
Hanover Park Branch Library	1266 Irving Park Rd	Hanover Park.
Harold Washington Library	400 S. State St	Chicago.
Hillside Public Library	405 Hillside Ave	Hillside.
Hoffman Estates Library	1550 Hassell Rd	Hoffman Estates.
Humboldt Park Library	1605 N. Troy St	Chicago.
Independence Library	3548 W. Irving Park Rd	Chicago.
Itasca Community Library	500 W. Irving Park Rd	Itasca.
Jefferson Park Library	5363 W. Lawrence Ave	Chicago.
Lincoln Belmont Library	1659 W. Melrose St	Chicago.
Lincoln Park Library	1150 W. Fullerton Ave	Chicago.
Logan Square Library	3030 W. Fullerton Ave	Chicago.
Lombard Public Library	110 W. Maple St	Lombard.
MayFair Library	4400 W. Lawrence Ave	Chicago.
Maywood Public Library	121 S. 5th Ave	Maywood.
Melrose Park Public Library	801 N. Broadway	Melrose Park.
Merlo Library	644 W. Belmont Ave	Chicago.
Morton Grove Public Library	6140 Lincoln Ave	Morton Grove.
Mount Prospect Public Library	10 S. Emerson St	Mount Prospect.
Niles Public Library	6960 W. Oakton St	Niles.
North Austin Library	5724 W. North Ave	Chicago.
North Pulaski Library	4300 W. North Ave	Chicago.
Northlake Public Library	231 N. Wolf Rd	Northlake.
Northtown Library	6435 N. California Ave	Chicago.
Oak Park Public Library	834 Lake St	Oak Park.
Oakton Community College Library	1616 E. Golf Rd	Des Plaines.
Oriole Park Library	7454 W. Balmoral Ave	Chicago.
Park Ridge Public Library	20 S. Prospect Ave	Park Ridge.
Portage-Cragin Library	5108 W. Belmont Ave	Chicago.
Prospect Heights Public Library	12 North Elm Street	Prospect Heights.
River Forest Public Library	735 Lathrop Ave	River Forest.
River Grove Public Library	8638 W. Grand Ave	River Grove.
Roden Library	6083 N. Northwest Highway	Chicago.
Rogers Park Library	6907 N. Clark St	Chicago.
Rolling Meadows Library	3110 Martin Ln	Rolling Meadows.
Roselle Public Library	40 South Park St	Roselle.
Schaumburg Township District Library	130 S. Roselle Rd	Schaumburg.
Schiller Park Public Library	4200 Old River Rd	Schiller Park.
Skokie Public Library	5215 Oakton Street	Skokie.
Uptown Library	929 W. Buena Ave	Chicago.
Villa Park Public Library	305 S. Ardmore Ave	Villa Park.
West Belmont	3104 N. Narragansett Ave	Chicago.
Wilmette Public Library	1242 Wilmette Ave	Wilmette.
Wood Dale Public Library	520 N. Wood Dale Rd	Wood Dale.

Written comments, faxes and emails should be submitted to Amy Hanson of the FAA. The comment period is open as of Monday, July 27, 2015, and closes Wednesday, August 26, 2015. Forms for providing written comments will also be available at the Public Workshops. FAA requests that comments submitted via email include the full name and city/

village of residence of the individual commenting. Court reporters will be available to record verbal comments at the Public Workshops. If you need the assistance of a translator, other than Spanish, please call Ms. Amy Hanson at (847) 294–7354 by August 3, 2015.

For Further Information or To Submit Comments Contact: Amy Hanson, Environmental Protection Specialist, Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, Des Plaines, IL 60018, FAX: 847–294–7046, email address: *omre-eval@faa.gov*.

Issued in Des Plaines, Illinois, July 20, 2015.

James G. Keefer,

Manager, Chicago Airports District Office.

[FR Doc. 2015–18209 Filed 7–24–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2015–0076]

Request for Comments

AGENCY: Office of the Secretary, U.S. Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the U.S. Department of Transportation (DOT) will forward the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for reinstatement with change of a previously approved collection. The ICR describes the nature of the information collection and its expected cost and burden hours. The OMB approved the form in 2009 with its renewal required by September 30, 2012. Subsequently, DOT was given approval of the form until August 31, 2014. The renewal period then lapsed; therefore, the form expired. The **Federal Register** Notice with a 60-day comment period soliciting comments on the form renewal was published on April 29, 2015, [FR Vol. 80, No. 82, page 23855]. No comments were received. This notice includes corrections and updates to the 60-day published notice.

DATES: Comments on this notice must be received by August 26, 2015.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal to the DOT/OST Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503, or by email to *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Tami L. Wright, Associate Director, Compliance Operations Division (S–34), Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, 202–366–9370.

SUPPLEMENTARY INFORMATION:

Form Title(s): Individual Complaint of Employment Discrimination Form.

Form Number: DOT F 1050–8.

OMB Control Number: 2105–0056.

Abstract: The DOT will utilize the form to collect information necessary to process Equal Employment Opportunity (EEO) discrimination complaints filed by employees, former employees, and applicants for employment with the Department. These complaints are processed in accordance with the Equal Employment Opportunity Commission's regulations, 29 CFR part 1614, as amended. The DOT will use the form to: (a) Request requisite information from the individual for processing his or her EEO employment discrimination complaint; and (b) obtain information to identify an individual or his or her attorney or other representative, if appropriate. An individual's filing of an EEO employment complaint is solely voluntary. The DOT estimates that it takes an individual approximately one hour to complete the form.

Type of Request: Reinstatement with change of a previously approved collection.

Affected Public: Job applicants filing EEO employment discrimination complaints.

Total Annual Estimated Burden: 10 hours.

Frequency of Collection: An individual's filing of an EEO complaint is solely voluntary.

Comments are Invited on: (a) Whether the proposed collection of information is reasonable for the proper performance of the EEO functions of the Department; (b) the accuracy of the Department's estimate of the burden of the proposed information collection, including the validity of methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate, automated, electronic, mechanical, or other technology. Comments should be addressed to the address in the preamble. All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will also become a matter of public record.

Issued in Washington, DC, on July 21, 2015.

Patricia Lawton,

PRA Clearance Officer, U.S. Department of Transportation.

BILLING CODE 4910–9X–P

OMB No:

PAPERWORK REDUCTION ACT BURDEN STATEMENT

Under the Paperwork Act of 1995, no persons are required to respond to a collection of information unless it displays valid OMB control number. The public reporting burden for this voluntary collection of information is estimated to average 1 hour per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to the U.S. Department of Transportation, Departmental Office of Civil Rights, S-34, 1200 New Jersey Avenue, SE., Washington, DC 20590

U.S. Department of Transportation

INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION
FORM INSTRUCTIONS

(*Read the following instructions carefully before you complete this form.*)
(*Please complete all items on the complaint form.*)

GENERAL: This form should be used only if you, as an applicant for employment with the Department of Transportation, or as a present or former Department of Transportation employee:

1) believe you have been discriminated against because of your **race, color, religion, sex** (gender, sexual harassment, pregnancy, sexual orientation, or gender identity), **national origin, age** (40 years or older at the time of the event giving rise to your claim), **physical or mental disability, equal pay/compensation, genetic information**, or believe that you have been **retaliated** against for participating in activities covered under the Equal Employment Opportunity statutes; and

2) have presented the matter for informal resolution to an EEO Counselor within **45-calendar days** of the event giving rise to your claim, or within **45-calendar days** of first becoming aware of the alleged discrimination.

IMPORTANT NOTE: In certain situations, the information provided in Part III of the attached complaint form may be used in lieu of an affidavit in the investigation of your complaint. Accordingly, the information you provide in this part should be brief, clear, and complete.

WHEN TO FILE: In accordance with 29 C.F.R. § 1614.106, your formal complaint must be filed within **15-calendar days** of the date you received the Notice of Right to File a Discrimination Complaint form from your EEO Counselor. You must sign and date your complaint. If you are represented by an attorney, the attorney may sign the complaint on your behalf.

These time limits may be extended: **1)** if you show that you were not notified of the time limits and were not otherwise aware of them, or **2)** if you were prevented by circumstances beyond your control from submitting the matter within the time limits, or **3)** for other reasons considered sufficient by the Department.

REPRESENTATION: You may have a representative of your own choosing at all stages of the processing of your complaint. However, your representative will be disqualified if such representation would conflict with the official or collateral duties of the representative. No EEO Counselor or EEO Officer may serve as a representative. *(Your representative need not be an attorney, but only an attorney representative may sign the complaint on your behalf.)*

WHERE TO FILE: The complaint should be filed with the Associate Director, Compliance Operations Division (S-34), Departmental Office of Civil Rights, 1200 New Jersey Avenue, S.E., W76-401, Washington, DC 20590. Filing instructions are contained in the Notice of Right to File a Discrimination Complaint form which was provided by your EEO Counselor. Keep a copy of the completed complaint form for your records.

(PLEASE ALSO READ THE PRIVACY ACT STATEMENT ON THE REVERSE SIDE)

PRIVACY ACT STATEMENT

1. **FORM NUMBER/TITLE DATE**: Department of Transportation Form Number 1050-8, Individual Complaint of Employment Discrimination with the Department of Transportation.

2. **AUTHORITY**: 42 U.S.C. 2000e; 29 U.S.C. 633a; PL 95-062 as amended; 5 U.S.C. 1303 and 1304; 5 C.F.R. 5.2 and 5.3; 29 C.F.R. 1614.105 and 1614.107; and Executive Order 11478, as amended.

3. **PRINCIPAL PURPOSES**: The purpose of this complaint form, whether recorded initially on the form or taken from a letter from the Complainant, is to record the filing of a formal written complaint of employment discrimination with the Department of Transportation on the grounds of race, color, religion, sex (gender, sexual harassment, pregnancy, sexual orientation, or gender identity), national origin, age, physical or mental disability, genetic information, or reprisal, and to reach a decision on the complaint. Information provided on this form will be used by the Department of Transportation to determine whether the complaint was timely filed and whether the claims in the complaint are within the purview of 29 C.F.R. Part 1614, and to provide a factual basis for investigation of the complaint.

4. **ROUTINE USES**: Other disclosures may be:

   a. to respond to a request from a Member of Congress regarding the status of the complaint or appeal;
   b. to respond to a court subpoena and/or to refer to a district court in connection with a civil suit;
   c. to disclose information to authorized officials or personnel to adjudicate a complaint or appeal;
   d. to disclose information to another Federal agency or to a court or third party in litigation when the Government is party to a suit before the court.

5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY, AND EFFECT ON INDIVIDUAL BY NOT PROVIDING INFORMATION**: Formal complaints of employment discrimination must be in writing, signed by the Complainant (or attorney representative), and must identify the parties and action or policy at issue. Failure to comply may result in the Department of Transportation dismissing the complaint. It is not mandatory that this form be used to provide the requested information.

DETACH AND KEEP THIS PAGE WHEN YOU FILE YOUR COMPLAINT

ONE DOT Working Better Together DEPARTMENT OF TRANSPORTATION

INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION WITH THE DEPARTMENT OF TRANSPORTATION

FOR OFFICE USE ONLY

DEPARTMENT CASE NUMBER

FILING DATE

PART I COMPLAINANT IDENTIFICATION INFORMATION

1. Name (Last, First, Middle Initial):

2. Telephone/Fax (Include Area Code):

Home: Fax:

Work: Fax:

E-Mail:

3. Present Home Address (You must notify the Departmental Office of Civil Rights of any changes to your address while the complaint is pending, or your complaint may be dismissed):

Street Address

City State Zip Code

4. If you are a *current* or *former* employee of the Federal government, list your most recent title, series, and grade.

Title Series Grade

5. Name and Address of Organization Where You Work (If a Department of Transportation Employee):

Office and Staff Symbol:

Street Address:

City: State: Zip Code:

6. Employment Status in Relation to this Complaint:

☐ **Applicant** ☐ **Probationary** ☐ **Career/Career Conditional**

☐ **Former Employee** _____ **Date Last Employed at Department**

☐ **Retired** _____ **Date of Retirement**

☐ **Other** _____ **Specify**

7. I certify that all of the statements made in this complaint are true, complete, and correct to the best of my knowledge and belief.

Signature of Complainant or ATTORNEY Representative **Date**

PART II DESIGNATION OF REPRESENTATIVE

8. You may represent yourself in this complaint or you may choose someone to represent you. Your representative does not have to be an attorney. You may change your designation of a representative at a later date, but you must notify the Departmental Office of Civil Rights immediately in writing of any change, and you must include the same information requested in this Part.

"I hereby designate _____ (Please Print Name) to serve as my representative during the course of this complaint. I understand that my representative is authorized to act on my behalf.

9. Representative's Mailing Address:

Firm/Organization

Street Address

City State Zip Code

10. Representative's Employer (If Federal Agency):

11. Representative's Telephone/Fax (Include Area Code):

Telephone: Fax:

12. SIGNATURE of Complainant (or ATTORNEY) **DATE**

PART III ALLEGED DISCRIMINATORY ACTIONS

13. Name and Address of Agency/office that took the action at issue (if different than item 5.)

Office and Organizational Component

Street Address

City State Zip Code

14. If your complaint involves non-selection for a position, please complete the following:

Position Title Series Grade

Vacancy Announcement No. Date Learned of Non-selection

15. Mark below ONLY the basis(es) you believe were relied on to take the actions described in #17.

- ☐ Race (Specify) _____
- ☐ Color (State Complexion) _____
- ☐ Religion (Specify) _____
- ☐ Sex (Gender, Sexual Harassment, Pregnancy, Sexual Orientation, or Gender Identity) _____
- ☐ National Origin (Specify) _____
- ☐ Age (Date of Birth) _____
- ☐ Mental Disability (Specify) _____
- ☐ Physical Disability (Specify) _____
- ☐ Equal Pay/Compensation (Specify) _____
- ☐ Genetic Information (Specify) _____
- ☐ Retaliation (Date(s) of prior EEO Activity) _____

16. Mark below ONLY the claim(s) you believe were relied on to take the actions described in #17.

☐	1. Appointment/Hire	☐	14. Reassignment A. Denied B. Directed
☐	2. Assignment Of Duties	☐	15. Reasonable Accommodation – Disability
☐	3. Awards	☐	16. Reinstatement
☐	4. Conversion To Full-Time	☐	17. Religious Accommodation
☐	5. Disciplinary Action A. Demotion B. Reprimand C. Suspension D. Termination E. Other	☐	18. Retirement
☐	6. Duty Hours	☐	19. Sex Stereotyping (LGBT-related discrimination only)
☐	7. Evaluation/Appraisal	☐	20. Telework
☐	8. Examination/Test	☐	21. Termination
☐	9. Harassment A. Non-Sexual B. Sexual C. Hostile Work Environment (non-sexual) D. Hostile Work Environment (sexual)	☐	22. Terms/Conditions Of Employment

☐	10. Medical Examination	☐	23. Time And Attendance
☐	11. Pay Including Overtime	☐	24. Training
☐	12. Performance Evaluation/ Appraisal	☐	25. Other
☐	13. Promotion/Non-Selection		

17. (A) Describe the action taken against you that you believe was discriminatory; (B) Give the date the action occurred, and the name of each person responsible for the action; (C) Describe how you were treated differently than other employees or applicants because of your race, color, religion, sex (gender, sexual harassment, pregnancy, sexual orientation, or gender identity), national origin, age (40 years or older), disability (mental and/or physical), genetic information, or in retaliation for your participation in the EEO complaint process or opposition to alleged discriminatory practices; (D) indicate what harm, if any, came to you in your work situation as a result of this action. (You may attach extra sheets.)

18. What remedial or corrective action are you seeking?

PART IV EEO COUNSELOR CONTACT

19. When did the most recent discriminatory event occur?

Month Day Year

20. When did you first become aware of the alleged discrimination?

Month Day Year

21. When did you contact an EEO Counselor?

Month Day Year

22. Did you discuss ALL actions raised in item 17 with an EEO Counselor? ☐ YES ☐ NO
(If no, explain on attached sheet)

23. Name and Telephone number of EEO Counselor

Name Telephone No.

24. When did you receive your Notice of Right to File a Discrimination Complaint?

Month Day Year

25. On this same matter, have you filed a grievance or appeal under:

- Negotiated Grievance procedures ☐ YES ☐ NO
- Agency grievance procedure ☐ YES ☐ NO
- MSPB appeal procedure ☐ YES ☐ NO

If you filed a grievance or appeal, provide date filed, case number, and present status.

[FR Doc. 2015–18398 Filed 7–24–15; 8:45 am]

BILLING CODE 4910–9X–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning collection requirements related to application of section 338 to insurance companies.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 317–5746, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application of section 338 to Insurance Companies.

OMB Number: 1545–1990.

Form Number: T.D. 9377.

Abstract: Final regulations and removal of temporary regulations.

This document contains final regulations under *section 197 of the Internal Revenue Code* (Code) that apply to a *section 197* intangible resulting from an assumption reinsurance transaction, and under *section 338* that apply to reserve increases after a deemed asset sale. The final regulations also provide guidance with respect to existing *section 846(e)* elections to use historical loss payment patterns. The final regulations apply to insurance companies.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Farms.

Estimated Number of Respondents: 12.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 12.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 21, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18387 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 911

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 911, Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order).

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order).

OMB Number: 1545–1504.

Form Number: 911.

Abstract: This form is used by taxpayers to apply for relief from a significant hardship which may have already occurred or is about to occur if the IRS takes or fails to take certain actions. This form is submitted to the IRS Taxpayer Advocate Office in the district where the taxpayer lives.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, farms and state, local or tribal governments.

Estimated Number of Respondents: 93,000.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 46,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 14, 2015.

Christie Preston,

IRS Supervisory Tax Analyst.

[FR Doc. 2015–18367 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 13925, Notice of Election and Agreement to Special Lien under Internal Revenue Code Section 6324A and Regulations, and special lien for estate taxes deferred under section 6166 or 6166A.

DATES: Written comments should be received on or before September 25, 2015, to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations or form should be directed to Kerry Dennis at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice of Election and Agreement to Special Lien under Internal Revenue Code Section 6324A and Regulations, and Special lien for estate taxes deferred under section 6166 or 6166A.

OMB Number: 1545–2109.

Regulation Project Number: Form 13925 and TD 7941.

Abstract: Under IRC section 6166, an estate may elect to pay the estate tax in installments over 14 years if certain conditions are met. If the IRS determines that the government's interest in collecting estate tax is sufficiently at risk, it may require the estate provide a bond. Alternatively, the executor may elect to provide a lien in lieu of bond. Under section 6324A(c) and the regulations there under, to make this election the executor must submit a lien agreement to the IRS. Form 13925 is a form lien agreement that executors may use for this purpose.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 510.

Estimated Time per Respondent: 1 hr.

Estimated Total Annual Burden Hours: 510.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. *Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 10, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18384 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 99–50

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 99–50, Combined Information Reporting.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of revenue procedure should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Combined Information Reporting.

OMB Number: 1545–1667.

Revenue Procedure Number: Revenue Procedure 99–50.

Abstract: Revenue Procedure 99–50 permits combined information reporting by a successor business entity (*i.e.,* a corporation, partnership, or sole proprietorship) in certain situations following a merger or an acquisition. Combined information reporting may be elected by a successor with respect to certain Forms 1042–S, all forms in the series 1098, 1099, and 5498, and Forms W–2G. The successor must file a statement with the IRS indicating what forms are being filed on a combined basis.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and farms.

Estimated Number of Respondents: 6,000.

Estimated Average Time per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and

tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18368 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5498–ESA

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5498–ESA, Coverdell ESA Contribution Information.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Coverdell ESA Contribution Information.

OMB Number: 1545–1815.

Form Number: 5498–ESA.

Abstract: Form 5498–ESA is used by trustees or issuers of Coverdell Education Savings accounts to report contributions and rollovers to these accounts to beneficiaries.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organization.

Estimated Number of Responses: 386,600.

Estimated Time per Response: 7 minutes.

Estimated Total Annual Burden Hours: 46,392.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18359 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8906

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8906, Distilled Spirits Credit.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington, at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Distilled Spirits Credit.

OMB Number: 1545–1982.

Form Number: Form 8906.

Abstract: Form 8906, Distilled Spirits Credit, was developed to carry out the provisions of IRC section 5011(a). This section allows eligible wholesalers and persons subject to IRC section 5055 an income tax credit for the average cost of carrying excise tax on bottled distilled spirits. The new form provides a means for the eligible taxpayer to compute the amount of credit.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Farms.

Estimated Number of Respondents: 300.

Estimated Time per Respondent: 1 hour 52 minutes.

Estimated Total Annual Burden Hours: 558.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 16, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18364 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to energy efficient homes credit; manufactured homes.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice 2008–36: Energy Efficient Homes Credit; Manufactured Homes.

OMB Number: 1545–1994.

Notice Number: Notice 2008–36.

Abstract: This notice supersedes Notice 2006–28 by substantially republishing the guidance contained in that publication. This notice clarifies the meaning of the terms equivalent rating network and eligible contractor, and permits calculation procedures other than those identified in Notice 2006–28 to be used to calculate energy consumption. Finally, this notice clarifies the process for removing software from the list of approved software and reflects the extension of the tax credit through December 31, 2008. Notice 2006–28, as updated, provided guidance regarding the calculation of heating and cooling energy consumption for purposes of determining the eligibility of a manufactured home for the New Energy Efficient Home Credit under Internal Revenue Code § 45L. Notice 2006–28 also provided guidance relating to the public list of software programs that may be used to calculate energy consumption. Guidance relating to dwelling units other than manufactured homes is provided in Notice 2008–35.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 15.

Estimated Average Time per Respondent: 4 hrs.

Estimated Total Annual Burden Hours: 60.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18381 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2013–30

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this

opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2013–30, Uniform Late S Corporation Election Revenue Procedure.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedures should be directed to Sara Covington, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, through the internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Revenue Procedure 2013–30, Uniform Late S Corporation Election Revenue Procedure.

OMB Number: 1545–1548.

Revenue Procedure Number: Revenue Procedure 2013–30.

Abstract: Revenue Procedure 2013–30 provides a simplified method for taxpayers to request relief for late S corporation elections, Electing Small Business Trust (ESBT) elections, Qualified Subchapter S Trust (QSST) elections, Qualified Subchapter S Subsidiary (Q Sub) elections, and late corporate classification elections which the taxpayer intended to take effect on the same date that the taxpayer intended that an S corporation election for the entity should take effect. Generally, this revenue procedure facilitates the grant of relief to taxpayers that request relief previously provided in numerous other revenue procedures by consolidating the provisions of those revenue procedures into one revenue procedure and extending relief in certain circumstances. Revenue Procedures 97–48, 2003–43, 2004–48, 2004–49, and 2007–62 are affected.

Current Actions: There are no changes being made to these revenue procedures at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 50,000.

Estimated Average Time per Respondent varies: .5 hours to 1 hour.

Estimated Total Annual Burden Hours: 50,000.

The following paragraph applies to the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 21, 2015.

Allan Hopkins,

IRS Reports Clearance Officer.

[FR Doc. 2015–18366 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 7004

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 7004, Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns.

OMB Number: 1545–0233.

Form Number: 7004.

Abstract: Form 7004 is used by corporations and certain nonprofit institutions to request an automatic extension of time to file their income tax returns. The information is needed by IRS to determine whether Form 7004 was timely filed so as not to impose a late filing penalty in error and also to insure that the proper amount of tax was computed and deposited.

Current Actions: There are no changes being made to this form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations and non-profit institutions.

Estimated Number of Respondents: 2,834,328.

Estimated Time per Respondent: 6 hr., 46 min.

Estimated Total Annual Burden Hours: 19,216,744.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the

request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 16, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18362 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning conclusive presumption of worthlessness of debts held by banks (section 1.166–2).

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Conclusive Presumption of Worthlessness of Debts Held by Banks.

OMB Number: 1545–1254.

Regulation Project Number: FI–34–91.

Abstract: Section 1.166–2(d)(3) of this regulation allows a bank to elect to determine the worthlessness of debts by using a method of accounting that conforms worthlessness for tax purposes to worthlessness for regulatory purposes, and establish a conclusive presumption of worthlessness. An election under this regulation is treated as a change in accounting method.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 200.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 50.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of thefunctions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18382 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Agency Information Collection Activity; Proposed Collection

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Transfers of Securities Under Certain Agreements.

OMB Number: 1545–0770.

Regulation Project Number: FI–182–78.

Abstract: Section 1058 of the Internal Revenue Code provides tax-free treatment for transfers of securities pursuant to a securities lending agreement. The agreement must be in writing and is used by the taxpayer, in a tax audit situation, to justify nonrecognition treatment of gain or loss on the exchange of the securities.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, and not-for-profit institutions.

Estimated Number of Respondents: 11,742.

Estimated Time per Respondent: 50 minutes.

Estimated Total Annual Burden Hours: 9,781.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18372 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Agency Information Collection Activity; Proposed Collection

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Sara Covington, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Adjusted Current Earnings.

OMB Number: 1545–1233.

Regulation Project Number: IA–14–91 (TD 8454—final).

Abstract: Section 1.56(g)–1(r) of the regulation sets forth rules pursuant to section 56(g) of the Internal Revenue Code that permit taxpayers to elect a simplified method of computing their inventory amounts in order to compute their alternative minimum tax.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 13, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18365 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning returns required with respect to controlled foreign partnerships and information reporting with respect to certain foreign partnerships and certain foreign corporations.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Sara Covington, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Section 6038—Returns Required with Respect to Controlled Foreign Partnerships, and Information Reporting with Respect to Certain Foreign Partnerships and Certain Foreign Corporations.

OMB Number: 1545–1617.

Regulation Project Number: REG–124069–02, REG–118966–97.

Abstract: REG–124069–02: Treasury Regulation § 1.6038–3 requires certain United States person who own interests in controlled foreign partnerships to annually report information to the IRS on Form 8865. This regulation amends the reporting rules under Treasury Regulation section § 1.6038–e to provide that a U.S. person must follow the filing requirements that are specified in the instructions for Form 8865 when the U.S. person must file Form 8865 and the foreign partnership completes and files Form 1065 or Form 1065–B. *REG–118966–97:* Section 6038 requires certain U.S. persons who own interest in controlled foreign partnerships or certain foreign corporations to annually report information to the IRS. This regulation provides reporting rules to identify foreign partnerships and foreign corporations which are controlled by U.S. persons.

Current Actions: There are no changes to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit institutions and individuals or households.

Estimated Number of Respondents: 600.

Estimated Total Burden Hours: 500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 14, 2015.

Christie Preston,

IRS Supervisory Tax Analyst.

[FR Doc. 2015–18363 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2003–33

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2003–33, Section 9100 Relief for 338 Elections.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Section 9100 Relief for 338 Elections.

OMB Number: 1545–1820.

Revenue Procedure Number: Revenue Procedure 2003–33.

Abstract: Revenue Procedure 2003–33 provides qualifying taxpayers with an extension of time pursuant to § 301.9100–3 of the Procedure and Administration Regulations to file an election described in § 338(a) or § 338(h)(10) of the Internal Revenue Code to treat the purchase of the stock of a corporation as an asset acquisition.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and individuals or households.

Estimated Number of Respondents: 60.

Estimated Average Time per Respondent: 5 hours.

Estimated Total Annual Reporting Burden: 300.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18371 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2004–53

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 96–60, Procedure for filing Forms W–2 in certain acquisitions.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Procedure for Filing Forms W–2 in Certain Acquisitions.

OMB Number: 1545–1510.

Revenue Procedure Number: Revenue Procedure 2004–53.

Abstract: The information is required by the Internal Revenue Service to assist predecessor and successor employers in complying with the reporting requirements under Internal Revenue Code sections 6051 and 6011 for Forms W–2 and 941.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 553,500.

Estimated Time per Respondent: 12 minutes.

Estimated Total Annual Burden Hours: 110,700.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 15, 2015.

Christie Preston,

IRS Reports Clearance Officer.

[FR Doc. 2015–18370 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 14039, 14039–SP, and 14039–B

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 14039, Identity Theft Affidavit, Form 14039–SP, Declaración Jurada sobre el Robo de Identidad, and Form 14039–B, Business Identity Theft Affidavit.

DATES: Written comments should be received on or before September 25, 2015 to be assured of consideration.

ADDRESSES: Direct all written comments to Christie Preston, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 317–5746, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Identity Theft Affidavit, and Declaración Jurada sobre el Robo de Identidad, Business Identity Theft Affidavit.

OMB Number: 1545–2139.

Form Number: 14039, 14039–SP, and 14039–B.

Abstract: The primary purpose of these forms is to provide a method of reporting identity theft issues to the IRS so that the IRS may document situations where individuals are or may be victims of identity theft. Additional purposes include the use in the determination of proper tax liability and to relieve taxpayer burden. The information may be disclosed only as provided by 26 U.S.C. 6103.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 100,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 25,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material

in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 7, 2015.

Christie Preston,

IRS, Reports Clearance Officer.

[FR Doc. 2015–18386 Filed 7–24–15; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 80 Monday,

No. 143 July 27, 2015

Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 701, 773, et al.

Stream Protection Rule; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827

RIN 1029–AC63

[Docket ID: OSM–2010–0018; S1D1S SS08011000 SX064A000 156S180110; S2D2S SS08011000 SX064A000 15X501520]

Stream Protection Rule

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE or OSM), are proposing to revise our regulations, based on, among other things, advances in science, to improve the balance between environmental protection and the Nation's need for coal as a source of energy. This proposed rule would better protect streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations and provide mine operators with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment. We propose to revise our regulations to clearly define ''material damage to the hydrologic balance outside the permit area'' and require that each permit specify the point at which adverse mining-related impacts on groundwater and surface water would reach that level of damage; collect adequate premining data about the site of the proposed mining operation and adjacent areas to establish an adequate baseline for evaluation of the impacts of mining and the effectiveness of reclamation; adjust monitoring requirements to enable timely detection and correction of any adverse trends in the quality or quantity of surface water and groundwater or the biological condition of streams; ensure protection or restoration of perennial and intermittent streams and related resources; ensure that permittees and regulatory authorities make use of advances in science and technology; ensure that land disturbed by mining operations is restored to a condition capable of supporting the uses that it was capable of supporting before mining; and update and codify the requirements and procedures for protection of threatened or endangered species and designated critical habitat. The proposed changes would apply to both surface mines and the surface effects of underground mines. The majority of the proposed revisions update our regulations to incorporate or reflect the best available science and experience gained over the last 30 years. Approximately thirty percent of the proposed rule consists of editorial revisions and organizational changes intended to improve consistency, clarity, accuracy, and ease of use.

DATES: *Electronic or written comments:* We will accept electronic or written comments on the proposed rule, the draft environmental impact statement, and the draft regulatory impact analysis on or before September 25, 2015.

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

Federal eRulemaking Portal: http://www.regulations.gov. The Docket ID for the proposed rule is OSM–2010–0018, while the Docket ID for the draft environmental impact statement is OSM–2010–0021 and the docket ID for the draft regulatory impact analysis is OSM–2015–0002. Please follow the online instructions for submitting comments.

Mail/Hand-Delivery/Courier: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252 SIB, 1951 Constitution Avenue NW., Washington, DC 20240. Please include the appropriate Docket ID: OSM–2010–0018 for the proposed rule, OSM–2010–0021 for the draft environmental impact statement, or OSM–2015–0002 for the draft regulatory impact analysis.

If you wish to comment on the information collection aspects of this proposed rule, submit your comments to the Department of the Interior Desk Officer at OMB—OIRA, via email at *OIRA_Submission@omb.eop.gov*, or via facsimile at (202) 395–5806. Also, send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203 SIB, Washington, DC 20240, or via email at *jtrelease@osmre.gov*.

You may review the proposed rule, the draft environmental impact statement, and the draft regulatory impact analysis online at *www.osmre.gov*. You also may review these documents in person at the location listed below and at the addresses listed in Part XII under **SUPPLEMENTARY INFORMATION**. You may also review the information collection requests at *http://www.reginfo.gov/public/do/PRAMain*.

Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101 SIB, 1951 Constitution Avenue NW., Washington, DC 20240, 202–208–4264.

FOR FURTHER INFORMATION CONTACT:

For the proposed rule: Dennis G. Rice, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2829.

For the draft environmental impact statement: Robin T. Ferguson, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2802.

For the draft regulatory impact analysis: Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2716.

For information collection matters: John A. Trelease, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2716.

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I. Executive Summary

Significant advances in scientific knowledge and mining and reclamation techniques have occurred in the more than 30 years that have elapsed since the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) [1] and the adoption of federal regulations implementing that law. The proposed rule seeks to acknowledge the advancements in science, technology, policy, and the law that impact coal communities and natural resources, based on our experience and engagement with state regulatory authorities, industry, non-governmental organizations, academia, citizens, and other stakeholders.

The primary purpose of this proposed rule is to reinforce the need to minimize the adverse impacts [2] of surface coal mining operations on surface water, groundwater, fish, wildlife, and related environmental values, with particular emphasis on protecting or restoring streams and aquatic ecosystems. The proposed rule, if adopted as final, also will enhance public health by reducing exposure to contaminants from coal mining in drinking water. The proposed rule has the following seven major elements:

- First, the proposed rule defines the term ''material damage to the hydrologic balance outside the permit area'' and requires that each permit establish the point at which adverse mining-related impacts on groundwater and surface water reach an unacceptable level; *i.e.,* the point at which adverse impacts from mining would cause material damage to the hydrologic balance outside the permit area.
- Second, the proposed rule sets forth how to collect adequate premining data about the site of the proposed mining operation and adjacent areas to establish a comprehensive baseline that will

[1] 30 U.S.C. 1201 *et seq.*

[2] Impacts include loss of headwater streams, long-term degradation of water quality in streams downstream of a mine, displacement of native species, fragmentation of large blocks of mature hardwood forests, compaction and improper construction of postmining soils that inhibit the reestablishment of native plant communities and adverse impacts on watershed hydrology where coal mining occurs.

facilitate evaluation of the effects of mining operations.

• Third, the proposed rule outlines how to conduct effective, comprehensive monitoring of groundwater and surface water during and after both mining and reclamation and during the revegetation responsibility period to provide real-time information documenting mining-related changes in water quality and quantity. Similarly, the proposed rule addresses the need to require monitoring of the biological condition of streams during and after mining and reclamation to evaluate changes in aquatic life. Proper monitoring would enable timely detection of any adverse trends and allow timely implementation of any necessary corrective measures.

• Fourth, the proposed rule promotes the protection or restoration of perennial and intermittent streams and related resources, especially the headwater streams that are critical to maintaining the ecological health and productivity of downstream waters.

• Fifth, the proposed rule is intended to ensure that permittees and regulatory authorities make use of advances in information, technology, science, and methodologies related to surface and groundwater hydrology, surface-runoff management, stream restoration, soils, and revegetation, all of which relate directly or indirectly to protection of water resources.

• Sixth, the proposed rule is intended to ensure that land disturbed by surface coal mining operations is restored to a condition capable of supporting the uses that it was capable of supporting before mining. Soil characteristics and the degree and type of revegetation have a significant impact on surface-water runoff quantity and quality as well as on aquatic life and the terrestrial ecosystems dependent upon perennial and intermittent streams. The proposed rule also would require revegetation of reclaimed minesites with native species unless and until a conflicting postmining land use, such as intensive agriculture, is implemented.

• Seventh, the proposed rule would update and codify requirements and procedures to protect threatened and endangered species and designated critical habitat under the Endangered Species Act of 1973.[3] It also would better explain how the fish and wildlife protection and enhancement provisions of SMCRA should be implemented.

This proposed rule would more completely implement SMCRA's permitting requirements and performance standards, provide regulatory clarity to operators and stakeholders while better achieving the purposes of SMCRA as set forth in section 102 of the Act.[4] In particular, the proposed rule would more completely realize the purposes in paragraphs (a), (c), (d), and (f) of that section, which include establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and assuring that surface coal mining operations are conducted in an environmentally protective manner and are not conducted where reclamation is not feasible. Furthermore, the proposed rule is intended to address recent court decisions, mitigate legal challenges, and strike the appropriate balance between environmental protection, agricultural productivity and the Nation's need for coal as an essential source of energy, while providing greater regulatory certainty to the mining industry.

Apart from the procedural determinations in Part XIII, this document does not discuss the benefits and costs of the proposed rule in detail. Please refer to the draft regulatory impact analysis for an in-depth analysis of projected benefits and costs of the proposed rule and other alternatives under consideration.

II. Why are we proposing to revise our regulations?

Our primary purpose in proposing this rule is to strike a better balance between ''protection of the environment and agricultural productivity and the Nation's needs for coal as an essential source of energy.'' [5] Specifically, the proposed rule is designed to minimize the adverse impacts of surface coal mining operations on surface water, groundwater, and site productivity, with particular emphasis on protecting or restoring streams, aquatic ecosystems, riparian habitats and corridors, native vegetation, and the ability of mined land to support the uses that it was capable of supporting before mining. Our proposed changes reflect our experience during the more than three decades since adoption of the existing regulations, as well as advances in scientific knowledge and mining and reclamation techniques during that time. The proposed rule would more completely implement sections 515(b)(24) and 516(b)(11) of SMCRA, which provide that, to the extent possible using the best technology currently available, surface coal mining and reclamation operations must be conducted to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable.[6] It also would update our regulations concerning compliance with the Endangered Species Act of 1973.[7] In addition, we propose to revise and reorganize our regulations for clarity, to make them more user-friendly, to remove obsolete and redundant provisions, and to implement plain language principles.

Coal mining operations continue to have adverse impacts on streams, fish, and wildlife despite the enactment of SMCRA and the adoption of federal regulations implementing that law more than 30 years ago. Those impacts include loss of headwater streams, long-term degradation of water quality in streams downstream of a mine, displacement of pollution-sensitive species of fish and insects by pollution-tolerant species, fragmentation of large blocks of mature hardwood forests, replacement of native species by highly competitive non-native species that inhibit reestablishment of native plant communities, and compaction and improper construction of postmining soils that result in a reduction of site productivity and adverse impacts on watershed hydrology.

Impacts on Aquatic Ecology

Headwater streams consist of first-order through third-order streams [8] under the Strahler stream-order system, which is the generally-accepted geographical classification system for ranking streams by size.[9] Headwater streams are the small swales, creeks, and streams that connect to form larger streams and rivers. They trap floodwaters, recharge groundwater, remove pollution, provide fish and wildlife habitat, and sustain the health of downstream rivers, lakes, and bays. These streams support diverse biological communities of aquatic invertebrates, such as insects, and

[3] 16 U.S.C. 1531 *et seq.*

[4] 30 U.S.C. 1202.

[5] 30 U.S.C. 1202(f).

[6] See 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[7] 16 U.S.C. 1531 *et seq.*

[8] The U.S. Geological Survey sometimes characterizes only first-order and second-order streams as headwater streams. See, *e.g.,* Argue, D. M., Pope, J. P., and Dieffenbach, Fred. 2012. Characterization of major-ion chemistry and nutrients in headwater streams along the Appalachian National Scenic Trail and within adjacent watersheds, Maine to Georgia: U.S. Geological Survey Scientific Investigations Report 2011–5151, 63 p., plus CD–ROM, p. 4. Also available at *http://pubs.usgs.gov/sir/2011/5151* (last accessed February 27, 2015).

[9] See *http://geography.about.com/od/physicalgeography/a/streamorder.htm* (last accessed January 29, 2015). A first-order stream has no tributaries. When two first-order streams join, they form a second-order stream. When two second-order streams join, they form a third-order stream.

vertebrates, including fish and salamanders, that are often distinct from the species found further downstream. Headwater streams function as sources of sediment, water, nutrients, and organic matter for downstream systems. Riparian vegetation provides organic matter to headwater streams in the form of dropped leaves and other plant parts. This organic matter fuels the aquatic food web.[10] According to the U.S. Environmental Protection Agency (EPA), headwater streams that flow only seasonally or in response to precipitation events; *i.e.,* intermittent and ephemeral streams, comprise approximately 53 percent of the total stream miles in the continental United States.[11]

Headwater streams are the streams most likely to be directly disturbed or impacted by coal mining activities. The EPA estimates that SMCRA permits in existence between 1992 and 2002 authorized the destruction of 1,208 miles of headwater streams.[12] This total included approximately 2 percent of the total stream miles and 4 percent of the first-order and second-order stream miles in the central Appalachian coalfields.[13]

Our proposed rule would address loss of stream miles in two ways. First, we propose to amend the standards governing excess spoil and coal mine waste to minimize both the generation of excess spoil and the placement of excess spoil and coal mine waste in perennial or intermittent streams. Second, we propose to adopt standards that would minimize mining through perennial and intermittent streams. When mining through a perennial or an intermittent stream does occur, our revised standards would require that the permittee restore both the hydrological form and the ecological function of the mined-through stream segment.

Midwestern studies of reconstructed stream segments demonstrate that restoration of hydrological form and ecological function after mining through a stream is technologically feasible and attainable. In Illinois, case studies documented that streams flowing through channels reconstructed after mining can approach the regional biological diversity found in streams in unmined watersheds in that region.[14] Another Illinois study focused on 25 miles of low-gradient perennial streams with moderately disturbed premining watersheds. Those stream segments were relocated in the 1980s to facilitate mining and then were restored in their approximate premining location, although two of the three streams were routed through permanent pit impoundments for part of their length. In general, the study found that the premining hydrological form and ecological function of the streams have been successfully restored, based on a comparison with relatively undisturbed segments of those streams that are upstream of the mining operations.[15] The exception is fish abundance and diversity, which is substantially lower, perhaps, the authors suggest, because of the lack of mature riparian timber and instream woody debris.[16] In addition, monitoring of habitat, water chemistry, and biological parameters of a low-gradient stream in Indiana that flows through a channel reconstructed after mining has demonstrated rapid recovery of the stream's ecological function.[17]

The general consensus is that reconstruction and restoration of high-gradient streams after mining is more challenging. However, a 2012 EPA publication notes that ''restoration of high-gradient, very small intermittent and ephemeral channels as part of stream mitigation projects is common in coalmining regions.'' [18] This statement appears in the context of a discussion of improving existing degraded stream channels as mitigation for the adverse impacts of coal mining elsewhere, but the principles set forth in the publication also should apply to functional restoration of stream channels newly constructed or reconstructed as part of surface coal mining and reclamation operations. Appendix B of the publication describes a scenario in which high-gradient stream channels devoid of aquatic life on an abandoned minesite in West Virginia may be restored to biological health in an estimated 10 years.[19]

Most adverse impacts of surface coal mining operations on water quality occur as a result of the excavation and fracturing of the rock layers above the coal seam. The mining process converts mostly solid rock, which has few pore spaces and thus offers little opportunity for chemical reaction with air and water, into highly fragmented mine spoil, which contains a vastly greater number and volume of pore spaces and thus offers much greater opportunity for chemical reaction with air and water. Surface water and groundwater infiltrate the pore spaces in mine spoil placed in the backfilled area of a mine or in an excess spoil fill and react with air and the surfaces of the rock fragments to produce drainage with high ionic concentrations. Specifically, water percolating through an excess spoil fill or the backfilled area of a mine typically contains substantially higher concentrations of sulfate, bicarbonate, calcium, and magnesium ions, as well as some trace metals, compared to the concentrations of those ions and metals in groundwater discharges and surface runoff from areas undisturbed by mining.[20]

[10] Palmer, Margaret A. and Emily S. Bernhardt. 2009. Mountaintop Mining Valley Fills and Aquatic Ecosystems: A Scientific Primer on Impacts and Mitigation Approaches. p. 12.

[11] See *http://water.epa.gov/type/rsl/streams.cfm* (last accessed January 12, 2015).

[12] U.S. Environmental Protection Agency. 2011. A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams (Final Report). Office of Research and Development, National Center for Environmental Assessment, Washington, DC. EPA/600/R–10/023F, p. 16.

[13] *Id.* However, the fact that the mining plan in the permit authorized destruction of a stream segment does not necessarily mean that the destruction occurred. In some cases, the permittee may have decided not proceed with mining or to alter mining plans subsequent to permit issuance. An unknown amount of the habitat destruction was offset through the section 404 permitting process of the U.S. Army Corps of Engineers, which requires mitigation of loss or degradation of waters of the United States.

[14] Nawrot, J., W.G. O'Leary, and P. Malone. 2009. Illinois stream restoration—opportunities for habitat enhancement: policy, principles, and practices. Pages 183–195 *in* Proceedings of the 2009 Geomorphic Reclamation and Natural Stream Design at Coal Mines: A Technical Interactive Forum, 28–30 April 2009. Bristol, VA, 226 pp.

[15] Williard, Karl, B. Borries, T. Straub, D. Rosenboom, C. Nielson, and V. Kelly. 2013. Stream restoration—long term performance: a reassessment. Final report for Office of Surface Mining Cooperative Agreement S11AC20024 AS.

[16] *Id.* at 77–78. The restored streams have a relative lack of minnows and benthic invertivores along with an abundance of sunfish. Lentic species replaced lotic species in the two streams that were routed through permanent pit impoundments.

[17] ENVIRON International Corporation. September 10, 2010. Report for Fish and Macroinvertebrate Sampling for 2010 Bioassessment Monitoring of West Fork Busseron Creek. Prepared for Peabody Energy, Evansville, Indiana.

[18] Harman, W., R. Starr, M. Carter, K. Tweedy, M. Clemmons, K. Suggs, C. Miller. 2012. *A Function-Based Framework for Stream Assessment and Restoration Projects.* U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, Washington, DC EPA 843–K–12–006, p. 230.

[19] *Id.* at 336–339.

[20] See, *e.g.,* Lindberg. T.T., E.S. Bernhardt, *R. Bier, A. Helton,* R. Merola, A. Vengosh, and R.T. Di Giulio. 2011. Cumulative impacts of mountaintop mining on an Appalachian watershed. *Proceedings of the National Academy of Sciences* 108: 20929–20934, 20929. The researchers state that typical specific conductance levels in low order streams in West Virginia range from 13 to 253 microSiemens per centimeter (μS/cm). Specific conductance levels in streams impacted by mining range from 502 to 2,540 μS/cm. (Specific conductance is a measure of electrical conductivity. High specific conductance readings are a strong indicator of land disturbance, such as agriculture, urbanization, or mining. See Pond, G.J., M.E. Passmore, F.A. Borsuk, L. Reynolds, and C.J. Rose. 2008..Downstream effects of mountaintop coal mining: comparing biological

When sulfate is the dominant anion in those discharges, the result can be acid mine drainage, which mobilizes metals such as iron, manganese, aluminum, and zinc that are directly toxic to fish at high levels.[21] But high concentrations of sulfate ions do not necessarily result in acid mine drainage because groundwater discharges and surface runoff from backfilled areas and excess spoil fills often also contain elevated concentrations of alkaline ions (especially calcium, magnesium, and carbonate ions), which neutralize the acidic sulfate ions, thus preventing the formation of acid mine drainage.[22]

However, alkaline ions also can have negative impacts on water quality and aquatic life. Elevated concentrations of alkaline ions in mine drainage may result in significant increases in the pH and electrical conductivity of streams that receive discharges from mined areas.[23] Elevated concentrations of both these ions and sulfate ions are highly correlated with elevated electrical conductivity in streams, which is highly correlated with the loss or absence of pollution-sensitive species of aquatic insects and fish even when in-stream habitat downstream of the mining activity is otherwise intact.[24] The adverse impacts may extend far downstream. One study found that adverse impacts from both surface and underground mines on water quality in Appalachian streams extended an average of 6.2 miles downstream from the mine.[25]

The EPA has established an aquatic life benchmark of 300 microsiemens per centimeter (µS/cm) for electrical conductivity, based on a scientific determination that maintaining conductivity at or below this level should prevent the extirpation of 95 percent of invertebrate genera, such as mayflies, dragonflies, damselflies, and aquatic beetles, in central Appalachian streams.[26] In other words, mining activities that cause an increase in the electrical conductivity of a stream to no more than 300 µS/cm would be expected to result in the extirpation of no more than 5 percent of the invertebrate genera present in the stream before mining. A recent study suggests that a similar benchmark for fish would be somewhat higher because adverse impacts on the populations and diversity of fish species begin to appear at conductivity readings between 600 and 1,000 µS/cm.[27]

Elevated electrical conductivity in streams can persist for many years after the completion of mining and land reclamation.[28] This water quality characteristic can prevent or restrict recolonization by the species of fish[29] and insects[30] that inhabited the affected stream segment before mining began in the watershed. Studies in Appalachia of existing minesites have not found any ecologically significant improvement in electrical conductivity with either time or the extent of reforestation of the minesite.[31] However, a recent study of test plots on a surface mine in Kentucky found that the quality of water emanating from plots that used the Forestry Reclamation Approach[32] to soil reconstruction improved dramatically within 3 to 9 years after spoil placement, with electrical conductivity apparently stabilizing at levels 50 percent below those recorded during the first 3 years.[33] Our proposed rule would address the conductivity issue by requiring that backfilling techniques consider impacts on electrical conductivity, by requiring that excess spoil fills be constructed in compacted lifts, and by incorporating elements of the Forestry Reclamation Approach into our soil reconstruction and revegetation rules.

Selenium Impacts

In locations with geological formations that contain selenium, mining has sometimes resulted in elevated levels of selenium in streams downgradient of the minesite. Mining exposes elemental selenium to air, thus facilitating oxidation to selenite and selenate, which are soluble in water. Selenium bioaccumulates[34] in fish tissues, causing reproductive problems, physical deformities, and, in extreme cases, mortality in fish in the affected streams.[35] Selenium is beneficial to animals, including humans, when ingested in small amounts, but toxic when ingested in amounts ranging from 0.1 to 10 mg/kg of food.[36] Humans have a dietary requirement estimated to be 0.04 to 0.10 mg/kg of food, but ingestion of selenium in amounts as low as 0.07 mg per day has been shown to have deleterious effects similar to arsenic poisoning.[37] Thus, selenium concentrations in streams may be a human health concern when the stream serves as a drinking water supply or

conditions using family- and genus-level macroinvertebrate bioassessment tools. J. N. Am. Benthol. Soc., 2008, 27(3): 717–737, 720.)

[21] Williard, *op. cit.* at 4.

[22] Palmer, M.A. and E.S. Bernhardt. 2009. Mountaintop Mining Valley Fills and Aquatic Ecosystems: A Scientific Primer on Impacts and Mitigation Approaches, p. 14.

[23] *Id.*

[24] *Id.* at 3, 14–15.

[25] Petty, T., K. Fulton, M. Strager, G. Merovich, J. Stiles, and P. Ziemkiewicz. 2010. Landscape indicators and thresholds of stream ecological impairment in an intensively mined Appalachian watershed. *Journal of the North American Benthological Society* 29(4): 1292–1309.

[26] U.S. Environmental Protection Agency. 2011. A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams (Final Report). Office of Research and Development, National Center for Environmental Assessment, Washington, DC. EPA/600/R–10/023F, p. 41. EPA states that this benchmark applies to parts of West Virginia and Kentucky and that it may be applicable to Ohio, Tennessee, Pennsylvania, Virginia, Alabama, and Maryland in Ecoregions 68, 69, and 70 because the salt matrix and background (calcium and magnesium cations and sulfate and bicarbonate anions at circum-neutral pH) is expected to be similar throughout those ecoregions. EPA further states that this benchmark also may be appropriate for other nearby regions, but that it may not apply when the relative concentrations of dissolved ions are different.

[27] Hitt, N.P. and D.B. Chambers. 2014. Temporal changes in taxonomic and functional diversity of fish assemblages downstream from mountaintop mining. *Freshwater Science* 33(3):000–000. Published online June 30, 2014, in unpaginated form.

[28] See, *e.g.,* Lindberg. T.T., E.S. Bernhardt, *R. Bier, A. Helton,* R. Merola, A. Vengosh, R.T. Di Giulio. 2011. *Cumulative impacts of mountaintop mining on an Appalachian watershed. Proceedings of the National Academy of Sciences* 108: 20929–20934, 20931. Available at *http://www.pnas.org/cgi/doi/10.1073/pnas.1112381108* (last accessed January 29, 2015).

[29] Hitt and Chambers, *op. cit.*

[30] Pond, G.J., M.E. Passmore, N.D. Pointon, J.K. Felbinger, C.A. Walker, K.J.G. Krock, G.B. Fulton, and W.L. Nash. 2014. Long-Term Impacts on Macroinvertebrates Downstream of Reclaimed Mountaintop Mining Valley Fills in Central Appalachia. *Environmental Management 54*(4), 919–933.

[31] *Id.*

[32] The Forestry Reclamation Approach is a set of five steps for reclaiming mined sites to encourage native forest regeneration. These steps are: (1) Prepare a suitable growth medium, (2) minimize compaction, (3) minimize competition from groundcover, (4) plant early- and late-successional tree species, and (5) use proper tree-planting techniques. See *http://arri.osmre.gov/FRA/FRApproach.shtm* (last accessed January 6, 2015).

[33] Sena, Kenton L., ''Influence of Spoil Type on Afforestation Success and Hydrochemical Function on a Surface Coal Mine in Eastern Kentucky'' (2014). *Theses and Dissertations—Forestry.* Paper 16, pp. 39 and 60. See *http://uknowledge.uky.edu/forestry_etds/16* (last accessed January 6, 2015). Electrical conductivity during the first 3 years averaged between 829 and 1224 µS/cm, depending upon whether the soil consisted of brown sandstone, gray sandstone, or a mix. Electrical conductivity in the last year of the study averaged between 421 and 564 µS/cm.

[34] Bioaccumulation means an increase in the concentration of a chemical in a biological organism over time, compared to the chemical's concentration in the environment. Compounds accumulate in living things any time they are taken up and stored faster than they are broken down (metabolized) or excreted. See *extoxnet.orst.edu/tibs/bioaccum.htm* (last accessed January 6, 2015).

[35] Hitt and Chambers, op. cit., suggest that an aquatic life benchmark for total dissolved selenium concentrations using the criteria that EPA relied upon to establish a benchmark for electrical conductivity would be between four and seven micrograms per liter, at least for fish.

[36] U.S. Environmental Protection Agency, ''Quality Criteria for Water'' (1976), p. 200.

[37] *Id.*

when fish in the stream are used for human consumption.

The proposed rule would address the environmental and human health concerns related to selenium by requiring collection of baseline hydrologic and geologic information on this element. If selenium is present in any of the overburden to be removed as part of the mining process, the proposed rule would require that the permit include limits on selenium discharges to prevent material damage to the hydrologic balance outside the permit area. The hydrologic reclamation plan and toxic materials handling plan must address selenium and the surface water and groundwater monitoring plans must include selenium.

Impacts on Stream Flow Regime and Flooding

In addition to the water quality impacts discussed above, mining may affect the flow regime of streams by removing springs and otherwise causing changes in base flow, water temperature, seasonal variations in flow, and fluctuations in flow in response to storm events. Reclaimed minesites generally exhibit both reduced evapotranspiration (as a result of forest loss due to mining) and reduced infiltration of rainfall (as a result of soil compaction during reclamation), compared to unmined areas. A 2009 study of flood response in Virginia watersheds found that flood magnitude increased with the amount of surface-mined land within the watershed. In contrast, logging operations that removed most forest cover in similar Virginia watersheds increased overall water yield within the watershed without increasing flood volume, a difference that the authors of the study attributed to the soil compaction associated with typical surface mine reclamation. Another study in Maryland found that the volume of surface runoff as a result of a storm in a watershed influenced by surface mining was significantly higher than the volume of runoff from an undisturbed forested watershed as a result of the same-size storm. The authors attributed this difference to soil compaction on the mined land, which reduced infiltration rates to less than 1 cm/hr, compared to 30 cm/hr in the undisturbed watershed. Increased surface runoff in response to storms increases the potential for flood damage and may adversely impact the hydrological function of the stream by causing stream channelization.[38] Our proposed rule would address this issue by minimizing soil compaction and maximizing reforestation.

Impacts on Topography and Microclimates

Mining impacts on the terrestrial environment include a loss of topographic complexity; *i.e.,* regraded minesites generally are flatter and more uniform in terms of surface elevation and configuration when compared with the premining topography. U.S. Geological Survey studies of central Appalachia found that surface coal mining reduced ridgetop elevations by an average of 112 feet, raised valley floor elevations by an average of 174 feet, reduced slope steepness by 9.5–11 percent, and changed slope aspect [39] by 38–41 degrees.[40] Changes are less dramatic in areas with flatter topography, but the same principle of greater uniformity and less topographic diversity after mining and regrading still applies. Regraded minesites usually lack the small drainageways and variations in slope and other topographical features found prior to mining. Therefore, they also lack the microclimates and associated ecosystems found prior to mining. Landsat data from 2007–2009 for the area containing a large mountaintop removal mining operation in West Virginia indicate that surface temperatures of areas disturbed by mining were warmer and more variable in all seasons except winter.[41] Surface temperatures influence the type of vegetation that can survive on mined land and the extent and rate at which the premining plant community and associated fauna can recolonize the site.

Impacts on Soils, Vegetation, and Terrestrial Wildlife

Other terrestrial impacts include forest fragmentation (loss of large blocks of contiguous mature interior forest and increases in forest edge and grassland habitat), loss of native forests, changes in species composition and biodiversity of both plants and animals, and loss or severe compaction of soil horizons and organic matter. At least temporarily, mining of previously forested areas adversely impacts species that prefer or require interior forest (for example, the cerulean warbler, the ovenbird, and the scarlet tanager) and favors species that prefer or require edge habitat (for example, the cardinal, the brown-headed cowbird, and many species of sparrows).

Furthermore, conventional reclamation techniques typically result in heavily compacted soils that offer a hostile environment for native plant species and soil microorganisms, which means that minesites reclaimed by those techniques often are either planted with or colonized by nonnative species and remain in a state of arrested ecological succession. Both soil compaction and competitive herbaceous ground covers inhibit the establishment of native forests similar to those that occupied the area prior to mining. Soil compaction also reduces the site indices for tree growth, which means that the reclaimed minesite is not capable of supporting a forest with a productivity equal to that of the forest that either existed or could have existed prior to mining.

Our proposed rule would address terrestrial impacts in a variety of ways, including a requirement for restoration of the premining drainage pattern to the extent possible and incorporation of elements of the Forestry Reclamation Approach. Use of that approach would minimize soil compaction and maximize reforestation and restoration of site productivity. Our proposed rule emphasizes revegetation with native species, restoration of natural plant communities whenever there is no conflict with implemented postmining land uses, and the protection or establishment of riparian corridors along streams to promote protection, restoration, and enhancement of fish, wildlife, and related environmental values. It also would modify the standards for approval of exceptions to the approximate original contour restoration requirement by limiting exceptions to those necessary to implement the postmining land use within the revegetation responsibility period.

Draft Environmental Impact Statement (EIS)

The draft EIS for this proposed rule contains an expanded discussion of the impacts of mining on the environment. Almost all the literature surveys and studies reviewed for this rulemaking process have been published since the adoption in 1983 of our principal regulations concerning protection of the hydrologic balance [42] and protection of fish, wildlife, and related environmental

[38] Sena at 27.

[39] Aspect is the compass direction that a slope faces. It has a significant effect on the soils and microclimate of the slope and hence on the plant and animal life found there, as well as the site's productivity.

[40] Wickham, James, Petra Bohall Wood, Matthew C. Nicholson, William Jenkins, Daniel Druckenbrod, Glenn W. Suter, Michael P. Strager, Christine Mazzarella, Walter Galloway, and John Amos. The overlooked terrestrial impacts of mountaintop mining. *BioScience* 63, no. 5 (2013): 335–348, 338–339.

[41] *Id.* at 338.

[42] 48 FR 43956 (Sept. 26, 1983).

values,[43] which underscores the need to update our regulations to reflect new scientific understanding of impacts associated with coal mining.

Relationship to 2009 MOU

This proposed rule helps fulfill our responsibilities under a memorandum of understanding (MOU) that the Secretary of the Department of the Interior, the Administrator of the EPA, and the Acting Assistant Secretary of the Army (Civil Works) entered into on June 11, 2009. This MOU implemented an interagency action plan designed to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states and ensure that future mining is conducted consistent with federal law. Specifically, Part III.A. of the MOU provides that we will review our ''existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining.'' It also provides that, at a minimum, we will consider revisions to the stream buffer zone rule published December 12, 2008,[44] and our existing regulatory requirements concerning approximate original contour. Ultimately, we determined that development of a comprehensive, nationally applicable stream protection rule would be the most appropriate and effective method of achieving the purposes and requirements of SMCRA, as well as meeting the goals set forth in the MOU.[45]

III. What needs does this proposed rule address?

All versions of the stream buffer zone rule that we have adopted over the years, including the version now in effect, focused primarily on activities in or within 100 feet of the stream itself.[46] Yet, mining activities beyond the 100-foot stream buffer zone can adversely impact the quality and quantity of water in streams by disturbing aquifers, by altering the physical and chemical nature of recharge zones as well as surface-water runoff and infiltration rates and drainage patterns, and by modifying the topography and vegetative composition of the watershed. Thus, there are many components of our regulations that could be revised to improve implementation of SMCRA with regard to protection of streams in particular and the hydrologic balance in general. We have identified six specific areas in which we propose to revise our regulations to better protect streams and associated environmental values.

First, while ephemeral streams derive their flow from surface runoff from precipitation events, perennial and intermittent streams derive their flow from both groundwater discharges and surface runoff from precipitation events. Therefore, there is a need to clearly define the point at which adverse mining-related impacts on both groundwater and surface water reach an unacceptable level; that is, the point at which adverse impacts from mining cause material damage to the hydrologic balance outside the permit area. Neither SMCRA nor the existing regulations define the term ''material damage to the hydrologic balance outside the permit area'' or establish criteria for determining what level of adverse impacts would constitute material damage. In particular, there is no requirement that the SMCRA regulatory authority establish a specific standard for conductivity or selenium, both of which can have deleterious effects on aquatic life at elevated levels.

Second, there is a need to collect adequate premining data about the site of the proposed mining operation and adjacent areas to establish a comprehensive baseline that will facilitate evaluation of the effects of mining. The existing rules require data only for a limited number of water-quality parameters rather than the full suite needed to establish a complete baseline against which the impacts of mining can be compared. The existing rules also contain no requirement for determining the biological condition of streams within the proposed permit and adjacent areas, so there is no assurance that the permit application will include baseline data on aquatic life.

Third, there is a need for effective, comprehensive monitoring of groundwater and surface water during and after both mining and reclamation and during the revegetation responsibility period to provide real-time information documenting mining-related changes in the values of the parameters being monitored. Similarly, there is a need to require monitoring of the biological condition of streams during and after mining and reclamation to evaluate changes in aquatic life. Proper monitoring will enable timely detection of any adverse trends and timely implementation of any necessary corrective measures. The existing rules require monitoring of only water quantity and a limited number of water-quality parameters, not all parameters necessary to evaluate the impact of mining and reclamation. The existing rules do not ensure that the number and location of monitoring points will be adequate to determine the impact of mining and reclamation. They also allow discontinuance or reduction of water monitoring too early to ascertain the impacts of mining and reclamation on water quality with a reasonable degree of confidence, especially for groundwater.

Fourth, there is a need to ensure protection or restoration of streams and related resources, including the headwater streams that are important to maintaining the ecological health and productivity of downstream waters. The existing rules have not always been applied in a manner sufficient to ensure protection or restoration of streams, especially with respect to the ecological function of streams. Maintenance, restoration, or establishment of riparian corridors or buffers, comprised of native species, for streams is a critical element of stream protection. In forested areas, riparian buffers for streams moderate the temperature of water in the stream, provide food (in the form of fallen leaves and other plant parts) for the aquatic food web, roots that stabilize stream banks, reduce surface runoff, and filter sediment and nutrients in surface runoff.

Fifth, there is a need to ensure that permittees and regulatory authorities make use of advances in information, technology, science, and methodologies related to surface and groundwater hydrology, surface-runoff management, stream restoration, soils, and revegetation, all of which relate directly or indirectly to protection of water resources.

Sixth, there is a need to ensure that land disturbed by surface coal mining operations is restored to a condition capable of supporting the uses that it was capable of supporting before any mining, including both those uses dependent upon stream protection or restoration and those uses that promote or support protection and restoration of

[43] 48 FR 30312 (Jun. 30, 1983).

[44] The U.S. District Court for the District of Columbia vacated the 2008 stream buffer zone rule on February 20, 2014, in *National Parks Conservation Ass'n* v. *Jewell,* 2014 U.S. Dist. LEXIS 152383 (D.D.C. Feb. 20, 2014). See also 79 FR 76227–76233 (Dec. 22, 2014).

[45] In keeping with our commitment in the MOU, we considered making revisions to our approximate original contour regulations. Ultimately, we decided not to propose any major changes to our permitting requirements and performance standards concerning approximate original contour restoration at this time because of cost concerns and perceived difficulty of implementation. However, we are proposing revisions to our regulations governing exceptions to the requirement to restore the approximate original contour.

[46] The 2008 rule was somewhat broader in that it also included provisions intended to minimize the creation of excess spoil and to limit the footprint of excess spoil fills.

streams and related environmental values. Existing rules and permitting practices have focused primarily on the land's suitability for a single approved postmining land use and they have not always been applied in a manner that results in the construction of postmining soils that provide a growth medium suitable for restoration of premining site productivity. A corollary need is to ensure that reclaimed minesites are revegetated with native species unless and until a conflicting postmining land use, such as intensive agriculture, is implemented. Soil characteristics and the degree and type of revegetation have a major impact on surface-water runoff quantity and quality as well as on aquatic life and the terrestrial ecosystems dependent upon perennial and intermittent streams. Under the existing rules, sites with certain postmining land uses have been revegetated with non-native species even when the postmining land use is not implemented prior to final bond release and even on those portions of the site where non-native species are not necessary to achieve the postmining land use.

The proposed rule would address these needs in the manner described in Part IX of this preamble. As mentioned in Part II of this preamble, we determined that improved protection of the hydrologic balance, especially streams, and related environmental values would benefit all regions of the country, not just Appalachia. In addition, one of the reasons SMCRA was enacted was to ensure a minimum level of environmental protection nationwide by establishing national surface coal mining and reclamation standards to prevent competition for coal markets from undermining the ability of states to maintain adequate regulatory programs for coal mining operations within their borders. See section 101(g) of SMCRA, 30 U.S.C. 1201(g). Thus, we concluded that a nationwide rule is required to clearly articulate a minimum standard for protection of the hydrologic balance, especially streams, and related environmental values that strikes an appropriate balance between environmental protection and the Nation's need for coal.

IV. What Clean Water Act programs protect streams?

The goal of the Clean Water Act is to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' [47] To achieve that objective, section 301 of the Clean Water Act [48] prohibits the discharge of pollutants from point sources into waters of the United States unless consistent with the requirements of the Act. Section 402 of the Clean Water Act [49] governs the discharge of pollutants other than dredged or fill material, while section 404 [50] governs the discharge of dredged or fill material into waters of the United States.

Section 303 Water Quality Standards

Section 303 of the Clean Water Act [51] requires states to adopt water quality standards applicable to their intrastate and interstate waters. Water quality standards assist in maintaining the physical, chemical, and biological integrity of a water body by designating uses, setting water quality criteria to protect those uses, and establishing provisions to protect water quality from degradation. Water quality standards established by states [52] are subject to EPA review. 40 CFR 131.5; 33 U.S.C. 1313(c). EPA may object to state-adopted water quality standards and may require changes to the state-adopted water quality standards and, if the state does not respond to EPA's objections, EPA may promulgate federal standards. 33 U.S.C. 1313(c)(3)–(4); 40 CFR 131.5, 131.21.

Water quality criteria may be expressed numerically and implemented in permits through specific numeric limitations on the concentration of a specific pollutant in the water (*e.g.,* 0.1 milligrams of chromium per liter) or by more general narrative standards applicable to a wide set of pollutants. To assist states in adopting water quality standards that will meet with EPA's approval, Congress authorized EPA to develop and publish recommended criteria for water quality that accurately reflect ''the latest scientific knowledge.'' 33 U.S.C. 1314(a). Water quality standards are not self-implementing; they are implemented through permits, such as the section 402 permit or the section 404 permit. 33 U.S.C. 1311(b)(1)(C); 40 CFR 122.44(d), 230.10(b).

Section 401 Water Quality Certification

State water quality standards are incorporated into all federal Clean Water Act permits through section 401, which requires each applicant to submit a certification from the affected state that the discharge will be consistent with state water quality requirements. 33 U.S.C. 1341(a)(1). Thus, section 401 provides states with a veto over federal permits that may allow exceedances of state water quality standards. It also empowers states to impose and enforce water quality standards that are more stringent than those required by federal law. 33 U.S.C. 1370.

Section 402 National Pollutant Discharge Elimination System (NPDES)

Section 402 of the Clean Water Act governs discharges of pollutants other than dredged or fill material into waters of the United States. Permits issued under the authority of section 402 are known as NPDES permits. They typically contain numerical limits called effluent limitations that restrict the amounts of specified pollutants that may be discharged. NPDES permits must contain technology-based effluent limits and any more stringent water quality-based effluent limits necessary to meet applicable state water quality standards. 33 U.S.C. 1311(b)(1)(A) and (C), 33 U.S.C. 1342(a); 40 CFR 122.44(a)(1) and (d)(1). Water quality-based effluent limitations are required for all pollutants that the permitting authority determines ''are or may be discharged at a level [that] will cause, have the reasonable potential to cause, or contribute an excursion above any [applicable] water quality standard, including State narrative criteria for water quality.'' 40 CFR 122.44(d)(1)(i). The procedure for determining the need for water quality-based effluent limits is called a reasonable potential analysis, or ''RPA.''

Section 402 permits are issued by EPA unless the state has an approved program whereby the state issues the permits, subject to EPA oversight. 33 U.S.C. 1342(b)(e); 551 U.S. 644, 650–651 (2007). The state must submit draft permits to EPA for review, and EPA may object to a proposed permit that is not consistent with the Clean Water Act and federal regulations. 33 U.S.C. 1342(d); 40 CFR 123.43 and 123.44. If the state does not adequately address EPA's objections, EPA may assume the authority to issue the permit. 33 U.S.C. 1342(d)(4). EPA's procedures for the review of state-issued permits are set forth in regulations at 40 CFR 123.44 and in memoranda of agreement with the states.

Section 404 Permits

Section 404(a) of the Clean Water Act authorizes the Secretary of the Army, acting through the U.S. Army Corps of Engineers (ACE or the Corps), to ''issue

[47] 33 U.S.C. 1251(a).

[48] 33 U.S.C. 1311.

[49] 33 U.S.C. 1342.

[50] 33 U.S.C. 1344.

[51] 33 U.S.C. 1313.

[52] EPA may treat an eligible federally-recognized Indian tribe in the same manner as a state for implementing and managing certain environmental programs, including under the Clean Water Act.

permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.'' 33 U.S.C. 1344(a). By this authority, the ACE regulates discharges of dredged and fill material into waters of the United States in connection with surface coal mining and reclamation operations. The ACE's regulations governing section 404 permit procedures are set forth at 33 CFR part 325.

Although the ACE is the permitting authority under section 404, EPA has an important role in the permitting process. Section 404(b) of the Clean Water Act requires that permitting decisions comply with guidelines developed by EPA in conjunction with the ACE. These guidelines, which are referred to as the ''404(b)(1) Guidelines,'' are codified in 40 CFR part 230. Among other things, the 404(b)(1) Guidelines prohibit the discharge of fill if it would cause or contribute to a violation of a water quality standard or cause or contribute to significant degradation of the waters of the United States. 40 CFR 230.10(b), (c)(1) through (c)(3). The 404(b)(1) Guidelines require the ACE to analyze more than 15 different factors that could be impacted by the proposed action, including substrate, suspended particulates, turbidity, water quality, water circulation, water level fluctuations, salinity gradients, threatened and endangered species, aquatic organisms in the food web, other wildlife special aquatic sites, water supplies, fisheries, recreation, aesthetics, and parks. 40 CFR 230(c) through (f). The 404(b)(1) Guidelines provide that the ACE must ensure that the proposed discharges would not cause or contribute to significant adverse effects on human health or welfare, aquatic life, or aquatic ecosystems. 40 CFR 230.10(c)(1) through (c)(3).

Before the ACE may issue a section 404 permit, it must provide notice to the public, EPA, and other resource agencies, which may provide comments to the ACE for consideration. 33 CFR 325.3(d). In addition, the ACE and EPA have entered into a Memorandum of Agreement (MOA) as directed by section 404(q) of the Clean Water Act, 33 U.S.C. 1344(q), that expressly recognizes that ''the EPA has an important role in the Department of the Army Regulatory Program under the Clean Water Act[.]'' The MOA provides that ''[p]ursuant to its authority under section 404(b)(1) of the Clean Water Act, the EPA may provide comments to the Corps identifying its views regarding compliance with the section 404(b)(1) Guidelines'' and ''[t]he Corps will fully consider EPA's comments when determining [compliance] with the National Environmental Policy Act, and other relevant statutes, regulations, and policies.'' *Id.*

In addition, section 404(c) of the Clean Water Act provides EPA with the authority to prohibit, withdraw, deny, or restrict the specification of disposal sites that would otherwise be authorized by a section 404 permit. This provision is often referred to as EPA's permit veto authority.

The ACE reviews individual permit applications under section 404(a) of the Clean Water Act on a case-by-case basis. 33 U.S.C. 1344(a). Individual permits may be issued or denied after a review involving, among other things, site-specific documentation and analysis, opportunity for public hearing, public interest review, and a formal determination that the permit is lawful and warranted. 33 CFR parts 320, 323, and 325.

Not every discharge is of such significance that an individual evaluation of the discharge's environmental effects is necessary. Instead, section 404(e) of the Clean Water Act authorizes the Secretary of the Army to issue general permits for categories of activities involving discharges of dredged or fill material that, as a group, have only minimal impacts on the waters of the United States. The ACE can issue these general permits (as well as individual permits) on a state, regional, or nationwide basis. The ACE refers to general permits issued on a nationwide basis as ''nationwide permits'' (NWP). NWPs must be reviewed reissued every 5 years to remain valid. The ACE last reissued the NWPs on February 21, 2012 (77 FR 10184).

NWP 21, Surface Coal Mining Activities, provides authorization for the discharge of dredged or fill material into waters of the United States when those discharges are associated with surface coal mining activities. The permittee must submit a preconstruction notification to the ACE district engineer and receive written authorization prior to commencing the activity. The ACE review of preconstruction notifications under NWP 21 is focused on the individual and cumulative adverse effects to the aquatic environment and on determining appropriate mitigation should mitigation be necessary. The ACE review does not extend to upland areas or the mining operation as a whole.

To qualify for NWP 21, an activity must meet all of the following criteria:

(1) The activities are already authorized or are currently being processed by a SMCRA-approved state program or an integrated permit processing procedure by the Department of the Interior.

(2) The discharge will not cause the loss of more than ½ acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of streambed, unless, for intermittent and ephemeral streambeds, the ACE district engineer waives the 300-linear-foot limit by making a written determination concluding that the discharge will result in minimal individual and cumulative adverse effects.

(3) The discharge is not associated with the construction of valley fills which are fill structures associated with surface coal mining activities that are typically constructed within valleys associated with steep, mountainous terrain.

Any surface mining activity that does not meet all three criteria must apply for an individual permit instead unless the activity qualifies for NWP 49 as discussed below.

Two other NWPs may apply to coal mining activities under SMCRA.

NWP 49, Coal Remining Activities, applies to discharges of dredged or fill material into non-tidal waters of the United States when those discharges are associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized by the SMCRA regulatory authority or be in process as part of an integrated permit processing procedure under SMCRA.

The permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the ACE that the overall mining plan will result in a net increase in aquatic resource functions. The ACE will consider the SMCRA regulatory authority's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area. The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity.

NWP 50, Underground Coal Mining Activities, applies to discharges of dredged or fill material into non-tidal waters of the United States when those discharges are associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized by the SMCRA regulatory authority or be in process as part of an integrated permit processing procedure under SMCRA.

The discharge must not cause the loss of greater than ½ acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless, for intermittent and ephemeral streambeds, the ACE district engineer waives the 300-linear-foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize coal preparation and processing activities outside the minesite or discharges into nontidal wetlands adjacent to tidal waters. The permittee must submit a pre-construction notification to the ACE district engineer and receive written authorization prior to commencing the activity.

V. What provisions of SMCRA provide legal authority for the proposed rule?

This proposed rule would more completely implement SMCRA's permitting requirements and performance standards and better achieve the purposes of SMCRA as set forth in section 102 of the Act.[53] It is intended to balance all relevant purposes of the Act, which include ensuring that surface coal mining operations are conducted in a manner that protects the environment, establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations, and ensuring a coal supply adequate for our Nation's energy needs.

Our proposed rule is intended to address the adverse impacts and needs discussed in Parts II and III of this preamble by adding specificity to and otherwise revising our existing regulations to more completely implement various provisions of SMCRA, including, but not limited to:

Section 101(c),[54] in which Congress finds that ''many surface coal mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by * * * polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, * * * and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.''

Section 102(a),[55] which provides that one of the purposes of the Act is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.''

Section 102(d),[56] which provides that one of the purposes of the Act is to ''assure that surface coal mining operations are so conducted as to protect the environment.''

Section 102(f),[57] which provides that one of the purposes of the Act is to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.''

Section 102(m),[58] which provides that the Secretary, wherever necessary, ''exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.''

Section 201(c)(2),[59] which provides that the Secretary, acting through OSMRE, will ''publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.''

Section 510(b)(2),[60] which provides that the regulatory authority may not approve a permit application unless it first finds that ''the applicant has demonstrated that reclamation as required by this Act and the State or Federal program can be accomplished under the reclamation plan contained in the permit application.''

Section 510(b)(3),[61] which provides that the regulatory authority may not approve a permit application unless it first finds that the proposed operation ''has been designed to prevent material damage to the hydrologic balance outside the permit area.''

Section 515(b)(2),[62] which requires that the permittee restore land affected by surface coal mining and reclamation operations ''to a condition capable of supporting the uses which it was capable of supporting prior to mining.'' This paragraph also allows restoration to a condition capable of supporting ''higher or better uses of which there is reasonable likelihood,'' provided certain conditions relating to public health or safety, water pollution, and consistency with land use policies, plans, and legal requirements are met.

Section 515(b)(10),[63] which requires that surface coal mining and reclamation operations ''minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' Section 516(b)(9)[64] contains similar provisions applicable to underground mining operations.

Section 515(b)(19),[65] which requires that surface coal mining and reclamation operations ''establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.'' Section 516(b)(6)[66] contains generally similar provisions applicable to underground mining operations.

Section 515(b)(22)(A),[67] which requires that all excess spoil material be ''transported and placed in a controlled manner in position for concurrent compaction and in such a way to assure mass stability and to prevent mass movement.''

Section 515(b)(23),[68] which requires that surface coal mining and reclamation operations ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.''

Section 515(b)(24),[69] which provides that surface coal mining and reclamation operations must, ''to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' Section 516(b)(11)[70] contains similar

[53] 30 U.S.C. 1202.
[54] 30 U.S.C. 1201(c).
[55] 30 U.S.C. 1202(a).
[56] 30 U.S.C. 1202(d).
[57] 30 U.S.C. 1202(f).
[58] 30 U.S.C. 1202(m).
[59] 30 U.S.C. 1211(c)(2).
[60] 30 U.S.C. 1260(b)(2).
[61] 30 U.S.C. 1260(b)(3).
[62] 30 U.S.C. 1265(b)(2).
[63] 30 U.S.C. 1265(b)(10).
[64] 30 U.S.C. 1266(b)(9).
[65] 30 U.S.C. 1265(b)(19).
[66] 30 U.S.C. 1266(b)(6).
[67] 30 U.S.C. 1265(b)(22)(A).
[68] 30 U.S.C. 1265(b)(23).
[69] 30 U.S.C. 1265(b)(24).
[70] 30 U.S.C. 1266(b)(11).

provisions for underground mining operations.

Finally, section 702(a) of SMCRA [71] provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. While this provision does not provide rulemaking authority, it does place limits on rulemaking under SMCRA.

VI. What is the history of our regulation of coal mining in relation to buffer zones for streams?

The U.S. House of Representatives first passed a bill (H.R. 6482) to regulate surface coal mining operations in 1972. Section 9(a) of that bill included a flat prohibition on mining within 100 feet of any ''body of water, stream, pond, or lake to which the public enjoys use and access, or other private property.'' However, the bill never became law and the provision did not appear in either the House or Senate versions of the bills that ultimately became SMCRA. Therefore, nothing in SMCRA specifically establishes or requires a buffer zone for streams, although sections 515(b)(24) and 516(b)(11) of SMCRA [72] require that mining operations minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available. We have consistently interpreted those and other provisions of SMCRA as meaning that protection of perennial and intermittent streams, with their intrinsic value to fish and wildlife, is an important element of the environmental protection regime that SMCRA established. Since the enactment of SMCRA, we have adopted four sets of regulations, which we discuss below, that included the concept of a buffer zone for streams.

The 1977 Stream Buffer Zone Rule

In 1977, we published initial regulatory program regulations providing that no land within 100 feet of an intermittent or perennial stream could be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes those operations. See 30 CFR 715.17(d)(3) and 717.17(d), as published at 42 FR 62639, 62686, 62697 (Dec. 13, 1977). We stated that we adopted that rule as a means ''to protect stream channels from abnormal erosion'' from nearby upslope mining activities.[73] However, that rule, which applies only to the now-limited subset of surface coal mining and reclamation operations subject to the initial regulatory program, does not specify the conditions under which the regulatory authority may authorize surface coal mining operations within the buffer zone.

The 1979 Stream Buffer Zone Rule

In 1979, we published the original version of our permanent regulatory program regulations. Those regulations, as codified at 30 CFR 816.57 and 817.57, provided that, with the exception of stream diversions, the surface of land within 100 feet of a perennial stream or a non-perennial stream with a biological community could not be disturbed by surface mining activities or surface operations and facilities associated with an underground mine unless the regulatory authority specifically authorized mining-related activities closer to or through the stream. Under the regulations, the regulatory authority could grant that authorization only after making a finding that the original stream channel would be restored and that, during and after the mining, the water quantity and quality in the section of the stream within 100 feet of the mining activities would not be adversely affected.

Paragraph (c) of these rules provided that a biological community existed if, at any time, the stream contained an assemblage of two or more species of arthropods or molluscan animals that were adapted to flowing water for all or part of their life cycle, dependent upon a flowing water habitat, reproducing or could reasonably be expected to reproduce in the water body where they are found, and longer than two millimeters at some stage of the part of their life cycle spent in the flowing water habitat. See 44 FR 14902, 15175 (Mar. 13, 1979).

The preamble to the 1979 rules explains that the purpose of the revised rules was to implement paragraphs (b)(10) and (b)(24) of section 515 of the Act.[74] It states that ''[b]uffer zones are required to protect streams from the adverse effects of sedimentation and from gross disturbance of stream channels,'' but that ''if operations can be conducted within 100 feet of a stream in an environmentally acceptable manner, they may be approved.'' [75] In addition, it states that ''[t]he 100-foot limit is based on typical distances that should be maintained to protect stream channels from sedimentation,'' but that, while the 100-foot standard provides a simple rule for enforcement purposes, ''site-specific variation should be made available when the regulatory authority has an objective basis for either increasing or decreasing the width of the buffer zone.'' [76]

The 1983 Stream Buffer Zone Rule

In 1983, we revised 30 CFR 816.57 and 817.57 by deleting the requirement to restore the original stream channel. We also replaced the biological community criterion for determining which non-perennial streams are protected under the rule with a requirement for protection of all perennial and intermittent streams. We redefined an intermittent stream as a stream or reach of a stream that (a) drains a watershed of at least one square mile or (b) is below the local water table for at least some part of the year and obtains its flow from both surface runoff and groundwater discharge. Finally, we replaced the 1979 finding with a requirement that the regulatory authority find that the proposed mining activities would not cause or contribute to a violation of applicable state or federal water quality standards and would not adversely affect the quantity or quality of the water in the stream or the other environmental resources of the stream. See 48 FR 30312, 30327–30328 (Jun. 30, 1983).

In 1983, we also adopted revised performance standards for coal preparation plants not located within the permit area of a mine. At that time, we decided not to apply the stream buffer zone rule to those preparation plants. See 30 CFR 827.12 and the preamble to those rules at 48 FR 20399 (May 5, 1983).

The preamble to the 1983 stream buffer zone rules reiterates the general rationale for adoption of a stream buffer zone rule that we specified in the preamble to the 1979 rules. In addition, it identifies the reason for replacing the biological community criterion with the intermittent stream threshold as a matter of improving the ease of administration and eliminating the possibility of applying the rule to ephemeral streams:

> The biological-community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community as defined by previous § 816.57(c). Thus, much confusion arose when operators attempted to apply the previous rule's standards to springs, seeps,

[71] 30 U.S.C. 1292(a).

[72] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[73] *Id.* at 62652.

[74] *Id.* at 15176.

[75] *Id.*

[76] *Id.* at 15176–15177.

ponding areas, and ephemeral streams. While some small biological communities which contribute to the overall production of downstream ecosystems will be excluded from special buffer-zone protection under final § 816.57(a), the purposes of Section 515(b)(24) of the Act will best be achieved by providing a buffer zone for those streams with more significant environmental-resource values.[77]

Referring to those streams that would not be protected by 30 CFR 816.57, *i.e.,* ephemeral streams, the preamble further states that ''[i]t is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota.'' [78] Referring to those streams that would be protected by 30 CFR 816.57, *i.e.,* perennial and intermittent streams, the preamble also states that ''surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental-resource value.'' [79] The preamble further provides that the revised rules ''also recognize that intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act.'' [80] In addition, the preamble notes that ''[a]lthough final § 816.57 is intended to protect significant biological values in streams, the primary objective of the rule is to provide protection for the hydrologic balance and related environmental values of perennial and intermittent streams''.[81] It further states that ''[t]he 100-foot limit is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats.'' [82]

We also stated that we removed the requirement to restore the original stream channel in deference to the stream-channel diversion requirements of 30 CFR 816.43 and 817.43 and to clarify that there does not have to be a stream diversion for mining to occur inside the buffer zone.[83]

Finally, the preamble states that we expanded the finding in 30 CFR 816.57(a)(1) to include environmental resources of the stream other than water quantity and quality to clarify ''that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer-zone determinations'' and ''to provide a more accurate reflection of the objectives of Sections 515(b)(10) and 515(b)(24) of the Act.'' [84] In fact, the language of the revised finding not only allowed regulatory authorities to consider environmental resources of the stream other than water quantity and quality, it required that they do so.

The National Wildlife Federation challenged this regulation as being inconsistent with sections 515(b)(10) and (24) of the Act, primarily because it deleted the biological community criterion for non-perennial stream protection. However, the court rejected that challenge, finding without elaboration that the ''regulation is not in conflict with either section 515(b)(10) or 515(b)(24).'' [85] The court also noted that the Secretary had properly justified the rule change on the grounds that the previous rule was confusing and difficult to apply without protecting areas of little biological significance.

Industry also challenged the 1983 version of 30 CFR 817.57(a) to the extent that it included all underground mining activities. However, industry withdrew its challenge when the Secretary stipulated that the rule would apply only to surface lands and surface activities associated with underground mining.[86]

Historically, we and some state regulatory authorities applied the 1983 stream buffer zone rule in a manner that allowed the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams within the permit area. However, as discussed at length in the preamble to a 2004 proposed rule,[87] which we never finalized, there has been considerable controversy over the proper interpretation of both the Clean Water Act and our 1983 rules as they apply to the placement of fill material in or near perennial and intermittent streams.

One interpretation of the 1983 stream buffer zone rules appears in our annual oversight reports for West Virginia for 1999 and 2000, which state that the stream buffer zone rule does not apply to the footprint of a fill placed in a perennial or intermittent stream as part of a surface coal mining operation. On June 4, 1999, in *West Virginia Highlands Conservancy* v. *Babbitt,* Civ. No. 1:99CV01423 (D.D.C.), the plaintiffs challenged the validity of that interpretation, alleging that it constituted rulemaking in violation of the Administrative Procedure Act.

However, on August 9, 1999, OSMRE, the U.S. Army Corps of Engineers, EPA, and the West Virginia Division of Environmental Protection (WVDEP) signed a memorandum of understanding (MOU) in which all four agencies in effect agreed to an interpretation that allowed valley fills in intermittent or perennial streams to be approved only if the buffer zone findings were made for the filled stream segments. The MOU also stated that the Clean Water Act Section 404(b)(1) Guidelines at 40 CFR part 230 contain requirements comparable to the findings required by the combination of OSMRE's 1983 stream buffer zone rule and the West Virginia stream buffer zone rule. Consequently, the MOU found that, ''where a proposed fill is consistent with the requirements of the Section 404(b)(1) Guidelines and applicable requirements for Section 401 certification of compliance with water quality standards, the fill would also satisfy the criteria for granting a stream buffer zone variance under SMCRA and WVDEP regulations.'' [88] As a result of the signing of the MOU, the court approved an unopposed motion to dismiss the case mentioned above [89] as moot in an order filed September 23, 1999.

In a lawsuit filed in the U.S. District Court for the Southern District of West Virginia in July 1998, plaintiffs asserted that the 1983 stream buffer zone rule should be interpreted to allow mining activities through a perennial or intermittent stream or within the buffer zone for a perennial or intermittent stream only if the activities are minor incursions.[90] They argued that the rule did not allow substantial segments of a perennial or intermittent stream to be buried underneath excess spoil fills or other mining-related structures.[91] On October 20, 1999, the district court ruled in favor of the plaintiffs on this

[77] 48 FR 30313 (Jun. 30 1983). Based upon additional scientific information developed over the last 30 years, we no longer concur with this characterization of the significance of ephemeral streams.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 30312.

[81] *Id.* at 30313. However, as discussed in Part II and elsewhere in this preamble, implementation of the 1983 rule has not resulted in uniform or consistent achievement of this primary objective.

[82] *Id.* at 30314.

[83] *Id.*

[84] *Id.* at 30316.

[85] *In re: Permanent Surface Mining Regulation Litigation II-Round II,* 21 ERC 1725, 1741–1742 (D.D.C. 1984).

[86] See footnote 21, *id.* at 1741.

[87] See 69 FR 1038–1042 (Jan. 7, 2004).

[88] Memorandum Of Understanding among the U.S. Office of Surface Mining, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, and West Virginia Division Of Environmental Protection for the Purpose of Clarifying the Application of Regulations Related to Stream Buffer Zones under the Surface Mining Control and Reclamation Act for Surface Coal Mining Operations that Result in Valley Fills, August 9, 1999, p. 4.

[89] *West Virginia Highlands Conservancy* v. *Babbitt,* Civ. No. 1:99CV01423 (D.D.C.).

[90] See *Bragg* v. *Robertson,* 72 F. Supp. 2d 642, 660–663 (S.D. W. Va. 1999).

[91] *Id.*

point, holding that the West Virginia version of the stream buffer zone rule applies to all segments of a stream, including those segments within the footprint of an excess spoil fill, not just to the stream as a whole.[92] The court stated that the construction of fills in perennial or intermittent streams is inconsistent with the language of the West Virginia counterpart to 30 CFR 816.57(a)(1), which provides that the regulatory authority may authorize surface mining activities within a stream buffer zone only after making certain findings, including a finding that the proposed activities would not ''adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream . . . .''[93] The court also concluded that, contrary to the August 1999 MOU, satisfaction of the Section 404(b)(1) Guidelines is not equivalent to satisfaction of the SMCRA buffer zone rule.[94]

On appeal, the U.S. Court of Appeals for the Fourth Circuit vacated the judgment of the district court and remanded the case with instructions to dismiss the counts concerning the stream buffer zone rule as barred by the Eleventh Amendment to the U.S. Constitution. See *Bragg* v. *West Virginia Coal Ass'n,* 248 F.3d 275, 296 (4th Cir. 2001), *cert. denied,* 534 U.S. 1113 (2002). While the Fourth Circuit did not interpret the 1983 version of the stream buffer zone rule, the brief for the federal appellants in that case included another interpretation of the regulation in their brief. In sum, the federal appellants supported an interpretation based on the district court decision and stated that 30 CFR 816.57 ''prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil.''[95]

In a different case related to the issuance of a nationwide section 404 permit under the Clean Water Act, the U.S. District Court for the Southern District of West Virginia stated in an opinion that SMCRA and the 1983 stream buffer zone rule do not authorize disposal of overburden in streams: ''SMCRA contains no provision authorizing disposal of overburden waste in streams, a conclusion further supported by the buffer zone rule.''[96] Yet, on appeal, the U.S. Court of Appeals for the Fourth Circuit rejected the district court's conclusion, stating that ''SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States.''[97] The court further stated that ''it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose.''[98]

In subsequent litigation, the federal appellants stated that ''OSM has historically interpreted its 'stream buffer zone' rule . . . to allow for the construction of valley fills in intermittent and perennial streams, even if such fills cover a stream segment. The traditional interpretation of the [stream buffer zone] is in harmony with this Court's decision in *Rivenburgh.*''[99] Additionally, the U.S. Court of Appeals for the Fourth Circuit has discussed SMCRA's role in the regulation of valley fills in the context of a challenge to individual permits under section 404 of the Clean Water Act.[100] See *Ohio Valley Envtl. Coal.* v. *Aracoma Coal Co.,* 556 F.3d 177, 195 (4th Cir. 2009) (''Congress clearly contemplated that the regulation of the disposal of excess spoil and the creation of valley fills falls under the SMCRA rubric.'').

The 2008 Rule

In 2004, we proposed a rule to revise the 1983 version of the stream buffer zone rule in order ''to clarify the circumstances in which mining activities such as the construction of excess spoil fills may be allowed within the [stream buffer zone]''.[101] Although we abandoned this proposed rule, we proposed another rule in 2007, in part ''to end the ambiguity in interpretation of the stream buffer zone rules and to ensure that regulatory authorities, mine operators, other governmental entities, landowners, and citizens all can have a common understanding of what the stream buffer zone rules do and do not require, consistent with underlying statutory authority.''[102]

We subsequently adopted a final rule that revised the circumstances under which mining activities may be conducted in or near perennial or intermittent streams and established new requirements for the creation and disposal of excess spoil and coal mine waste. Among other things, the rule required that mining operations be designed to minimize the creation of excess spoil and that permit applicants consider a range of reasonable alternatives to the disposal of excess spoil and coal mine waste in perennial or intermittent streams or their buffer zones and select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. With respect to activities in the stream itself, it replaced the findings in the 1983 rule with a requirement for a finding that avoiding disturbance of the stream is not reasonably possible. It also required a demonstration of compliance with the Clean Water Act before the permittee initiates mining activities in a perennial or intermittent stream if those activities require authorization or certification under the Clean Water Act. With respect to activities confined to the stream buffer zone, the rule replaced the findings in the 1983 rule with a requirement for a finding that avoiding disturbance of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program. That rule, which we refer to in this preamble as the 2008 rule, took effect January 12, 2009. For a more detailed history of the 2008 rule, please refer to the discussion in the preamble to that rule.[103]

Litigation Concerning the 2008 Rule

Shortly after publication of the 2008 rule, ten environmental organizations challenged the validity of the rule. See *Coal River Mountain Watch* v. *Salazar* (''*Coal River*''), No. 08–2212 (D.D.C., filed Dec. 22, 2008) and *National Parks Conservation Ass'n* v. *Salazar* (''*NPCA*''), No. 09–115 (D.D.C., filed Jan. 16, 2009).

In *NPCA,* the Federal Government filed a motion on April 27, 2009, for voluntary remand and vacatur of the 2008 rule. The motion was based on the Secretary's determination that OSMRE

[92] *Id.*

[93] *Id.* at 650–653, 661. In a related matter, a consent decree filed on January 3, 2000, and approved on February 17, 2000, stated that the West Virginia stream buffer zone rules only apply downstream from the toes of downstream faces of embankments of sediment control structures in perennial and intermittent streams. *Bragg* v. *Robertson,* 83 F. Supp. 2d 713, 718 n.4 (S.D. W. Va. 2000).

[94] *Id.* at 660.

[95] Brief for Federal Appellants at 2, *Bragg* v. *West Virginia Coal Ass'n,* 248 F.3d 275 (4th Cir. 2001) (No. 99–2683) (footnote omitted).

[96] *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh,* 204 F. Supp. 2d 927, 942 (S.D. W. Va. 2002).

[97] *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh,* 317 F.3d 425, 442 (4th Cir. 2003).

[98] *Id.* at 443. The preamble to a proposed rule, which we published on January 7, 2004, but which we never adopted in final form, contains additional discussion of litigation and related matters arising from the 1983 stream buffer zone rule through 2003. See especially Part I.B.1. at 69 FR 1038–1040.

[99] Corrected Brief for Federal Appellants at 9 n.2, *Ohio Valley Envtl. Coal.* v. *Bulen,* 556 F.3d 177 (4th Cir. 2009) (Nos. 04–2129 (L), 04–2137, 04–2402) (footnote omitted).

[100] 33 U.S.C. 1344.

[101] 69 FR 1039–1040 (Jan. 7, 2004).

[102] 72 FR 48890, 48892 (Aug. 24, 2007).

[103] See 73 FR 75814, 75816–75818 (Dec. 12, 2008).

erred in failing to initiate consultation with the U.S. Fish and Wildlife Service (FWS or the Service) under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2), to evaluate possible effects of the 2008 rule on threatened and endangered species. In *Coal River,* the Federal Government filed a motion on April 28, 2009, to dismiss the complaint as moot if the court granted the motion in *NPCA.*

On August 12, 2009, the court denied the Federal Government's motion in *NPCA,* holding that, absent a ruling on the merits, significant new evidence, or consent of all the parties, a grant of vacatur would allow the government to improperly bypass the procedures set forth in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* for repealing an agency rule. On the same date, the court denied the Federal Government's motion to dismiss in *Coal River.* See *Nat'l Parks Conservation Ass'n* v. *Salazar,* 660 F. Supp. 2d 3, 4 (D.D.C. 2009).

On March 19, 2010, the parties involved in the *NPCA* and *Coal River* litigation signed a settlement agreement in which the Secretary agreed to make best efforts to sign a proposed rule to amend or replace the 2008 rule within a year and sign a final rule within approximately 18 months. On April 2, 2010, the court granted the parties' motion to hold in abeyance further judicial proceedings concerning the 2008 rule to allow time for us to conduct this rulemaking. However, for a variety of reasons, the Secretary had not yet published a proposed rule as of the beginning of 2013. Given this delay, on March 19, 2013, the court granted the plaintiffs' motions to resume the litigation.

On February 20, 2014, the court vacated the 2008 rule because ''OSM's determination that the revisions to the stream protection rule encompassed by the 2008 Rule would have no effect on threatened and endangered species or critical habitat was not a rational conclusion'' and that therefore our failure to initiate consultation on the 2008 rule was a violation of section 7(a)(2) of the Endangered Species Act. *NPCA* v. *Jewell,* 2014 U.S. Dist. LEXIS 152383, at * 13–* 14 (D.D.C. Feb. 20, 2014).[104] Given the court's ruling in *NPCA,* the court determined that ''there is no further relief that the court can grant'' in *Coal River* and dismissed that case. *Coal River* v. *Jewell,* No. 08–2212, Memorandum Decision and Order of Dismissal at 2.

The court in *NPCA* remanded the vacated rule to us for further proceedings consistent with the decision.[105] The court's decision also stated that vacatur of the 2008 rule resulted in reinstatement of the rule in effect before the vacated rule took effect.[106] In response, OSMRE published a notice of vacatur in the **Federal Register**.[107] Therefore, the proposed rule that we are publishing today uses the pre-2008 rules as the baseline for all proposed changes.

The 2009 Memorandum of Understanding

As mentioned above, on June 11, 2009, the Secretary, the Administrator of the EPA, and the Acting Assistant Secretary of the Army (Civil Works) entered into an MOU[108] implementing an interagency action plan designed to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states,[109] while ensuring that future mining remains consistent with federal law. Among other things, in the MOU we committed to review our ''existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining.'' It also provides that, at a minimum, we will consider revisions to the 2008 rule and our regulatory requirements concerning approximate original contour.[110]

The proposed rule that we are publishing today is, in part, the result of our review of existing regulatory authorities and procedures as promised in the MOU. The proposed rule would replace the vacated 2008 rule and the reinstated pre-2008 rules. However, we have decided not to propose any major changes to our permitting requirements and performance standards concerning approximate original contour restoration at this time because of cost concerns and perceived difficulty of implementation.[111]

The Advance Notice of Proposed Rulemaking (ANPRM)

On November 30, 2009 (74 FR 62664–64668), we published an advance notice of proposed rulemaking, consistent with the MOU and *National Parks Conservation Association* v. *Salazar,* 660 F. Supp. 2d 3, 4 (D.D.C. 2009). Specifically, the notice described ten alternatives for revising the 2008 rule and related rules and invited the public to comment on those alternatives and to suggest other ways that the 2008 rule should be revised to better protect streams and implement the MOU. We also invited the public to identify provisions of our regulations other than the 2008 rule that should be revised to better protect the environment and the public from the impacts of Appalachian surface coal mining. We received approximately 32,750 comments during the 30-day comment period.

After evaluating the comments that we received on the ANPRM, re-examining the 2008 rule, and re-examining practices in and outside Appalachia, we determined that development of a comprehensive stream protection rule would be the most appropriate and effective method of better achieving the purposes and requirements of SMCRA as well as the goals set forth in the MOU and the ANPRM. Consequently, we are proposing a rule that would identify measures that mine operators and SMCRA regulatory authorities must take to prevent or minimize mining-related impacts on streams and fish, wildlife and related environmental values.

Thus, the scope of this proposed rule is broader than the scope of the 2008 rule, which focused primarily on excess spoil handling, coal mine waste disposal, and activities conducted in or near streams. Consistent with the broader scope of the proposed rule, we are preparing a new EIS, rather than supplementing the EIS prepared for the 2008 rule. We also are consulting with the U.S. Fish and Wildlife Service as required by section 7 of the Endangered Species Act. Furthermore, if we determine that adoption of this proposed rule may affect species under the jurisdiction of the National Marine Fisheries Service (NMFS), we will consult with NMFS, which is

[104] Pursuant to Federal Rule of Civil Procedure 25(d), S.M.R. ''Sally'' Jewell was automatically substituted for Ken Salazar as Secretary of the Interior.

[105] *NPCA* v. *Jewell,* U.S. Dist. LEXIS 152383 at * 22.

[106] *Id.* at * 19.

[107] See 79 FR 76227–76233 (Dec. 22, 2014).

[108] The MOU can be viewed online at *www.osmre.gov/resources/mou/ASCM061109.pdf* (last accessed August 1, 2014).

[109] Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

[110] The MOU also stated that we would develop guidance clarifying how the 1983 stream buffer zone rule would be applied to reduce adverse impacts on streams if the court granted the Government's motion in *NPCA* for remand and vacatur of the 2008 rule. However, the court in *NPCA* did not grant the specific motion mentioned in the MOU. See *Nat'l Parks Conservation Ass'n* v. *Salazar,* 660 F. Supp. 2d 3, 4 (D.D.C. 2009).

[111] The draft EIS and draft regulatory impact analysis for this rulemaking evaluate potential changes to approximate original contour requirements, including the addition of landforming and digital modeling requirements, as part of Alternative 4.

responsible for administration and enforcement of the Endangered Species Act with respect to anadromous and marine species.

Comments that we received in response to the ANPRM differed as to whether the proposed rule should be national in scope or whether it should be limited to central Appalachia or to steep-slope mining operations. After evaluating those comments, we have decided to propose rules that are national in scope because streams are ecologically important regardless of topography or where they are located in the country. Measures to protect the quality and quantity of streamflow, both from surface sources and groundwater discharges, are likewise important regardless of topography or location. In addition, section 101(g) of SMCRA states that ''[national] surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders.'' In other words, national standards are necessary because they define a set of environmental protection requirements that a state cannot relax as an incentive to coal producers to either continue to mine coal in the state or to relocate to the state.

Protecting our water resources and preventing water pollution is important everywhere, especially in the arid and semiarid West and portions of the country that are experiencing droughts. There is a need for consistent, scientifically-valid documentation of the premining physical, chemical, and biological condition of streams and the impacts of mining and reclamation on those streams. All permits should include plans for stream protection or restoration that require use of best practices to either maintain the ecological condition of streams or restore both the physical form and the ecological function of affected streams. The proposed rule is sufficiently flexible to accommodate the different regions where coal is mined and the differences in streams found in those regions.

In addition, the proposed rule would address some concerns that commenters on the ANPRM expressed with respect to other provisions of our regulations that are not necessarily directly related to stream protection, but that are important in terms of protecting the hydrologic balance or better achieving other requirements and purposes of SMCRA. We also propose to reorganize, revise, and streamline our rules to improve their readability and internal consistency, to update or remove obsolete provisions, to remove redundant and unneeded provisions, to be consistent with court decisions, and to incorporate plain language principles.

VII. Why does the proposed rule include protective measures for ephemeral streams?

Unlike the regulations implementing the Clean Water Act, the existing regulations implementing SMCRA contain no specific protections for ephemeral streams. As summarized in Part II of this preamble, scientific studies completed since the enactment of SMCRA and the adoption of our existing rules have documented the importance of headwater streams, including ephemeral streams, in maintaining the ecological health and function of streams downgradient of headwater streams. EPA recently completed a literature review of the importance of headwater streams and published a report summarizing the findings of more than 1,200 peer-reviewed studies.[112] With some exceptions, the report generally does not differentiate between the various types of headwaters streams, which consist of a mix of perennial, intermittent, and ephemeral streams, but it does emphasize that ephemeral streams are an important component of headwaters streams and that they have an effect on the form and function of downstream channels and aquatic life. Consistent with the findings of this report and other studies, our proposed rule includes some protections for ephemeral streams, tailored to their hydrologic and ecological functions.

We also are considering adopting an alternative that would provide equal protection to all streams, without regard to whether the stream is perennial, intermittent, or ephemeral. We invite comment on whether we should adopt this alternative in the final rule and, if so, whether we should extend all the protections that this proposed rule would afford to perennial and intermittent streams to ephemeral streams or whether we should instead scale back those protections to avoid undue adverse impacts on the mining industry, while still providing improved environmental protection to all streams compared with the existing regulations.

A. What are the findings of the EPA report?

The report states that the evidence unequivocally demonstrates that the stream channels, riparian wetlands, floodplain wetlands, and open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. According to the authors, the body of literature documenting connectivity and downstream effects is most abundant for perennial and intermittent streams and for riparian and floodplain wetlands. However, the report states that, although less abundant, the evidence for connectivity and downstream effects of ephemeral streams is strong and compelling, particularly in context with the large body of evidence supporting the physical connectivity and cumulative effects of channelized flows that form and maintain stream networks.[113]

The report identifies five principal contributions of ephemeral streams: (1) Providing streamflow to larger streams; (2) conveying water into local storage compartments such as ponds, shallow aquifers, or streambanks that are important sources of water for maintenance of the baseflow in larger streams; (3) transporting sediment, woody debris, and nutrients; (4) providing the biological connectivity that is necessary either to support the life cycle of some invertebrates or to facilitate the transport of terrestrial invertebrates that serve as food resources in downstream communities; and (5) influencing fundamental biogeochemical processes such as the assimilation and transformation of nitrogen that may otherwise have detrimental impacts on downstream communities. The report's explanation of these contributions is summarized below. In addition, headwater streams, including ephemeral and intermittent streams, shape downstream channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris.[114] These materials help structure stream and river channels by slowing the flow of water through channels and providing substrate and habitat for aquatic organisms.[115]

[112] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report).* Office of Research and Development, National Center for Environmental Assessment, Washington, DC EPA/600/R–14/47F (2015). Available at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414* (last accessed June 16, 2015).

[113] *Id.* at ES–7.

[114] *Id.* at ES–8.

[115] *Id.*

Providing Streamflow to Larger Streams

Ephemeral streams are hydrologically connected to downstream waters via channels that convey surface and subsurface water in direct response to precipitation. Moreover, these streams are the defining characteristic of many watersheds in arid and semi-arid regions of the United States; thus serving a critical role in the maintenance of water resources.[116]

Conveyance of Water Into Local Storage Compartments

Ephemeral streams may convey water to local storage compartments, such as ponds, shallow aquifers, and streambanks, and recharge regional alluvial aquifers, depending upon the frequency, duration, magnitude, and timing of precipitation events. These local storage compartments are important sources of water for maintaining baseflow in perennial streams. Streamflow typically depends on the delayed (*i.e.,* lagged) release of shallow groundwater from local storage, especially during dry periods and in areas with shallow groundwater tables and pervious subsurfaces. Relative to their cumulative surface area, an inordinate amount of groundwater recharge occurs in headwater ephemeral and intermittent channels within arid drainage basins. Furthermore, in the southwestern United States, short-term shallow groundwater storage in alluvial floodplain aquifers, with gradual release into stream channels, is a major source of annual flow in rivers.[117]

Transport of Sediment and Nutrients

Ephemeral streams frequently contain boulders and woody debris that entrain and store loose, unconsolidated sediment during smaller precipitation events that is subsequently released during infrequent, high-magnitude precipitation events. Because of the abundance and distribution of headwater streams, sediment storage and transport by those streams can have a substantial cumulative effect on downstream waters; headwater streams are important sediment sources for maintaining channels and floodplains.[118] Similarly, headwater streams are important sources of organic matter (organic carbon) that serves as a downstream food source for aquatic life forms such as benthic macroinvertebrates and that enhances the fertility of agriculture on alluvial fans where some of the organic matter is deposited.[119]

Biological Connectivity

Headwaters streams, including ephemeral streams, play an important role in the dispersal of genetic material and production and transport of food resources. For example, headwaters streams provide habitat that is critical for completion of one or more life-cycle stages of many aquatic and semiaquatic species capable of moving throughout water networks. These streams provide habitat for completion of complex life cycles. They also provide a refuge from predators, competitors, parasites, or adverse physical conditions in downstream waters.[120]

Because biological connections often result from passive transport of organisms or their products with water flow, biological connectivity often depends on hydrologic connectivity. Many living organisms, however, also can actively move with or against water flow; others disperse actively or passively over land by walking, flying, drifting, or ''hitchhiking.'' All of these organism-mediated connections form the basis of biological connectivity between headwater streams and downstream waters. Biological connections between upstream and downstream reaches can affect downstream waters via multiple pathways or functions. For organisms capable of significant upstream movement, headwater streams, including ephemeral and intermittent streams, can increase both the amount and quality of habitat available to those organisms. Many organisms require different habitats for different resources (*e.g.,* food, spawning habitat, overwintering habitat), and thus move throughout the river network—both longitudinally and laterally—over their life cycles, with some requiring dry channels to complete part of their life cycle. Furthermore, dry stream channels can facilitate dispersal of aquatic invertebrates by serving as dispersal corridors for terrestrial adult forms. Headwater streams also provide food resources to downstream waters, especially in the form of terrestrial invertebrates that accumulate in intermittent and ephemeral streams during dry periods and are then transported downstream by storm flows during and after a precipitation event.[121]

Biogeochemical Processes

There is strong evidence that headwater streams function as nitrogen sources (via export) and sinks (via uptake and transformation) for river networks. For example, one study estimated that rapid cycling of nutrients, including nitrogen, in small streams with no agricultural or urban impacts removed 20–40% of the nitrogen that otherwise would be delivered to downstream waters. Nutrients, including nitrogen, are necessary to support aquatic life, but excess nutrients lead to eutrophication and hypoxia, in which over-enrichment causes dissolved oxygen concentrations to fall below the level necessary to sustain most aquatic animal life in the stream and streambed. Thus, the influence of streams on nutrient loads can have significant repercussions for hypoxia in downstream waters.[122]

B. What specific rule changes are we proposing with respect to ephemeral streams?

We propose to require that the permit applicant identify and map all ephemeral streams within the proposed permit and adjacent areas. The applicant must describe the physical and hydrologic characteristics of those streams in detail, as well as any associated vegetation in the riparian zone if one exists. In addition, the applicant must assess the biological condition of a representative sample of those ephemeral streams. See proposed 30 CFR 780.19(c)(6) and 784.19(c)(6).

We also propose to require that the significance of ephemeral streams be evaluated during the permitting process as part of the determination of the probable hydrologic consequences of mining and the cumulative hydrologic impact assessment. See proposed 30 CFR 780.20, 780.21, 784.20, and 784.21.

We further propose to specify that the backfilling and grading plan in the reclamation plan required by proposed 30 CFR 780.12(d) and 784.12(d) must include contour maps, cross-sections, or models that show in detail the anticipated final surface configuration, including drainage patterns, of the proposed permit area. Proposed 30 CFR 780.28(c)(1) and 784.28(c)(1) would require that the postmining drainage pattern, including ephemeral streams, be similar to the premining drainage pattern, with limited exceptions.

[116] U.S. Environmental Protection Agency, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest.* Office of Research and Development, Washington, DC Final Report No. EPA/600/R–08/134 (2008).

[117] EPA, *Connectivity of Streams and Wetlands to Downstream Waters, op. cit., at ES–8 and 3–11.*

[118] *Id.* at 3–15.

[119] *Id.* at 3–31 and 3–32.

[120] *Id.* at ES–8.

[121] *Id.* at 3–37, 3–38, and 3–39.

[122] *Id.* at ES–8.

Under proposed 30 CFR 780.28(b)(3) and 784.28(b)(3), the reclamation plan for an operation that proposes to disturb a perennial, intermittent, or ephemeral stream, or the surface of land within 100 feet of that stream, must include the planting of native species, including, when appropriate, species adapted to and suitable for planting in riparian zones, within a corridor at least 100 feet in width on each side of the stream as part of the reclamation process following the completion of mining activities. The riparian corridor requirement would not apply to prime farmland or when a corridor would be inconsistent with an approved postmining land use that is actually implemented before expiration of the revegetation responsibility period. Nor would it apply to stream segments that are buried beneath an excess spoil fill or a coal mine waste disposal facility.

VIII. Overview and Tabular Summaries of Proposed Revisions and Organizational Changes

The following derivation tables summarize the organizational changes in the proposed rule, relative to the existing rules. They also indicate whether we propose to revise the rule text in each redesignated section or paragraph. The organizational changes serve several purposes, including—

- Breaking up overly long sections and paragraphs into multiple shorter sections and paragraphs for ease of reference and improved comprehension.
- Renumbering sections in the underground mining rules to align their numbering with the corresponding sections in the surface mining rules. This change would greatly improve ease of reference and the user-friendliness of our rules.
- Moving permitting requirements from subchapter K (performance standards) to subchapter G to consolidate permitting requirements in subchapter G.
- Restructuring subchapter G to better distinguish between baseline information requirements and reclamation plan requirements.
- Removing redundant, suspended, and obsolete provisions.

The following table is organized in the numerical order of the existing rule citations. It includes only those provisions of the existing regulations that we propose to move or remove.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 700.11(d)(1)(i)	§ 700.11(d)(1)	Yes, editorial.
§ 700.11(d)(1)(ii)	§ 700.11(d)(2)	Yes.
§ 700.11(d)(2)	§ 700.11(d)(3)	Yes.
§ 701.5 [paragraphs (a) and (b) of definition of "replacement of water supply"].	§§ 816.40 and 817.40	Yes.
§ 773.7(a) [last sentence]	§ 773.7(b)(1)	Yes, editorial.
§ 773.7(b)	§ 773.7(c)	Yes, editorial.
§ 773.15(n)	§ 773.15(m)	No.
§ 777.13(a)	§ 777.13(a)(1)	Yes.
§ 777.13(b)	§ 777.13(a)(2)	Yes, editorial.
§ 779.11	None	Proposed for removal; redundant of remainder of part 779.
§ 779.12(a)	None	Proposed for removal; redundant of proposed § 779.24(a)(3).
§ 779.12(b)	§ 779.17	Yes, editorial.
§ 779.24(a) through (f)	§ 779.24(a)(1) through (a)(6)	Yes.
§ 779.24(g)	§ 779.24(a)(10)	Yes.
§ 779.24(h) through (k)	§ 779.24(a)(14) through (a)(17)	No, except for editorial changes in (a)(17).
§ 779.24(l)	§ 779.24(a)(28)	No.
§ 779.25(a)(1)	§ 779.24(a)(18)	Yes.
§ 779.25(a)(2)	§ 779.24(a)(20)	Yes.
§ 779.25(a)(3)	§ 779.24(a)(21)	Yes.
§ 779.25(a)(4)	§ 779.24(a)(22)	No.
§ 779.25(a)(5)	§ 779.24(a)(23) and (a)(24)	Yes, editorial.
§ 779.25(a)(6)	§ 779.24(a)(19)	Yes.
§ 779.25(a)(7)	§ 779.24(a)(9)	Yes, editorial.
§ 779.25(a)(8)	§ 779.24(a)(25)	No.
§ 779.25(a)(9)	§ 779.24(a)(26)	Yes.
§ 779.25(a)(10)	§ 779.24(a)(8) [water wells], § 779.24(a)(27) [gas and oil wells].	Yes.
§ 780.12	§ 780.14	Yes, editorial.
§ 780.13	§ 780.15	Yes.
§ 780.14	§ 780.13	Yes.
§ 780.15	None	Proposed for removal as obsolete.
§ 780.16(a)	§ 779.20(a) through (c)	Yes.
§ 780.16(b)	§ 780.16(a) through (d)	Yes.
§ 780.16(c)	§ 779.20(d), § 780.16(e)	Yes.
§ 780.18 [in general]	§ 780.12 [in general]	Yes.
§ 780.18(b)(1)	§ 780.12(b)	Yes.
§ 780.18(b)(2)	§ 780.12(c)	Yes.
§ 780.18(b)(3)	§ 780.12(d)	Yes.
§ 780.18(b)(4)	§ 780.12(e) [in general]	Yes.
§ 780.18(b)(5)	§ 780.12(g) [in general]	Yes.
§ 780.18(b)(6)	§ 780.12(i)	Yes, editorial.
§ 780.18(b)(7)	§ 780.12(j)	Yes.
§ 780.18(b)(8)	§ 780.12(k)	Yes, editorial.
§ 780.18(b)(9)	§ 780.12(l)	Yes, editorial.
§ 780.21(a)	§ 777.13(b)	Yes.
§ 780.21(b)(1) [location and ownership information in first sentence].	§ 779.24(a)(7)	Yes, editorial.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 780.21(b)(1) [except location and ownership information in first sentence].	§ 780.19(b)	Yes.
§ 780.21(b)(2) [first part of first sentence through ''impoundments''].	§ 779.24(a)(9)	Yes, editorial.
§ 780.21(b)(2) [the part of the first sentence that pertains to discharges].	§ 779.24(a)(12)	Yes, editorial.
§ 780.21(b)(2) [except the part of the first sentence that precedes ''and information on . . .''].	§ 780.19(c)	Yes.
§ 780.21(b)(3)	§ 780.20(b)	Yes.
§ 780.21(c)	§ 780.19(g)	Yes.
§ 780.21(d)	§ 777.13(d)	Yes.
§ 780.21(e)	§ 780.22(b)(1)	Yes.
§ 780.21(f)(1) through (f)(3)	§ 780.20(a)	Yes.
§ 780.21(f)(4)	§ 780.20(c)(1)	Yes.
§ 780.21(g)	§ 780.21	Yes.
§ 780.21(h)	§ 780.22(a)	Yes.
§ 780.21(i)	§ 780.23(a)	Yes.
§ 780.21(j)	§ 780.23(b)	Yes.
§ 780.22(a)	§ 780.19(a)(1)	Yes.
§ 780.22(b)	§ 780.19(f)(1) through (3)	Yes.
§ 780.22(c)	§ 780.19(f)(4)	Yes, editorial.
§ 780.22(d)	§ 780.19(f)(5)	Yes, editorial.
§ 780.23(a)	§ 779.22	Yes.
§ 780.23(b) [except (b)(3)]	§ 780.24(a)	Yes.
§ 780.23(b)(3)	§ 780.12(m)	Yes, editorial.
§ 780.29	§ 780.29(c)	Yes.
§ 780.35(a)	§ 780.35(f) and (h)	Yes, editorial.
§ 780.35(b)	§ 780.35(g)	Yes.
§ 780.35(c)	§ 780.35(i)	Yes, editorial.
§ 783.11	None	Proposed for removal; redundant of remainder of part 783.
§ 783.12(a)	None	Proposed for removal; redundant of proposed § 783.24(a)(3).
§ 783.12(b)	§ 783.17	Yes, editorial.
§ 783.24(a) through (f)	§ 783.24(a)(1) through (a)(6)	Yes.
§ 783.24(g)	§ 783.24(a)(10)	Yes.
§ 783.24(h) through (k)	§ 783.24(a)(14) through (a)(17)	No, except for editorial changes in (a)(17).
§ 783.24(l)	§ 783.24(a)(28)	No.
§ 783.25(a)(1)	§ 783.24(a)(18)	Yes.
§ 783.25(a)(2)	§ 783.24(a)(20)	Yes.
§ 783.25(a)(3), [Suspended August 4, 1980]	§ 783.24(a)(21)	Yes. We are re-proposing part of this rule and proposing to remove the remainder.
§ 783.25(a)(4)	§ 783.24(a)(22)	Yes.
§ 783.25(a)(5)	§ 783.24(a)(23) and (a)(24)	Yes.
§ 783.25(a)(6)	§ 783.24(a)(19)	Yes.
§ 783.25(a)(7)	§ 783.24(a)(9)	Yes, editorial.
§ 783.25(a)(8), [Suspended August 4, 1980]	§ 783.24(a)(25)	Yes, editorial. We are re-proposing this rule.
§ 783.25(a)(9), [Suspended August 4, 1980]	§ 783.24(a)(26)	Yes. We are re-proposing part of this rule and proposing to remove the remainder.
§ 783.25(a)(10)	§ 783.24(a)(8) [water wells], § 783.24(a)(27) [gas and oil wells].	Yes.
§ 784.12	§ 784.14	Yes, editorial.
§ 784.13 [in general]	§ 784.12 [in general]	Yes.
§ 784.13(b)(1)	§ 784.12(b)	Yes.
§ 784.13(b)(2)	§ 784.12(c)	Yes.
§ 784.13(b)(3)	§ 784.12(d)	Yes.
§ 784.13(b)(4)	§ 784.12(e) [in general]	Yes.
§ 784.13(b)(5)	§ 784.12(g) [in general]	Yes.
§ 784.13(b)(6)	§ 784.12(i)	Yes, editorial.
§ 784.13(b)(7)	§ 784.12(j)	Yes.
§ 784.13(b)(8)	§ 784.12(k)	Yes, editorial.
§ 784.13(b)(9)	§ 784.12(l)	Yes, editorial.
§ 784.14(a)	§ 777.13(b)	Yes.
§ 784.14(b)(1) [location and ownership information in first sentence].	§ 783.24(a)(7)	Yes, editorial.
§ 784.14(b)(1) [except location and ownership information in first sentence].	§ 784.19(b)	Yes.
§ 784.14(b)(2) [the part of the first sentence that precedes ''impoundments''].	§ 783.24(a)(9)	Yes, editorial.
§ 784.14(b)(2) [the part of the first sentence that pertains to discharges].	§ 783.24(a)(12)	Yes, editorial.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 784.14(b)(2) [except the part of the first sentence that precedes "and information on . . ."].	§ 784.19(c)	Yes.
§ 784.14(b)(3)	§ 784.20(b)	Yes
§ 784.14(c)	§ 784.19(g)	Yes.
§ 784.14(d)	§ 777.13(d)	Yes.
§ 784.14(e)(1) through (e)(3)	§ 784.20(a)	Yes.
§ 784.14(e)(4)	§ 784.20(c)(1)	Yes.
§ 784.14(f)	§ 784.21	Yes.
§ 784.14(g)	§ 784.22(a)	Yes.
§ 784.14(h)	§ 784.23(a)	Yes.
§ 784.14(i)	§ 784.23(b)	Yes.
§ 784.15(a)	§ 783.22	Yes.
§ 784.15(b) [except (b)(3)]	§ 784.24(a)	Yes.
§ 784.15(b)(3)	§ 784.12(m)	Yes, editorial.
§ 784.17	§ 784.31	No.
§ 784.18	§ 784.33	No.
§ 784.19	§ 784.35	Yes.
§ 784.20	§ 784.30	Yes.
§ 784.21(a)	§ 783.20(a) and (b)	Yes.
§ 784.21(b)	§ 784.16(a) through (d)	Yes.
§ 784.21(c)	§ 783.20(d), § 784.16(e)	Yes.
§ 784.22(a)	§ 784.19(a)(1)	Yes.
§ 784.22(b)	§ 784.19(f)(1) through (4)	Yes.
§ 784.22(c)	§ 784.19(f)(5)	Yes, editorial.
§ 784.22(d)	§ 784.19(f)(6)	Yes, editorial.
§ 784.23	§ 784.13	Yes.
§ 784.24	§ 784.37	Yes.
§ 784.25	§ 784.26	Yes, editorial.
§ 784.26	§ 784.12(f)	Yes.
§ 784.29	§ 784.29(c)	Yes
§ 784.30	§ 784.38	Yes, editorial.
§ 784.200(a)	§ 784.24(c)	Yes.
§ 785.14(b)	§ 701.5 [definition of "mountaintop removal mining"].	Yes, editorial.
§ 785.14(c) [introductory text]	§ 785.14(b) [introductory text]	Yes, editorial.
§ 785.14(c)(1) [introductory text]	§ 785.14(b)(1)	Yes, editorial.
§ 785.14(c)(1)(i)	§ 785.14(b)(2)	Yes, editorial.
§ 785.14(c)(1)(ii)	§ 785.14(b)(3)	Yes, editorial.
§ 785.14(c)(1)(iii) [except paragraph (c)(1)(iii)(G)].	§ 785.14(b)(4)	Yes, editorial.
§ 785.14(c)(1)(iii)(G)	§ 785.14(b)(5)	Yes, editorial.
§ 785.14(c)(1)(iv)	§ 785.14(b)(6)	Yes, editorial.
§ 785.14(c)(1)(v)	§ 785.14(b)(7)	Yes, editorial.
§ 785.14(c)(2)	§ 785.14(b)(8)	Yes, editorial.
§ 785.14(c)(3)	None	Proposed for removal as unnecessary.
§ 785.14(c)(4)	§ 785.14(b)(12)	Yes, editorial.
§ 785.14(c)(5)	§ 785.14(c)	Yes.
§ 785.14(d)(1) and (2)	§ 785.14(d)(1)	Yes.
§ 785.14(d)(3)	§ 785.14(d)(2)	Yes, editorial.
§ 785.16(a) [introductory text]	§ 785.16(a) (introductory text)	Yes, editorial.
§ 785.16(a)(1)	§ 785.16(a)(1)	Yes, editorial.
§ 785.16(a)(2)	§ 785.16(a)(2)	Yes, editorial.
§ 785.16(a)(3)	§ 785.16(a)(9)	Yes.
§ 785.16(a)(4)	§ 785.16(a)(10)	Yes.
§ 785.16(b)(1)	None	Proposed for removal as unnecessary.
§ 785.16(b)(2)	§ 785.16(b)(1)	Yes, editorial.
§ 785.16(c) and (d)	§ 785.16(b)(2)	Yes.
§ 785.16(e)	§ 785.16(b)(3)	Yes, editorial.
§ 785.16(f)	§ 785.16(b)(4)	Yes, editorial.
§ 785.25(b) [first sentence]	§ 785.25(b)(1)	Yes, editorial.
§ 785.25(b) [except first sentence]	§ 785.16(b)(2)	Yes, editorial.
§ 800.11(e)	§ 800.9	Yes.
§ 800.11(a) through (d)	§ 800.11	Yes, editorial.
§ 800.15(c) [first sentence]	§ 800.15(a)(2)(ii)	Yes, editorial.
§ 800.16(e)(2)	§ 800.30(b)	Yes.
§ 800.17	None	Proposed for removal; redundant of remainder of part 800.
§ 800.30(a)	§ 800.30(a)(1)	Yes.
§ 800.30(b)	§ 800.30(a)(3)	Yes.
§ 800.40(a)	§ 800.40	Yes, editorial, except for (b)(2)(vi), which has substantive changes.
§ 800.40(b)(1)	§ 800.41	Yes, editorial, except for (a)(2), which has substantive changes.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 800.40(b)(2)	§ 800.43(a)	Yes, editorial.
§ 800.40(c)	§ 800.42	Yes.
§ 800.40(d)	§ 800.43(b)	Yes, editorial.
§ 800.40(e)	§ 800.43(c)	Yes, editorial.
§ 800.40(f) through (h)	§ 800.44(a) through (c)	Yes, editorial.
§ 816.13	§ 816.13(a), (c), (d), and (f)	Yes, editorial.
§ 816.14	§ 816.13(b)	Yes, editorial.
§ 816.15	§ 816.13(e)	Yes, editorial.
§ 816.22(a)(1) through (4)	§ 816.22(a)(1) and (2)	Yes.
§ 816.22(b)	§ 780.12(e)(2), § 816.22(c)	Yes.
§ 816.22(c)	§ 816.22(b)	Yes.
§ 816.22(d)(1)	§ 816.22(e)(1)	Yes.
§ 816.22(d)(2)	§ 816.22(d)(2)	Yes, editorial.
§ 816.22(d)(3)	§ 816.22(e)(3)	Yes, editorial.
§ 816.22(d)(4)	None	Proposed for removal; covered by proposed § 780.12(g)(1)(iii).
§ 816.22(e)	§ 780.12(e)(1)(ii)	Yes.
§ 816.41(a), (b), and (d)	§ 816.34(a) through (c)	Yes.
§ 816.41(c)	§ 816.35	Yes.
§ 816.41(e)	§ 816.36	Yes.
§ 816.41(f)	§ 816.38	Yes.
§ 816.41(g)	§ 816.39	Yes.
§ 816.41(h)	§ 816.40	Yes.
§ 816.41(i)	§ 816.41	Yes.
§ 816.42	§ 816.42(a)	Yes.
§ 816.43(a)(3) [last sentence], § 816.43(b)	§ 780.28(c), § 816.57(b)	Yes.
§ 816.43(c)(3)	Merged into § 816.43(a)(5)(ii)	Yes.
§ 816.46(b)(2), [Suspended December 22, 1986].	None	Proposed for removal.
§ 816.46(c)(1)(i)	None	Proposed for removal as unnecessary.
§ 816.46(c)(1)(ii) and (iii)	§ 816.46(c)(1)(i) and (ii)	Yes.
§ 816.57(a) [first sentence]	§ 816.57(a)(1)	Yes.
§ 816.57(a) [except first sentence]	§ 780.28(e)(2)	Yes
§ 816.57(b)	Merged into § 816.11(e)	Yes, editorial.
§ 816.71(b)(1)	§ 780.35(f) and (j)	Yes, editorial.
§ 816.71(b)(2)	§ 816.71(b)(1)	Yes, editorial.
§ 816.71(c)	§ 780.35(e)(2) and (3)	Yes.
§ 816.71(d)(1)	§ 780.35(g)(1) and (4)	Yes.
§ 816.71(d)(2) [first sentence]	§ 816.71(b)(2)	Yes.
§ 816.71(d)(2) [second sentence]	Merged into § 780.35(i)	Yes, editorial.
§ 816.71(e)(1)	§ 816.71(d)	Yes.
§ 816.71(e)(2)	§ 816.71(g)(1)	Yes.
§ 816.71(e)(3)	§ 816.71(h)	Yes.
§ 816.71(e)(4)	§ 816.71(i)	Yes.
§ 816.71(e)(5)	§ 816.71(g)(3)	Yes, editorial.
§ 816.71(g)	§ 816.71(j)	Yes, editorial.
§ 816.71(h)	§ 816.71(k)	Yes.
§ 816.71(i)	§ 816.71(l)	Yes.
§ 816.71(j)	§ 816.71(m)	Yes, editorial.
§ 816.72(a)(1)	§ 816.71(e)(2)	Yes, editorial.
§ 816.72(a)(2)	§ 816.71(e)(1)	Yes.
§ 816.72 [except paragraph (a)]	None	Proposed for removal.
§ 816.73	None	Proposed for removal.
§ 816.74(c) [first sentence]	§ 816.74(c)(1)	Yes, editorial.
§ 816.74(c) [second sentence]	§ 816.74(c)(2)	Yes, editorial.
§ 816.74(c) [third sentence]	§ 816.74(d)(1)	Yes, editorial.
§ 816.74(c) [fourth sentence]	§ 816.74(d)(2)	Yes, editorial.
§ 816.74(d) [except (d)(4)]	§ 816.74(e)	Yes.
§ 816.74(d)(4)	§ 816.74(c)(3)	Yes.
§ 816.74(e)	§ 816.74(f)	Yes, editorial.
§ 816.74(f)	§ 816.74(g)	Yes, editorial.
§ 816.74(g)	§ 816.74(h)	Yes, editorial.
§ 816.74(h)	None	Proposed for removal.
§ 816.81(a) [first sentence]	§ 816.81(a)	Yes, editorial.
§ 816.81(a) [except first sentence]	§ 816.81(b)	Yes.
§ 816.81(b)	§ 816.81(c)	Yes, editorial.
§ 816.81(c)	§ 816.81(d)	Yes.
§ 816.81(d)	§ 816.81(e)	Yes, editorial.
§ 816.81(e)	§ 816.81(g)	Yes, editorial.
§ 816.81(f)	§ 816.81(h)	Yes, editorial.
§ 816.83 [introductory text]	§ 816.83(a)	Yes, editorial.
§ 816.83(a)	§ 816.83(b)	Yes.
§ 816.83(b)	§ 816.83(c)	Yes, editorial.
§ 816.83(c)	§ 816.83(d)	Yes.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 816.83(d)	§ 816.83(e)	Yes, editorial.
§ 816.84 [introductory text]	§ 816.84(a)	Yes, editorial.
§ 816.84(a)	§ 816.84(b)	Yes, editorial.
§ 816.84(b)	§ 816.84(c)	Yes, editorial.
§ 816.84(c)	§ 816.84(d)	Yes, editorial.
§ 816.84(d)	§ 816.84(e)	Yes.
§ 816.84(e)	§ 780.25(d)(3)(iv)	Yes, editorial.
§ 816.97(d)	§ 816.97(b)(5) and (c)(4)	Yes, editorial.
§ 816.97(e)	§ 816.97(d)	Yes.
§ 816.97(f)	§ 816.97(e)	Yes.
§ 816.97(g)	§ 816.97(f)	Yes.
§ 816.97(h)	§ 816.97(g)	Yes.
§ 816.101 [Suspended August 31, 1992]	None	Proposed for removal.
§ 816.102(a)(2)	§ 816.102(a)(3) [introductory text]	Yes.
§ 816.102(a)(3)	§ 816.102(a)(4)	No.
§ 816.102(a)(4)	§ 816.102(a)(5)	Yes.
§ 816.102(a)(5)	§ 816.102(a)(6)	No.
§ 816.102(b)	§ 816.102(b) [introductory text] and (b)(1)	Yes, editorial.
§ 816.102(d)	§ 816.102(b)(3)	Yes.
§ 816.102(f)	§ 816.102(d)	Yes.
§ 816.102(g)	§ 816.102(a)(2)	Yes.
§ 816.102(h)	§ 816.102(a)(3)(i)	Yes.
§ 816.102(i)	§ 816.102(a)(3)(ii)	Yes.
§ 816.102(j)	§ 816.102(f)	Yes.
§ 816.102(k)(1)	§ 816.102(a)(1)(iii)	Yes, editorial.
§ 816.102(k)(2)	§ 816.102(a)(1)(iv)	Yes, editorial.
§ 816.102(k)(3)(i)	§ 816.102(a)(1)(i)	Yes, editorial.
§ 816.102(k)(3)(ii)	§ 816.102(a)(1)(ii)	Yes, editorial.
§ 816.102(k)(3)(iii)	§ 816.102(a)(1)(v)	Yes, editorial.
§ 816.111(a) [except (a)(2) and (a)(4)]	§ 816.111(a) and (b)	Yes.
§ 816.111(a)(2)	§ 780.12(g)(3)(i)	Yes.
§ 816.111(a)(4)	§ 780.12(g)(3)(ii)	Yes.
§ 816.111(b)(1)	§ 780.12(g)(3)(iii)	No.
§ 816.111(b)(2)	§ 780.12(g)(3)(iv)	Yes.
§ 816.111(b)(3)	§ 780.12(g)(3)(v)	Yes, editorial.
§ 816.111(b)(4)	§ 780.12(g)(3)(vi)	No.
§ 816.111(b)(5)	§ 780.12(g)(3)(vii)	Yes, editorial.
§ 816.111(c)	§ 780.12(g)(4)	Yes.
§ 816.111(d)	§ 780.12(g)(5)	Yes, editorial.
§ 816.113	§ 816.111(e)	Yes.
§ 816.114	§ 816.111(d)	Yes.
§ 816.116(a) [introductory text]	§ 816.116(b)	Yes.
§ 816.116(a)(1)	§ 816.116(a)	Yes, editorial.
§ 816.116(a)(2) [first sentence]	§ 816.116(c)	Yes.
§ 816.116(a)(2) [second sentence]	§ 816.116(d)	Yes, editorial.
§ 816.116(b) [introductory text], (b)(1), (b)(2), and introductory text of (b)(3).	None	Proposed for removal; superseded by remainder of proposed § 816.116.
§ 816.116(b)(3)(i)	§ 816.116(e)	Yes.
§ 816.116(b)(3)(ii)	§ 816.116(f)(1) and (f)(2)	Yes.
§ 816.116(b)(3)(iii)	§ 816.116(f)(3)	Yes.
§ 816.116(b)(4)	§ 816.116(g)	Yes.
§ 816.116(b)(5)	§ 816.116(h)	Yes, editorial.
§ 816.116(c)	§ 816.115	Yes.
§ 816.133(a) [introductory text]	§ 816.133 [introductory text]	Yes, editorial.
§ 816.133(a)(1)	§ 816.133(a)	Yes, editorial.
§ 816.133(a)(2)	§ 816.133(b)	Yes, editorial.
§ 816.133(b) [first sentence]	§ 780.24(b)	Yes.
§ 816.133(b) [last sentence]	§ 780.24(e)	Yes.
§ 816.133(c)	§ 780.24(b)	Yes.
§ 816.133(d)(1)	None	Proposed for removal; redundant of § 785.16(a).
§ 816.133(d)(2)	§ 785.16(a)(2)	Yes, editorial.
§ 816.133(d)(3)	None	Proposed for removal as unnecessary and duplicative.
§ 816.133(d)(4)	§ 785.16(a)(3)	Yes, editorial.
§ 816.133(d)(5)	§ 785.16(a)(5)	Yes, editorial.
§ 816.133(d)(6)	§ 785.16(a)(9)	Yes.
§ 816.133(d)(7)	§ 785.16(a)(6)	Yes, editorial.
§ 816.133(d)(8)	§ 785.16(a)(7)	Yes, editorial.
§ 816.133(d)(9)	§ 785.16(a)(10)	Yes, editorial.
§ 816.133(d)(10)	§ 785.16(a)(4)	Yes, editorial.
§ 816.200	None	Proposed for removal as obsolete.
§ 817.13	§ 817.13(a), (d), (e), and (g)	Yes, editorial.
§ 817.14(a)	§ 817.13(b)	Yes, editorial.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 817.14(b)	§ 817.13(c)	Yes, editorial.
§ 817.15	§ 817.13(f)	Yes, editorial.
§ 817.22(a)(1) through (4)	§ 817.22(a)(1) and (2)	Yes.
§ 817.22(b)	§ 784.12(e)(2), § 817.22(c)	Yes.
§ 817.22(c)	§ 817.22(b)	Yes.
§ 817.22(d)(1)	§ 817.22(e)(1)	Yes.
§ 817.22(d)(2)	§ 817.22(d)(2)	Yes, editorial.
§ 817.22(d)(3)	§ 817.22(e)(3)	Yes, editorial.
§ 817.22(d)(4)	None	Proposed for removal; covered by proposed § 784.12(g)(1)(iii).
§ 817.22(e)	§ 784.12(e)(1)(ii)	Yes.
§ 817.41(a), (b), and (d)	§ 817.34(a) through (c)	Yes.
§ 817.41(c)	§ 817.35	Yes.
§ 817.41(e)	§ 817.36	Yes.
§ 817.41(f)	§ 817.38	Yes.
§ 817.41(g)	§ 817.39	Yes.
§ 817.41(j)	§ 817.40	Yes.
§ 817.41(h)	§ 817.41	Yes.
§ 817.41(i)	§ 817.44	Yes, editorial.
§ 817.42	§ 817.42(a)	Yes.
§ 817.43(a)(3) [last sentence], § 817.43(b)	§ 784.28(c), § 817.57(b)	Yes.
§ 817.43(c)(3)	Merged into § 817.43(a)(5)(ii)	Yes.
§ 817.46(b)(2) [Suspended December 22, 1986].	None	Proposed for removal.
§ 817.46(c)(1)(i)	None	Proposed for removal as unnecessary.
§ 817.46(c)(1)(ii) and (iii)	§ 817.46(c)(1)(i) and (ii)	Yes.
§ 817.57(a) [first sentence]	§ 817.57(a)(1)	Yes.
§ 817.57(a) [except first sentence]	§ 784.28(e)(2)	Yes.
§ 817.57(b)	Merged into § 817.11(e)	Yes, editorial.
§ 817.71(b)(1)	§ 784.35(f) and (j)	Yes, editorial.
§ 817.71(b)(2)	§ 817.71(b)(1)	Yes, editorial.
§ 817.71(c)	§ 784.35(e)(2) and (3)	Yes.
§ 817.71(d)(1)	§ 784.35(g)(1) and (4)	Yes.
§ 817.71(d)(2) [first sentence]	§ 817.71(b)(2)	Yes.
§ 817.71(d)(2) [second sentence]	Merged into § 784.35(i)	Yes, editorial.
§ 817.71(e)(1)	§ 817.71(d)	Yes.
§ 817.71(e)(2)	§ 817.71(g)(1)	Yes.
§ 817.71(e)(3)	§ 817.71(h)	Yes.
§ 817.71(e)(4)	§ 817.71(i)	Yes.
§ 817.71(e)(5)	§ 817.71(g)(3)	Yes, editorial.
§ 817.71(g)	§ 817.71(j)	Yes.
§ 817.71(h)	§ 817.71(k)	Yes.
§ 817.71(i)	§ 817.71(l)	Yes.
§ 817.71(j)	§ 817.71(m)	Yes, editorial.
§ 817.72(a)(1)	§ 817.71(e)(2)	Yes, editorial.
§ 817.72(a)(2)	§ 817.71(e)(1)	Yes.
§ 817.72 [except paragraph (a)]	None	Proposed for removal.
§ 817.73	None	Proposed for removal.
§ 817.74(c) [first sentence]	§ 817.74(c)(1)	Yes, editorial.
§ 817.74(c) [second sentence]	§ 817.74(c)(2)	Yes, editorial.
§ 817.74(c) [third sentence]	§ 817.74(d)(1)	Yes, editorial.
§ 817.74(c) [fourth sentence]	§ 817.74(d)(2)	Yes, editorial.
§ 817.74(d) [except (d)(4)]	§ 817.74(e)	Yes.
§ 817.74(d)(4)	§ 817.74(c)(3)	Yes.
§ 817.74(e)	§ 817.74(f)	Yes, editorial.
§ 817.74(f)	§ 817.74(g)	Yes, editorial.
§ 817.74(g)	§ 817.74(h)	Yes, editorial.
§ 817.74(h)	None	Proposed for removal.
§ 817.81(a) [first sentence]	§ 817.81(a)	Yes, editorial.
§ 817.81(a) [except first sentence]	§ 817.81(b)	Yes.
§ 817.81(b)	§ 817.81(c)	Yes, editorial.
§ 817.81(c)	§ 817.81(d)	Yes.
§ 817.81(d)	§ 817.81(e)	Yes.
§ 817.81(e)	§ 817.81(g)	Yes, editorial.
§ 817.81(f)	§ 817.81(h)	Yes, editorial.
§ 817.83 [introductory text]	§ 817.83(a)	Yes, editorial.
§ 817.83(a)	§ 817.83(b)	Yes.
§ 817.83(b)	§ 817.83(c)	Yes, editorial.
§ 817.83(c)	§ 817.83(d)	Yes.
§ 817.83(d)	§ 817.83(e)	Yes, editorial.
§ 817.84 [introductory text]	§ 817.84(a)	Yes, editorial.
§ 817.84(a)	§ 817.84(b)	Yes, editorial.
§ 817.84(b)	§ 817.84(c)	Yes, editorial.
§ 817.84(c)	§ 817.84(d)	Yes, editorial.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 817.84(d)	§ 817.84(e)	Yes.
§ 817.84(e)	§ 784.25(d)(3)(iv)	Yes, editorial.
§ 817.97(d)	§ 817.97(b)(5) and (c)(4)	Yes, editorial.
§ 817.97(e)	§ 817.97(d)	Yes.
§ 817.97(f)	§ 817.97(e)	Yes.
§ 817.97(g)	§ 817.97(f)	Yes.
§ 817.97(h)	§ 817.97(g)	Yes.
§ 817.102(a)(2)	§ 817.102(a)(3) [introductory text]	Yes.
§ 817.102(a)(3)	§ 817.102(a)(4)	No.
§ 817.102(a)(4)	§ 817.102(a)(5)	Yes.
§ 817.102(a)(5)	§ 817.102(a)(6)	No.
§ 817.102(b)	§ 817.102(b) [introductory text] and (b)(1)	Yes, editorial.
§ 817.102(d)	§ 817.102(b)(2)	Yes.
§ 817.102(f)	§ 817.102(d)	Yes.
§ 817.102(g)	§ 817.102(a)(2)	Yes.
§ 817.102(h)	§ 817.102(a)(3)(i)	Yes.
§ 817.102(i)	§ 817.102(a)(3)(ii)	Yes.
§ 817.102(j)	§ 817.102(f)	Yes.
§ 817.102(k)(1)	§ 817.102(a)(1)(i)	Yes, editorial.
§ 817.102(k)(2)	§ 817.102(a)(1)(ii)	Yes, editorial.
§ 817.102(l)	§ 817.102(a)(1)(vii)	Yes.
§ 817.111(a) [except (a)(2) and (a)(4)]	§ 817.111(a) and (b)	Yes.
§ 817.111(a)(2)	§ 784.12(g)(3)(i)	Yes.
§ 817.111(a)(4)	§ 784.12(g)(3)(ii)	Yes.
§ 817.111(b)(1)	§ 784.12(g)(3)(iii)	No.
§ 817.111(b)(2)	§ 784.12(g)(3)(iv)	Yes.
§ 817.111(b)(3)	§ 784.12(g)(3)(v)	Yes, editorial.
§ 817.111(b)(4)	§ 784.12(g)(3)(vi)	No.
§ 817.111(b)(5)	§ 784.12(g)(3)(vii)	Yes, editorial.
§ 817.111(c)	§ 784.12(g)(4)	Yes.
§ 817.111(d)	§ 784.12(g)(5)	Yes, editorial.
§ 817.113	§ 817.111(e)	Yes.
§ 817.114	§ 817.111(d)	Yes.
§ 817.116(a) [introductory text]	§ 817.116(b)	Yes.
§ 817.116(a)(1)	§ 817.116(a)	Yes, editorial.
§ 817.116(a)(2) [first sentence]	§ 817.116(c)	Yes.
§ 817.116(a)(2) [second sentence]	§ 817.116(d)	Yes, editorial.
§ 817.116(b) [introductory text], (b)(1), (b)(2), and introductory text of (b)(3).	None	Proposed for removal; superseded by remainder of proposed § 817.116.
§ 817.116(b)(3)(i)	§ 817.116(e)	Yes.
§ 817.116(b)(3)(ii)	§ 817.116(f)(1) and (f)(2)	Yes.
§ 817.116(b)(3)(iii)	§ 817.116(f)(3)	Yes.
§ 817.116(b)(4)	§ 817.116(g)	Yes.
§ 817.116(b)(5)	§ 817.116(h)	Yes, editorial.
§ 817.116(c)	§ 817.115	Yes.
§ 817.121(c)(1)	§ 817.121(c)	Yes, editorial.
§ 817.121(c)(2)	§ 817.121(d)	Yes, editorial.
§ 817.121(c)(3)	§ 817.121(e)	Yes, editorial.
§ 817.121(c)(4)(i) through (c)(4)(iv) [Suspended December 22, 1999].	None	Proposed for removal.
§ 817.121(c)(4)(v)	§ 817.121(f)	Yes, editorial.
§ 817.121(c)(5)	§ 817.121(g)	Yes.
§ 817.121(d)	§ 817.121(h)	Yes, editorial.
§ 817.121(e)	§ 817.121(i)	Yes, editorial.
§ 817.121(f)	§ 817.121(j)	Yes, editorial
§ 817.121(g)	§ 817.121(k)	Yes, editorial.
§ 817.133(a) [introductory text]	§ 817.133 [introductory text]	Yes, editorial.
§ 817.133(a)(1)	§ 817.133(a)	Yes, editorial.
§ 817.133(a)(2)	§ 817.133(b)	Yes, editorial.
§ 817.133(b) [first sentence]	§ 784.24(b)	Yes.
§ 817.133(b) [last sentence]	§ 784.24(e)	Yes.
§ 817.133(c)	§ 784.24(b)	Yes.
§ 817.133(d)(1)	None	Proposed for removal; redundant of § 785.16(a).
§ 817.133(d)(2)	§ 785.16(a)(2)	Yes, editorial.
§ 817.133(d)(3)	None	Proposed for removal as unnecessary and duplicative.
§ 817.133(d)(4)	§ 785.16(a)(3)	Yes, editorial.
§ 817.133(d)(5)	§ 785.16(a)(5)	Yes, editorial.
§ 817.133(d)(6)	§ 785.16(a)(9)	Yes.
§ 817.133(d)(7)	§ 785.16(a)(6)	Yes, editorial.
§ 817.133(d)(8)	§ 785.16(a)(7)	Yes, editorial.
§ 817.133(d)(9)	§ 785.16(a)(10)	Yes, editorial.
§ 817.133(d)(10)	§ 785.16(a)(4)	Yes, editorial.

Existing rule	Proposed redesignation	Existing text revised in proposed rule?
§ 817.200 [except paragraph (d)(1)]	None	Proposed for removal as obsolete.
§ 817.200(d)(1)	§ 784.24(c)	Yes.
§ 824.11(a) [introductory text] and (a)(1)	§ 824.11(a)	Yes, editorial.
§ 824.11(a)(2) and (a)(3)	§ 701.5 [definition of "mountaintop removal mining"].	Yes, editorial.
§ 824.11(a)(4)	None	Proposed for removal; redundant of proposed § 785.14(b)(3).
§ 824.11(a)(5)	§ 824.11(b)(1)	Yes.
§ 824.11(a)(6)	§ 824.11(b)(2)	Yes.
§ 824.11(a)(7)	§ 824.11(b)(3)	Yes, editorial.
§ 824.11(a)(8)	§ 824.11(b)(4)	Yes.
§ 824.11(a)(9)	§ 785.14(b)(9)	Yes.
§ 824.11(a)(10)	None	Proposed for removal; redundant of proposed paragraph (b)(1).
§ 824.11(a)(11)	§ 824.11(b)(5)	Yes.
§ 827.12(a) through (l)	Merged with introductory text of § 827.12	Yes, editorial.

The following table is organized in numerical order of the proposed rule citations. It does not include those provisions of the proposed rule for which there is no counterpart in the existing regulations. In addition, it includes only those provisions of the proposed rule for which we propose to move the existing rule counterpart to a different paragraph or section; *i.e.,* those provisions that we propose to redesignate.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 700.11(d)(1)	§ 700.11(d)(1)(i)	Yes, editorial.
§ 700.11(d)(2)	§ 700.11(d)(1)(ii)	Yes.
§ 700.11(d)(3)	§ 700.11(d)(2)	Yes.
§ 701.5 [definition of "mountaintop removal mining"].	§ 785.14(b), § 824.11(a)(2) and (a)(3)	Yes, editorial.
§ 773.7(b)(1)	§ 773.7(a) [last sentence]	Yes, editorial.
§ 773.7(c)	§ 773.7(b)	Yes, editorial.
§ 773.15(m)	§ 773.15(n)	No.
§ 777.13(a)(1)	§ 777.13(a)	Yes.
§ 777.13(a)(2)	§ 777.13(b)	Yes, editorial.
§ 777.13(b)	§§ 780.21(a) and 784.14(a)	Yes.
§ 777.13(d)	§§ 780.21(d) and 784.14(d)	Yes.
§ 779.17	§ 779.12(b)	Yes, editorial.
§ 779.20(a) through (c)	§ 780.16(a)	Yes.
§ 779.20(d)	§ 780.16(c)	Yes.
§ 779.22	§ 780.23(a)	Yes.
§ 779.24(a)(1) through (a)(6)	§ 779.24(a) through (f)	Yes.
§ 779.24(a)(7)	§ 780.21(b)(1) [location and ownership information in first sentence].	Yes, editorial.
§ 779.24(a)(9)	§ 780.21(b)(2) [first part of first sentence through "impoundments"] and § 779.25(a)(7).	Yes, editorial.
§ 779.24(a)(10)	§ 779.24(g)	Yes.
§ 779.24(a)(12)	§ 780.21(b)(2) [the part of the first sentence that pertains to discharges].	Yes, editorial.
§ 779.24(a)(14) through (a)(17)	§ 779.24(h) through (k)	No, except for editorial changes in (a)(17).
§ 779.24(a)(18)	§ 779.25(a)(1)	Yes.
§ 779.24(a)(19)	§ 779.25(a)(6)	Yes.
§ 779.24(a)(20)	§ 779.25(a)(2)	Yes.
§ 779.24(a)(21)	§ 779.25(a)(3)	Yes.
§ 779.24(a)(22)	§ 779.25(a)(4)	No.
§ 779.24(a)(23) and (a)(24)	§ 779.25(a)(5)	Yes, editorial.
§ 779.24(a)(25)	§ 779.25(a)(8)	No.
§ 779.24(a)(26)	§ 779.25(a)(9)	Yes.
§ 779.24(a)(8) [water wells], § 779.24(a)(27) [gas and oil wells].	§ 779.25(a)(10)	Yes.
§ 779.24(a)(28)	§ 779.24(l)	No.
§ 780.12 [in general]	§ 780.18 [in general]	Yes.
§ 780.12(b)	§ 780.18(b)(1)	Yes.
§ 780.12(c)	§ 780.18(b)(2)	Yes.
§ 780.12(d)	§ 780.18(b)(3)	Yes.
§ 780.12(e) [in general]	§ 780.18(b)(4)	Yes.
§ 780.12(e)(1)(ii)	§ 816.22(e)	Yes.
§ 780.12(e)(2)	§ 816.22(b)	Yes.
§ 780.12(g) [in general]	§ 780.18(b)(5)	Yes.
§ 780.12(g)(3)(i)	§ 816.111(a)(2)	Yes.
§ 780.12(g)(3)(ii)	§ 816.111(a)(4)	Yes.
§ 780.12(g)(3)(iii)	§ 816.111(b)(1)	No.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 780.12(g)(3)(iv)	§ 816.111(b)(2)	Yes.
§ 780.12(g)(3)(v)	§ 816.111(b)(3)	Yes, editorial.
§ 780.12(g)(3)(vi)	§ 816.111(b)(4)	No.
§ 780.12(g)(3)(vii)	§ 816.111(b)(5)	Yes, editorial.
§ 780.12(g)(4)	§ 816.111(c)	Yes.
§ 780.12(g)(5)	§ 816.111(d)	Yes, editorial.
§ 780.12(i)	§ 780.18(b)(6)	Yes, editorial.
§ 780.12(j)	§ 780.18(b)(7)	Yes.
§ 780.12(k)	§ 780.18(b)(8)	Yes, editorial.
§ 780.12(l)	§ 780.18(b)(9)	Yes, editorial.
§ 780.12(m)	§ 780.23(b)(3)	Yes, editorial.
§ 780.13	§ 780.14	Yes.
§ 780.14	§ 780.12	Yes, editorial.
§ 780.15	§ 780.13	Yes.
§ 780.16(a) through (d)	§ 780.16(b)	Yes.
§ 780.16(e)	§ 780.16(c)	Yes.
§ 780.19(a)(1)	§ 780.22(a)	Yes.
§ 780.19(b)	§ 780.21(b)(1) [except location and ownership information in the first sentence].	Yes.
§ 780.19(c)	§ 780.21(b)(2) [except the part of the first sentence that precedes "and information on . . . "].	Yes.
§ 780.19(f)(1) through (3)	§ 780.22(b)	Yes.
§ 780.19(f)(4)	§ 780.22(c)	Yes, editorial.
§ 780.19(f)(5)	§ 780.22(d)	Yes, editorial.
§ 780.19(g)	§ 780.21(c)	Yes.
§ 780.20(a)	§ 780.21(f)(1) through (f)(3)	Yes.
§ 780.20(b)	§ 780.21(b)(3)	Yes.
§ 780.20(c)(1)	§ 780.21(f)(4)	Yes.
§ 780.21	§ 780.21(g)	Yes.
§ 780.22(a)	§ 780.21(h)	Yes.
§ 780.22(b)(1)	§ 780.21(e)	Yes.
§ 780.23(a)	§ 780.21(i)	Yes.
§ 780.23(b)	§ 780.21(j)	Yes.
§ 780.24(a)	§ 780.23(b) [except (b)(3)]	Yes.
§ 780.24(b)	§ 816.133(b) [first sentence], § 816.133(c)	Yes.
§ 780.24(c)	None	Yes, modeled on existing §§ 784.200(a) and 817.200(d)(1).
§ 780.24(e)	§ 816.133(b) [last sentence]	Yes.
§ 780.25(d)(3)(iv)	§ 816.84(e)	Yes, editorial.
§ 780.28(c)	§ 816.43(a)(3) [last sentence], § 816.43(b)	Yes.
§ 780.28(e)(2)	§ 816.57(a) [except first sentence]	Yes
§ 780.29(c)	§ 780.29	Yes.
§ 780.35(e)(2) and (3)	§ 816.71(c)	Yes.
§ 780.35(f)	§ 780.35(a) [in part], § 816.71(b)(1) [first sentence].	Yes, editorial.
§ 780.35(g)	§ 780.35(b), § 816.71(d)(1)	Yes.
§ 780.35(h)	§ 780.35(a) [in part]	Yes, editorial.
§ 780.35(i)	§ 780.35(c)	Yes, editorial.
§ 780.35(j)	§ 816.71(b)(1) [second sentence]	Yes, editorial.
§ 783.17	§ 783.12(b)	Yes, editorial.
§ 783.20(a) and (b)	§ 784.21(a)	Yes.
§ 783.20(d)	§ 784.21(c)	Yes.
§ 783.22	§ 784.15(a)	Yes.
§ 783.24(a)(1) through (a)(6)	§ 783.24(a) through (f)	Yes.
§ 783.24(a)(7)	§ 784.14(b)(1) [location and ownership information in first sentence].	Yes, editorial.
§ 783.24(a)(9)	§ 784.14(b)(2) [the part of the first sentence that precedes "impoundments"] § 783.25(a)(7).	Yes, editorial.
§ 783.24(a)(10)	§ 783.24(g)	Yes.
§ 783.24(a)(12)	§ 784.14(b)(2) [the part of the first sentence that pertains to discharges].	Yes, editorial.
§ 783.24(a)(14) through (a)(17)	§ 783.24(h) through (k)	No, except for editorial changes in (a)(17).
§ 783.24(a)(18)	§ 783.25(a)(1)	Yes.
§ 783.24(a)(19)	§ 783.25(a)(6)	Yes.
§ 783.24(a)(20)	§ 783.25(a)(2)	Yes.
§ 783.24(a)(21)	§ 783.25(a)(3), [Suspended August 4, 1980]	Yes. We are re-proposing part of this rule and proposing to remove the remainder.
§ 783.24(a)(22)	§ 783.25(a)(4)	Yes.
§ 783.24(a)(23) and (a)(24)	§ 783.25(a)(5)	Yes.
§ 783.24(a)(25)	§ 783.25(a)(8), [Suspended August 4, 1980]	Yes, editorial. We are re-proposing this rule.
§ 783.24(a)(26)	§ 783.25(a)(9), [Suspended August 4, 1980]	Yes. We are re-proposing part of this rule and proposing to remove the remainder.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 783.24(a)(8) [water wells], § 783.24(a)(27) [gas and oil wells].	§ 783.25(a)(10)	Yes.
§ 783.24(a)(28)	§ 783.24(l)	No.
§ 784.12 [in general]	§ 784.13 [in general]	Yes.
§ 784.12(b)	§ 784.13(b)(1)	Yes.
§ 784.12(c)	§ 784.13(b)(2)	Yes.
§ 784.12(d)	§ 784.13(b)(3)	Yes.
§ 784.12(e) [in general]	§ 784.13(b)(4)	Yes.
§ 784.12(e)(1)(ii)	§ 817.22(e)	Yes.
§ 784.12(e)(2)	§ 817.22(b)	Yes.
§ 784.12(f)	§ 784.26	Yes.
§ 784.12(g) [in general]	§ 784.13(b)(5)	Yes.
§ 784.12(g)(3)(i)	§ 817.111(a)(2)	Yes.
§ 784.12(g)(3)(ii)	§ 817.111(a)(4)	Yes.
§ 784.12(g)(3)(iii)	§ 817.111(b)(1)	No.
§ 784.12(g)(3)(iv)	§ 817.111(b)(2)	Yes.
§ 784.12(g)(3)(v)	§ 817.111(b)(3)	Yes, editorial.
§ 784.12(g)(3)(vi)	§ 817.111(b)(4)	No.
§ 784.12(g)(3)(vii)	§ 817.111(b)(5)	Yes, editorial.
§ 784.12(g)(4)	§ 817.111(c)	Yes.
§ 784.12(g)(5)	§ 817.111(d)	Yes, editorial.
§ 784.12(i)	§ 784.13(b)(6)	Yes, editorial.
§ 784.12(j)	§ 784.13(b)(7)	Yes.
§ 784.12(k)	§ 784.13(b)(8)	Yes, editorial.
§ 784.12(l)	§ 784.13(b)(9)	Yes, editorial.
§ 784.12(m)	§ 784.15(b)(3)	Yes, editorial.
§ 784.13	§ 784.23	Yes.
§ 784.14	§ 784.12	Yes, editorial.
§ 784.16(a) through (d)	§ 784.21(b)	Yes.
§ 784.16(e)	§ 784.21(c)	Yes.
§ 784.19(a)(1)	§ 784.22(a)	Yes.
§ 784.19(b)	§ 784.14(b)(1) [except location and ownership information].	Yes.
§ 784.19(c)	§ 784.14(b)(2) [except the part of the first sentence that precedes "and information on . . . "].	Yes.
§ 784.19(f)(1) through (4)	§ 784.22(b)	Yes.
§ 784.19(f)(5)	§ 784.22(c)	Yes, editorial.
§ 784.19(f)(6)	§ 784.22(d)	Yes, editorial.
§ 784.19(g)	§ 784.14(c)	Yes.
§ 784.20(a)	§ 784.14(e)(1) through (e)(3)	Yes.
§ 784.20(b)	§ 784.14(b)(3)	Yes.
§ 784.20(c)(1)	§ 784.14(e)(4)	Yes.
§ 784.21	§ 784.14(f)	Yes.
§ 784.22(a)	§ 784.14(g)	Yes.
§ 784.23(a)	§ 784.14(h)	Yes.
§ 784.23(b)	§ 784.14(i)	Yes.
§ 784.24(a)	§ 784.15(b) [except (b)(3)]	Yes.
§ 784.24(b)	§ 817.133(b) [first sentence], § 817.133(c)	Yes.
§ 784.24(c)	§ 784.200(a), § 817.200(d)(1)	Yes.
§ 784.24(e)	§ 817.133(b) [last sentence]	Yes.
§ 784.25(d)(3)(iv)	§ 817.84(e)	Yes, editorial.
§ 784.26	§ 784.25	Yes, editorial.
§ 784.28(c)	§ 817.43(a)(3) [last sentence], § 817.43(b)	Yes.
§ 784.28(e)(2)	§ 817.57(a) [except first sentence]	Yes
§ 784.29(c)	§ 784.29	Yes.
§ 784.30	§ 784.20	Yes.
§ 784.31	§ 784.17	No.
§ 784.33	§ 784.18	No.
§ 784.35	§ 784.19, § 817.71(b)(1), (c), (d)(1), and (d)(2) [second sentence].	Yes.
§ 784.37	§ 784.24	Yes.
§ 784.38	§ 784.30	Yes, editorial.
§ 785.14(b)	§ 785.14(c)	Yes, editorial.
§ 785.14(b) (introductory text)	§ 785.14(c) [introductory text]	Yes, editorial.
§ 785.14(b)(1)	§ 785.14(c)(1) [introductory text]	Yes, editorial.
§ 785.14(b)(2)	§ 785.14(c)(1)(i)	Yes, editorial.
§ 785.14(b)(3)	§ 785.14(c)(1)(ii)	Yes, editorial.
§ 785.14(b)(4)	§ 785.14(c)(1)(iii) [except paragraph (c)(1)(iii)(G)].	Yes, editorial.
§ 785.14(b)(5)	§ 785.14(c)(1)(iii)(G)	Yes, editorial.
§ 785.14(b)(6)	§ 785.14(c)(1)(iv)	Yes, editorial.
§ 785.14(b)(7)	§ 785.14(c)(1)(v)	Yes, editorial.
§ 785.14(b)(8)	§ 785.14(c)(2)	Yes, editorial.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 785.14(b)(9)	§ 824.11(a)(9)	Yes.
§ 785.14(b)(12)	§ 785.14(c)(4)	Yes, editorial.
§ 785.14(c)	§ 785.14(c)(5)	Yes.
§ 785.14(d)(1)	§ 785.14(d)(1) and (2)	Yes.
§ 785.14(d)(2)	§ 785.14(d)(3)	Yes, editorial.
§ 785.16(a) (introductory text)	§ 785.16(a) [introductory text]	Yes, editorial.
§ 785.16(a)(1)	§ 785.16(a)(1)	Yes, editorial.
§ 785.16(a)(2)	§ 816.133(d)(2)	Yes, editorial.
§ 785.16(a)(3)	§ 816.133(d)(4)	Yes, editorial.
§ 785.16(a)(4)	§ 816.133(d)(10)	Yes, editorial.
§ 785.16(a)(5)	§ 816.133(d)(5)	Yes, editorial.
§ 785.16(a)(6)	§ 816.133(d)(7)	Yes, editorial.
§ 785.16(a)(7)	§ 816.133(d)(8)	Yes, editorial.
§ 785.16(a)(9)	§ 785.16(a)(3), § 816.133(d)(6)	Yes.
§ 785.16(a)(10)	§ 785.16(a)(4), § 816.133(d)(9)	Yes.
§ 785.16(b)(1)	§ 785.16(b)(2)	Yes, editorial.
§ 785.16(b)(2)	§ 785.16(c) and (d)	Yes.
§ 785.16(b)(3)	§ 785.16(e)	Yes, editorial.
§ 785.16(b)(4)	§ 785.16(f)	Yes, editorial.
§ 785.25(b)(1)	§ 785.25(b) [first sentence]	Yes, editorial.
§ 785.25(b)(2)	§ 785.25(b) [except first sentence]	Yes, editorial.
§ 800.9	§ 800.11(e)	Yes.
§ 800.11	§ 800.11(a) through (d)	Yes, editorial.
§ 800.15(a)(2)(ii)	§ 800.15(c) [first sentence]	Yes, editorial.
§ 800.30(a)(1)	§ 800.30(a)	Yes.
§ 800.30(a)(3)	§ 800.30(b)	Yes
§ 800.30(b)	§ 800.16(e)(2)	Yes.
§ 800.40	§ 800.40(a)	Yes, editorial, except for (b)(2)(vi), which has substantive changes.
§ 800.41	§ 800.40(b)(1)	Yes, editorial, except for (a)(2), which has substantive changes.
§ 800.42	§ 800.40(c)	Yes.
§ 800.43(a)	§ 800.40(b)(2)	Yes, editorial.
§ 800.43(b)	§ 800.40(d)	Yes, editorial.
§ 800.43(c)	§ 800.40(e)	Yes, editorial
§ 800.44(a) through (c)	§ 800.40(f) through (h)	Yes, editorial.
§ 816.13(a), (c), (d), and (f)	§ 816.13	Yes, editorial.
§ 816.13(b)	§ 816.14	Yes, editorial.
§ 816.13(e)	§ 816.15	Yes, editorial.
§ 816.22(a)(1) and (2)	§ 816.22(a)(1) through (4)	Yes.
§ 816.22(b)	§ 816.22(c)	Yes.
§ 816.22(c)	§ 816.22(b)	Yes.
§ 816.22(d)(2)	§ 816.22(d)(2)	Yes, editorial.
§ 816.22(e)(1)	§ 816.22(d)(1)	Yes.
§ 816.22(e)(3)	§ 816.22(d)(3)	Yes, editorial.
§ 816.34(a) through (c)	§ 816.41(a), (b), and (d)	Yes.
§ 816.35	§ 816.41(c)	Yes.
§ 816.36	§ 816.41(e)	Yes.
§ 816.38	§ 816.41(f)	Yes.
§ 816.39	§ 816.41(g)	Yes.
§ 816.40	§ 816.41(h) and paragraphs (a) and (b) of definition of ''replacement of water supply'' in § 701.5.	Yes.
§ 816.41	§ 816.41(i)	Yes.
§ 816.42(a)	§ 816.42	Yes.
§ 816.43(a)(5)(ii)	§ 816.43(c)(3)	Yes.
§ 816.46(c)(1)(i) and (ii)	§ 816.46(c)(1)(ii) and (iii)	Yes.
§ 816.57(a)(1)	§ 816.57(a) [first sentence]	Yes.
§ 816.57(b)	§ 816.43(a)(3) (last sentence), § 816.43(b)	Yes.
§ 816.71(b)(1)	§ 816.71(b)(2)	Yes, editorial.
§ 816.71(b)(2)	§ 816.71(d)(2) [first sentence]	Yes.
§ 816.71(d)	§ 816.71(e)(1)	Yes.
§ 816.71(e)(1)	§ 816.72(a)(2)	Yes.
§ 816.71(e)(2)	§ 816.72(a)(1)	Yes, editorial.
§ 816.71(g)(1)	§ 816.71(e)(2)	Yes.
§ 816.71(g)(3)	§ 816.71(e)(5)	Yes, editorial.
§ 816.71(h)	§ 816.71(e)(3)	Yes.
§ 816.71(i)	§ 816.71(e)(4)	Yes.
§ 816.71(j)	§ 816.71(g)	Yes, editorial.
§ 816.71(k)	§ 816.71(h)	Yes.
§ 816.71(l)	§ 816.71(i)	Yes.
§ 816.71(m)	§ 816.71(j)	Yes, editorial.
§ 816.74(c)(1)	§ 816.74(c) [first sentence]	Yes, editorial.
§ 816.74(c)(2)	§ 816.74(c) [second sentence]	Yes, editorial.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 816.74(c)(3)	§ 816.74(d)(4)	Yes.
§ 816.74(d)(1)	§ 816.74(c) [third sentence]	Yes, editorial.
§ 816.74(d)(2)	§ 816.74(c) [fourth sentence]	Yes, editorial.
§ 816.74(e)	§ 816.74(d) [except (d)(4)]	Yes.
§ 816.74(f)	§ 816.74(e)	Yes, editorial.
§ 816.74(g)	§ 816.74(f)	Yes, editorial.
§ 816.74(h)	§ 816.74(g)	Yes, editorial.
§ 816.81(a)	§ 816.81(a) [first sentence]	Yes, editorial.
§ 816.81(b)	§ 816.81(a) [except first sentence]	Yes.
§ 816.81(c)	§ 816.81(b)	Yes, editorial.
§ 816.81(d)	§ 816.81(c)	Yes.
§ 816.81(e)	§ 816.81(d)	Yes, editorial.
§ 816.81(g)	§ 816.81(e)	Yes, editorial.
§ 816.81(h)	§ 816.81(f)	Yes, editorial.
§ 816.83(a)	§ 816.83 [introductory text]	Yes, editorial.
§ 816.83(b)	§ 816.83(a)	Yes.
§ 816.83(c)	§ 816.83(b)	Yes, editorial.
§ 816.83(d)	§ 816.83(c)	Yes.
§ 816.83(e)	§ 816.83(d)	Yes, editorial.
§ 816.84(a)	§ 816.84 [introductory text]	Yes, editorial.
§ 816.84(b)	§ 816.84(a)	Yes, editorial.
§ 816.84(c)	§ 816.84(b)	Yes, editorial.
§ 816.84(d)	§ 816.84(c)	Yes, editorial.
§ 816.84(e)	§ 816.84(d)	Yes.
§ 816.97(b)(5) and (c)(4)	§ 816.97(d)	Yes, editorial.
§ 816.97(d)	§ 816.97(e)	Yes.
§ 816.97(e)	§ 816.97(f)	Yes.
§ 816.97(f)	§ 816.97(g)	Yes.
§ 816.97(g)	§ 816.97(h)	Yes.
§ 816.102(a)(1)(i)	§ 816.102(k)(3)(i)	Yes, editorial.
§ 816.102(a)(1)(ii)	§ 816.102(k)(3)(ii)	Yes, editorial.
§ 816.102(a)(1)(iii)	§ 816.102(k)(1)	Yes, editorial.
§ 816.102(a)(1)(iv)	§ 816.102(k)(2)	Yes, editorial.
§ 816.102(a)(1)(v)	§ 816.102(k)(3)(iii)	Yes, editorial.
§ 816.102(a)(2)	§ 816.102(g)	Yes.
§ 816.102(a)(3) [introductory text]	§ 816.102(a)(2)	Yes.
§ 816.102(a)(3)(i)	§ 816.102(h)	Yes.
§ 816.102(a)(3)(ii)	§ 816.102(i)	Yes.
§ 816.102(a)(4)	§ 816.102(a)(3)	No.
§ 816.102(a)(5)	§ 816.102(a)(4)	Yes.
§ 816.102(a)(6)	§ 816.102(a)(5)	No.
§ 816.102(b) [introductory text] and (b)(1)	§ 816.102(b)	Yes, editorial.
§ 816.102(b)(3)	§ 816.102(d)	Yes.
§ 816.102(d)	§ 816.102(f)	Yes.
§ 816.102(f)	§ 816.102(j)	Yes.
§ 816.111(a) and (b)	§ 816.111(a) [except (a)(2) and (a)(4)]	Yes.
§ 816.111(d)	§ 816.114	Yes.
§ 816.111(e)	§ 816.113	Yes.
§ 816.116(a)	§ 816.116(a)(1)	Yes, editorial.
§ 816.116(b)	§ 816.116(a) [introductory text]	Yes.
§ 816.116(c)	§ 816.116(a)(2) [first sentence]	Yes
§ 816.116(d)	§ 816.116(a)(2) [second sentence]	Yes, editorial.
§ 816.116(e)	§ 816.116(b)(3)(i)	Yes.
§ 816.116(f)(1) and (f)(2)	§ 816.116(b)(3)(ii)	Yes.
§ 816.116(f)(3)	§ 816.116(b)(3)(iii)	Yes.
§ 816.116(g)	§ 816.116(b)(4)	Yes.
§ 816.116(h)	§ 816.116(b)(5)	Yes, editorial.
§ 816.115	§ 816.116(c)	Yes.
§ 816.133 [introductory text]	§ 816.133(a) [introductory text]	Yes, editorial.
§ 816.133(a)	§ 816.133(a)(1)	Yes, editorial.
§ 816.133(b)	§ 816.133(a)(2)	Yes, editorial.
§ 817.13(a), (d), (e), and (g)	§ 817.13	Yes, editorial.
§ 817.13(b)	§ 817.14(a)	Yes, editorial.
§ 817.13(c)	§ 817.14(b)	Yes, editorial.
§ 817.13(f)	§ 817.15	Yes, editorial.
§ 817.22(a)(1) and (2)	§ 817.22(a)(1) through (4)	Yes.
§ 817.22(b)	§ 817.22(c)	Yes.
§ 817.22(c)	§ 817.22(b)	Yes.
§ 817.22(d)(2)	§ 817.22(d)(2)	Yes, editorial.
§ 817.22(e)(1)	§ 817.22(d)(1)	Yes.
§ 817.22(e)(3)	§ 817.22(d)(3)	Yes, editorial.
§ 817.34(a) through (c)	§ 817.41(a), (b), and (d)	Yes.
§ 817.35	§ 817.41(c)	Yes.
§ 817.36	§ 817.41(e)	Yes.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 817.38	§ 817.41(f)	Yes.
§ 817.39	§ 817.41(g)	Yes.
§ 817.40	§ 817.41(j) and paragraphs (a) and (b) of definition of ''replacement of water supply'' in § 701.5.	Yes.
§ 817.41	§ 817.41(h)	Yes.
§ 817.42(a)	§ 817.42	Yes.
§ 817.43(a)(5)(ii)	§ 817.43(c)(3)	Yes.
§ 817.44	§ 817.41(i)	Yes, editorial.
§ 817.46(c)(1)(i) and (ii)	§ 817.46(c)(1)(ii) and (iii)	Yes.
§ 817.57(a)(1)	§ 817.57(a) [first sentence]	Yes.
§ 817.57(b)	§ 817.43(a)(3) [last sentence], § 817.43(b)	Yes.
§ 817.71(b)(1)	§ 817.71(b)(2)	Yes, editorial.
§ 817.71(b)(2)	§ 817.71(d)(2) [first sentence]	Yes.
§ 817.71(d)	§ 817.71(e)(1)	Yes.
§ 817.71(e)(1)	§ 817.72(a)(2)	Yes.
§ 816.71(e)(2)	§ 817.72(a)(1)	Yes, editorial.
§ 817.71(g)(1)	§ 817.71(e)(2)	Yes.
§ 817.71(g)(3)	§ 817.71(e)(5)	Yes, editorial.
§ 817.71(h)	§ 817.71(e)(3)	Yes.
§ 817.71(i)	§ 817.71(e)(4)	Yes.
§ 817.71(j)	§ 817.71(g)	Yes.
§ 817.71(k)	§ 817.71(h)	Yes.
§ 817.71(l)	§ 817.71(i)	Yes.
§ 817.71(m)	§ 817.71(j)	Yes, editorial.
§ 817.74(c)(1)	§ 817.74(c) [first sentence]	Yes, editorial.
§ 817.74(c)(2)	§ 817.74(c) [second sentence]	Yes, editorial.
§ 817.74(c)(3)	§ 817.74(d)(4)	Yes.
§ 817.74(d)(1)	§ 817.74(c) [third sentence]	Yes, editorial.
§ 817.74(d)(2)	§ 817.74(c) [fourth sentence]	Yes, editorial.
§ 817.74(e)	§ 817.74(d) [except (d)(4)]	Ye.s
§ 817.74(f)	§ 817.74(e)	Yes, editorial.
§ 817.74(g)	§ 817.74(f)	Yes, editorial.
§ 817.74(h)	§ 817.74(g)	Yes, editorial.
§ 817.81(a)	§ 817.81(a) [first sentence]	Yes, editorial.
§ 817.81(b)	§ 817.81(a) [except first sentence]	Yes.
§ 817.81(c)	§ 817.81(b)	Yes, editorial.
§ 817.81(d)	§ 817.81(c)	Yes.
§ 817.81(e)	§ 817.81(d)	Yes.
§ 817.81(g)	§ 817.81(e)	Yes, editorial.
§ 817.81(h)	§ 817.81(f)	Yes, editorial.
§ 817.83(a)	§ 817.83 [introductory text]	Yes, editorial.
§ 817.83(b)	§ 817.83(a)	Yes.
§ 817.83(c)	§ 817.83(b)	Yes, editorial.
§ 817.83(d)	§ 817.83(c)	Yes.
§ 817.83(e)	§ 817.83(d)	Yes, editorial.
§ 817.84(a)	§ 817.84 [introductory text]	Yes, editorial.
§ 817.84(b)	§ 817.84(a)	Yes, editorial.
§ 817.84(c)	§ 817.84(b)	Yes, editorial.
§ 817.84(d)	§ 817.84(c)	Yes, editorial.
§ 817.84(e)	§ 817.84(d)	Yes.
§ 817.97(b)(5) and (c)(4)	§ 817.97(d)	Yes, editorial.
§ 817.97(d)	§ 817.97(e)	Yes.
§ 817.97(e)	§ 817.97(f)	Yes.
§ 817.97(f)	§ 817.97(g)	Yes.
§ 817.97(g)	§ 817.97(h)	Yes.
§ 817.102(a)(1)(i)	§ 817.102(k)(1)	Yes, editorial.
§ 817.102(a)(1)(ii)	§ 817.102(k)(2)	Yes, editorial.
§ 817.102(a)(1)(vii)	§ 817.102(l)	Yes.
§ 817.102(a)(2)	§ 817.102(g)	Yes.
§ 817.102(a)(3) [introductory text]	§ 817.102(a)(2)	Yes.
§ 817.102(a)(3)(i)	§ 817.102(h)	Yes.
§ 817.102(a)(3)(ii)	§ 817.102(i)	Yes.
§ 817.102(a)(4)	§ 817.102(a)(3)	No.
§ 817.102(a)(5)	§ 817.102(a)(4)	Yes.
§ 817.102(a)(6)	§ 817.102(a)(5)	No.
§ 817.102(b) [introductory text] and (b)(1)	§ 817.102(b)	Yes, editorial.
§ 817.102(b)(2)	§ 817.102(d)	Yes.
§ 817.102(d)	§ 817.102(f)	Yes.
§ 817.102(f)	§ 817.102(j)	Yes.
§ 817.111(a) and (b)	§ 817.111(a) [except (a)(2) and (a)(4)]	Yes.
§ 817.111(d)	§ 817.114	Yes.
§ 817.111(e)	§ 817.113	Yes.
§ 817.116(a)	§ 817.116(a)(1)	Yes, editorial.

Proposed rule	Existing rule counterpart	Existing text revised in proposed rule?
§ 817.116(b)	§ 817.116(a) [introductory text]	Yes.
§ 817.116(c)	§ 817.116(a)(2) [first sentence]	Yes.
§ 817.116(d)	§ 817.116(a)(2) [second sentence]	Yes, editorial.
§ 817.116(e)	§ 817.116(b)(3)(i)	Yes.
§ 817.116(f)(1) and (f)(2)	§ 817.116(b)(3)(ii)	Yes.
§ 817.116(f)(3)	§ 817.116(b)(3)(iii)	Yes.
§ 817.116(g)	§ 817.116(b)(4)	Yes.
§ 817.116(h)	§ 817.116(b)(5)	Yes, editorial.
§ 817.115	§ 817.116(c)	Yes.
§ 817.133 [introductory text]	§ 817.133(a) [introductory text]	Yes, editorial.
§ 817.133(a)	§ 817.133(a)(1)	Yes, editorial.
§ 817.133(b)	§ 817.133(a)(2)	Yes, editorial.
§ 817.121(c)	§ 817.121(c)(1)	Yes, editorial.
§ 817.121(d)	§ 817.121(c)(2)	Yes, editorial.
§ 817.121(e)	§ 817.121(c)(3)	Yes, editorial.
§ 817.121(f)	§ 817.121(c)(4)(v)	Yes, editorial.
§ 817.121(g)	§ 817.121(c)(5)	Yes.
§ 817.121(h)	§ 817.121(d)	Yes, editorial.
§ 817.121(i)	§ 817.121(e)	Yes, editorial.
§ 817.121(j)	§ 817.121(f)	Yes, editorial.
§ 817.121(k)	§ 817.121(g)	Yes, editorial.
§ 824.11(a)	§ 824.11(a) [introductory text] and (a)(1)	Yes, editorial.
§ 824.11(b)(1)	§ 824.11(a)(5)	Yes.
§ 824.11(b)(2)	§ 824.11(a)(6)	Yes.
§ 824.11(b)(3)	§ 824.11(a)(7)	Yes, editorial.
§ 824.11(b)(4)	§ 824.11(a)(8)	Yes.
§ 824.11(b)(5)	§ 824.11(a)(11)	Yes.

In general, we drafted the proposed rule using plain language principles, consistent with section 501(b) of SMCRA, 30 U.S.C. 1251(a), which provides that regulations must be ''concise and written in plain, understandable language,'' and Executive Order 13563, which provides that our regulatory system ''must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.'' [123] In addition, a June 1, 1998, Executive Memorandum on Plain Language in Government Writing [124] requires the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The Office of the Federal Register also encourages the use of plain language in writing regulations, as set forth in detail at *www.plainlanguage.gov* and associated links.

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization and easy-to-read design features like short sections, short sentences, tables, and lots of white space. They use common everyday words (except for necessary technical terms), pronouns, the active voice, and a question-and-answer format when feasible.

The proposed rule and preamble use the pronouns ''we,'' ''us,'' and ''our'' to refer to OSMRE, and the pronouns ''I,'' ''you,'' and ''your'' to refer to a permit applicant or permittee. We avoid use of the word ''shall'' in the proposed rule and preamble, except in quoted material. Instead, we use ''must'' to indicate an obligation, ''will'' to identify a future event, and ''may not'' to convey a prohibition.

We invite comment on how we could more fully incorporate plain language principles.

IX. How do we propose to revise specific provisions of our existing regulations?

In this portion of the preamble, we discuss selected provisions of our proposed rule in the order in which the regulations that we propose to revise would appear in Title 30, Chapter VII of the Code of Federal Regulations. In general, we do not discuss proposed organizational changes (see Part VIII of this preamble for a listing of organizational changes), nonsubstantive editorial revisions (*e.g.,* plain language changes, correction of grammatical errors, and syntax improvements), cross-reference changes, or revisions of a minor nature. No substantive change in meaning is intended for proposed revisions made in accordance with plain language principles.

A. Section 700.11(d): Termination and Reassertion of Jurisdiction

The basis and purpose for our termination-of-jurisdiction rules is set forth in the preamble to the 1988 version of these rules. See 53 FR 44356–44363 (Nov. 2, 1988). We propose to revise paragraph (d)(1) of the existing rules by removing the phrase ''the reclaimed site of'' from the existing introductory language because the regulatory authority's jurisdiction extends to the entire surface coal mining and reclamation operation, not just to the lands disturbed and reclaimed by the operation. Hence, any decision to terminate jurisdiction likewise should extend to the entire operation.

We propose to improve the structure of the existing rule by placing the termination of jurisdiction requirements for initial program operations in paragraph (d)(1) and the requirements for permanent program operations in paragraph (d)(2). We also propose to add a provision to paragraph (d)(2)(ii) to reflect the proposed addition to 30 CFR part 800 of provisions concerning financial assurances for treatment of long-term discharges. In particular, we propose to allow the regulatory authority to terminate jurisdiction over all portions of a minesite and all aspects of the operation, except treatment-related facilities and obligations, once the permittee posts an acceptable financial assurance under proposed 30 CFR 800.18 to guarantee treatment of all long-term discharges. Termination of jurisdiction may not occur until all performance bonds for the remainder of the permit area are fully released. Our proposed rule would improve the efficiency of regulatory authorities by eliminating unnecessary inspections of

[123] 76 FR 3821 (Jan. 21, 2011).

[124] 63 FR 31883–31886 (Jun. 10, 1998).

the portion of the permit area that has been fully reclaimed. It also would eliminate the need for federal oversight of those sites and allow the property owner to acquire full control over the land. Continuing to conduct inspections of a fully-reclaimed minesite or of fully-completed operations would divert scarce resources from unreclaimed sites and other regulatory program responsibilities.

Because of the restructuring described above, we propose to redesignate existing paragraph (d)(2) as paragraph (d)(3). This paragraph provides that the regulatory authority must reassert jurisdiction if the termination was based upon fraud, collusion, or misrepresentation of a material fact. We also propose to revise this provision to clarify that it applies to both intentional and unintentional misrepresentations of a material fact, including the subsequent discovery of a discharge that requires treatment. Our proposed revision is consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit that upheld our termination of jurisdiction rules.[125]

In addition, proposed paragraph (d)(4) would specify that the termination of jurisdiction provisions of proposed paragraphs (d)(1) and (2) do not apply to proposed 30 CFR 817.40, which contains the domestic water supply replacement requirements for underground mines, or to the structural damage repair or compensation requirements of 30 CFR 817.121(c)(2). Proposed paragraph (d)(4) is consistent with the decision of the U.S. District Court for the District of Columbia concerning termination of jurisdiction for the water replacement and subsidence damage correction obligations imposed on underground mines by section 720(a) of SMCRA.[126] In that decision, the court held that those obligations are not subject to the termination of jurisdiction provisions of 30 CFR 700.11(d).[127]

Finally, we propose to revise existing 30 CFR 700.11(d)(1)(ii), which we propose to redesignate as 30 CFR 700.11(d)(2), to specify that the requirements of that paragraph also apply to coal exploration activities, as was intended when we first published our termination-of-jurisdiction rules in 1988.[128] The phrase ''or of a coal exploration site'' was inadvertently omitted from the published text of existing 30 CFR 700.11(d)(1). We plan to correct this inadvertent error when publishing a final rule. However, we invite comment on whether we should instead limit the scope of that requirement to termination of jurisdiction for coal exploration permits issued under 30 CFR 772.12. The rationale for a limitation of this nature is that, unlike coal exploration permits, coal exploration notices do not require regulatory authority approval and do not involve activities that substantially disturb the land surface.

B. Section 701.5: Definitions

This portion of the preamble discusses, in alphabetical order, each definition that we propose to add, remove, or revise.

Acid Drainage

We propose to revise the definition of this term to clarify that the same definition applies to the term ''acid mine drainage.'' We also propose to correct the terminology in the definition to comport with the terminology used in SMCRA. Specifically, we propose to replace the undefined term ''surface coal mine and reclamation operation'' with ''surface coal mining and reclamation operations,'' which is defined at section 701(27) of SMCRA,[129] as well as in 30 CFR 700.5.

Adjacent Area

Proposed paragraph (a) would revise and broaden the existing definition of ''adjacent area'' to ensure that it includes all areas outside the proposed or actual permit area within which there is a reasonable possibility of adverse impacts from surface coal mining operations or underground mining activities, as applicable. The existing definition limits the adjacent area to areas where adverse impacts could reasonably be expected to occur and, for underground mining, to areas where subsidence is probable. Those limits are too restrictive because they effectively limit baseline data collection and monitoring to the area in which adverse impacts are almost certain to occur. If impacts occur outside that area, there will be no baseline data against which to evaluate those impacts. Therefore, we propose to revise the definition to include areas where impacts are reasonably possible, as determined by the regulatory authority on a site-specific basis.

The revised definition would emphasize that the term ''adjacent area'' is both site-specific and context-specific. As in the existing definition, the nature of the resource and the context in which the regulations use the term ''adjacent area'' would determine the size and dimensions of the adjacent area for that resource. Our regulations require that each permit application contain information concerning historic resources, fish and wildlife resources, surface water, groundwater, and geology for the proposed permit and adjacent areas. The size and boundaries of the adjacent area in the context of historic resources, which are stationary, may differ substantially from the size and boundaries of the adjacent area for surface water, for which flow patterns are determined by topography, and the size and boundaries of the adjacent area for groundwater, which has a migration pattern determined by geology.

Proposed paragraph (b) would specify that the adjacent area for an underground mine includes both the area overlying the proposed underground workings and the area within a reasonable angle of draw[130] from the perimeter of the underground workings. This provision would ensure that the adjacent area includes all areas in which subsidence may reasonably occur.

Proposed paragraph (c) would specify that, for all operations, the adjacent area also includes the area that might be affected physically or hydrologically by dewatering existing underground mine pools as part of surface or underground mining operations, plus the area that might be affected physically or hydrologically by mine pools that develop after cessation of mining activities.

We considered adding another paragraph to specify that, in the context of surface-water resources, the adjacent area would include, at a minimum, the HUC–12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset)[131] watershed or watersheds in which the proposed or actual permit area is located. However, we decided against including that provision because HUC boundaries are fixed and do not vary with the location of the mining operation. Surface-water data collected from those portions of the HUC–12 watershed that are upgradient of the

[125] *Nat'l Wildlife Fed'n* v. *Lujan,* 950 F.2d 765, 770 (D.C. Cir. 1991); see also Brief for the Secretary at 27 n. 11.

[126] 30 U.S.C. 1309a(a).

[127] *Nat'l Mining Ass'n* v. *Babbitt,* No. 95–0938, slip op. at 15 (D.D.C. May 29, 1998).

[128] 53 FR 44360 (Nov. 2, 1988).

[129] 30 U.S.C. 1291(27).

[130] The angle of draw is the angle between the outside edge of an underground mine void and the point on the surface to which subsidence may extend when the strata overlying the mine void collapse. Draw usually proceeds at an angle of 65–75° to the horizontal. This definition is adapted from: Ailsa Allaby and Michael Allaby. ''angle of draw.'' *A Dictionary of Earth Sciences.* 1999. Retrieved February 02, 2015, from Encyclopedia.com: *http://www.encyclopedia.com/doc/1O13-angleofdraw.html.*

[131] See *http://water.usgs.gov/GIS/huc.html* (last accessed September 8, 2014).

proposed operation would be of little or no value in making permitting decisions or evaluating the impacts of mining. In addition, HUC–12 watersheds typically contain between 10,000 and 40,000 acres, which is much larger than the area necessary or appropriate to establish baseline conditions for most coal mines, which are only tens or hundreds of acres in size.

We invite comment on whether the definition should prescribe a more appropriate minimum size for the adjacent area for surface-water resources and, if so, how that minimum size should be determined. For example, a 2002 OSMRE reference document on baseline data recommends that the adjacent area for surface water include both the surface-water runoff drainage area for the proposed operation and at least the next higher-order drainage area.

Approximate Original Contour

We propose to revise the definition of this term to explain its scope and to incorporate plain language principles. In concert with these changes, we propose to clarify that the term refers to the general surface configuration of the land within the permit area as it existed before any mining, not the configuration that existed immediately prior to the proposed or current operation. We intend this change to operate as a requirement that operations backfill and regrade previously mined areas to closely resemble the general surface configuration that existed before any mining, except as provided in 30 CFR 816.106 or 817.106. This approach is consistent with section 515(b)(2) of SMCRA,[132] which requires that surface coal mining and reclamation operations be conducted so as to ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining . . . .'' In ruling on the regulations implementing that provision of the Act, the U.S. District Court for the District of Columbia subsequently held that ''[t]he use of the word 'any' indicates that Congress intended the operator to restore the land to the condition that existed before it was ever mined.'' [133]

Our proposed addition of the phrase ''within the permit area'' when referring to the general surface configuration is intended to clarify that determinations of approximate original contour must be made based on the general surface configuration of the permit area, not the general surface configuration of the surrounding area. The proposed addition is consistent with section 701(2) of SMCRA,[134] which defines ''approximate original contour'' as meaning ''that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area . . . closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain . . . .'' The statutory definition clearly applies the term ''general surface configuration'' only to the area that is mined and reclaimed; it does not extend to the surrounding area. Instead, with respect to the surrounding area, the statutory definition requires that the general surface configuration of the reclaimed area blend into and complement the drainage pattern of the surrounding terrain. Limiting the scope of the term ''general surface configuration'' to the mined and reclaimed area also is consistent with the discussion and diagrams in the legislative history of SMCRA. See H.R. Rep. No. 94–45, at 94 (1975).

In addition, we propose to revise the definition to include an exception for excess spoil fills, consistent with a June 18, 1999, legal opinion from the Department of the Interior's Office of the Solicitor. That opinion confirmed that the AOC restoration requirements of SMCRA do not apply to the construction of excess spoil fills, in part because the statutory definition of approximate original contour in section 701(2) of SMCRA [135] applies only to ''that surface configuration achieved by backfilling and grading of the mined area.'' Excess spoil fills are not part of the backfilling process and they are at least initially located outside the mined area. We also propose to add an exception for coal mine waste refuse piles because the same rationale applies to the construction of those piles. Furthermore, sections 515(b)(11) and 516(b)(4) of SMCRA [136] clearly envision the construction of permanent coal mine waste refuse piles on the land's surface, but there is no requirement to restore the surface of that land to approximate original contour, nor would it be possible to do so. Instead, section 515(b)(11) of the Act [137] requires that the operation ''assure the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to the provisions of the Act.'' Section 516(b)(4) [138] includes similar language for refuse piles associated with underground mines.

We also propose to revise the definition to clarify that, consistent with the legislative history, the potentially confusing placement of the phrase ''including any terracing or access roads'' in the statutory definition does not mean that terraces and access roads must be regraded to the approximate original contour. As explained in the legislative history of the definition of approximate original contour, Congress added this phrase to clarify that the AOC restoration requirement does not prohibit the construction of terraces or the retention of access roads on backfilled areas.[139] Therefore, we propose to add language stating that the requirements of the definition do not prohibit the approval of terracing under 30 CFR 816.102 or 817.102 or the retention of access roads under 30 CFR 816.150 or 817.150.

Finally, we propose to replace the cross-references to 30 CFR 816.133 and 817.133 with cross-references to 30 CFR 780.24(b) and 784.24(b), respectively. This change reflects our proposal to move the relevant portions of 30 CFR 816.133 and 817.133 to 30 CFR 780.24(b) and 784.24(b), respectively.

Backfill

We propose to add a definition of ''backfill'' to clarify the difference between backfill, excess spoil fills, and thick overburden returned to the mined-out area under 30 CFR 816.105, all of which have different permitting requirements and performance standards. We derived our proposed definition from the definition of ''backfill'' in *A Dictionary of Mining, Mineral, and Related Terms* (U.S. Bureau of Mines, 1968). However, we modified that definition by tailoring it to coal mining and the purpose stated in the first sentence of this discussion. Specifically, we propose to define ''backfill,'' when used as a noun, as the spoil and waste materials used to fill the void resulting from an excavation created for the purpose of extracting coal from the earth. When used as a verb, the term would refer to the process of filling that void. The definition also would include all materials used to restore the approximate original contour of the mined-out area. We propose to

[132] 30 U.S.C. 1265(b)(2).

[133] *In re Permanent Surface Mining Regulation Litig. I, Round I (PSMRL I, Round I),* 1980 U.S. Dist. LEXIS 17722 at * 95 (D.D.C. 1980), 14 Env't Rep. Cas. (BNA) 1083, 1107, 10 Envtl. L. Rep. (Envtl. Law Inst.) 20208.

[134] 30 U.S.C. 1291(2).

[135] *Id.*

[136] 30 U.S.C. 1265(b)(11) and 1266(b)(4).

[137] 30 U.S.C. 1265(b)(11).

[138] 30 U.S.C. 1266(b)(4).

[139] See H.R. Rep. No. 95–218, at 178 (1977) and H.R. Rep. No. 95–493, at 112 (1977) (Conf. Rep.).

make conforming changes to the definition of excess spoil, which is discussed below under a separate heading.

Bankfull

We propose to add a definition of this technical and scientific term because we use this term in our proposed regulations to more precisely fix the boundaries of stream buffer zones and riparian corridors and in our proposed stream restoration requirements. Under our proposed definition, bankfull would mean the water level or stage at which a stream, river, or lake is at the top of its banks and any further rise would result in water moving into the flood plain. The proposed definition parallels the one that appears in the National Weather Service glossary.[140]

Biological Condition

We propose to add a definition of biological condition in conjunction with the new permitting requirements and performance standards concerning documentation, protection, and restoration of biological communities in streams. Specifically, we propose to define biological condition as a measure of the ecological health of a stream or segment of a stream as determined by the type, diversity, distribution, abundance, and physiological state of aquatic organisms and communities found in the stream or stream segment. The biological condition of a water body is the ultimate indicator of watershed health because aquatic organisms and communities reflect the cumulative conditions of all other watershed components and processes.[141]

Our proposed rule would require application of a multimetric biological assessment and taxonomic assessment protocol to determine biological condition. See, *e.g.,* proposed 30 CFR 780.19(e) and 784.19(e). Multimetric indices include metrics such as species richness, complexity, and tolerance as well as trophic measures. They provide a quantitative comparison (often referred to as an index of biological or biotic integrity) of the ecological complexity of biological assemblages relative to a regionally-defined reference condition. For example, River Invertebrate Prediction and Classification System models quantify biological condition by comparing the observed taxa at a site to the taxa that would be expected to be present in the absence of human-caused stress.[142]

Our existing regulations do not specifically require collection of the baseline data necessary to determine the biological condition of streams. Consequently, the permit application often lacks specific descriptions of the aquatic community residing in streams within the permit and adjacent areas. The lack of baseline information on the biological condition of streams creates an impediment to determining whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area, as required by sections 507(b) and 510(b)(3) of SMCRA.[143] It also creates an impediment to evaluating whether the operation has been and is being conducted to minimize adverse impacts on fish, wildlife, and related environmental values, as required by sections 515(b)(24) and 516(b)(11) of SMCRA.[144] Furthermore, preparation of a comprehensive cumulative hydrologic impact assessment is not always possible if the permit application does not include information on the biological condition of streams. While the information sometimes may be available from the agencies responsible for implementing the Clean Water Act, those agencies generally do not assess the cumulative loading of substances legally discharged into the receiving stream until the stream becomes impaired.

Cumulative Impact Area

Sections 507(b)(11) and 510(b)(3) of SMCRA [145] require that the regulatory authority prepare an assessment of the probable cumulative impact of all anticipated mining in the area upon the hydrology of the general area. In 1983, we adopted a definition of cumulative impact area to identify both the extent of the area that must be included in this evaluation and the scope of the term ''anticipated mining.'' [146] The first sentence of the 1983 definition mentions only anticipated mining, while the second sentence includes existing operations in the list of the types of operations encompassed by the term ''anticipated mining.'' We propose to resolve this inconsistency by replacing the term ''anticipated mining'' with ''existing and anticipated mining'' or its equivalent.

In addition, we propose to add language clearly specifying that the term ''mining'' includes both surface and underground mining operations. Discharges of water from underground mines can cause material damage to the hydrologic balance outside the permit area, as demonstrated by a 2010 incident in which water discharged from an underground mine resulted in a golden algae bloom in Dunkard Creek in West Virginia and Pennsylvania that caused a major fish kill.[147] Our revised definition would clarify that the cumulative impact area includes the area within which the proposed or actual operation may interact with the impacts of all existing and anticipated surface and underground coal mining operations.

We propose to restructure the definition for clarity. Proposed paragraphs (a) through (c) would specify the areas that must be included in the cumulative impact area.

Proposed paragraph (a) would require that the cumulative impact area include the actual or proposed permit area. The addition of the ''actual or proposed'' language reflects the fact that the cumulative impact area is a concept that applies both before and after permit issuance.

Proposed paragraph (b) would require that the cumulative impact area include the HUC–12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset) [148] watershed or watersheds in which the actual or proposed permit area is located. We propose to add this provision to establish a bright-line standard for the minimum size of the cumulative impact area. For operations that straddle a ridgeline or other watershed boundary, the cumulative impact area must include, at a minimum, the HUC–12 watershed on each side of the ridgeline or other boundary.

Proposed paragraph (c) would provide that, in addition to the areas specified in proposed paragraphs (a) and (b), the cumulative impact area must include any other area within which impacts resulting from an actual or proposed surface or underground coal mining operation may interact with the impacts of all existing and anticipated surface and underground coal mining on surface-water and groundwater systems, including the impacts that existing and

[140] See *http://forecast.weather.gov/glossary.php?word=BANKFULL* (last accessed January 16, 2015).

[141] *http://water.epa.gov/polwaste/nps/watershed/biotic.cfm* (last accessed June 8, 2015).

[142] *Id.*

[143] 30 U.S.C. 1257(b) and 1260(b)(3).

[144] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[145] 30 U.S.C. 1257(b)(1)) and 1260(b)(3).

[146] 48 FR 43956, 43957 (Sept. 26, 1983).

[147] Reynolds, Louis. Update on Dunkard Creek (November 23, 2009). U.S. Environmental Protection Agency, Region 3, Environmental Analysis and Innovation Division, Office of Monitoring and Assessment, Freshwater Biology Team.

[148] See *http://water.usgs.gov/GIS/huc.html* (last accessed September 8, 2014).

anticipated mining will have during mining and reclamation and after final bond release. Proposed paragraphs (c)(1) through (6) would specify the minimum components of the term ''existing and anticipated mining.'' Proposed paragraphs (c)(1) through (3) are substantively identical to paragraphs (a) through (c) of the existing definition.

Proposed paragraph (c)(4) would specify that ''anticipated mining'' includes any proposed surface or underground mining operation for which a person has submitted a request for an authorization, certification, or permit under the Clean Water Act. Inclusion of proposed operations for which the Clean Water Act authorization process has begun would assist in preparation of a more comprehensive analysis on the part of both the permit applicant or permittee and the regulatory authority.

Proposed paragraph (c)(5) would modify paragraph (d) of the existing definition to clarify that anticipated mining includes all lands for which a resource recovery and protection plan has been either approved or submitted to and reviewed by the authorized officer of the Bureau of Land Management under 43 CFR 3482.1(b). The added language would clarify the point at which lands containing leased Federal coal must be included within the cumulative impact area.

Proposed paragraph (c)(6) would specify that anticipated mining includes, for underground mines, all areas of contiguous coal reserves adjacent to an existing or proposed underground mine that are owned or controlled by the applicant. This addition is appropriate because, barring significant changes in economic or regulatory conditions, the mine very likely will be extended into those reserves in the future.

Ecological Function

We propose to add a definition of this term in concert with our proposal to require that permittees restore the ecological function of the segments of perennial and intermittent streams through which they mine. Ecological function includes physical parameters, biological parameters, and a consideration of physical and biological interactions as nutrients and energy are collected and transferred down the stream continuum.[149] Specifically, we propose to define this term as including the role that the stream plays in dissipating energy and transporting water, sediment, organic matter, and nutrients downstream. It also includes the ability of the stream ecosystem to retain and transform inorganic materials needed for biological processes into organic forms (forms containing carbon) and to oxidize those organic molecules back into elemental forms through respiration and decomposition. Finally, the term includes the role that the stream plays in the life cycles of plants, insects, amphibians (especially salamanders), reptiles, fish, birds, and mammals that either reside in the stream or depend upon it for habitat, reproduction, food, water, or protection from predators. The proposed definition is based upon a functional assessment guidebook that the U.S. Army Corps of Engineers developed for ephemeral and intermittent streams in central Appalachia.[150] The biological condition of a stream is one measure of its ecological function.

Ephemeral Stream

We propose to redefine ''ephemeral stream'' in a manner that is substantively identical to the manner in which the U.S. Army Corps of Engineers defines that term in Part F of the 2012 reissuance of the nationwide permits under section 404 of the Clean Water Act. See 77 FR 10184, 10288 (Feb. 21, 2012). Adoption of a substantively identical definition would promote consistency in application and interpretation of that term under both SMCRA and Clean Water Act programs.

We invite comment on whether the definition in the final rule should include language specifying that the U.S. Army Corps of Engineers has the ultimate authority to determine the point at which an ephemeral stream becomes an intermittent stream or a perennial stream and vice versa. Further, if the final rule includes language to that effect, we invite comment on whether the definition also should provide that any determination that the Corps makes concerning these transition points will be controlling for purposes of SMCRA regulatory programs. Commenters should discuss the applicability of two SMCRA provisions in this context. First, section 702(a) of SMCRA [151] provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. Second, section 505(b) of SMCRA [152] provides that any provision of any state law or regulation may not be construed to be inconsistent with SMCRA if it ''provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation[s] than do the provisions of this Act or any regulation issued pursuant thereto.'' In other words, should our regulations allow states to adopt and apply stream definitions in a manner that would protect a greater length of stream than would the Corps determinations?

The primary difference between our existing definition and the Corps definition that we propose to adopt concerns the treatment of snowmelt. Our existing definition classifies streamflow in response to the melting of snow and ice as an ephemeral stream, whereas the Corps definition is silent on this point. The preamble to the Corps definition notes that the Corps declined to accept a recommendation from a commenter that streamflow resulting from snowmelt be classified as an ephemeral stream. The preamble explains that, while snowmelt may contribute to the flow of ephemeral streams, snowmelt also contributes to the flow of intermittent and perennial streams, especially in areas with deep snow packs. The preamble further states that the definition appropriately focuses on the duration of flow and that melting snow should not be considered a precipitation event because the development of a snowpack occurs over the course of a winter season. See 77 FR 10184, 10262 (Feb. 21, 2012).

Excess Spoil

Our existing rules define excess spoil as spoil material disposed of in a location other than the mined-out area. The definition excludes spoil used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in non-steep slope areas. However, the existing definition is silent with respect to the characterization of spoil placed on the mined-out area in excess of the amount of spoil needed to restore the approximate original contour. We propose to revise the definition of excess spoil and add a definition of backfill to more clearly differentiate among backfill, material placed in excess spoil fills, and thick overburden returned to the mined-out area under 30 CFR 816.105.

[149] Vannote, R. L., G. W. Minshall, K. W. Cummins, J. R. Sedell, and C. E. Cushing. The river continuum concept. (1980) *Can. J. Fish. Aquat. Sci.* 37:130–137.

[150] ''Operational Draft Regional Guidebook for the Functional Assessment of High-Gradient Ephemeral and Intermittent Headwater Streams in Western West Virginia and Eastern Kentucky.'' ERDC/EL TR–10–11, July 2010, U.S. Army Engineer Research and Development Center, Vicksburg, MS.

[151] 30 U.S.C. 1292(a).

[152] 30 U.S.C. 1255(b).

Specifically, we propose to define excess spoil as including all spoil material disposed of in a location other than the mined-out area within the permit area. The definition also would include all spoil material placed above the approximate original contour within the mined-out area as part of the continued construction of an excess spoil fill with a toe located outside the mined-out area. The added language concerning continuation of an excess spoil fill onto the mined-out area is intended to ensure that the fill is constructed using consistent standards for the entire structure so that the fill is uniformly stable.

The revised definition would retain the clarification that spoil used to restore the approximate original contour of the mined-out area is not excess spoil. It also would retain the exception for spoil used to blend the mined-out area with the surrounding terrain in non-steep slope areas. We propose to add a new provision clarifying that the definition does not include spoil material placed within the mined-out area in accordance with the thick overburden provisions of 30 CFR 816.105(b)(1), even if it exceeds the amount needed to restore the approximate original contour, unless that material is a continuation of an excess spoil fill. This provision would eliminate any ambiguity regarding thick overburden treatment in the existing rules and is consistent with the thick overburden provisions of section 515(b)(3) of SMCRA,[153] which makes no reference to the excess spoil provisions of section 515(b)(22) of SMCRA [154] in establishing requirements for the placement and grading of spoil within the mined-out area.

In summary, under our proposed rule, the general backfilling and grading requirements of 30 CFR 816.102 or 817.102 would apply to all spoil placed in the mined-out area for the purpose of restoring the approximate original contour within the parameters of those rules. The thick overburden performance standards of 30 CFR 816.105(b) would apply to all spoil placed in or on the mined-out area in excess of the approximate original contour parameters established in 30 CFR 816.102(a)(1) or 817.102(a)(1), with the exception of spoil that is a continuation of an excess spoil fill with a toe located outside the mined-out area. For all operations, the excess spoil disposal requirements of 30 CFR 816.71 and 816.74 or 817.71 and 817.74 would govern the construction of excess spoil fills, including any spoil placed above the approximate original contour within the mined-out area as part of the continuation of an excess spoil fill with a toe located outside the mined-out area.

Fill

We propose to define the term ''fill'' to clarify the meaning of this term as it is used in the context of surface coal mining operations under SMCRA and to differentiate this term from the term ''fill material'' as used and defined in the regulations implementing section 404 of the Clean Water Act.[155] See 33 CFR 323.2(e) and 40 CFR 232.2. Our proposed definition would include only permanent, non-impounding structures constructed for the purpose of disposing of excess spoil and solid coal mine waste, consistent with the common usage of this term in the context of coal mining operations. It would not include any impoundments or temporary structures. It has no relationship to whether construction of the excess spoil or coal mine waste disposal facility involves the discharge of dredged or fill material into waters of the United States under the Clean Water Act.

Fugitive Dust

We propose to remove this definition because it defines a term that we no longer use in our regulations. See the preamble discussions of proposed 30 CFR 780.12(f) and our proposed removal of existing 30 CFR 780.15 and 784.26 for further explanation.

Groundwater

This definition would replace the existing definition of the term ''Ground water.'' We propose to replace the words ''ground water'' with the single word ''groundwater'' throughout our regulations for internal consistency. We also propose to revise the definition to add clarity and to more closely resemble generally-accepted definitions in scientific and trade publications. Specifically, our proposed definition is adapted from Freeze and Cherry (1979) [156] and a publication entitled ''The ABCs of Aquifers.'' [157] Under the proposed rule, ''groundwater'' would mean subsurface water located in those portions of soils and geologic formations that are completely saturated with water; *i.e.,* those zones where all the pore spaces and rock fractures are completely filled with water. We propose to add a sentence clarifying that this term includes subsurface water in both regional and perched aquifers, but that it does not include water in soil horizons that are temporarily saturated by precipitation events.

Perched aquifers occur where subsurface water collects above unsaturated rock formations as a result of a discontinuous impermeable layer.[158] Perched aquifers are fairly common in glacial sediments.[159] They also occur in other sedimentary formations where weathered layers, ancient soils or caliche (found in arid or semiarid areas) have created impermeable zones.[160] Perched aquifers are often removed by surface coal mining operations; they need not be restored unless restoration is needed to prevent material damage to the hydrologic balance outside the permit area.

Highwall Remnant

We propose to remove this definition because the term ''highwall remnant'' is self-explanatory and because the existing definition inappropriately limits the term to remining operations. There is no basis under SMCRA for this limitation.

Hydrologic Balance

The existing definition of hydrologic balance mentions water quality, but focuses on water quantity, water flow and movement, water storage, and changes in the physical state of water. We propose to revise this definition to include provisions relating to water quality and the impact of water quality on the biological condition of streams. Specifically, we propose to add language stating that the term includes interactions that result in changes in the chemical composition or physical characteristics of groundwater and surface water, which may affect the biological condition of streams and other water bodies. The proposed revisions are intended to clarify that water quality is as important as water quantity. They are consistent with the manner and context in which the term ''hydrologic balance'' appears in SMCRA. Sections 507, 508, 510, 515, and 516 of SMCRA[161] contain repeated references to water quality considerations. As summarized in Part II of this preamble, in many cases, adverse impacts on water quality and the resulting change in the biological condition of streams are the principal

[153] 30 U.S.C. 1265(b)(3).

[154] 30 U.S.C. 1265(b)(22).

[155] 33 U.S.C. 1344.

[156] Freeze, R. A., and Cherry, J. A. *Groundwater.* (1979), Prentice-Hall, Englewood Cliffs, NJ, p. 2.

[157] Stone, Andrew. ''The ABCs of Aquifers,'' (May 30, 2010); available at *http://www.nationaldriller.com/articles/85773-the-abcs-of-aquifers* (last accessed September 8, 2014).

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] 30 U.S.C. 1257, 1258, 1260, 1265, and 1266.

cause of material damage to the hydrologic balance outside the permit area as we proposed to define that term in 30 CFR 701.5.

Intermittent Stream

We propose to redefine ''intermittent stream'' in a manner that is substantively identical to the manner in which the U.S. Army Corps of Engineers defines that term in Part F of the 2012 reissuance of the nationwide permits under section 404 of the Clean Water Act. See 77 FR 10184, 10288 (Feb. 21, 2012). Adoption of a substantively-identical definition would promote consistency in application and interpretation of that term under both SMCRA and Clean Water Act programs.

We invite comment on whether the definition in the final rule should include language specifying that the U.S. Army Corps of Engineers has the ultimate authority to determine the point at which an ephemeral stream becomes an intermittent stream or a perennial stream and vice versa. Further, if the final rule includes language to that effect, we invite comment on whether the definition also should provide that any determination that the Corps makes concerning these transition points will be controlling for purposes of SMCRA regulatory programs. Commenters should discuss the applicability of two SMCRA provisions in this context. First, section 702(a) of SMCRA [162] provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. Second, section 505(b) of SMCRA [163] provides that any provision of any state law or regulation may not be construed to be inconsistent with SMCRA if it ''provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation[s] than do the provisions of this Act or any regulation issued pursuant thereto.'' In other words, should our regulations allow states to adopt and apply stream definitions in a manner that would protect a greater length of stream than would the Corps determinations?

Our existing definition has two principal differences with the Corps' definition that we propose to adopt. First, paragraph (b) of our existing definition of an intermittent stream would not consider a stream with a base flow resulting from the melting of a snowpack to be an intermittent stream because the snowpack does not lie below the local water table and because snowmelt is not considered groundwater. However, the preamble to the definition of ''ephemeral stream'' that the Corps adopted as part of the 2012 reissuance of the nationwide permits under section 404 of the Clean Water Act states that snowmelt contributes to the flow of intermittent and perennial streams, especially in areas with deep snow packs, and that melting snow should not be considered a precipitation event because the development of a snowpack occurs over the course of a winter season. See 77 FR 10184, 10262 (Feb. 21, 2012). In essence, the preamble discussion would allow a stream originating from a melting snowpack to be considered an intermittent stream even though the definition of ''intermittent stream'' requires groundwater as the source of base flow. We invite comment on whether we should revise our proposed definition of ''intermittent stream'' to include language consistent with the discussion of snowmelt in the preamble to the Corps' definition of ''ephemeral stream.''

Second, we propose to remove paragraph (a) of our existing definition of ''intermittent stream.'' That paragraph automatically designates any stream or reach of a stream that drains a watershed of at least one square mile as an intermittent stream. This provision is inconsistent with generally-accepted stream classification systems because it is based on watershed size rather than streambed characteristics and duration and source of streamflow. For example, one study in West Virginia found perennial streams with a median drainage area of less than 0.1 square mile and intermittent flows with a median drainage area of 14.5 acres, both of which are much smaller than one square mile (640 acres).[164] On the other hand, ephemeral streams in arid regions can have drainage areas of dozens of square miles. Furthermore, the existing definition could be construed as meaning that all streams with a watershed greater than one square mile are intermittent, even when they would otherwise be classified as perennial streams.

We originally adopted the watershed-size criterion because Alabama and Illinois found it easy to administer and apply and because we believed that a stream with a watershed of that size has a potential for flood volumes that would necessitate application of the stream-channel diversion requirements.[165] As explained below, we no longer find either reason compelling.

First, the easy-to-administer argument is valid only if the watershed-size criterion was the only criterion for determining whether a stream is intermittent. However, that is not the case. The existing definition also provides that any stream that is below the local water table for at least part of the year and obtains its flow from both surface runoff and groundwater discharge is an intermittent stream. As discussed above, both perennial and intermittent streams often have watersheds much smaller than one square mile, so the permit applicant and the regulatory authority still must conduct a hydrological evaluation of streams in watersheds smaller than one square mile to determine whether they are nonetheless intermittent or perennial based on the source of streamflow.

With respect to the second reason, the possibility of flood damage from diversion of an otherwise-ephemeral stream with a watershed greater than one square mile does not justify retention of a definition of intermittent stream that is not consistent with definitions used by the U.S. Army Corps of Engineers and the scientific community. The preamble to 30 CFR 816.43 and 817.43 requests comment on whether we should revise our regulations governing diversions to adopt design requirements based on whether the diversion is permanent or temporary rather than on whether the flow being diverted is perennial, intermittent, or ephemeral.

Land Use

We propose to revise the introductory text of this definition for clarity and to add a sentence specifying that the individual land use categories in the definition are the categories to be used in the regulatory program. In addition, we propose to remove the third sentence of the first paragraph of the existing definition. That sentence reads: ''Changes of land use from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority.'' This sentence is inconsistent with the revisions that we are proposing to 30 CFR 780.24 and 784.24, as discussed later in this preamble. Under our proposed revisions to those rules, a proposed postmining

[162] 30 U.S.C. 1292(a).

[163] 30 U.S.C. 1255(b).

[164] Paybins, Katherine M., ''Flow Origin, Drainage Area, and Hydrologic Characteristics for Headwater Streams in the Mountaintop Coal-Mining Region of Southern West Virginia, 2000–2001.'' Water-Resources Investigations Report 02–4300, U.S. Department of the Interior Geological Survey.

[165] 44 FR 14932 (Mar. 13, 1979).

land use that differs from the actual premining land use would not require approval as a higher or better use if the land as it existed before mining was already capable of supporting that use in its existing condition. Moreover, this change would better implement section 515(b)(2) of SMCRA,[166] which provides that the permittee must ''restore the land affected to a condition capable of supporting the uses [not just the use that existed immediately prior to mining] which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood.'' This statutory language indicates that the alternative postmining land use requirements in our rules should apply only when the applicant or permittee proposes a higher or better use, not a use that the land was capable of supporting before mining.

We also propose to revise the definition of cropland in paragraph (a) of the definition of land use to more accurately and inclusively describe the types of plantings and planting settings associated with that land use category. Specifically, we propose to include commercial nursery plantings, vegetables, fruits, nuts, and other plants typically grown in fields, orchards, vineyards, and similar settings involving intensive agricultural uses.

Material Damage

We propose to revise a cross-reference to 30 CFR 784.20 in this definition to be consistent with our proposed redesignation of existing § 784.20 as § 784.30. We propose no other changes to this definition, which applies only in the context of damage that occurs as a result of subsidence caused by underground mining operations. It is not related to, nor does it replace or supersede, the definition of ''material damage to the hydrologic balance outside the permit area'' or requirements related to that definition.

Material Damage to the Hydrologic Balance Outside the Permit Area

Our existing regulations do not define this term, which, as discussed below, is central to one of the principal findings required for approval of a permit application. Section 510(b)(3) of SMCRA [167] specifies that the regulatory authority may not approve a permit application unless the regulatory authority has ''made an assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 507(b).'' This assessment is generally referred to as the cumulative hydrologic impact assessment (CHIA). Section 507(b)(11) of SMCRA,[168] the pertinent part of the SMCRA section referenced in the quote above, requires that each permit application include—

> a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impact of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability.

Section 510(b)(3) also specifies that the regulatory authority may not approve a permit unless the application affirmatively demonstrates and the regulatory authority finds in writing that the proposed operation ''has been designed to prevent material damage to the hydrologic balance outside the permit area.'' However, SMCRA does not define or explain the meaning of the term ''material damage to the hydrologic balance outside the permit area.''

Our existing regulations do not fully integrate the implementation of sections 507(b)(11) and 510(b)(3) of SMCRA [169] because they do not require collection of sufficient data for the proposed permit area and surrounding areas to prepare an adequate CHIA and because they do not define or establish criteria for determining material damage to the hydrologic balance outside the permit area. In particular, they do not specifically require data related to the biological community in streams or data comprised of a complete suite of the chemical and physical constituents and properties of groundwater and surface water. Without sound baseline information on surface-water and groundwater quality and quantity and the biological communities in streams, the regulatory authority cannot prepare an adequate cumulative hydrologic impact assessment or determine whether the proposed mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area. This proposed rule is intended to correct this problem by adding a definition of the term ''material damage to the hydrologic balance outside the permit area'' and by refining and expanding baseline data requirements for permit applications, which we discuss later in this preamble in connection with proposed 30 CFR 780.19. These two changes would promote more effective implementation of sections 507(b)(11) and 510(b)(3) of SMCRA [170] and, in combination with the improved monitoring requirements in proposed 30 CFR 780.23 and 816.35 through 816.37, would better protect streams.

In developing a definition of ''material damage to the hydrologic balance outside the permit area,'' we looked to our previous statements on this matter in preambles to our regulations concerning hydrology and geology. We also examined other provisions of SMCRA and the legislative history of section 510(b)(3) of SMCRA.[171] Several commenters on a proposed rule on hydrology and geology that we published on June 25, 1982 (47 FR 27712), requested that we add a definition of material damage to the hydrologic balance outside the permit area to our regulations. However, the preamble to the final rule that we adopted in response to that proposed rule explains that we declined the requests for a definition ''because the gauges for measuring material damage may vary from area to area and from operation to operation. OSM[RE] has not established fixed criteria, except for those established under §§ 816.42 and 817.42 related to compliance with water-quality standards and effluent limitations.'' [172] The preamble provides no further explanation of that statement, but it does state that we agreed with commenters that ''regulatory authorities should establish criteria to measure material damage.'' [173]

In the 30 years since we published that preamble, very few states have adopted a definition or established programmatic criteria for material damage to the hydrologic balance outside the permit area. Therefore, adoption of a federal definition of material damage to the hydrologic balance outside the permit area is both necessary and appropriate to ensure effective and consistent application of that term.

In addition, the absence of either a federal definition of or criteria for material damage to the hydrologic balance outside the permit area has made it difficult for us to determine whether states are effectively implementing their counterparts to 30 CFR 773.15(c) and section 510(b)(3) of

[166] 30 U.S.C. 1265(b)(2).

[167] 30 U.S.C. 1260(b)(3).

[168] 30 U.S.C. 1257(b)(11).

[169] 30 U.S.C. 1257(b)(11) and 1260(b)(3).

[170] 30 U.S.C. 1257(b)(11) and 1260(b)(3).

[171] 30 U.S.C. 1260(b)(3).

[172] 48 FR 43973 (Sept. 26, 1983).

[173] *Id.*

SMCRA.[174] As we have long recognized, definitions can help us more effectively implement SMCRA: ''Many of the terms used by Congress are not defined or explained and thus are too vague to be enforced effectively until given more precise meanings.'' [175]

The legislative history of section 510(b)(3) of SMCRA [176] provides little illumination as to the meaning of material damage to the hydrologic balance outside the permit area and thus is of little assistance in developing a definition. The term first appears in H.R. 2, the House version of the legislation that ultimately became SMCRA. Earlier unsuccessful precursors to SMCRA used the phrase ''significant irreparable offsite damage,'' which also was undefined. In explaining the change in terminology, the Committee report states only that the previous phrase was ''deleted in favor of language that specifies that the mine is to be designed to prevent damage to the hydrologic balance outside the permit area.'' [177] There is no discussion of whether, in making this substitution, Congress intended to eliminate the elements of ''significant'' and ''irreparable'' from the standard, or whether the new language is merely a nonsubstantive change in wording.

When we declined to define ''material damage to the hydrologic balance outside the permit area'' in 1983, we noted that the only fixed criteria that we established at the time for such damage were those included in ''§§ 816.42 and 817.42 related to compliance with water-quality standards and effluent limitations.'' However, we do not think it appropriate to interpret this preamble statement as meaning that any exceedance of water quality standards or effluent limitations, no matter how minor and no matter what the cause, would constitute material damage to the hydrologic balance outside the permit area.

Our proposed definition reflects our conclusion that the mere possibility of an acid or toxic discharge or other type of degradation of surface water or groundwater does not provide an adequate basis for permit denial on the grounds that it would not prevent material damage to the hydrologic balance outside the permit area. Instead, for a permit to be denied on this basis, there must be some probability of the formation of acid or toxic mine drainage that may continue after the completion of mining and land reclamation, and there must be a reasonable likelihood that the reclamation plan proposed by the applicant will not be capable of preventing the formation of that drainage. We base our conclusion, in part, on our prior statements relating to the preparation of cumulative hydrologic impact assessments. We find these statements to be particularly instructive because section 510(b)(3) of SMCRA,[178] which refers to those assessments, also contains the term ''material damage to the hydrologic balance outside the permit area.'' In particular, in the preamble to the 1983 version of 30 CFR 780.21(g), we stated that the cumulative hydrologic impact assessment must be ''accomplished in an environmentally and scientifically sound fashion,'' and that it ''cannot reasonably be extended to include remote and speculative impacts.'' [179] Instead, we determined that the assessment ''should be based upon those impacts that have a reasonable likelihood for occurring and which are sufficiently defined to enable the regulatory authority to reach a decision.'' [180]

That preamble, however, does not define or otherwise clarify the meaning of ''reasonable likelihood'' and ''sufficiently defined.'' Thus, we looked to other sources, including related provisions of SMCRA, to provide some guidance as to what material damage to the hydrologic balance outside the permit area means in the context of water quality parameters for which there are no effluent limitations. Section 508(a)(13) of SMCRA [181] requires that each reclamation plan include—

> [A] detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:
>
> (A) the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process;
>
> (B) the rights of present users to such water; and
>
> (C) the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured[.]

In 1979, we noted that this provision of SMCRA, along with sections 102, 510(b)(3), and 522(a) through (d) of the Act,[182] ''requires that mining not be permitted at all, if reclamation cannot be feasibly performed to protect water uses. Thus, to the extent that mining would result in unacceptable discharges of sulfates and total dissolved solids, the regulatory authority should not issue permits for the areas involved.'' [183] As that passage from the 1979 preamble indicates, we have never interpreted section 508(a)(13) of SMCRA [184] to operate as an absolute prohibition on mining operations that would have adverse effects on the hydrologic balance. In our judgment, this provision also does not supersede the performance standards in sections 515 and 516 of SMCRA,[185] which recognize that mining may cause some adverse effects on surface water and groundwater, particularly within the permit area. See, *e.g.,* section 515(b)(10) of SMCRA,[186] which provides that surface coal mining and reclamation operations must be conducted ''to minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' Significantly, this provision of SMCRA uses the term ''minimize'' rather than ''prevent'' when describing the standard that surface coal mining and reclamation operations must meet in this context.

With these considerations in mind, we have designed our proposed definition of material damage to the hydrologic balance outside the permit area to protect all designated uses of surface water and all existing and reasonably foreseeable uses of surface water and groundwater outside the permit area. Specifically, in relevant part, under our proposed definition, ''material damage to the hydrologic balance outside the permit area'' would mean any adverse impact from surface or underground mining operations on the quantity or quality of surface water or groundwater, or on the biological condition of a perennial or intermittent stream, that would preclude any designated surface-water use under sections 101(a) and 303(c) of the Clean Water Act [187] or any existing or reasonably foreseeable use of surface water or groundwater outside the permit area. Our proposed definition is consistent with our statement in the 1979 preamble that mining should not be permitted at all if reclamation cannot feasibly protect water uses.[188]

[174] 30 U.S.C. 1260(b)(3).

[175] 44 FR 15148 (Mar. 13, 1979).

[176] 30 U.S.C. 1260(b)(3).

[177] H.R. Rep. No. 218, at 65 (1977).

[178] 30 U.S.C. 1260(b)(3).

[179] 48 FR at 43972 (Sept. 26, 1983).

[180] *Id.*

[181] 30 U.S.C. 1258(a)(13).

[182] 30 U.S.C. 1202, 1260(b)(3), and 1272(a) through (d).

[183] 44 FR 15156 (Mar. 13 1979).

[184] 30 U.S.C. 1258(a)(13).

[185] 30 U.S.C. 1265 and 1266.

[186] 30 U.S.C. 1265(b)(10).

[187] 33 U.S.C. 1251(a) and 1313(c).

[188] 44 FR 15156 (Mar. 13, 1979).

States have developed multimetric bioassessment protocols for use in determining the biological condition of streams and other surface waters for purposes of preparing the water quality inventory required under section 305(b) of the Clean Water Act. Multimetric indices include metrics such as species richness, complexity, and tolerance as well as trophic measures. They provide a quantitative comparison (often referred to as an index of biological or biotic integrity) of the ecological complexity of biological assemblages relative to a regionally-defined reference condition. Under proposed 30 CFR 780.19(e)(2) and 784.19(e)(2), states would be required to establish a correlation between these index values and each designated use under sections 101(a) and 303(c) of the Clean Water Act, as well as any other existing or reasonably foreseeable uses. In other words, we anticipate that the SMCRA regulatory authority, with assistance from the appropriate Clean Water Act agencies, will define the range of index values required to support each existing, reasonably foreseeable, and designated use of the stream segment in question. Any change in the biological condition of the stream or other surface-water body, as documented by index scores resulting from use of the bioassessment protocol for monitoring purposes, that would preclude attainment or maintenance of an existing, reasonably foreseeable, or designated use of surface water would constitute material damage to the hydrologic balance outside the permit area if the change in scores is a result of the SMCRA operation. We seek comment on the effectiveness of using index scores from bioassessment protocols to ascertain impacts on existing, reasonably foreseeable, or designated uses. If you disagree with the use of index scores from bioassessment protocols, please identify a viable and scientifically-valid alternative.

The regulations implementing the Clean Water Act define ''existing uses'' as ''those uses actually attained in a waterbody on or after November 28, 1975, whether or not they are included in the water quality standards.'' See 40 CFR 131.3. In the context of this proposed definition, we intend to interpret the term ''existing uses'' in a similar fashion; *i.e.,* existing uses would be those uses in existence at the time of preparation of the permit application, regardless of whether those uses are designated uses. Alternatively, we may replace the term ''existing uses'' with ''premining uses'' for purposes of clarity. We invite comment on this topic.

The second part of the proposed definition of ''material damage to the hydrologic balance outside the permit area'' provides that this term means any adverse impact from surface coal mining and reclamation operations or from underground mining activities, including any adverse impacts from subsidence that may occur as a result of underground mining activities, on the quality or quantity of surface water or groundwater, or on the biological condition of a perennial or intermittent stream, that would impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* This provision is intended to ensure compliance with both the Endangered Species Act and the fish and wildlife protection provisions of sections 515(b)(24) and 516(b)(11) of SMCRA. We also are considering alternative language for the second part of the definition. That alternative would replace the phrase ''that would impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*'' with ''that would jeopardize the continued existence of threatened or endangered species, or result in the destruction or adverse modification of designated critical habitat, outside the permit area in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*'' The second alternative would parallel the language of existing and proposed 30 CFR 816.97(b) and 817.97(b).

State water quality standards and associated water quality criteria provide a starting point for establishment of material damage criteria under SMCRA for surface waters, but they are not the endpoint. SMCRA material damage criteria must be no less stringent than Clean Water Act water quality standards and criteria in all cases, but, in some situations, they may need to be more stringent to protect unique uses or to comply with the Endangered Species Act. In addition, the SMCRA regulatory authority may need to establish numerical material damage criteria for parameters of concern for which there are no numerical water quality standards or water quality criteria under the Clean Water Act.

The Clean Water Act does not apply to groundwater, so the SMCRA regulatory authority would need to use best professional judgment to establish material damage criteria to protect existing and reasonably foreseeable uses of groundwater. Material damage criteria for groundwater also would need to take into consideration the needs of any threatened or endangered species.

The proposed definition does not differentiate between permanent or long-term impacts and temporary or short-term impacts. Any impact that would preclude a designated, existing, or reasonably foreseeable use of surface water outside the permit area, or an existing or reasonably foreseeable use of groundwater outside the permit area, would constitute material damage to the hydrologic balance, regardless of the duration of the impairment. Isolated noncompliant discharges would not be considered material damage unless those discharges are of a magnitude sufficient to preclude a protected use. We invite comment on whether the definition should exclude temporary adverse impacts if the permit applicant can demonstrate that there will be no long-term adverse impacts after mining is completed.

Nothing in the proposed definition is intended to supersede the water supply replacement provisions of sections 717 and 720 of SMCRA.[189] In other words, material damage to the hydrologic balance outside the permit area would not exist solely because the operation destroys or damages protected water supplies, provided that the permittee replaces those supplies in accordance with applicable regulatory program requirements (*i.e.,* proposed 30 CFR 816.40 or 817.40) and the definition of ''replacement of water supply'' in 30 CFR 701.5.

The definition would apply to adverse impacts from subsidence resulting from underground mining operations and to other adverse impacts resulting from underground mining operations; *e.g.,* dewatering a stream by mining through a fracture zone or dewatering an aquifer or saturated zone that serves as a water supply for legitimate uses. It would not be limited to the impacts of surface mining activities or the impacts of activities conducted on the surface of land in connection with an underground coal mine. Section 510(b)(3) of SMCRA[190] applies to all applications for permits or permit revisions. This provision has never contained an exception for impacts from underground mining operations or for any other type of surface coal mining operations for which a permit is required.

[189] 30 U.S.C. 1307 and 1309a.

[190] 30 U.S.C. 1260(b)(3).

Paragraphs (a) and (d) of section 516 of SMCRA[191] require that the Secretary take into consideration the distinct difference between surface and underground coal mining when promulgating regulations for underground mining operations. However, this provision does not justify allowing underground mining operations or subsidence resulting from underground mining operations to dewater or degrade a stream to the extent of precluding an existing, reasonably foreseeable, or designated use of that stream. Doing so would hold underground mines to a lesser standard of environmental protection than surface mines. Nothing in the environmental protection purposes of SMCRA, as set forth in paragraphs (a), (c), (d), and (f) of section 102 of the Act,[192] suggests or supports the adoption of a lesser standard for underground mines.

We are aware of concerns that including impacts from subsidence in the definition could effectively prohibit use of the longwall mining method or other high-extraction methods of underground mining to recover a substantial proportion of coal reserves. However, application of this definition to the area overlying proposed underground workings and the area within a reasonable angle of draw from the perimeter of those workings would not prohibit all mining operations that would result in subsidence of streams. It would only prohibit mining operations that would result in dewatering of a stream to the extent that the stream would no longer be able to support existing or reasonably foreseeable uses or designated uses of the stream under the Clean Water Act and for which there are no viable measures to prevent this impact. Our draft regulatory impact analysis found that the proposed rule, including this definition, would not strand or sterilize any reserves; *i.e.,* the proposed rule would not make any coal reserves that are technically and economically feasible to mine under baseline conditions unavailable for extraction.

Underground mine operators cannot avoid application of section 510(b)(3) of SMCRA[193] by drawing the permit boundaries for the mine to include undisturbed areas that may be affected by subsidence. In revising the definition of ''permit area'' in 1983, we specifically rejected a suggestion that the definition should include all areas overlying underground workings. Instead, we stated that the permit area consists of all ''areas for which reclamation operations are planned and for which the performance bond can be accurately set,'' which, we further explain, would not include areas with subsidence potential but no planned disturbance.[194] We recognize that some state regulatory programs may include the area overlying the proposed underground workings and other undisturbed areas with subsidence potential within their definitions of ''permit area.'' Should our proposed definition of material damage to the hydrologic balance outside the permit area become final, those states would need to specify that the prohibition on the approval of permit applications for operations that would result in material damage to the hydrologic balance outside the permit area applies to all lands to which that prohibition would apply under the federal regulations. In other words, state regulatory authorities would have to ensure that the prohibition would apply to all lands overlying the underground mine workings and to all lands within a reasonable angle of draw[195] from the perimeter of those workings, if those lands are not otherwise disturbed by surface operations or facilities associated with the underground mine.

Mountaintop Removal Mining

We propose to consolidate the descriptions of mountaintop removal mining operations in existing 30 CFR 785.14(b) and 824.11(a)(2) and (3) into a new definition in § 701.5 for clarity and ease of use. This new definition is consistent with section 515(c)(2) of SMCRA,[196] which pertains to operations that ''remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmining uses in accord with the requirements of this section.'' We anticipate that this definition also may be useful in correcting misconceptions about the meaning of this term and what types of operations it includes.

Occupied Residential Dwelling and Structures Related Thereto

We propose to revise a cross-reference to 30 CFR 784.20 in this definition to be consistent with our proposed redesignation of existing § 784.20 as § 784.30. We propose no other substantive revisions to this definition—only a plain language revision to the last sentence.

Parameters of Concern

We propose to add a definition of this term because we use this term extensively in our proposed rule. Under the proposed definition, parameters of concern would consist of those chemical or physical characteristics or properties of surface water or groundwater that could be altered by mining activities in a manner that would adversely impact the quality of surface water or groundwater or the biological condition of a stream.

Perennial Stream

We propose to redefine ''perennial stream'' in a manner that is substantively identical to the manner in which the U.S. Army Corps of Engineers defines that term in Part F of the 2012 reissuance of the nationwide permits under section 404 of the Clean Water Act. See 77 FR 10184, 10288 (Feb. 21, 2012). Adoption of a substantively identical definition would promote consistency in application and interpretation of that term under both SMCRA and Clean Water Act programs.

We invite comment on whether the definition in the final rule should include language specifying that the U.S. Army Corps of Engineers has the ultimate authority to determine the point at which an ephemeral stream becomes an intermittent stream or a perennial stream and vice versa. Further, if the final rule includes language to that effect, we invite comment on whether the definition also should provide that any determination that the Corps makes concerning these transition points will be controlling for purposes of SMCRA regulatory programs. Commenters should discuss the applicability of two SMCRA provisions in this context. First, section 702(a) of SMCRA[197] provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. Second, section 505(b) of SMCRA[198] provides that any provision of any state law or regulation may not be construed to be inconsistent with SMCRA if it ''provides for more stringent land use and environmental controls and regulations of surface coal mining and

[191] 30 U.S.C. 1266(a) and (d).

[192] 30 U.S.C. 1202(a),(c),(d), and (f).

[193] 30 U.S.C. 1260(b)(3).

[194] 48 FR 14820 (Apr. 5, 1983).

[195] The angle of draw would be determined on a site-specific basis after evaluating the thickness of the strata overlying the coal seam, the lithology of the strata overlying the coal seam, and the thickness of the coal seam mined.

[196] 30 U.S.C. 1265(c)(2).

[197] 30 U.S.C. 1292(a).

[198] 30 U.S.C. 1255(b).

reclamation operation[s] than do the provisions of this Act or any regulation issued pursuant thereto.'' In other words, should our regulations allow states to adopt and apply stream definitions in a manner that would protect a greater length of stream than would the Corps determinations?

Our existing definition has two principal differences with the Corps' definition that we propose to adopt. First, our existing definition of a perennial stream would not consider a stream with a base flow resulting from the melting of a snowpack to be a perennial stream because the snowpack does not lie below the local water table and because snowmelt is not considered groundwater. However, the preamble to the definition of ''ephemeral stream'' that the Corps adopted as part of the 2012 reissuance of the nationwide permits under section 404 of the Clean Water Act states that snowmelt contributes to the flow of intermittent and perennial streams, especially in areas with deep snow packs, and that melting snow should not be considered a precipitation event because the development of a snowpack occurs over the course of a winter season. See 77 FR 10184, 10262 (Feb. 21, 2012). In essence, the preamble discussion would allow a stream originating from a melting snowpack to be considered a perennial stream even though the definition of ''perennial stream'' requires groundwater as the source of base flow. We invite comment on whether we should revise our proposed definition of ''perennial stream'' to include language consistent with the discussion of snowmelt in the preamble to the Corps' definition of ''ephemeral stream.''

Second, the Corps' definition of ''perennial stream'' refers to continuous flow year-round ''during a typical year.'' Our existing definition refers to continuous flow during all of the calendar year. The Corps' definition—and hence our proposed definition—reflect the fact that perennial streams or segments of those streams may cease flowing during periods of sustained below-normal precipitation. Our proposed adoption of the Corps' definition would have the effect of clarifying that those stoppages do not result in reclassification of the stream as intermittent.

Reclamation

The existing definition of reclamation in 30 CFR 701.5 provides that this term ''means those actions taken to restore mined land as required by this chapter to a postmining land use approved by the regulatory authority.'' This definition is too narrow and does not fully implement SMCRA.

First, the existing definition applies only to the mined area, not to the entire disturbed area. Section 102(e) of SMCRA [199] states that one of the purposes of SMCRA is to ''assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations.'' Among other things, the definition of ''surface coal mining operations'' in section 701(28) of SMCRA [200] includes all activities conducted on the surface of lands in connection with a surface coal mine. Those activities are not limited to mined areas. In addition, paragraph (B) of the definition includes ''the areas upon which such activities occur or where such activities disturb the natural land surface.'' Therefore, we propose to apply the definition to the entire disturbed area, rather than limiting it to the mined area.

Second, the existing definition includes only actions taken to restore land to an approved postmining land use, not to all actions taken to restore land and water to the conditions required by the Act and regulatory program. Third, the existing definition implies that the land must be restored to an actual postmining land use when, in fact, section 515(b)(2) of SMCRA[201] requires only that the land be restored to a condition in which it is capable of supporting the uses it was capable of supporting prior to any mining or, subject to certain restrictions, higher or better uses.

The proposed definition corrects these deficiencies. Our proposed rule would define reclamation as meaning those actions taken to restore the mined land and associated disturbed areas to a condition in which the site is (1) capable of supporting the uses it was capable of supporting prior to any mining or any higher or better uses approved by the regulatory authority, and (2) meets all other requirements of the permit and regulatory program that pertain to restoration of the site. In addition, our proposed definition specifically details what reclamation means for sites with discharges that require treatment. For those sites, we propose to revise the definition to specify that the term also includes those actions taken or that must be taken to eliminate, remediate or treat those discharges, including both discharges from the mined area and all other discharges that are hydrologically connected to either the mined area or the mining operation, regardless of whether those discharges are located within the disturbed area.

However, nothing in this proposed definition should be construed as meaning that the regulatory authority may approve a permit application for an operation that will cause, or that is likely to cause, a postmining discharge that requires treatment to prevent pollution. Doing so would violate SMCRA as explained in the acid mine drainage policy statement that we issued on March 31, 1997.[202]

Reclamation Plan

We propose to add this definition to clarify which provisions of our permit application requirements are considered part of the reclamation plan. Section 701(21) of SMCRA [203] defines ''reclamation plan'' as ''a plan submitted by an applicant for a permit under a State program or Federal program which sets forth a plan for reclamation of the proposed surface coal mining operations pursuant to section 508 [of SMCRA.]'' In this proposed rule, we propose to adopt a streamlined version of the statutory definition that complies with plain language principles, eliminates the unnecessary reference to state or federal programs, and contains adaptations needed to reflect the structure and organization of the regulations that correspond to the reclamation plan requirements of SMCRA. Specifically, the proposed rule would replace the reference to section 508 of SMCRA [204] with references to 30 CFR parts 780, 784, and 785. Part 780 contains the rules that implement section 508 of SMCRA.[205] Part 784 is the underground mining counterpart of part 780. Part 785 contains permit application requirements, including reclamation plan requirements, that apply to special categories of mining.

Renewable Resource Lands

We propose to revise this definition to clarify that it includes recharge areas for surface waters, not just recharge areas for underground waters. We find no legal or technical reason to exclude recharge areas for lakes, ponds, and wetlands from classification as renewable resource lands. Section

[199] 30 U.S.C. 1202(e).

[200] 30 U.S.C. 1291(28).

[201] 30 U.S.C. 1265(b)(2).

[202] ''Policy Goals and Objectives on Correcting, Preventing and Controlling Acid/Toxic Mine Drainage,'' OSMRE, March 31, 1997. Available at *www.osmre.gov/lrg/docs/amdpolicy033197.pdf* (last accessed August 27, 2014).

[203] 30 U.S.C. 1291(21).

[204] 30 U.S.C. 1258.

[205] 30 U.S.C. 1258.

522(a)(3)(C) of SMCRA [206] uses this term in the context of establishing criteria for designating lands as unsuitable for certain types of surface coal mining operations. Specifically, it provides that lands are eligible for designation if surface coal mining operations would ''affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply . . .'' This statutory provision further provides that those lands ''include aquifers and aquifer recharge areas,'' but it does not limit the scope of that provision to those areas. Many towns and cities depend upon surface-water reservoirs for their water supply, which means that paragraph (a)(3)(C) would include the watersheds of those reservoirs. Surface disturbances like mining that involve removal of vegetation can significantly impact both the quantity and quality of water available from those watersheds.

Replacement of Water Supply

We propose to revise this definition by moving existing paragraphs (a) and (b), which describe how the water supply replacement obligation may be satisfied, to the performance standards at 30 CFR 816.40 and 817.40. Existing paragraphs (a) and (b) of the definition are more appropriately categorized as performance standards, which means that they should be codified as part of the performance standards in subchapter K, not as part of the definition of this term.

Temporary Diversion

We propose to revise this definition in a manner that avoids using part of the term itself (''diversion'') as part of the definition. In addition, the existing definition, which includes only diversions of streams and overland flow, could be construed as excluding diversion channels used to convey surface runoff or pit water to a siltation structure or treatment facility. We propose to revise the definition to specifically include those channels.

Waters of the United States

To promote consistency with the Clean Water Act, we propose to define this term as having the same meaning as the corresponding definition in 40 CFR 230.3(s), which is part of the Section 404(b)(1) Guidelines under the Clean Water Act

[206] 30 U.S.C. 1272(a)(3)(C).

C. Part 773: Requirements for Permits and Permit Processing

1. Section 773.5: How must the regulatory authority coordinate the permitting process with requirements under other laws?

Section 773.5 specifies that each regulatory program must provide for the coordination of review and issuance of SMCRA permits with applicable provisions of various federal laws. It implements, in part, section 503(a)(6) of SMCRA,[207] which requires that each state regulatory program establish ''a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations.''

We propose to add the Clean Water Act, 33 U.S.C. 1251 *et seq.,* to the list of laws for which coordination is required under both state and federal regulatory programs. Almost all surface coal mining operations require Clean Water Act permits and both SMCRA and the Clean Water Act are concerned with protection of water quality, so it makes sense to coordinate the SMCRA and Clean Water Act permitting processes. Coordination of the SMCRA and Clean Water Act permitting processes also would assist in reducing or eliminating potential conflicts between SMCRA and Clean Water Act permits. That outcome would be consistent with section 702(a) of SMCRA,[208] which provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act.

In addition, we propose to add the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4371 *et seq.,* to the list of laws for which a coordination process is required under federal regulatory programs. There is no need or basis to apply this coordination requirement to state regulatory programs approved under SMCRA because the Departmental Manual excludes permit applications under state SMCRA regulatory programs from NEPA compliance. See 516 DM 13.3.

Finally, we propose to clarify that only federal regulatory programs must establish a process for coordination with the National Historic Preservation Act of 1966 (NHPA), 54 U.S.C. 300101 *et seq.* This change is consistent with *National Mining Association* v. *John M. Fowler,* 324 F.3d 752 (D.C. Cir. 2003), in which the court held that projects licensed or permitted by state and local agencies pursuant to a delegation or approval by a federal agency are not federally funded or federally licensed undertakings for purposes of section 106 of the NHPA.

[207] 30 U.S.C. 1253(a)(6).

[208] 30 U.S.C. 1292(a).

2. Section 773.7: How and when will the regulatory authority review and make a decision on a permit application?

We propose to restructure 30 CFR 773.7(a) to improve clarity and eliminate a grammatical error in the existing language. There are no substantive revisions to this paragraph.

We also propose to add 30 CFR 773.7(b)(2), which would list the factors that the regulatory authority must consider in determining what constitutes a reasonable time for notifying a permit applicant whether the application has been approved or disapproved, in whole or in part. The factors in proposed paragraphs (b))(2)(i) through (iv) reflect the factors listed in section 514(b) of SMCRA.[209] Proposed paragraph (b)(2)(v) would require consideration of the time required to complete the interagency permitting coordination process under 30 CFR 773.5.

Finally, we propose to redesignate existing 30 CFR 773.7(b) as 30 CFR 773.7(c) and revise that paragraph to specifically state that an applicant for the transfer, assignment, or sale of permit rights has the burden of proof for establishing that the application is in compliance with all regulatory program requirements. We propose to make this change because the transfer, assignment, or sale of permit rights is a type of permit revision, which means that an application of that nature is subject to section 510(a) of SMCRA.[210] In relevant part, that paragraph of the Act states that the applicant for a permit or permit revision has the burden of establishing that the application is in compliance with all requirements of the applicable regulatory program.

3. Section 773.15: What findings must the regulatory authority make before approving a permit application?

Most of the changes that we propose to make to this section result from either the application of plain language principles or an effort to clarify the meaning and scope of the findings that the regulatory authority must make before approving a permit application.

Proposed paragraph (c)(2) would clarify that the finding that the proposed

[209] 30 U.S.C. 1264(b).

[210] 30 U.S.C. 1260(a).

permit area is not within an area designated as unsuitable for surface coal mining operations under 30 CFR parts 762 and 764 or 769 applies only to lands that are designated as unsuitable for the type of surface coal mining operations that the permit applicant proposed to conduct. For example, lands may be designated as unsuitable only for surface mining, in which case the regulatory authority may approve a permit for an underground mine. Similarly, proposed paragraph (c)(3) would clarify that the finding that the proposed permit area is not within an area subject to the prohibitions of 30 CFR 761.11 does not apply in situations in which one or more of the exceptions (valid existing rights, the existing operation exemption, landowner consent, joint approval, etc.) to those prohibitions applies.

We propose to revise the finding in paragraph (e) concerning the assessment of the cumulative hydrologic impacts of mining by adding paragraph (e)(3), which would require that the regulatory authority find that it has inserted into the permit criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis, expressed in numerical terms for each parameter of concern, as required by § 780.21(b) or § 784.21(b). Our proposed revision is intended to ensure that permit-specific criteria are both established and readily available to the permittee, inspectors, and permit reviewers.

Existing paragraph (j) provides that, before approving a permit application, the regulatory authority must find that the proposed operation is not likely to either jeopardize the continued existence of threatened or endangered species or result in destruction or adverse modification of critical habitat, as determined under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* In response to discussions with the U.S. Fish and Wildlife Service concerning compliance with the Endangered Species Act, we propose to modify paragraph (j) to extend the finding to include species that the Secretary has proposed for listing as threatened or endangered.[211] The proposed change is consistent with section 7(a)(4) of the Endangered Species Act, which provides that ''[e]ach Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.'' It also would assist in implementing the fish and wildlife protection provisions of sections 515(b)(24) and 516(b)(11) of SMCRA. The conferencing requirement of section 7(a)(4) of the Endangered Species Act is not the same as the consultation requirement for threatened and endangered species under section 7(a)(2) of the Endangered Species Act. Also, the U.S. Fish and Wildlife Service is responsible for determining allowable take of species listed as threatened or endangered.

We propose to remove existing paragraph (m), which applies to permits to be issued under 30 CFR 785.25 (permits containing lands eligible for remining). This finding is not needed because it merely repeats requirements already stated in 30 CFR 785.25. In addition, paragraph (m) is duplicative of paragraph (h), which requires a finding that the applicant has satisfied all applicable requirements of 30 CFR part 785. Removal of existing paragraph (m) would result in the redesignation of existing paragraph (n) as paragraph (m).

In addition, we propose to add a new paragraph (n), which would require that the regulatory authority find that the applicant has demonstrated that the operation has been designed to prevent the formation of discharges that would require long-term treatment after mining has been completed. The regulatory authority also would be required to find that the applicant has demonstrated that there is no credible evidence that the design of the operation will not work as intended to prevent the formation of discharges of that nature.

Avoiding creation of discharges that require long-term treatment benefits both the permittee (because the permittee would bear the cost of treating the discharge) and the public (because there is no risk of environmental damage or use of tax receipts to pay for treatment if the permittee defaults). Adoption of proposed paragraph (n) would incorporate into regulation one of the provisions of the policy entitled ''Hydrologic Balance Protection: Policy Goals and Objectives on Correcting, Preventing, and Controlling Acid/Toxic Mine Drainage''[212] that we issued on March 31, 1997. In that policy, we explain that approval of a permit that would result in the creation of a discharge requiring long-term treatment would be inconsistent with SMCRA: ''In no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a postmining pollutional discharge that would require continuing long-term treatment without a defined endpoint.''[213] The regulatory authority may rely upon data from similar completed mining operations under conditions that are representative of those found at the site of the proposed operation as credible evidence for this demonstration and finding.

We explained our authority for this provision when we issued our policy document:

> Several commenters expressed concern that OSM exceeded its statutory authority by focusing on section 510(b)(3) of SMCRA, which provides that no permit application may be approved unless the regulatory authority finds that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area, and interpreting that section as requiring the prevention of AMD [acid mine drainage] formation. The commenters noted that sections 515(b)(10) and 516(b)(9) of SMCRA refer to minimization (rather than prevention) of hydrologic disturbances and avoidance (rather than the prevention) of AMD, with the prevention of AMD formation being only one of the three avoidance mechanisms listed in these sections.
>
> *Response:* The minimization and avoidance provisions of sections 515(b)(10) and 516(b)(9) of SMCRA do not negate the material damage prevention requirement of section 510(b)(3). Furthermore, the Act specifies that the provisions cited by the commenters apply only during mining and reclamation. OSM interprets this limitation as meaning that conducting operations in a manner likely to result in AMD production is acceptable only when AMD formation is expected to be a temporary phenomenon. In other words, discharge treatment is an appropriate means of avoiding AMD and minimizing damage to the hydrologic balance only when the need for treatment has a defined endpoint.
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> The approach adopted in the policy statement is fully consistent with the *Rith Energy* decision in which the IBLA [Interior Board of Land Appeals] upheld OSM's refusal to approve a mining plan that sought to minimize, rather than avoid, AMD. In that case, the IBLA agreed with OSM that ''the statute, as properly read, requires the agency to minimize disturbance to the prevailing hydrologic balance by avoiding acid or toxic mine drainage. Minimizing the contact of water and toxic-producing deposits, as argued by petitioner [*Rith Energy*], is not the standard.'' 111 IBLA 249. The policy

[211] We will revise this provision and other proposed rules concerning protection of threatened and endangered species to include the National Marine Fisheries Service (NMFS), which is responsible for administration and enforcement of the Endangered Species Act with respect to anadromous and marine species, if we determine that this rulemaking may affect species under NMFS jurisdiction.

[212] See *www.osmre.gov/lrg/docs/amdpolicy033197.pdf* (last accessed August 5, 2014).

[213] *Id.,* p. 5.

statement accords with *Rith Energy* because it provides that ''[p]ermits may only be approved where the operation is designed to ensure that off-site material damage to the hydrologic balance will be *prevented.*'' (Emphasis added.) Permittees may not plan in advance to allow AMD to occur and then simply mitigate the effects of the AMD.[214]

Finally, we propose to add a new required finding in paragraph (o) in response to discussions with the U.S. Fish and Wildlife Service concerning compliance with the Endangered Species Act. This finding would specify that, to the extent possible using the best technology currently available, the proposed operation has been designed to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, as identified in § 779.20 or § 783.20, and to enhance those resources where practicable, as required under § 780.16 and § 784.16. The proposed language is similar to sections 515(b)(24) and 516(b)(11) of SMCRA [215] and is intended to reinforce those statutory provisions.

4. Section 773.17: What conditions must the regulatory authority place on each permit issued?

We propose to revise paragraph (c) of this section to require that the permittee comply with all applicable requirements of the Act rather than all applicable performance standards of the Act. We propose to make this change because the condition also requires compliance with the requirements of the regulatory program, which means that the applicable performance standards would be in the program, not the Act.

We propose to revise paragraph (e) of this section to require that the permittee notify the regulatory authority and other appropriate state and federal regulatory agencies of any adverse impact to the environment or public health or safety as a result of a noncompliance with any term or condition of the permit. Notification would allow those agencies to take any necessary action to minimize the impacts of the noncompliance on the environment or public health or safety, consistent with the purpose stated in section 102(a) of SMCRA.[216]

We propose to add a new permit condition in paragraph (h) of this section to require that the permittee obtain all necessary authorizations, certifications, and permits in accordance with Clean Water Act requirements before conducting any activities that require approval or authorization under the Clean Water Act. The new condition would be consistent with section 702(a) of SMCRA,[217] which provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act,[218] or any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. It also would be consistent with our efforts to enhance coordination between the SMCRA and Clean Water Act regulatory authorities. Permit conditions are directly enforceable under SMCRA. Therefore, the addition of this permit condition would mean that the SMCRA regulatory authority must take enforcement action if the permittee does not obtain all necessary Clean Water Act authorizations, certifications, and permits before beginning any activity under the SMCRA permit that also requires approval, authorization, or certification under the Clean Water Act.

D. Part 774: Revision; Renewal; Transfer, Assignment, or Sale of Permit Rights; Post-Permit Issuance Requirements.

1. Section 774.10: When must the regulatory authority review a permit?

We propose to revise paragraphs (a)(2) and (a)(3) of this section to establish identical review requirements for permits for mountaintop removal mining operations under 30 CFR 785.14 and for permits that include a variance from approximate original contour restoration requirements under 30 CFR 785.16. This change is appropriate because the statutory review requirements for those types of operations in paragraphs (c)(6) and (e)(6) of section 515 of SMCRA [219] are substantively identical. Furthermore, these reviews are one-time events, not recurring requirements like midterm permit reviews.

In concert with this change, we propose to move the midterm review requirements for permits with a variance for a delay in contemporaneous reclamation requirements because of combined surface and underground mining from paragraph (a)(2) to a new paragraph (a)(4). Creation of the new single-topic paragraph also is in keeping with plain language principles.

2. Section 774.15: How may I renew a permit?

We propose to revise paragraph (b)(2) of this section by adding paragraph (b)(2)(vii), which would require that each application for permit renewal include an analysis of the monitoring results for surface water, groundwater, and the biological condition of streams and an evaluation of the accuracy and adequacy of the determination of the probable hydrologic consequences of mining (PHC determination). We also propose to add paragraph (b)(2)(viii), which would require that the renewal application include either an update of the PHC determination or documentation that the findings in the existing PHC determination are still valid. Similarly, we propose to revise paragraph (c)(1) of this section by adding paragraph (c)(1)(viii), which would authorize the regulatory authority to withhold approval of a permit renewal application if monitoring results or the updated PHC determination indicate that the finding that the regulatory authority made under 30 CFR 773.15(e) that the operation is designed to prevent material damage to the hydrologic balance outside the permit area is no longer accurate.

These revisions would assist the regulatory authority in ensuring that the operation continues to be designed and conducted to prevent material damage to the hydrologic balance outside the permit area. A narrow reading of section 510(b)(3) of SMCRA [220] and 30 CFR 773.15(e) might hold that the finding concerning material damage to the hydrologic balance outside the permit area is required only for the approval of an application for a permit or permit revision. However, we interpret section 510(b)(3) of SMCRA more broadly. Addition of a requirement for an equivalent finding as a prerequisite for the approval of permit renewal applications is consistent with the intent and purpose of section 510(b)(3) of the Act.[221]

Proposed paragraph (b)(2)(v) is substantively identical to existing paragraph (b)(2)(iii), with the exception that we propose to remove the provision requiring that the application for a permit renewal include any additional bond requested by the regulatory authority. This provision is both unnecessary and out of sequence because, at the time that the permittee submits the application for renewal, the amount of additional bond needed, if any, would not yet be known. The regulatory authority determines the amount of additional bond required after completing a technical review of the renewal application. Proposed paragraph (c)(1)(vi), like existing paragraph (c)(1)(v), provides that the

[214] *Id.* at 12 and 14.

[215] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[216] 30 U.S.C. 1202.

[217] 30 U.S.C. 1292(a).

[218] 33 U.S.C. 1251 *et seq.*

[219] 30 U.S.C. 1265(c)(6) and (e)(6).

[220] 30 U.S.C. 1260(b)(3).

[221] 30 U.S.C. 1260(b)(3).

regulatory authority may deny a permit renewal application if the applicant has not submitted the additional bond required by the regulatory authority. This paragraph provides sufficient protection against renewal of a permit that lacks the necessary bond coverage.

We propose to revise paragraph (c)(1)(ii) to specify that the regulatory authority will apply the permit eligibility standards in 30 CFR 773.12 through 773.14 in making this determination. In other words, applicants for permit renewal may avail themselves of the provisionally-issued permit procedures of 30 CFR 773.14 and the exception in 30 CFR 773.13 for unanticipated events or conditions at remining sites. Extending the exception for unanticipated events or conditions at remining sites to permit renewals is consistent with the intent of Congress in enacting section 510(e) of SMCRA.[222]

In addition, as a matter of equitable treatment, a permittee with a violation who is seeking renewal of a permit should have the same opportunity to obtain a provisionally-renewed permit as a person with a violation who is seeking to obtain a new permit has to obtain a provisionally-issued permit. Under 30 CFR 773.14, the regulatory authority may provisionally issue a permit if (1) the applicant certifies that each outstanding violation is being abated to the satisfaction of the agency with jurisdiction over the violation and the regulatory authority has no evidence to the contrary, (2) the applicant and operations owned or controlled by the applicant are in compliance with any abatement plan approved by the agency with jurisdiction over the violation, (3) the applicant is pursuing a good faith challenge to the pertinent ownership or control listing and there is no initial judicial decision in force affirming the listing, or (4) the violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation and there is no initial judicial decision in force affirming the violation. Our proposed revisions to 30 CFR 774.15(c)(1)(ii) would apply the same principles and criteria to the permit renewal process. In addition, the provisions of 30 CFR 773.14(c), which specify the actions that the regulatory authority must take to suspend or revoke the permit if the permittee ceases to be eligible for a provisionally-issued permit, would apply.

We also propose assorted other nonsubstantive changes to 30 CFR 774.15 to improve compliance with plain language principles.

[222] 30 U.S.C. 1260(e).

E. Part 777: General Content Requirements for Permit Applications

1. Section 777.11: What are the format and content requirements for permit applications?

We propose to revise paragraph (a)(3) of this section to require that permit applications be filed in an electronic format prescribed by the regulatory authority, unless the regulatory authority grants an exception to this requirement for good cause. We propose this change to facilitate public participation and interagency coordination in the permitting process because it is much more efficient and convenient to review and exchange information online or by email than it is to review hard copies, which are time-consuming to produce and which may involve considerable travel to other offices to review documents that cannot be copied. Electronic filing also would assist in the coordination of regulatory and inspection activities required by section 713 of SMCRA.[223] Furthermore, use of an electronic format for the permitting process can improve efficiency by enabling correction letters and applicant responses to occur in real time with less expense to the regulatory authority and the applicant. Finally, electronic filing promotes attainment of the goals of the Paperwork Reduction Act.

2. Section 777.13: What requirements apply to the collection, analysis, and reporting of technical data and to the use of models?

We propose to consolidate existing paragraphs (a) and (b) into proposed paragraph (a) because both paragraphs pertain to technical data and analyses. Existing paragraph (a) would be recodified as paragraph (a)(1) and existing paragraph (b) would be recodified as paragraph (a)(2).

Proposed paragraph (a)(1) would add a requirement for submission of metadata, which consists of data describing the contents and context of data files. The availability of metadata greatly increases the usefulness of the original data by providing information about how, where, when, and by whom the data were collected and analyzed. It enables reviewers to evaluate the validity of both the data itself and comparisons with data collected at other times and other places by other persons. Existing paragraph (a) already required submission of much of this information, *i.e.,* the names of persons or organizations that collected and analyzed the data, the dates that the data were collected and analyzed, and descriptions of the methodology used to collect and analyze the data. We also propose to revise the rule to add requirements for submission of the field sampling sheets prepared for water samples collected from wells (the sheets would identify the presence of any well screens as well as the depth at which the sample was taken). For all samples that require laboratory analysis, the proposed rule would require information pertaining to the quality assurance and quality control procedures used by the laboratory that analyzed the sample. For electronic data, the proposed rule would require identification of any transformations that the data underwent. The proposed rule would not limit metadata to the specific items listed in proposed paragraph (a)(1). Although not specified in the proposed rule, metadata should be generated in a format commonly used by the scientific community.

Proposed paragraph (b) would require that all sampling and analyses of groundwater and surface water performed to meet the permitting requirements of subchapter G of our regulations be conducted according to the methodology in 40 CFR parts 136 and 434. Proposed paragraph corresponds to the provisions concerning water-quality sampling and analysis methodologies in existing 30 CFR 780.21(a) and 784.14(a). Moving this provision to 30 CFR 777.13 would consolidate the requirements concerning sampling and analysis methodologies for groundwater and surface water in one location and expand their applicability to all pertinent data and analyses required for permit applications under subchapter G, which should promote better data collection and analysis procedures and, hence, improved permitting decisions.

We propose to eliminate the incorporation by reference of the 15th edition of the ''Standard Methods for the Examination of Water and Wastewater'' in existing 30 CFR 780.21(a) and 784.14(a). That document is now obsolete because the current edition is the 22nd edition, which was published in 2012. However, rather than incorporating the current edition of the ''Standard Methods for the Examination of Water and Wastewater,'' we propose to remove the existing incorporation by reference of the 15th edition of that document while retaining the provision in the existing rule that allows use of the sampling and analysis methodologies in 40 CFR parts 136 and 434. This proposed change would ensure that sampling and analysis methodologies under SMCRA are

[223] 30 U.S.C. 1303.

consistent with those approved by EPA for use for Clean Water Act purposes. We invite comment on whether there are any unique SMCRA-related requirements that would necessitate incorporating the current edition of the ''Standard Methods for the Examination of Water and Wastewater'' into our rule. In other words, would the collection and analysis of the baseline and monitoring data that we propose to require under this rule involve the use of sampling and analysis methodologies that 40 CFR parts 136 and 434 do not include?

Proposed paragraph (c) would require that all geological sampling and analyses performed to meet the permitting requirements of subchapter G of our regulations be conducted using a scientifically-valid methodology. This new provision should promote better geologic data collection and analysis procedures and, hence, improved permitting decisions. Scientifically-valid methodologies include, but are not limited to, those set forth in the Engineering Geology Field Manual, Second Edition (1998), developed by the Bureau of Reclamation within the U.S. Department of the Interior.

We propose to move the provisions concerning the use of models found in existing 30 CFR 780.21(d) and 784.14(d) to 30 CFR 777.13(d) to consolidate requirements concerning the use of models in the latter paragraph. If adopted as final, proposed paragraph (d) would apply to all permit application requirements. The existing provisions in 30 CFR 780.21(d) and 784.14(d) apply only to hydrologic data, but we find no scientific reason for limiting the use of modeling in this manner. We also propose to modify the existing provisions by adding paragraph (d)(2), which would require that all models be calibrated using actual site-specific data and that they be validated for the region and ecosystem in which they will be used. The additional requirements are intended to improve the accuracy and validity of any models used. Finally, we propose to add a new paragraph (d)(3) clarifying that the regulatory authority has the discretionary authority to prohibit the use of models and to require the submission of additional actual, site-specific data.

3. Section 777.15: What information must my application include to be administratively complete?

We propose to revise this section to use terminology consistent with the revisions to the permitting regulations published on September 28, 1983 (48 FR 44344), which removed the term ''complete application'' and replaced it with the terms ''administratively complete application'' and ''complete and accurate application.''

F. Part 779: Surface Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions

1. Section 779.1: What does this part do?

Existing 30 CFR 779.1 states that part 779 establishes the minimum requirements for the Secretary's approval of regulatory program provisions for the environmental resources contents of permit applications for surface mining activities. However, the content requirements and standards for approval of state regulatory programs are located in 30 CFR parts 730 through 732. Therefore, we propose to revise 30 CFR 779.1 to specify that part 779 sets forth permit application requirements relating to environmental resources and conditions.

2. Section 779.2: What is the objective of this part?

We propose to revise this section to reflect plain language principles and to clarify that the objective of part 779 is to ensure that the permit applicant provides the regulatory authority with a complete and accurate description of both the environmental resources that may be impacted or affected by proposed surface mining activities and the environmental conditions that exist within the proposed permit and adjacent areas. The existing language does not mention environmental conditions, such as the information on climate required by 30 CFR 779.18.

3. Why are we proposing to remove existing 30 CFR 779.11 and 779.12?

We propose to remove 30 CFR 779.11, which requires a description of the existing premining environmental resources within the proposed permit and adjacent areas, because the requirements for this description are set out in detail in other sections of part 779. Therefore, existing 30 CFR 779.11 is redundant and unnecessary.

We propose to remove existing 30 CFR 779.12(a) because the anticipated mining schedule that it requires is duplicative of proposed 30 CFR 779.24(a)(3). We propose to move the cultural resource requirements of existing 30 CFR 779.12(b) to a new 30 CFR 779.17 devoted to that topic.

4. Section 779.19: What information on vegetation must I include in my permit application?

We propose to revise existing 30 CFR 779.19 by adding more specificity and making submission of vegetation information mandatory rather than discretionary as under the existing rules. The changes that we propose are needed to ensure that native plant communities are restored on reclaimed areas as required by section 515(b)(19) of SMCRA.[224] Further, these changes are intended to implement, in part, section 515(b)(24) of SMCRA,[225] which requires that, ''to the extent possible using the best technology currently available,'' surface coal mining and reclamation operations be conducted in a manner that will ''minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.''

Restoration or establishment of native plant communities is the most effective way of restoring or enhancing wildlife habitat. The Virginia Department of Conservation and Natural Resources describes the benefits of native plants as follows:

> The benefit of growing plants within the region they evolved is they are more likely to thrive under the local conditions while being less likely to invade new habitats. Native plants are well adapted to local environmental conditions, maintain or improve soil fertility, reduce erosion, and often require less fertilizer and pesticides than many alien plants. These characteristics save time and money and reduce the amount of harmful run-off threatening the aquatic resources of our streams, rivers, and estuaries. In addition, functionally healthy and established natural communities are better able to resist invasions by alien plant species. So the use of native plants can help prevent the spread of alien species already present in a region and help avert future introductions. ***
>
> Native plants provide familiar sources of food and shelter for wildlife. As natural habitats are replaced by urban and suburban development, the use of native plants in landscaping can provide essential shelter for displaced wildlife. Land managers can use native plants to maintain and restore wildlife habitat. Native wildlife species comprise a majority of the game and non-game animals we manage habitat for, and they evolved with native plant species. Although alien species are often promoted for their value as wildlife food plants, there is no evidence that alien plant materials are superior to native plants. For instance, on land managed for upland game animals, native warm season grasses (big and little bluestem, switch grass, Indian grass, coastal panic grass, gama grass), and other native forbs (butterfly weed, ironweed,

[224] 30 U.S.C. 1265(b)(19).

[225] 30 U.S.C. 1265(b)(24).

Joe Pye weed) offer good sources of nutrition without the ecological threats associated with nonnative forage plants. Dramatic increases in nesting success of both game birds and songbirds have been observed in fields planted with native grasses, which also offer superior winter cover. In addition, warm season grasses provide productive and palatable livestock forage. ***

On a broader ecological scale, planting native species contributes to the overall health of natural communities. Disturbances of intact ecosystems that open and fragment habitat, such as land clearing activities, increase the potential of invasion by alien species. Native plants provide important alternatives to alien species for conservation and restoration projects in these disturbed areas. They can fill many land management needs currently occupied by nonnative species, and often with lower costs and maintenance requirements. Once established in an appropriate area, most native plant species are hardy and do not require watering, fertilizers, or pesticides.[226]

A U.S. Fish and Wildlife Service publication describes the benefits of native plants as follows:

Native plants naturally occur in the region in which they evolved. While non-native plants might provide some of the above benefits, native plants have many additional advantages. Because native plants are adapted to local soils and climate conditions, they generally require less watering and fertilizing than non-natives. Natives are often more resistant to insects and disease as well, and so are less likely to need pesticides. Wildlife evolved with plants; therefore, they use native plant communities for food, cover and rearing young. Using native plants helps preserve the balance and beauty of natural ecosystems.[227]

Notwithstanding the advantages of native plant communities, many regraded and revegetated areas do not contain a diverse, effective, permanent vegetative cover of the same seasonal variety native to the area as required by section 515(b)(19) of SMCRA.[228] Instead, areas that were previously forested were backfilled, regraded, and revegetated in a manner that makes the land incapable of achieving its premining forested status. Those lands are now heavily compacted grasslands with scrub trees. Neither grassland nor the trees are representative of the native premining vegetation. A 2007 study estimates that Appalachia alone contains between 750,000 and 1.5 million acres of such reclaimed mine land.[229] Our proposed refinements to the regulations would lead to better implementation of the revegetation requirements of section 515(b)(19) of SMCRA.[230] In addition, the proposed rule would assist in the implementation of section 508(a)(2) of SMCRA,[231] which requires that the reclamation plan in each permit application identify both the premining land uses and the capability of the land prior to any mining to support a variety of uses.

Moreover, the proposed rule is consistent with Section 2.(a)(2)(iv) of Executive Order 13112, ''Invasive Species,'' which requires that ''[e]ach Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, . . . provide for the restoration of native species and habitat conditions in ecosystems that have been invaded.'' [232]

Proposed paragraph (a) would require that the permit application identify, describe, and map existing vegetation and plant communities, as well as those plant communities that would exist under conditions of natural succession. The description and map must be adequate to evaluate whether the vegetation provides important habitat for fish and wildlife and whether the site contains any native plant communities of local or regional significance.

Proposed paragraph (b) would require that the applicant adhere to the classifications in the National Vegetation Classification Standard (NVCS) [233] in preparing the description required under proposed paragraph (a). The NVCS is the standard endorsed by the Federal Geographic Data Committee.[234] Use of this standard would promote consistent identification of plant communities and development of appropriate revegetation plans to restore those communities following mining.

Proposed paragraph (c) would allow the regulatory authority to approve the use of other generally-accepted vegetation classification systems in lieu of the NVCS. We invite comment on what other systems may exist.

Proposed paragraph (d) would require that the application include a discussion of the potential for reestablishing the plant communities described in paragraph (a) after the completion of mining. This discussion would assist the regulatory authority in evaluating the proposed revegetation plan and in determining which plant communities the permittee must reestablish.

5. Section 779.20: What information on fish and wildlife resources must I include in my permit application?

The fish and wildlife resource information requirements in existing 30 CFR 780.16(a) identify the baseline fish and wildlife resource information that each permit application must include. Therefore, we propose to move it to part 779, which contains environmental resource information requirements for permit applications. Part 779 is a better fit for a fish and wildlife resource information requirement than part 780, which contains operation and reclamation plan requirements. The fish and wildlife information requirements in existing 30 CFR 780.16(a) and proposed 30 CFR 779.20 are necessary to fully implement the fish and wildlife protection and enhancement requirements of section 515(b)(24) of SMCRA.[235]

Proposed paragraph (c)(1) is similar to the portion of existing 30 CFR 780.16(a)(2)(i) that pertains to species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* and to critical habitat designated under that law. We propose to add a requirement that the site-specific resource information include a description of the effects of future state or private activities that are reasonably certain to occur within the proposed permit and adjacent areas. The requested information will assist the U.S. Fish and Wildlife Service in fulfilling its responsibilities under the coordination process pertaining to threatened or endangered species.

Proposed paragraph (c)(2) is substantively identical to the portion of existing 30 CFR 780.16(a)(2)(i) that pertains to species or habitat protected by state statutes similar to the Endangered Species Act.

In proposed paragraph (c)(3), which corresponds to existing 30 CFR 780.16(a)(2)(ii), we propose to expand the list of examples of habitat of unusually high value to fish and

[226] *http://www.dcr.virginia.gov/natural_heritage/nativeplants.shtml (last accessed August 27, 2014).*

[227] Slattery, Britt E., Kathryn Reshetiloff, and Susan M. Zwicker. 2003. ''Native Plants for Wildlife Habitat and Conservation Landscaping: Chesapeake Bay Watershed.'' U.S. Fish and Wildlife Service, Chesapeake Bay Field Office, Annapolis, MD. 82 pp.

[228] 30 U.S.C. 1265(b)(19).

[229] Zipper, C.E., J.A. Burger, J.M. McGrath, and B. Amichev, ''Carbon Accumulation Potentials of Post-SMCRA Coal-Mined Lands.'' Paper prepared for presentation at the 30 Years of SMCRA and Beyond Symposium, June 2–7, 2007. Published by the American Society of Mining and Reclamation, R. I. Barnhisel, ed. (unpaginated document).

[230] 30 U.S.C. 1265(b)(19).

[231] 30 U.S.C. 1258(a)(2).

[232] 64 FR 6184 (Feb. 8, 1999).

[233] See *http://www.fgdc.gov/standards/projects/FGDC-standards-projects/vegetation/index_html* (last accessed August 5, 2014).

[234] See *https://www.fgdc.gov/standards/projects/FGDC-standards-projects/vegetation* (last accessed January 21, 2015).

[235] 30 U.S.C. 1265(b)(24).

wildlife to include areas that support populations of endemic species that are vulnerable because of restricted ranges, limited mobility, limited reproductive capacity, or specialized habitat requirements. We propose to delete the reference to important streams in the existing regulation because proposed paragraph (c)(5) would require site-specific information for all perennial and intermittent streams, not just important streams.

Proposed paragraph (c)(4) is substantively identical to existing 30 CFR 780.16(a)(2)(iii), except for the addition of language clarifying that this provision includes species identified as sensitive by a state or federal agency. Proposed paragraph (c)(6) would require submission of site-specific information when native plant communities of local or regional ecological significance are present.

Proposed paragraph (d) includes the U.S. Fish and Wildlife Service permit application review provisions found at 30 CFR 780.16(c) in our existing rules. We propose to revise those provisions in response to discussions with the U.S. Fish and Wildlife Service concerning compliance with the Endangered Species Act. We will further revise this provision and other proposed rules concerning protection of threatened and endangered species to include the National Marine Fisheries Service (NMFS), which is responsible for administration and enforcement of the Endangered Species Act with respect to anadromous and marine species, if we determine that this rulemaking may affect species under NMFS jurisdiction.

Proposed paragraph (d)(1)(i) would require that the regulatory authority provide the fish and wildlife resource information included in the permit application under proposed paragraph (c) to the applicable regional or field office of the U.S. Fish and Wildlife Service whenever that information includes species listed as threatened or endangered under the Endangered Species Act, critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The proposed rule would require that the regulatory authority provide this information to the Service no later than the time that it provides written notice of receipt of an administratively complete permit application to the Service under § 773.6(a)(3)(ii). Under the existing rule, the Service must request this information from the regulatory authority rather than receiving it automatically.

Proposed paragraph (d)(1)(ii) is similar to the existing rule in that it allows the Service to request fish and wildlife resource information submitted as part of permit applications even when the information in those applications does not include species listed as threatened or endangered under the Endangered Species Act, critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. Under both the existing and proposed rules, the regulatory authority must provide that information to the Service within 10 days of receipt of the request.

Proposed paragraph (d)(2) specifies how the regulatory authority must handle comments received from the Service and how any disagreements are to be resolved. This proposed paragraph generally parallels the provisions that we and the Service agreed to as a result of a formal section 7(a)(2) Endangered Species Act consultation pertaining to the approval and conduct of surface coal mining and reclamation operations under a SMCRA regulatory program. Specifically, proposed paragraphs (d)(2)(i) through (iii) provide that if the regulatory authority does not agree with a Service recommendation that pertains to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act or to critical habitat designated under that law, the regulatory authority must explain the rationale for that decision in a comment disposition document and must provide a copy of that document to the pertinent Service field office. The proposed rule also would require that the regulatory authority provide a copy of that document to the appropriate OSMRE field office for informational purposes and to allow the OSMRE field office to monitor resolution of the disagreement. If the Service field office does not concur with the regulatory authority's decision and the regulatory authority and the Service field office are subsequently unable to conclude an agreement at that level, the proposed rule allows either the regulatory authority or the Service to elevate the issue through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.

Proposed paragraph (d)(2)(iv) provides that the regulatory authority may not approve the permit application until all issues are resolved in accordance with this process and the regulatory authority receives written documentation from the Service that all issues have been resolved. Like all provisions in proposed paragraph (d)(2), this provision is intended to ensure the protection of threatened and endangered species in accordance with the Endangered Species Act.

Proposed paragraph (e) provides that the regulatory authority may require the prevention of adverse impacts to streams and watersheds in the permit and adjacent areas in order to protect exceptional environmental values. The proposed rule would require that all decisions be based upon scientific principles and analyses. In addition, it would require coordination with state and federal fish and wildlife agencies and agencies responsible for implementing the Clean Water Act before taking action under this paragraph. The protection that this proposed rule would provide through the permitting process would be in addition to any protection that might be available through the process for designating lands as unsuitable for surface coal mining operations under section 522 of SMCRA.[236] The proposed rule is consistent with section 102(c) of SMCRA,[237] which provides that one of the purposes of the Act is to ''assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible.'' Section 515(b)(23) of SMCRA,[238] requires that surface coal mining and reclamation operations ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.'' The site-specific nature of our proposed rule is consistent with this provision of the Act.

6. Section 779.21: What information on soils must I include in my permit application?

Existing 30 CFR 779.21 requires that each permit applicant submit adequate soil survey information for the proposed permit area. On August 4, 1980, we suspended the existing rules insofar as they apply to lands other than prime farmland.[239] The suspension reflects the February 26, 1980, decision of the U.S. District Court for the District of Columbia in litigation concerning the permanent regulatory program rules that we adopted in 1979. In that decision, the court held that section 507(b)(16) of SMCRA [240] is a clear expression of congressional intent to require soil surveys only for prime farmlands identified by a reconnaissance inspection. The court also ruled that the

[236] 30 U.S.C. 1272.

[237] 30 U.S.C. 1202(c).

[238] 30 U.S.C. 1265(b)(23).

[239] 45 FR 51548 (Aug. 4, 1980).

[240] 30 U.S.C. 1257(b)(16).

Secretary's reliance on section 508(a)(3) of SMCRA [241] as justification for the rule was misplaced.[242]

We propose to lift the suspension of existing 30 CFR 779.21 and replace the provisions of the existing rule with revised rule text that is consistent with the court decision. Proposed paragraph (a) would require that the application include the results of a reconnaissance inspection of the proposed permit area to determine whether or not prime farmland is present, as required by 30 CFR 785.17(b)(1). If that inspection indicates that prime farmland may be present, proposed paragraph (e) would require that the application include the soil survey information required by 30 CFR 785.17(b)(3). Proposed paragraphs (a) and (e) do not contain any new requirements; they merely include and cross-reference existing prime farmland regulations.

Proposed paragraph (b) would require a map showing all soil mapping units located within the proposed permit area, if the National Cooperative Soil Survey (NCSS) has completed and published a soil survey for the area. The application also would be required to include either a link to the appropriate soil survey information on the Natural Resources Conservation Service (NRCS) Web site, which is located at *http://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm* (as of August 27, 2014), or the equivalent information in paper form.

Proposed paragraph (c) would require a description of soil depths within the proposed permit area. Proposed paragraph (d) would require detailed information on soil quality to satisfy the requirements of proposed 30 CFR 780.12(e)(2)(ii) if the permit applicant seeks approval for the use of soil substitutes or supplements under 30 CFR 780.12(e). Proposed paragraph (e) is discussed above together with proposed paragraph (a). Proposed paragraph (f) would require that the permit applicant provide any other information that the regulatory authority finds necessary to determine land use capability and to prepare the reclamation plan.

The revised version of 30 CFR 779.21 that we are proposing today would be consistent with the decision in *PSMRL I, Round I.* First, the proposed rule would not require that the applicant conduct an actual soil survey for lands other than prime farmland. Instead, it would require submission of only existing soil survey information, which, apart from transferring pertinent information to the permit application maps, can be provided by reference to the appropriate link to the NRCS Web site. The proposed rule would not require that the applicant conduct an actual soil survey if the information is not available from the NRCS. (The NRCS has completed soil surveys for more than 99 percent of the land area within the conterminous states.)

Second, the statutory basis for proposed 30 CFR 779.21 is section 508(a)(2) of SMCRA,[243] not section 508(a)(3).[244] The court held that section 508(a)(3) did not constitute authority for the prior rule. However, section 508(a)(2) provides that—

> Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:
>
> * * * * *
>
> (B) the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover, and, if applicable, a soil survey prepared pursuant to section 507(b)(16).

All the information that we propose to require in 30 CFR 779.21 consists of soil and foundation characteristics. Section 508(a)(2) of SMCRA [245] requires the applicant to include that information in each permit application, not just in those applications that contain prime farmland. Identification of soil mapping units and submission of available soil survey information about those units, as proposed paragraph (b) would require, is critical to determining the premining capability of the land, as required by section 508(a)(2)(B) of SMCRA,[246] and to establishing the soil salvage and replacement requirements needed to ensure that the revegetation requirements of the Act and regulations can be met.

Likewise, the premining soil depth, soil quality, and other information that would be required under proposed paragraphs (c), (d), and (f) also is needed for the applicant and the regulatory authority to effectively determine the premining capability of the land and to establish the soil salvage, soil substitute, and soil replacement requirements needed to ensure that the revegetation requirements of the Act and regulations can be met. Furthermore, soil depth and quality are critical to determining the productivity of the site and hence to establishing pertinent revegetation success standards for the site for certain postmining land uses.

7. Section 779.22: What information on land use and productivity must I include in my permit application?

The counterpart in our existing rules to this section is 30 CFR 780.23(a). We propose to delete the second sentence of existing paragraph (a)(1), which provides that the application must include a description of the historical use of the land if the premining use changed within the 5 years preceding the anticipated starting date of the proposed operation. SMCRA does not include a similar provision and this timeframe has sometimes proven difficult to determine with precision. Furthermore, this information has little or no value in the existing permitting process because it is not a criterion or determinant of any permitting decisions under the existing rules.

The proposed rule would continue to require that the application include a narrative analysis of the capability of the land before any mining to support a variety of uses, as required by section 508(a)(2)(B) of SMCRA.[247] We propose to require a description of all historical uses of the land without a time limitation and without limitation to the single use preceding the permit application, as a component of this narrative because historical uses provide documentation, in part, of premining land use capability. Our proposed revisions are consistent with the legislative history of this provision of SMCRA, which states that:

> The description is to serve as a benchmark against which the adequacy of reclamation and the degradation resulting from the proposed mining may be measured. It is important that the potential utility which the land had for a variety of uses be the benchmark rather than any single, possibly low value, use which by circumstances may have existed at the time mining began.[248]

Thus, it is clear that a single-use criterion is not in accordance with sections 508(a) and 515(b)(2) of SMCRA [249] or the legislative history of section 508(a). The postmining land use must be compared with the variety of uses that the land was capable of supporting before any mining, not just a single premining use.

We also propose to add paragraph (b)(3), which would require that the permit application include a narrative

[241] 30 U.S.C. 1258(a)(3).

[242] *In re Permanent Surface Mining Regulation Litig. I, Round I (PSMRL I, Round I),* 1980 U.S. Dist. LEXIS 17722 at *62 (D.D.C., February 26, 1980), 14 Env't Rep. Cas. (BNA) 1083, 10 Envtl. L. Rep. (Envtl. Law Inst.) 20208.

[243] 30 U.S.C. 1258(a)(2).

[244] 30 U.S.C. 1258(a)(3).

[245] 30 U.S.C. 1258(a)(2).

[246] 30 U.S.C. 1258(a)(2)(B).

[247] 30 U.S.C. 1258(a)(2)(B).

[248] S. Rep. No. 95–128, at 76–77 (1977).

[249] 30 U.S.C. 1258(a) and 1265(b)(2), respectively.

analysis of the premining productivity of the proposed permit area for fish and wildlife. Section 508(a)(2)(C) of SMCRA [250] lists productivity in terms of the average yield of food, fiber, forage, or wood products, but it is not an exclusive list of productivity measures that can be used to assess premining productivity. The fish and wildlife information required by proposed paragraph (b)(3) would assist the regulatory authority in evaluating the environmental impacts of the proposed operation and in determining what fish and wildlife protection and enhancement measures may be appropriate. Limiting productivity measures to quantifiable commodity indicators such as food, fiber, and wood products would incorrectly ignore the underlying purposes of SMCRA, one of which is to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.[251]

Following the same logic, we propose to add paragraph (c), which would allow the regulatory authority to require submission of any additional information that the regulatory authority deems necessary to determine the condition, capability, and productivity of the land within the proposed permit area. This additional information may include data concerning the site's carbon absorption and storage capability.

8. Section 779.24: What maps, plans, and cross-sections must I submit with my permit application?

We propose to consolidate existing 30 CFR 779.24 and 779.25 into 30 CFR 779.24 and add a new paragraph (c) to clarify that the regulatory authority may require that the applicant submit all materials in a digital format that includes all necessary metadata. We invite comment on whether the digital format option should instead be mandatory to facilitate review by both the public and the regulatory authority.

Other substantive proposed changes are discussed below.

Proposed paragraph (a)(3) would require a description of the size, sequence, and timing of the mining of subareas for which the applicant anticipates seeking additional permits or expansion of an existing permit in the future. The corresponding existing rule at 30 CFR 779.24(c) applies this requirement to areas for which the applicant anticipates seeking additional permits. However, in practice, regulatory authorities do not always require a new permit application for additional acreage to be mined. Some state regulatory programs allow expansion by means of permit amendments or revisions. We have approved state program amendments of this nature, provided that the program amendment specifies that the permit amendment or revision application is subject to the same information requirements as a new permit and that the application must be processed and approved in the same manner as a new permit. We have found that amendments containing those provisions are no less stringent than section 510(a)(3) of SMCRA,[252] which provides that, except for incidental boundary revisions, any extension of the area covered by a permit must be made by application for a new permit. The proposed language would reflect this reality and ensure that the description would include all subareas for which the applicant anticipates seeking approval to mine in the future, not just those subareas for which the applicant anticipates seeking new permits.

Proposed paragraphs (a)(7), (a)(8), (a)(9), (a)(18), (a)(20), and (a)(27) would allow certain information that is not particularly amenable to display on a map to instead be submitted in a table cross-referenced to a map if approved by the regulatory authority. This information would include depth of water, gas and oil wells; ownership of wells and groundwater resources; ownership and descriptions of surface-water features; and elevations and geographic coordinates of test borings, core samplings, and monitoring stations.

In proposed paragraph (a)(11), we propose to add a provision requiring mapping of all public water supplies and wellhead protection zones [253] located within one-half mile of the proposed permit area. This information would be important in preparing the cumulative hydrologic impact assessment required by section 510(b)(3) of SMCRA [254] and may be of value in preparing the PHC determination and hydrologic reclamation plan for the proposed permit.

Proposed paragraph (a)(13) would add a requirement for a map showing the location of any discharge, including, but not limited to, a mine-water treatment or pumping facility, into or from an active, inactive, or abandoned underground mine that is hydrologically connected to the proposed permit area or that is located within one-half mile, measured horizontally, of the proposed permit area. The applicant will need this information to prepare the determination of the probable hydrologic consequences of mining required by section 507(b)(11) of SMCRA.[255] In addition, the regulatory authority will need this information to prepare the cumulative hydrologic impact assessment required by the same provision of the Act and by section 510(b)(3) of SMCRA.[256]

We propose to add a requirement in paragraphs (a)(18) and (20) that the application include the geographic coordinates of test borings, core samplings, and monitoring stations. Our inspectors have found that this information often is time-consuming or difficult to locate in the permit file or to determine from maps included in that file, so a list of features with their geographic coordinates should improve the efficiency with which regulatory authority and OSMRE personnel perform their duties by greatly improving the ability of regulatory authority and OSMRE personnel to field-check those locations using GPS devices. The requirement for geographic coordinates also is intended to ensure that the locations of these features are determined by an actual survey rather than approximated on a topographic map.

Proposed paragraph (a)(19) would expand upon the requirement in existing 30 CFR 779.25(a)(6) for the location and extent of subsurface water, if encountered, by adding provisions concerning aquifers that currently are found only in the corresponding requirements for underground mines at existing 30 CFR 783.25(a)(6). Specifically, we propose to require that the application include the areal and vertical distribution of aquifers and a portrayal of seasonal variations in hydraulic head in different aquifers. This information is equally important for proposed surface mining operations because it would be used to establish baseline groundwater conditions and predict the impacts of the proposed mining operation on those aquifers, regardless of whether the proposed operation is a surface mine or an underground mine. Furthermore, section 507(b)(14) of SMCRA,[257] which is the primary statutory counterpart to proposed 30 CFR 779.24, expressly requires that the application include the location of aquifers. In addition,

[250] 30 U.S.C. 1258(a)(2)(C).

[251] See 30 U.S.C. 1202(a).

[252] 30 U.S.C. 1260(b)(3).

[253] A wellhead protection zone or area is a surface and subsurface land area regulated under the Safe Drinking Water Act (42 U.S.C. 330f-300j) to prevent contamination of a well or well-field supplying a public water system.

[254] 30 U.S.C. 1260(b)(3).

[255] 30 U.S.C. 1257(b)(11).

[256] 30 U.S.C. 1260(b)(3).

[257] 30 U.S.C. 1257(b)(14).

proposed 30 CFR 779.24(a)(19) would include a requirement for the estimated elevation of the water table, which section 507(b)(14) of SMCRA also requires.

In proposed paragraph (a)(21), we propose to add a requirement that the maps, cross-sections, and plans include the commonly used names of the coal seams to be mined, overburden strata, and the stratum immediately below the lowest coal seam to be mined. This information would assist reviewers in predicting the impacts of the proposed operation by facilitating consultation with published reference materials on the coal seams and geological strata in question.

In proposed paragraph (a)(27), we propose to add a requirement that the application identify all directional or horizontal drilling for hydrocarbon extraction operations, including those using hydraulic fracturing methods, within or underlying the proposed permit and adjacent areas. Both the applicant and the regulatory authority need this information to determine the probable hydrologic consequences of the proposed operation and to ensure that the operation's design takes these operations and wells into consideration.

G. Part 780: Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans

1. Section 780.1: What does this part do?

Existing 30 CFR 780.1 states that part 780 provides the minimum requirements for the Secretary's approval of regulatory program provisions for the mining operations and reclamation plan portions of permit applications for surface mining activities, except to the extent that part 785 establishes different requirements. However, the content requirements and standards for approval of state regulatory programs are located in 30 CFR parts 730 through 732. Therefore, we propose to revise 30 CFR 780.1 to specify that part 780 sets forth permit application requirements for reclamation and operation plans for proposed operations.

2. Section 780.2: What is the objective of this part?

We propose to revise this section to specifically mention reclamation of the disturbed area to reflect the fact that part 780 includes numerous reclamation requirements. The existing rule only mentions surface mining activities. We recognize that this change is not essential because the definition of ''surface mining activities'' in 30 CFR 700.5 includes reclamation, but adding a mention of reclamation in 30 CFR 780.2 would make this rule clearer to the reader.

3. Section 780.12: What information must the reclamation plan include?

Paragraph (a): General Requirements

Proposed paragraph (a) is substantively identical to existing 30 CFR 780.18(a) with one exception. The existing rule requires that each permit application contain a reclamation plan showing how the applicant will comply with section 515 of SMCRA,[258] the federal performance standards in subchapter K of 30 CFR Chapter VII, and the environmental protection performance standards of the regulatory program. We propose to revise this provision to be more consistent with section 508(a) of SMCRA,[259] which requires that each reclamation plan include the information ''necessary to demonstrate that reclamation required by the State or Federal program can be accomplished.'' The existing rule is too limiting in that it refers only to performance standards, not to all reclamation requirements. In addition, the references to section 515 of SMCRA and subchapter K of 30 CFR Chapter VII in the existing rule are inconsistent with the principle of state primacy under section 503(a) of SMCRA,[260] which specifies that a state with an approved regulatory program assumes exclusive jurisdiction over surface coal mining and reclamation operations on non-Federal, non-Indian lands within its borders, except as provided in sections 521 and 523 [261] and title IV [262] of the Act. Therefore, we propose to revise paragraph (a) by deleting the references to performance standards and to section 515 of SMCRA and subchapter K of 30 CFR Chapter VII. Instead, we propose to require that each permit application include a reclamation plan showing how the applicant will comply with the reclamation requirements of the applicable regulatory program.

Paragraph (b): Reclamation Timetable

Section 508(a)(7) of SMCRA [263] requires the reclamation plan for each permit application include ''a detailed estimated timetable for the accomplishment of each major step in the reclamation plan.'' Existing 30 CFR 780.18(b)(1) implements this provision in part. We propose to revise the existing rule by listing the activities which, at a minimum, must be considered major steps in the reclamation process. In typical chronological order, those steps include, but are not limited to, backfilling, grading, restoration of the form of all reconstructed perennial and intermittent stream segments, soil redistribution, planting, demonstration of revegetation success, restoration of the ecological function of all reconstructed perennial and intermittent stream segments, and application for each phase of bond release. Establishment of a timetable that includes those steps should promote consistency in the application of this provision and result in a more comprehensive timetable, which would implement section 508(a)(7) of SMCRA more completely.

The regulatory authority must evaluate the proposed timetable to determine whether it meets the contemporaneous reclamation requirements of section 515(b)(16) of SMCRA.[264] Once approved as part of the permit, this timetable serves as a standard for evaluating compliance with the contemporaneous reclamation requirements of section 515(b)(16) of SMCRA.[265]

Paragraph (c): Reclamation Cost Estimate

We propose to revise this paragraph, which appears at 30 CFR 780.18(b)(2) in our existing rules, by clarifying that the cost estimates must include both direct and indirect costs and by requiring that the permit applicant use current, standardized construction cost estimation methods and equipment cost guides in developing estimates of the cost of reclamation. These changes should improve the accuracy of cost estimates and increase the usefulness of these estimates to the regulatory authority in determining the amount of performance bond required under section 509 of SMCRA [266] and 30 CFR part 800.

Paragraph (d): Backfilling and Grading Plan

Proposed paragraph (d) corresponds to existing 30 CFR 780.18(b)(3). We propose to add more specificity to the existing rule, which requires ''[a] plan for backfilling, soil stabilization, compacting, and grading, with contour maps or cross-sections that show the anticipated final surface configuration of the proposed permit area, in

[258] 30 U.S.C. 1265.

[259] 30 U.S.C. 1258(a).

[260] 30 U.S.C. 1253(a).

[261] 30 U.S.C. 1271 and 1273.

[262] 30 U.S.C. 1231 through 1243.

[263] 30 U.S.C. 1258(a)(7).

[264] 30 U.S.C. 1265(b)(16).

[265] *Id.*

[266] 30 U.S.C. 1259.

accordance with 30 CFR 816.102 through 816.107.''

Proposed paragraph (d)(1) would require that the reclamation plan contain a plan for backfilling the mined-out area, compacting the backfill, and grading the disturbed area in accordance with 30 CFR 817.102 through 817.107 of this chapter, using the best technology currently available. It also would specify that the plan must limit compaction to the minimum necessary to achieve stability requirements unless additional compaction is necessary to reduce infiltration to minimize leaching and discharges of parameters of concern. The added language is intended to achieve a balance between minimizing compaction, which research has shown stunts the growth of most crops and woody plants,[267] and the need to minimize the formation of discharges that contain sulfate and other ions that could have adverse impacts on receiving streams and their aquatic life.

Proposed paragraph (d)(1) also would require that the plan be accompanied by models, contour maps, or cross-sections that show in detail the anticipated final surface elevations and configuration of the proposed permit area, including drainage patterns. The regulatory authority would use this information to determine whether the proposed plan satisfies the backfilling, grading, and surface configuration requirements of 30 CFR 816.102 through 816.107.

Proposed paragraph (d)(2) would require that the plan describe in detail how the permittee will conduct backfilling and reclamation activities and handle acid-forming and toxic-forming materials, if present, to prevent the formation of acid or toxic mine drainage from acid-forming and toxic-forming materials within the overburden. It also would require an explanation of how the method selected will protect groundwater and surface water in accordance with 30 CFR 816.38, which contains the performance standards for handling acid-forming and toxic-forming materials. Proposed paragraph (d)(2) would implement in part the requirements in section 515(b)(3) of SMCRA [268] that surface coal mining and reclamation operations compact spoil where advisable to prevent leaching of toxic materials, cover all acid-forming and other toxic materials, and shape and grade overburden and spoil to prevent water pollution. It also would implement, in part, section 515(b)(14) of SMCRA,[269] which requires that all acid-forming materials and toxic materials be ''treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters.''

Paragraph (e): Soil Handling Plan

We propose to extensively revise our existing rules concerning soils to promote salvage, preservation, and redistribution of the best available soil materials for the purpose of creating a growing medium (soil) suitable for the intended vegetation, including creation of a root zone of sufficient depth for that vegetation. Proposed paragraph (e) would include those provisions of our existing rules at 30 CFR 816.22(b) and (e) that are permitting requirements rather than performance standards in an effort to consolidate permit application information and review requirements in subchapter G rather than having them split between subchapters G (permit requirements) and K (performance standards).

We propose to extensively revise our existing rules to better implement section 515(b)(5) of SMCRA,[270] which states that surface coal mining operations must—

> remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation, except if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation.

Proposed paragraph (e)(1)(i) is similar to the first sentence of existing 30 CFR 780.18(b)(4). It would require that the reclamation plan include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with 30 CFR 816.22.

Consistent with proposed 30 CFR 816.22(f), we also propose to add a requirement that the application include a plan for salvaging, protecting, and redistributing or otherwise using all organic matter (duff, other organic litter, and vegetative materials such as tree tops, small logs, and root balls) found on the site. Acceptable uses for organic matter are as a soil supplement, to promote revegetation, to assist in stream restoration, or to provide wildlife habitat. Preservation and distribution of organic matter on the regraded site would assist in meeting the requirement of section 515(b)(19) of SMCRA [271] to establish on the regraded area a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area. Our proposed rule also is consistent with the findings of an extensive literature review of reforestation on minesites in Appalachia. That review recommended that ''all surface organic debris (including stumps, stems, roots, and litter), all soil layers, and the soft saprolite and weathered rock materials under the soil be removed, mixed in the process of excavating, hauling and dumping, and placed on the surface of reclaimed mine sites to a depth of 1 to 2 meters.'' [272]

Proposed paragraph (e)(1)(ii) provides that the plan must require the removal, segregation, stockpiling, and redistribution of the B and C horizons and other underlying strata or portions thereof to the extent that those horizons and strata are needed to provide the root zone required to restore premining land use capability or to comply with the revegetation requirements of 30 CFR 816.111 and 816.116. The proposed rule differs from the existing rule at 30 CFR 816.22(e) in that the existing rule provides that salvage and redistribution of these soil materials is discretionary on the part of the regulatory authority.

However, the subsoil (the B and C horizons) also is important for plant growth. Plant roots extend through the topsoil into the subsoil (root zone), which provides a substantial proportion of the plant's nutrient requirements. For example, field studies have shown that between 45 percent and 65 percent of nitrogen available to plants from the soil lies below a depth of 6 inches. During dry summer weather, many plants, especially deep-rooted plants like alfalfa and most trees, depend for their survival on moisture available in the subsoil. Alfalfa extracts 55 percent of its moisture requirements from soil

[267] See, *e.g.,* Hamza, M. A., and W. K. Anderson. ''Soil compaction in cropping systems: a review of the nature, causes and possible solutions.'' *Soil and tillage research* 82.2 (2005): 121–145; Crossley, D. I. ''The effect of a compact subsoil horizon on root penetration.'' *Journal of Forestry* 38.10 (1940): 794–796.

[268] 30 U.S.C. 1265(b)(3).

[269] 30 U.S.C. 1265(b)(14).

[270] 30 U.S.C. 1265(b)(5).

[271] 30 U.S.C. 1265(b)(19).

[272] Zipper, C. E., J. A. Burger, C D. Barton, and J. G. Skousen. ''Rebuilding Soils on Mined Land for Native Forest in Appalachia'' (2012). Soil Sci. Soc. Am. J. (77:337–349), p. 347.

materials deeper than one foot and is capable of extracting water from subsoil up to 6 feet in depth. Even medium-rooted crops like wheat and corn extract up to 40 percent of their moisture requirements from soil materials deeper than one foot. Finally, many plants depend on root penetration well into the subsoil for physical support, especially where topsoil is thin. If plant roots are unable to penetrate deeply into a reclaimed subsoil, soil capability for plant growth will be degraded.[273]

Therefore, a failure to require salvage and redistribution of the B and C horizons under these conditions would result in a failure to restore the site to a condition in which it is capable of supporting those land uses that it was capable of supporting before any mining, as required by section 515(b)(2) of SMCRA.[274]

Furthermore, proposed paragraph (e)(1)(ii) is consistent with, and would improve implementation of, section 515(b)(5) of SMCRA,[275] which provides that if strata other than the topsoil ''can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation.'' The U.S. District Court for the District of Columbia upheld this interpretation of section 515(b)(5) of SMCRA in 1980 in *PSMRL I, Round I* concerning the 1979 version of our regulations at 30 CFR 816.22(d),[276] which required segregation of the B horizon and portions of the C horizon if the regulatory authority determined that those materials were necessary or desirable to ensure soil productivity:

> Section 515(b)(5) authorizes segregation [of materials other than topsoil] if the topsoil cannot sustain vegetation or if other strata enhance post-mining vegetation. This is essentially what the regulations command. They focus on ''soil productivity,'' and grant the regulatory authority power to require segregation if necessary to improve such productivity.[277]

Proposed paragraph (e)(1)(iii) would require that the plan explain how soil materials would be handled and stored to avoid contamination by acid-forming or toxic-forming materials and to minimize the loss of desirable soil characteristics during handling and storage. These provisions mirror similar requirements in section 515(b)(5) of SMCRA.[278]

Proposed paragraph (e)(2) contains expanded criteria and requirements for the approval and use of soil substitutes or supplements. It differs from existing 30 CFR 816.22(b) most significantly in that the existing rule allows use of topsoil substitutes or supplements if the resulting soil medium is equal to or more suitable than the existing topsoil in terms of its capability to sustain vegetation. We propose to eliminate the provision allowing use of topsoil substitutes or supplements when the resulting growing medium (soil) is only equal to the existing topsoil in terms of its capability to sustain vegetation. Our proposed revision would improve the implementation of section 515(b)(5) of SMCRA,[279] which allows use of other overburden strata in place of the topsoil only if those strata ''can be shown to be more suitable for vegetation requirements.'' Nothing in this provision of SMCRA authorizes the use of other strata in place of topsoil if the resulting medium is only equal in its ability to meet vegetation requirements.

While section 515(b)(5) of SMCRA [280] is silent on the use of subsoil substitutes, we propose to apply the same standards to the use of subsoil substitutes and supplements as we do to topsoil substitutes and supplements. The subsoil is an important part of the growing medium in that, among other things, it provides the root zone required by many plants for physical support, moisture, and nutrient uptake.[281] Therefore, application of the same standards for subsoil substitutes as for topsoil substitutes is appropriate to ensure that the reclaimed site is restored to a condition in which it is capable of supporting the uses that it was capable of supporting before any mining, as required by section 515(b)(2) of SMCRA.[282]

Proposed paragraph (e)(2)(i) explains that proposed paragraph (e)(2) would apply to all permit applicants proposing to use appropriate overburden materials as a supplement to or substitute for the existing topsoil or subsoil on the proposed permit area.

Proposed paragraph (e)(2)(ii)(A) would require that the permit applicant demonstrate, and the regulatory authority find in writing, that either the quality of the existing topsoil and subsoil is inferior to that of the alternative overburden materials proposed for use or that the quantity of existing topsoil and subsoil is not adequate to provide the optimal rooting depth or to meet other growth requirements of the native species to be planted under the revegetation plan. In the latter case, the proposed rule also would require that the soil handling plan provide for the salvage and redistribution of all existing soil materials as a component of the approved growing medium to obtain the benefits of the native existing soil materials as a source of seeds, other plant propagules, mycorrhizae, other soil flora and fauna, and other biological components that promote revegetation. Studies in Appalachia have found that native soils contain nitrogen and phosphorus in organic forms that are readily available to plants; they also contain organic carbon that is essential to soil microorganisms and nutrient cycling.[283] The author of an extensive literature review of reforestation on minesites in Appalachia concluded that native soils ''will be the most favorable material available on most mine sites for use in constructing mine soils for reforestation'' and that, when use of rock spoil is necessary, the native soils, as well as stumps and woody debris, should be mixed with those spoils to enhance their chemical, biological, and physical properties.[284]

Proposed paragraph (e)(2)(ii)(B) would require that the permit applicant demonstrate, and the regulatory authority find in writing, that use of the alternative overburden materials, either in combination with or in place of the topsoil or subsoil, would result in a growing medium (soil) that will provide superior rooting depth in comparison to the existing topsoil and subsoil and that will be more suitable to sustain the vegetation required by the approved postmining land use and the revegetation plan than the existing topsoil and subsoil.

Proposed paragraph (e)(2)(ii)(C) would require that overburden materials selected for use as a soil substitute or supplement be the best materials available in the proposed permit area to support the native vegetation to be established on the reclaimed area or the crops to be planted on that area.

The demonstrations and findings required by proposed paragraphs (e)(2)(ii)(A) through (C) would, in part, improve implementation of section

[273] Alberta Transportation, ''Alberta Transportation Guide to Reclaiming Borrow Excavations'' (December 2013); pp. 5–6.

[274] 30 U.S.C. 1265(b)(2).

[275] 30 U.S.C. 1265(b)(5).

[276] 30 CFR 816.22(d) was subsequently redesignated as 30 CFR 816.22(e) on May 16, 1983. See 48 FR 22100.

[277] *PSMRL I, Round I,* supra, slip op. at 54, 1980 U.S. Dist. LEXIS 17722 at *83.

[278] 30 U.S.C. 1265(b)(5).

[279] *Id.*

[280] *Id.*

[281] Alberta Transportation, ''Alberta Transportation Guide to Reclaiming Borrow Excavations'' (December 2013); pp. 5–6.

[282] 30 U.S.C. 1265(b)(2).

[283] Zipper, et al. (2012), *op. cit.* at 346.

[284] *Id.*

515(b)(5) of SMCRA,[285] which provides that ''if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation.'' In addition, these demonstrations and findings are intended to ensure the establishment of a growing medium on the reclaimed area that is capable of supporting the uses that the land was capable of supporting before any mining, as required by section 515(b)(2) of SMCRA.[286] Finally, the emphasis on the use of native species to determine optimal rooting depths and other growth requirements when evaluating the suitability of potential soil substitutes is consistent with section 515(b)(19) of SMCRA,[287] which requires establishment of a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession. . . .''

Proposed paragraphs (e)(2)(iii) and (iv) would expand upon the second and third sentences of existing 30 CFR 780.18(b)(4), which establish minimum content requirements for the demonstration of the suitability of potential soil substitutes or supplements and which allow the regulatory authority to require other analyses, field trials, or greenhouse tests if necessary. Proposed paragraph (e)(2)(iii) would require that the regulatory authority specify suitability criteria for potential soil substitutes and supplements; chemical and physical analyses, field trials, or greenhouse tests that the applicant must conduct on potential soil substitutes and supplements; and sampling objectives, sampling techniques, and the techniques to be used to analyze the samples collected. Proposed paragraph (e)(2)(iv)(A) would require that demonstrations of the suitability of potential soil substitutes and supplements include the physical and chemical soil characteristics and root zones needed to support the type of vegetation to be established on the reclaimed area. Proposed paragraph (e)(2)(iv)(B) would require that those demonstrations include a comparison and analysis of the thickness, total depth, texture, percent coarse fragments, pH, thermal toxicity, and areal extent of the different kinds of soil horizons and overburden materials available within the proposed permit area, based upon a statistically valid sampling procedure.

Proposed paragraphs (e)(2)(iii) and (iv) are intended to ensure that the determination of the suitability of potential soil substitutes and supplements is conducted in a scientifically-sound manner. Use of scientifically-invalid sampling and analytical techniques or a lack of comprehensive criteria for the evaluation and approval of potential soil substitutes and supplements could result in the establishment of an inferior growing medium on the reclaimed area that is incapable of supporting the uses that it was capable of supporting before any mining. Such a result would be inconsistent with section 515(b)(2) of SMCRA.[288] It also would be inconsistent with the requirement in section 515(b)(5) of SMCRA [289] that any topsoil substitutes be shown to be more suitable for vegetation requirements than the existing soil and that any substitute materials be the best able to support vegetation.

Proposed paragraph (e)(2)(v) would require that the soil handling plan include a plan for testing and evaluating overburden materials during both removal and redistribution to ensure that the permittee removes and redistributes only those overburden materials approved for use as soil substitutes or supplements. This requirement would provide a safeguard against the salvage and redistribution of overburden materials that have not been approved for use as soil substitutes or supplements. Use of unapproved materials could result in the establishment of an inferior growing medium on the reclaimed area that is incapable of supporting the uses that it was capable of supporting before any mining. Such a result would be inconsistent with section 515(b)(2) of SMCRA.[290] It also would be inconsistent with the requirement in section 515(b)(5) of SMCRA [291] that any topsoil substitutes be shown to be more suitable for vegetation requirements than the existing soil and that any substitute materials be the best able to support vegetation.

Paragraph (f): Surface Stabilization Plan

We propose to add this paragraph to replace existing 30 CFR 780.15, which requires that the reclamation plan include an air pollution control plan for fugitive dust. Under existing 30 CFR 780.15, at a minimum, the permit application must include a ''plan for fugitive dust control practices, as required under 30 CFR 816.95.'' We propose to remove 30 CFR 780.15 because the references to fugitive dust and cross-references to 30 CFR 816.95 in the existing rule refer to provisions that we removed in 1983 in response to a court decision striking down our authority to regulate air pollution under SMCRA, except for air pollution attendant to erosion. The court held that ''the legislative history indicates that Congress only intended to regulate air pollution related to erosion.'' [292] The 1983 rulemaking removed all requirements in 30 CFR 816.95 for fugitive dust control practices, including requirements for monitoring of fugitive dust to determine compliance with federal and state air quality standards. That rulemaking also changed the section heading of 30 CFR 816.95 from ''Air resources protection'' to ''Stabilization of surface areas'' and replaced the air quality performance standards formerly located in that section with soil stabilization requirements that contain no mention of fugitive dust or air quality monitoring. See 48 FR 1160–1163 (Jan. 10, 1983).

However, the 1983 rulemaking did not remove the parallel permitting requirements in 30 CFR 780.15 and 784.26. Instead, we stated in the preamble to that rulemaking that we agreed with a commenter that we also needed to amend the permit application rules at 30 CFR 780.15 and 784.26 for consistency with the revisions to 30 CFR 816.95 and 817.95, and that we would do so in a subsequent independent rulemaking.[293] Adoption of this proposed rule would fulfill that commitment in part by adding permit application information requirements consistent with the 1983 revisions to 30 CFR 816.95. In other words, we propose to replace the obsolete air pollution control plan requirements in existing 30 CFR 780.15 with the surface stabilization plan requirements in proposed 30 CFR 780.12(f) to correspond with the requirements in existing 30 CFR 816.95, as revised in 1983.

Proposed paragraph (f) would add a permitting counterpart to the current performance standard at 30 CFR 816.95(a), which provides that all exposed surface areas must be protected and stabilized to effectively control erosion and air pollution attendant to

[285] 30 U.S.C. 1265(b)(5).

[286] 30 U.S.C. 1265(b)(2).

[287] 30 U.S.C. 1265(b)(19).

[288] 30 U.S.C. 1265(b)(2).

[289] 30 U.S.C. 1265(b)(5).

[290] 30 U.S.C. 1265(b)(2).

[291] 30 U.S.C. 1265(b)(5).

[292] *In re Permanent Surface Min. Regulation Litig. I, Round II (PSMRL I, Round II),* 1980 U.S. Dist. LEXIS 17660 at *43–44 (D.D.C., May 16, 1980), 19 Env't Rep. Cas. (BNA) 1477.

[293] 48 FR 1161 (Jan. 10, 1983).

erosion. We also propose to add cross-references to the current dust control performance standards for roads in 30 CFR 816.150 and 816.151.

Paragraph (g): Revegetation Plan

We propose to extensively revise this paragraph, which appears at 30 CFR 780.18(b)(5) in our existing rules, by adding specificity for elements of the revegetation plan, by incorporating those provisions of 30 CFR 816.111 that are more appropriately considered permitting requirements rather than performance standards, and by ensuring that there is a detailed counterpart in the revegetation plan to the revegetation performance standards in 30 CFR 816.111 through 816.116, when appropriate. The various components of proposed paragraph (g) are intended to ensure compliance with or improve implementation of section 515(b)(19) of SMCRA,[294] which requires that surface coal mining and reclamation operations establish ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.''

Proposed paragraph (g)(1)(ii) would add a site preparation element to the revegetation plan to reflect extensive research documenting the adverse impacts of excessive compaction on vegetation, especially woody plants. The new element would require a description of the measures that the permittee will take to avoid compaction or, when avoidance is not possible, to minimize and alleviate compaction of the root zone during backfilling, grading, soil redistribution, and planting.

In addition, we propose to require in paragraph (g)(1)(viii) that the revegetation plan identify any normal husbandry practices that the permittee intends to use and explain whether the permittee intends to conduct irrigation or apply fertilizer after the first year and, if so, for how long and to what extent. This information will assist the regulatory authority in determining whether the proposed practices are normal husbandry practices or whether they are augmentative in nature, which would necessitate restarting the revegetation responsibility period under proposed 30 CFR 816.115, which corresponds to existing 30 CFR 816.116(c). These provisions would serve as the permit application information counterpart to the performance standards in proposed 30 CFR 816.115(a)(1) and (b), which correspond to existing 30 CFR 816.116(c)(1) and (c)(4).

Proposed paragraph (g)(1)(xi) would add a requirement that the revegetation plan include the measures that the permittee will take to avoid the establishment of invasive species on reclaimed areas or to control those species if they do become established. Invasive species are highly detrimental to native ecosystems, agriculture, and forestry. They have posed a problem on some minesites either because the permit improperly allowed the use of invasive non-native species or because of the reclamation practices used. We propose to add this provision to improve the implementation of section 515(b)(19) of SMCRA,[295] which requires the establishment of a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area, and section 515(b)(2) of SMCRA,[296] which requires restoration of mined land to a condition capable of supporting the uses it was capable of supporting before any mining. Allowing the establishment of invasive species also would be inconsistent with the fish and wildlife protection provisions of section 515(b)(24) of SMCRA.[297] Moreover, proposed paragraph (g)(1)(xi) is consistent with Section 2.(a)(2)(i) and (iv) of Executive Order 13112, ''Invasive Species,'' which requires that ''[e]ach Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, . . . (i) prevent the introduction of invasive species; . . . [and] (iv) provide for the restoration of native species and habitat conditions in ecosystems that have been invaded.'' [298]

Proposed paragraph (g)(2) would require that the plan be designed to create a diverse, effective, permanent vegetative cover that is consistent with the vegetative communities described in the permit application in accordance with 30 CFR 779.19. It also would require that the plan meet the other requirements of 30 CFR 816.116(a) and (b).

Proposed paragraph (g)(3) is substantively identical to the species-selection criteria of existing 30 CFR 816.111(a)(2), (a)(4), and (b), with two exceptions. Proposed paragraph (g)(3)(i) would prohibit the use of introduced species unless they are non-invasive. This proposed requirement is consistent with section 515(b)(19) of SMCRA,[299] which allows the use of introduced species only if they are desirable. Invasive introduced species are not desirable because they out-compete native vegetation and can have adverse impacts on fish and wildlife, which would be inconsistent with the fish and wildlife protection requirements of section 515(b)(24) of SMCRA.[300] Moreover, proposed paragraph (g)(3)(i) is consistent with Section 2.(a)(2)(i) of Executive Order 13112, ''Invasive Species,'' which requires that ''[e]ach Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, . . . prevent the introduction of invasive species''.[301]

Proposed paragraph (g)(3)(ii) would provide that the species selected need to be capable of stabilizing the soil surface from erosion only to the extent that control of erosion with herbaceous species is consistent with establishment of a permanent vegetative cover that resembles native plant communities in the area. We propose to add this qualifier because some level of erosion is natural and because excessive herbaceous cover can inhibit establishment of woody plants, as discussed at length elsewhere in this preamble.

Proposed paragraphs (g)(4) and (g)(5) are substantively identical to existing 30 CFR 816.116(c) and (d). Both paragraphs would provide limited exceptions to the species-selection requirements of proposed paragraphs (g)(3)(i), (iv), and (v), which correspond to the species-selection provisions of section 515(b)(19) of SMCRA.[302] Proposed paragraph (g)(3) would provide an exception for temporary cover, while proposed paragraph (g)(4) would provide an exception for long-term, intensive agricultural postmining land uses. These exceptions would be consistent with section 515(b)(19) of SMCRA,[303] which allows the use of introduced species ''in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.'' Proposed paragraph (g)(4) also would implement section 515(b)(20) of SMCRA [304] to the extent that it provides exceptions to the requirements of section 515(b)(19) for

[294] 30 U.S.C. 1265(b)(19).

[295] 30 U.S.C. 1265(b)(19).

[296] 30 U.S.C. 1265(b)(2).

[297] 30 U.S.C. 1265(b)(24).

[298] 64 FR 6184 (Feb. 8, 1999).

[299] 30 U.S.C. 1265(b)(19).

[300] 30 U.S.C. 1265(b)(24).

[301] 64 FR 6184 (Feb. 8, 1999).

[302] 30 U.S.C. 1265(b)(19).

[303] *Id.*

[304] 30 U.S.C. 1265(b)(20).

long-term, intensive agricultural postmining land uses.

Proposed paragraph (g)(6) would require that a professional forester or ecologist develop and certify all revegetation plans that include the establishment of trees and shrubs. It also would require that those plans include site-specific planting prescriptions for canopy trees, understory trees and shrubs, and herbaceous ground cover compatible with establishment of those trees and shrubs. In addition, this proposed paragraph would require that the plan rely exclusively upon the use of native species unless those species are inconsistent with the approved postmining land use and that land use is implemented before the entire bond amount for the area in question has been fully released.

Paragraph (h): Stream Restoration Plan

We propose to add this paragraph to require that the reclamation plan expressly address in detail how the permittee will restore the form and ecological function of each segment of a perennial or intermittent stream that is proposed to be mined through under 30 CFR 780.28. The plan must conform to the requirements of 30 CFR 780.28 and 816.57. The U.S. Army Corps of Engineers may require additional onsite or offsite mitigation under section 404 of the Clean Water Act.[305]

Paragraph (i): Coal Resource Conservation Plan

Proposed paragraph (i) corresponds to existing 30 CFR 780.18(b)(6). We propose to add language consistent with the existing coal recovery performance standard at 30 CFR 816.59. Proposed paragraph (i) would implement section 508(a)(6) of SMCRA,[306] which provides that the reclamation plan must include a statement of ''the consideration which has been given to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future can be minimized.''

Paragraph (j): Plan for Disposal of Noncoal Waste Materials

Proposed paragraph (j) corresponds to existing 30 CFR 780.18(b)(7). We propose to clarify that this requirement applies to all noncoal waste materials resulting from mining and reclamation activities, but not to coal combustion residuals such as fly ash and bottom ash. The existing rule applies to ''debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard.'' We propose to delete the reference to acid-forming and toxic-forming materials because proposed 30 CFR 780.22 contains the permit application information requirements for those materials. As revised, proposed paragraph (j) would apply to all noncoal waste materials covered by 30 CFR 816.89. It would serve as the permit application information counterpart to the performance standards for disposal of noncoal waste materials in 30 CFR 816.89.

We also propose to require that the reclamation plan describe the type and quantity of noncoal waste materials that the permittee intends to dispose of within the proposed permit area, how the permittee intends to dispose of those materials in accordance with 30 CFR 816.89, and the locations of any noncoal waste material disposal sites within the proposed permit area, as well as the contingency plans developed to preclude sustained combustion of combustible noncoal materials. These permit application information requirements would enable the regulatory authority to evaluate the potential environmental impacts of the disposal of noncoal waste materials and ensure that the permit includes appropriate measures to protect society and the environment from the adverse effects of this aspect of surface coal mining operations, as provided in section 102(a) of SMCRA.[307]

Paragraph (m): Consistency With Land Use Plans and Landowner Plans

In the existing rules, this paragraph appears in 30 CFR 780.23(b)(3). However, section 780.23(b) applies only in the context of the postmining land use, which is not consistent with the underlying statutory requirement at section 508(a)(8) of SMCRA.[308] That provision of the Act requires that the reclamation plan describe the consideration that has been given to making the surface coal mining and reclamation operations themselves consistent with surface owner plans and applicable state and local land use plans and programs. This provision is separate and distinct from the requirement in section 508(a)(3) of the Act[309] that the reclamation plan discuss the relationship of the postmining land use to existing land use policies and plans and the comments of the surface owner. Therefore, we propose to move the provision in existing 30 CFR 780.23(b)(3) to new § 780.12(m) to ensure that, in discussing consistency with surface owner plans and applicable state and local land use plans, the reclamation plan addresses the consistency of the proposed operations (not just the proposed postmining land use) with those plans.

4. Section 780.13: What additional maps and plans must I include in the reclamation plan?

We propose to redesignate existing 30 CFR 780.14 as 30 CFR 780.13. We also propose to combine existing paragraphs (a) and (b) into paragraph (a) and redesignate existing paragraph (c) as paragraph (b).

We propose to remove the requirement in existing 30 CFR 780.14(b)(7) for maps showing each air pollution collection and control facility because that requirement is associated with regulations in 30 CFR 816.95 that the court struck down in 1980 and that we removed in 1983. Specifically, the court struck down our authority to regulate air pollution under SMCRA, except for air pollution attendant to erosion.[310] See the portion of this preamble concerning our proposed removal of 30 CFR 780.15 for additional discussion.

In proposed paragraph (a)(7), which corresponds to existing paragraph (b)(6), we propose to add a requirement for a map showing the location of each point at which water will be discharged from the proposed permit area to a surface-water body and the name of that water body, consistent with equivalent requirements in sections 507(b)(10) and (14) of SMCRA.[311]

In proposed paragraph (a)(11), which corresponds to existing paragraph (b)(11), we propose to replace the terms ''coal processing waste bank'' and ''coal processing waste dam and embankment'' with ''refuse pile'' and ''coal mine waste impounding structure'' to employ terminology consistent with the definitions and performance standards that we adopted on September 26, 1983 (48 FR 44006). We also propose to add a reference to siltation structures, consistent with our addition of that terminology and requirements for those structures on September 26, 1983 (48 FR 44032).

We propose to add paragraphs (a)(12) through (a)(14), which would require a map showing each segment of a perennial or intermittent stream that would be mined through, buried, or diverted; any perennial or intermittent stream segment to be restored, any temporary or permanent stream-channel

[305] 33 U.S.C. 1344.

[306] 30 U.S.C. 1258(a)(6).

[307] 30 U.S.C. 1202(a).

[308] 30 U.S.C. 1258(a)(8).

[309] 30 U.S.C. 1258(a)(3).

[310] *PSMRL I, Round II,* 1980 U.S. Dist. LEXIS 17660 at *43–44, 19 Env't Rep. Cas. (BNA) 1477.

[311] 30 U.S.C. 1257(b)(10) and (14).

diversion, and each segment of a perennial or intermittent stream that would be improved as part of the fish and wildlife enhancement plan. The regulatory authority would need this information to assist in evaluating whether the proposed application is in compliance with requirements pertaining to activities in perennial and intermittent streams in proposed 30 CFR 780.28 and 816.57.

We also propose to add paragraph (a)(15), which would require a map showing the location and geographic coordinates of each point at which the applicant proposes to monitor groundwater, surface water, or the biological condition of perennial and intermittent streams. The regulatory authority would need this information to determine whether the application includes a sufficient number of monitoring sites and whether those sites are adequately distributed and located to ensure that monitoring results are representative of the entire permit area, as required by proposed 30 CFR 780.23.

In addition, we propose to revise existing 30 CFR 780.14(c), which we propose to redesignate as 30 CFR 780.13(b), by replacing the cross-references to 30 CFR 780.35(c) and 816.71(b) with a cross-reference to 30 CFR 780.35 to be consistent with other changes that we are proposing to those rules. Those changes include moving the design certification requirement formerly located in section 816.71(b) to 30 CFR 780.35(b) to consolidate permitting requirements in subchapter G. The existing rules also include a cross-reference to the certification requirements in 30 CFR 816.73(c) for durable rock fills. We do not propose to include a similar cross-reference in 30 CFR 780.13(b) because we are proposing to remove 30 CFR 816.73 in its entirety, which means that durable rock fills would no longer be allowed.

We propose to add paragraph (c), which would authorize the regulatory authority to require submission of the information required by paragraph (a) in a digital format, when appropriate. We invite comment on whether submission of this information in a digital format should be mandatory rather than discretionary to facilitate review and analysis by the public and the regulatory authority.

5. Why are we proposing to remove existing 30 CFR 780.15?

We propose to remove existing 30 CFR 780.15 and redesignate existing 30 CFR 780.13 as 30 CFR 780.15 because the references to fugitive dust and cross-references to 30 CFR 816.95 in existing 30 CFR 780.15 refer to provisions that we removed in 1983 in response to a court decision striking down our authority to regulate air pollution under SMCRA, except for air pollution attendant to erosion. The court held that ''the legislative history indicates that Congress only intended to regulate air pollution related to erosion'' [312] and that ''the Secretary's authority to regulate [air] pollution is limited to activities related to erosion.'' [313] The court remanded former 30 CFR 816.95 and 817.95 (1979), which contained performance standards for fugitive dust control, for revision. However, the court did not address the parallel permitting requirements at 30 CFR 780.15 and 784.26.

The 1983 rulemaking removed all requirements in 30 CFR 816.95 for fugitive dust control practices, including requirements for monitoring of fugitive dust to determine compliance with federal and state air quality standards. That rulemaking also changed the section heading of 30 CFR 816.95 from ''Air resources protection'' to ''Stabilization of surface areas'' and replaced the air quality performance standards formerly located in 30 CFR 816.95 with soil stabilization requirements that contain no mention of fugitive dust or air quality monitoring. See 48 FR 1160–1163 (Jan. 10, 1983).

However, the 1983 rulemaking did not remove the parallel permitting requirements in 30 CFR 780.15. Instead, we stated in the preamble to that rulemaking that we agreed with a commenter that we also needed to amend the permit application rules at 30 CFR 780.15 and 784.26 for consistency with the revisions to 30 CFR 816.95 and 817.95, and that we would do so in a subsequent independent rulemaking.[314] Adoption of this proposed rule would fulfill that long-delayed commitment.

In concert with the removal of 30 CFR 780.15, we propose to redesignate existing 30 CFR 780.13, which concerns blasting, as 30 CFR 780.15.

6. Section 780.16: What must I include in the fish and wildlife protection and enhancement plan?

Proposed 30 CFR 780.16 is the counterpart to paragraphs (b) and (c) of existing 30 CFR 780.16. Our proposed revisions to the existing rule would provide greater specificity on the measures that the fish and wildlife protection and enhancement plan in the permit application must include. The proposed revisions would improve implementation of section 515(b)(24) of SMCRA,[315] which provides that ''to the extent possible using the best technology currently available,'' surface coal mining and reclamation operations must ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of those resources where practicable.'' The proposed revisions also are consistent with paragraphs (a) and (d) of section 102 of SMCRA,[316] which provide that two of the purposes of SMCRA are establishing ''a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations'' and assuring ''that surface coal mining operations are so conducted as to protect the environment.''

Likewise, the proposed revisions to 30 CFR 780.16 are consistent with section 515(b)(23) of SMCRA,[317] which requires that surface coal mining and reclamation operations ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.'' Long-standing case law supports the Secretary's authority to adopt these regulations [318] and provides the Secretary ''great deference'' in determining how to ensure that the Act's provisions are enforced.[319]

Proposed paragraph (a) contains general requirements analogous to existing 30 CFR 780.16(b)(1) and (2). Like the existing rules, it provides that the fish and wildlife protection and enhancement plan must be consistent with the performance standards for fish and wildlife protection and enhancement at 30 CFR 816.97 and must be specific to the fish and wildlife resources of the proposed permit and adjacent areas as identified in the permit application in accordance with 30 CFR 779.20. We propose to add a requirement that the plan also comply with the specific protection and enhancement requirements of 30 CFR 780.16(b) through (e).

Proposed paragraph (b) concerns protection of threatened and endangered species. Like the existing rule, it would require a description of how the proposed operation will comply with the Endangered Species Act. We

[312] *PSMRL I, Round II,* 1980 U.S. Dist. LEXIS 17660 at *43–44, 19 Env't Rep. Cas. (BNA) 1477.

[313] *Id.* at *42.

[314] 48 FR 1161 (Jan. 10, 1983).

[315] 30 U.S.C. 1265(b)(24).

[316] 30 U.S.C. 1202(a) and (d).

[317] 30 U.S.C. 1265(b)(23).

[318] *Nat'l Wildlife Fed'n* v. *Hodel,* 839 F.2d 694, 735 (D.C. Cir. 1988).

[319] *Nat'l Wildlife Fed'n* v. *Lujan,* 1990 U.S. Dist. LEXIS 8869 at *84 (D.D.C. 1990).

propose to add a provision that would expressly require that the fish and wildlife protection and enhancement plan contain a description of any species-specific protection and enhancement plans developed under the Endangered Species Act, which would include any plans developed in accordance with the existing formal section 7(a)(2) Endangered Species Act consultation pertaining to the approval and conduct of surface coal mining and reclamation operations under a SMCRA regulatory program. We propose to add these provisions in response to discussions with the U.S. Fish and Wildlife Service concerning compliance with the Endangered Species Act.

Proposed paragraph (c) would contain requirements for the protection of fish and wildlife other than threatened and endangered species. It would require that the fish and wildlife protection and enhancement plan describe how, to the extent possible using the best technology currently available, the proposed operation will minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, as required by section 515(b)(24) of SMCRA.[320] It lists a number of measures that the fish and wildlife protection and enhancement plan must include to minimize disturbance and adverse impacts, including timing of operations to avoid or minimize disruption to wildlife and retention of forest cover and native vegetation for as long as possible.

As discussed below, riparian (streamside) vegetation plays a critical role in maintaining or restoring the ecological function of a stream. Therefore, proposed paragraph (c)(3) would specify that the fish and wildlife enhancement plan must require maintenance of an intact forested buffer at least 100 feet wide between surface disturbance and a perennial or intermittent stream to the extent possible. This requirement would apply only when the stream is located in a forested area.

Researchers have found that, in small, well-shaded upland streams, as much as 75 percent of the organic food base may be supplied by dissolved organic compounds or detritus such as fruit, limbs, leaves and insects that fall from the forest canopy in the riparian zone.[321] Benthic detritivores (bacteria, fungi and invertebrates) that live on the stream bottom feed on the detritus and form the basis of the aquatic food chain. They pass on this energy when they are, in turn, consumed by larger benthic fauna and eventually by fish. Thus, the streamside forest functions as an important energy source for the entire aquatic food chain from headwaters to estuary.[322]

Furthermore, forested riparian buffers are essential to prevent excessively high water temperatures in coldwater streams and to moderate temperature variations in other streams. One study found a four-fold decline in fish density in coldwater streams after removal of the forested riparian buffer.[323] Another study found that invertebrate populations in streams with forested buffers of 100 feet exhibited no change following clearcutting of the area outside the buffer zone. However, streams in watersheds in which clearcutting operations left narrower forested buffers experienced significant changes in the species diversity of invertebrate populations, with the extent of the changes correlating to buffer width.[324]

Studies of effective buffer widths for wildlife generally recommend wider buffers than those required for sediment control and protection of water quality. For example, recommended buffer widths for conservation of forest-dwelling birds often exceed 300 feet.[325] A comprehensive guide to riparian forest buffers in the Chesapeake Bay watershed provides a range of recommended minimum buffer widths for different objectives: 50 to 275 feet for wildlife habitat, 60 to 225 feet for flood mitigation, 50 to 175 feet for sediment removal, 35 to 140 feet for nitrogen removal, 20 to 60 feet for water temperature moderation, and 20 to 45 feet for bank stabilization and aquatic food web maintenance.[326] The minimum 100-foot buffer width that we propose to adopt lies within the lower end of the range of recommended minimum widths for wildlife habitat and flood mitigation, in the middle of the range for sediment removal and nitrogen removal, and exceeds the range recommended for water temperature moderation and bank stabilization and aquatic food web maintenance. Therefore, the 100-foot minimum width that we have proposed for the riparian buffer is an appropriate midrange compromise that strikes a balance among property rights and the various recommended buffer widths for relevant objectives, consistent with section 102(f) of SMCRA,[327] which provides that one of the purposes of SMCRA is to strike a balance between environmental protection and the need for coal production.

We propose to specify that the buffer width must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible streambanks, the centerline of the active channel. We derived this provision primarily from Natural Resources Conservation Service Conservation Practice Standard Code 391 (''Riparian Forest Buffer'') (July 2010), which states: ''Measurement shall begin at and perpendicular to the normal water line, bank-full elevation, or the top of the bank as determined locally.'' For streams that lack defined banks, our proposed rule would adopt the standard used in a riparian buffer conservation zone model ordinance, which calls for measurement from the centerline of the stream in those circumstances.[328]

Another measure listed in proposed paragraph (c) is a requirement for periodic evaluation of the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas. This paragraph would require that the permittee use that information to modify operations or take other action if necessary to avoid or minimize unforeseen adverse impacts on fish, wildlife, and related environmental values.

Proposed paragraph (d)(1) would require that the fish and wildlife protection and enhancement plan include a description of the measures that the permit applicant proposes to implement as the best technology currently available to enhance fish, wildlife, and related environmental values both within and outside the area

[320] 30 U.S.C. 12658(b)(24).

[321] Welsch, David J., ''Riparian Forest Buffers: Function and Design for Protection and Enhancement of Water Resources,'' NA–PR–07–91, U.S. Dept. of Agriculture, Forest Service, Northeastern Area State and Private Forestry (1991). Unpaginated document available at *http://www.na.fs.fed.us/spfo/pubs/n_resource/buffer/cover.htm* (last accessed January 16, 2015).

[322] *Id.*

[323] P. Lee et al., ''Quantitative review of riparian buffer width guidelines from Canada and the United States,'' *Journal of Environmental Management* 70 (2004) 165–180, p. 172. The review noted that fish populations recovered after stream temperatures decreased following reforestation.

[324] *Id.*

[325] Fischer, R. A. and J.C. Fischenich, Design recommendations for riparian corridors and vegetated buffer strips (2000) in ''EMRRP Technical Notes Collection'' (ERDC TN–EMRRP–SR–24), U.S. Army Engineer Research and Development Center, Vicksburg, MS.

[326] Palone, Roxane S. and Albert H. Todd, ed. ''Chesapeake Bay Riparian Handbook: A Guide for Establishing and Maintaining Riparian Forest Buffers,'' U.S. Dept. of Agriculture, Forest Service, Northeastern Area State and Private Forestry, May 1997, rev. June 1998. Figure 6–3, p. 132.

[327] 30 U.S.C. 1202(f).

[328] Passaic River Coalition and New Jersey Dept. of Environmental Protection, Division of Watershed Management, ''Riparian Buffer Conservation Zone Model Ordinance,'' Part IV (March 2005).

to be disturbed by mining activities, where practicable. If the applicant determines that it is not practicable to implement any enhancement measures, the application would have to explain the rationale for this determination. Proposed paragraphs (d)(1)(i) through (xi) list examples of potential enhancement measures. However, the applicant may select other measures. There is no expectation that each application will include all the measures listed here.

Under proposed paragraph (d)(2), implementation of fish and wildlife enhancement measures would be mandatory whenever the proposed operation would result in the long-term loss of native forest, other native plant communities, or a segment of a perennial or intermittent stream. In this context, ''long-term'' means that the permittee would not be able to correct the resource loss before expiration of the period of extended revegetation responsibility as prescribed in proposed 30 CFR 816.115. Thus, the removal of significant native forest cover and the loss of the ecological benefits associated with that cover would be considered a long-term loss, as would the burial of a perennial or intermittent stream segment by an excess spoil fill or coal mine waste disposal facility.

We invite comment on whether there are other interpretations of ''long-term'' that we should consider. We also invite comment on whether the regulatory authority may consider mitigation measures approved under the authority of the Clean Water Act as satisfying the separate SMCRA requirement for mandatory enhancement measures. Acceptance may enhance coordination of permitting reviews under SMCRA and the Clean Water Act. We request that anyone with data on the effectiveness and long-term viability of Clean Water Act mitigation measures that have already been implemented submit that data to us for consideration in our decision as to whether to accept Clean Water Act mitigation measures as fish and wildlife enhancement measures under SMCRA. We also request that anyone with data on downstream impacts from coal mining and the effectiveness of Clean Water Act mitigation measures on those impacts submit that data to us for consideration. Finally, we request that anyone with data on the cumulative downstream impacts of coal mining that are not addressed by Clean Water Act mitigation measures or National Pollutant Discharge Elimination System (NPDES) permits submit that data to us for consideration.

Proposed paragraph (d)(2)(ii) would require that the scope of the enhancement measures be commensurate with the potential long-term adverse impact to those resources and that the measures be permanent in nature. For example, riparian corridors must be protected by conservation easements (dedicated to an appropriate agency or organization) or deed restrictions or so that the newly planted vegetation is not destroyed after bond release and termination of jurisdiction under SMCRA. We invite comment on whether our regulations should define ''commensurate'' in this context and, if so, how we should define that term.

Proposed paragraph (d)(2)(iii)(A) would require that enhancement measures be implemented within the watershed in which the proposed operation is located, unless opportunities for enhancement are not available within that watershed. In the latter situation, the proposed rule would allow the permit applicant to propose enhancement measures for implementation in the nearest adjacent watershed in which enhancement opportunities exist. Proposed paragraph (d)(2)(iii)(B) would require that each regulatory program prescribe the size of the watershed for purposes of paragraph (d)(2)(iii)(A) of this section, using a generally-accepted watershed classification system. We invite comment on whether we should instead establish a standard size nationwide as part of the final rule. The HUC–12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset) watershed is one possibility.

Proposed paragraph (d)(2)(iv) would require that completion of mandatory enhancement measures be made a condition of permit issuance to ensure that this requirement is both enforceable and covered by the performance bond posted for the operation.

Proposed paragraph (d)(3) would require that the area to be disturbed by implementation of enhancement measures be included within the proposed permit area whenever implementation of those measures would result in more than a de minimis disturbance of the surface of land outside the area to be mined. This provision would ensure that the regulatory authority can enforce implementation of those measures under the SMCRA permit and that their implementation would be covered by the performance bond for the operation.

Proposed paragraph (e) would contain the U.S. Fish and Wildlife Service permit application review provisions located at existing 30 CFR 780.16(c). We propose to revise these provisions in response to discussions with the U.S. Fish and Wildlife Service concerning compliance with the Endangered Species Act.

Proposed paragraph (e)(1)(i) would require that the regulatory authority provide the fish and wildlife protection and enhancement plan developed under this section as part of the permit application to the applicable regional or field office of the U.S. Fish and Wildlife Service whenever the resource information submitted under proposed 30 CFR 779.20 includes species listed as threatened or endangered under the Endangered Species Act, critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The proposed rule would require that the regulatory authority provide this information to the Service no later than the time that the regulatory authority provides written notice of receipt of an administratively complete permit application to the Service under proposed 30 CFR 773.6(a)(3)(ii). Under existing 30 CFR 780.16(c), the Service must request this information from the regulatory authority rather than receiving it automatically.

Proposed paragraph (e)(1)(ii) is similar to existing 30 CFR 780.16(c) in that it would allow the Service to request an opportunity to review the fish and wildlife protection and enhancement plans submitted as part of other permit applications even when the resource information in those applications does not include species listed as threatened or endangered under the Endangered Species Act, critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. Under both the existing and proposed rules, the regulatory authority must provide that information to the Service within 10 days of receipt of the request.

Proposed paragraph (e)(2) would specify how the regulatory authority must handle comments received from the Service and how any disagreements are to be resolved. Proposed paragraph (e)(2) generally parallels the provisions that we and the Service agreed to as a result of a formal section 7(a)(2) Endangered Species Act consultation pertaining to the approval and conduct of surface coal mining and reclamation operations under a SMCRA regulatory program. Specifically, proposed paragraphs (e)(2)(i) through (iii) would provide that if the regulatory authority does not agree with a Service recommendation that pertains to fish and wildlife or plants listed as threatened or endangered under the

Endangered Species Act or to critical habitat designated under that law, the regulatory authority must explain the rationale for that decision in a comment disposition document and must provide a copy of that document to the pertinent Service field office. The proposed rule also would require that the regulatory authority provide a copy of that document to the appropriate OSMRE field office for informational purposes and to allow the OSMRE field office to monitor resolution of the disagreement. If the Service field office does not concur with the regulatory authority's decision and the regulatory authority and the Service field office are subsequently unable to conclude an agreement at that level, the proposed rule allows either the regulatory authority or the Service to elevate the issue through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.

Proposed paragraph (e)(2)(iv) would provide that the regulatory authority may not approve the permit application until all issues are resolved in accordance with this process and the regulatory authority receives written documentation from the Service that all issues have been resolved. Like all provisions of proposed paragraph (e)(2), this provision is intended to ensure the protection of threatened and endangered species in accordance with the Endangered Species Act.

7. Section 780.19: What baseline information on hydrology, geology, and aquatic biology must I provide?

Proposed paragraph (a): General Requirements

Proposed paragraph (a) would require that each permit application contain information on the hydrology, geology, and aquatic biology of the proposed permit and adjacent areas in sufficient detail to assist in preparing the determination of the probable hydrologic consequences of mining under 30 CFR 780.20, preparing the hydrologic reclamation plan under 30 CFR 780.22, preparing the surface-water and groundwater monitoring plans under 30 CFR 780.23, preparing the plans for monitoring the biological condition of streams under 30 CFR 780.23, demonstrating that all reclamation required by the regulatory program can be accomplished as required by 30 CFR 773.15(b), preparing the cumulative hydrologic impact assessment under 30 CFR 780.21, and determining whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area as required by 30 CFR 773.15(e).

Section 510(b)(3) of SMCRA [329] specifies that the regulatory authority may not approve a permit application unless the regulatory authority has ''made an assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 507(b).'' This assessment is commonly referred to as the CHIA. Section 507(b)(11) of SMCRA,[330] the pertinent part of the SMCRA section referenced in the quote above, requires that each permit application include—

> a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impact of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability.

Section 510(b)(3) also specifies that the regulatory authority may not approve a permit unless the application affirmatively demonstrates and the regulatory authority finds in writing that the proposed operation ''has been designed to prevent material damage to the hydrologic balance outside the permit area.'' In addition, section 510(b)(2) of SMCRA [331] specifies that the regulatory authority may not approve a permit unless the application affirmatively demonstrates and the regulatory authority finds in writing that the ''applicant has demonstrated that reclamation as required by this Act and the State or Federal program can be accomplished under the reclamation plan contained in the permit application.''

Without sound baseline information on surface-water and groundwater quality and quantity and the biological communities in streams, the regulatory authority cannot prepare an adequate CHIA or determine whether the proposed mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area. A lack of adequate baseline data and accurate mining impact analyses based on that data likewise would impair the ability of the regulatory authority to make the finding required by 30 CFR 773.15(b) and section 510(b)(2) of SMCRA [332] concerning the feasibility of reclamation. Proposed 30 CFR 780.19 would refine and expand baseline data requirements for permit applications to promote more effective implementation of sections 507(b)(11) and 510(b)(3) of SMCRA [333] and better protect streams, groundwater, and related environmental values.

Proposed Paragraph (b): Information on Groundwater

Proposed paragraph (b)(1) would require that each permit application include information sufficient to document seasonal variations in the quality, quantity, and usage of groundwater, including all surface discharges, within the proposed permit and adjacent areas. Currently, this provision is part of existing 30 CFR 780.21(b)(1).

Proposed paragraph (b)(2) would require that the permit application include an assessment of the seasonal characteristics of any underground mine pool that is present within the proposed permit or adjacent areas unless the applicant demonstrates, and the regulatory authority finds, that the mine pool is not hydrologically connected to the proposed permit area. Proposed paragraph (b)(2) also would require that the determination of the probable hydrologic consequences of the proposed operation include a discussion of the effect of the proposed mining operation on any underground mine pools within the proposed permit and adjacent areas. In our experience, the mine pools associated with underground mines adjacent to, underlying, or overlying the proposed operation are not always properly or completely described, including the current or potential degree of hydrologic connection between the mine pool and the proposed operation. The level of detail and data collection needs to be sufficient for the reviewer to understand the complex interaction between the mine pools and the hydrology of the proposed permit and adjacent areas.

Proposed paragraph (b)(3) would allow the regulatory authority to require the installation of properly-screened monitoring wells when necessary to obtain groundwater quality and quantity information sufficient to characterize seasonal variations. Properly-designed and constructed monitoring wells are essential to collection of reliable and scientifically-valid data, which section 517(b)(2) of SMCRA requires.

[329] 30 U.S.C. 1260(b)(3).

[330] 30 U.S.C. 1257(b)(11).

[331] 30 U.S.C. 1260(b)(2).

[332] *Id.*

[333] 30 U.S.C. 1257(b)(11) and 1260(b)(3).

Proposed paragraph (b)(4) would expand the list of parameters in existing 30 CFR 780.21(b)(1) that must be included in the description of groundwater quality. Proposed new parameters include major anions, major cations, the cation-anion balance, hot acidity,[334] total alkalinity, pH, ammonia, arsenic, cadmium, copper, nitrogen, selenium, and zinc. Our rationale for adding these parameters is that a complete characterization of the prevailing premining hydrologic balance, including water chemistry, is necessary to fully assess the impacts of the proposed operations. The additional data also would facilitate quality assurance and quality control procedures. Finally, the additional baseline data may document existing water quality or other problems and thus provide the permittee with a defense against later assertions that it has caused adverse impacts to a stream with respect to those parameters.

The proposed addition of selenium and a requirement for both total dissolved solids and specific conductance (rather than either total dissolved solids or specific conductance, as in the existing regulations) reflect concerns identified in scientific studies documenting the adverse impacts that elevated concentrations of those parameters have had on aquatic life in streams in the central Appalachian coalfields. Part II of this preamble summarizes some of those studies.

Proposed paragraph (b)(5) is substantively identical to the groundwater quantity information requirements in the last sentence of existing 30 CFR 780.21(b)(1).

Proposed paragraph (b)(6)(i) would require that the permit applicant establish monitoring wells (or equivalent monitoring points like springs and other direct surface discharges of groundwater) at a sufficient number of locations within the proposed permit and adjacent areas to determine groundwater quality, quantity, and movement in each aquifer above or immediately below the lowest coal seam to be mined. At a minimum, for each aquifer, we propose to require monitoring points upgradient and downgradient of the proposed permit area and within the proposed permit area to ensure collection of data sufficient to fully describe baseline groundwater conditions.

Proposed paragraph (b)(6)(ii) would require that the permit applicant collect water samples from the locations identified in proposed paragraph (b)(6)(i) at equally-spaced monthly intervals for a minimum of 12 consecutive months to document seasonal variations in the quality of groundwater through a complete hydrologic cycle. Proposed paragraph (b)(6)(ii) also would require that the permit applicant analyze those samples for all parameters listed in proposed paragraph (b)(4) at the same frequency. Analysis of all listed parameters would establish a comprehensive baseline for groundwater quality.

Proposed paragraph (b)(6)(iii) would require that the permit applicant take the measurements listed in proposed paragraph (b)(5) at each location identified in proposed paragraph (b)(6)(i) at equally spaced monthly intervals for a minimum of 12 consecutive months to document seasonal variations in groundwater levels and to establish a comprehensive baseline for groundwater availability.

Currently, regulatory authorities require anywhere from as few as three samples (high, mean, and low base flow) to multiple years of sampling. Requiring a minimum of 12 consecutive, equally-spaced monthly samples would ensure that the baseline data collected would cover the entire water year.[335] Under both our existing rules and the 1979 rules, the regulatory authority could accept fewer than 12 months of data, provided that, as explained in the preamble to the 1979 rules, the maximum seasonal variation could be established by extrapolation from existing data collected within the same watershed or in a similar watershed through the use of modeling or other reasonable predictive tools.[336] However, our past experience indicates that extrapolation is not a reliably accurate method to document and describe seasonal variation. Therefore, we now propose to require collection of actual data for the complete water year.

Proposed paragraph (b)(6)(iv) would require that the regulatory authority extend the minimum baseline data collection period whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought (−3.0 or lower on the Palmer Drought Severity Index[337]) or abnormally high precipitation (3.0 or higher on the Palmer Drought Severity Index) during the initial baseline data collection period. The Palmer Drought Severity Index is a national index used to characterize climatic conditions across the country on a weekly frequency. During excessively wet periods, the seasonal concentrations of chemical constituents might be lower than normal because flows and water levels are higher. During severe drought periods, the concentrations of chemical constituents might be higher than normal because flows and water levels are lower. We propose to require that baseline data collection continue until the dataset includes 12 consecutive months without severe drought or abnormally high precipitation. Without this provision, the baseline data in the permit application would not be an accurate description of normal premining conditions.

Proposed Paragraph (c): Information on Surface Water

Proposed paragraph (c)(1) would require that each permit application include information sufficient to document seasonal variation in surface-water quality, quantity, and usage within the proposed permit and adjacent areas. Currently, this provision is part of existing 30 CFR 780.21(b)(2).

Proposed paragraph (c)(2) would expand the list of parameters in existing 30 CFR 780.21(b)(2) that must be included in the descriptions of surface water quality. Proposed new parameters include major anions, major cations, the cation-anion balance, hot acidity,[338] total alkalinity, pH, ammonia, arsenic, cadmium, copper, nitrogen, selenium, and zinc. We also propose to require that the applicant include any additional parameters required by the agency implementing the NPDES program under section 402 of the Clean Water Act.[339] Our rationale for adding these parameters is that a complete characterization of the prevailing premining hydrologic balance, including water chemistry, is necessary to fully assess the impacts of the proposed operations. The additional data also would facilitate quality assurance and quality control procedures. Finally, the additional baseline data may document existing water quality or other problems and thus provide the permittee with a defense against later assertions that it

[334] Hot acidity refers to the hot peroxide treatment titration method for determination of acidity.

[335] The water year runs from October 1 through September 30.

[336] 44 FR 15034 (Mar. 13, 1979).

[337] See *http://www.drought.gov/drought/content/products-current-drought-and-monitoring-drought-indicators/palmer-drought-severity-index* (last accessed August 25, 2014).

[338] Hot acidity refers to the hot peroxide treatment titration method for determination of acidity.

[339] 33 U.S.C. 1342.

has caused adverse impacts to a stream with respect to those parameters.

The proposed addition of selenium and a requirement for both total dissolved solids and specific conductance (rather than just one or the other, as in the existing regulations) reflect concerns identified in scientific studies documenting the adverse impacts that elevated concentrations of those parameters have had on aquatic life in streams in the central Appalachian coalfields. Part II of this preamble summarizes some of those studies.

Proposed paragraph (c)(3)(i) would require that the applicant provide baseline information on seasonal flow variations and peak-flow magnitude and frequency for all perennial, intermittent, and ephemeral streams and other surface-water discharges within the proposed permit and adjacent areas. This information is needed to prepare the determination of the probable hydrologic consequences of mining under proposed 30 CFR 780.20 and to prepare the surface-water runoff control plan that we propose to require under 30 CFR 780.29. Proposed paragraph (c)(3)(i) also would require that the applicant provide information on the extent of existing usage for existing uses and anticipated usage for all reasonably foreseeable uses. This information is needed to prepare the determination of the probable hydrologic consequences of mining and the CHIA and to establish permit-specific criteria for material damage to the hydrologic balance outside the permit area, consistent with our proposed definition of that term in 30 CFR 701.5.

Proposed paragraph (c)(3)(ii) would require the use of generally-accepted professional flow measurement techniques to ensure the accuracy of baseline flow data. The proposed rule would prohibit the use of subjective visual flow observations because of the inherent lack of precision in those observations and variations among observers.

Proposed paragraph (c)(4)(i) would require that the permit applicant establish monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine the quality and quantity of water in each stream within those areas. At a minimum, we propose to require monitoring points upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas, as well as in a representative number of ephemeral streams within the proposed permit area, to ensure collection of data sufficient to fully describe baseline surface water conditions. Ephemeral streams in the adjacent area are unlikely to be affected by mining, so we do not propose to require monitoring of those streams.

Proposed paragraph (c)(4)(ii) would require that the permit applicant collect water samples from the locations identified in proposed paragraph (c)(4)(i) at equally-spaced monthly intervals for a minimum of 12 consecutive months to document seasonal variations in surface water quality through a complete hydrologic cycle. Proposed paragraph (c)(4)(ii) also would require that the permit applicant analyze those samples for all parameters listed in proposed paragraph (c)(2) at the same frequency. Analysis of all listed parameters would establish a comprehensive baseline for surface water quality.

Proposed paragraph (c)(4)(iii) would require that the permit applicant take the measurements listed in proposed paragraph (c)(3) at each location identified in proposed paragraph (c)(4)(i) at equally spaced monthly intervals for a minimum of 12 consecutive months to document seasonal variations in streamflow and to establish a comprehensive baseline for streamflow and surface water availability.

Currently, regulatory authorities require anywhere from as few as three samples (high, mean, and low base flow) to multiple years of sampling. Requiring a minimum of 12 consecutive, equally-spaced monthly samples would ensure that the baseline data collected would cover the entire water year.[340] Under both our existing rules and the 1979 rules, the regulatory authority could accept fewer than 12 months of data, provided that, as explained in the preamble to the 1979 rules, the maximum seasonal variation could be established by extrapolation from existing data collected within the same watershed or in a similar watershed through the use of modeling or other reasonable predictive tools.[341] However, our past experience indicates that extrapolation is not a reliably accurate method to document and describe seasonal variation. Therefore, we now propose to require collection of actual data for the complete water year. In addition, our proposal is consistent with the approach now being taken by agencies responsible for implementing the Clean Water Act.

Proposed paragraph (c)(4)(iv) would require that the regulatory authority extend the minimum baseline data collection period whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought (− 3.0 or lower on the Palmer Drought Severity Index[342]) or abnormally high precipitation (3.0 or higher on the Palmer Drought Severity Index) during the initial baseline data collection period. The Palmer Drought Severity Index is a national index used to characterize climatic conditions across the country on a weekly frequency. During excessively wet periods, the seasonal concentrations of chemical constituents might be lower than normal because flows and water levels are higher. During severe drought periods, the concentrations of chemical constituents might be higher than normal because flows and water levels are lower. We propose to require that baseline data collection continue until the dataset includes 12 consecutive months without severe drought or abnormally high precipitation. Without this provision, the baseline data in the permit application would not be an accurate description of normal premining conditions.

Proposed paragraph (c)(5) would require that the applicant provide records of precipitation amounts for the proposed permit area, using on-site self-recording devices. Precipitation records must be adequate to generate and calibrate a hydrologic model of the site, should the regulatory authority require such a model. This information is needed to prepare the PHC determination under proposed 30 CFR 780.20 and the surface-water runoff control plan required under proposed 30 CFR 780.29.

Proposed paragraph (c)(6) would require that the applicant identify and assess all perennial, intermittent, and ephemeral streams within the permit and adjacent areas. The assessment would include a description of the physical and hydraulic characteristics of the stream channel, as well as the biological condition of each stream, and the nature of vegetation within the riparian zone. For streams that appear on the list of impaired surface waters prepared under section 303(d) of the Clean Water Act,[343] it also would

[340] The water year runs from October 1 through September 30.

[341] 44 FR 15034 (Mar. 13, 1979).

[342] See *http://www.drought.gov/drought/content/products-current-drought-and-monitoring-drought-indicators/palmer-drought-severity-index* (last accessed August 25, 2014).

[343] 33 U.S.C. 1313(d).

require identification of the stressors and associated total maximum daily loads, if applicable. Proposed paragraph (c)(6) would result in documentation of the premining physical and biological conditions of streams for purposes of evaluating the impacts of mining, establishing stream restoration standards, and establishing revegetation requirements for riparian corridors.

Proposed Paragraph (d): Additional Information for Discharges From Previous Coal Mining Operations

Proposed paragraph (d) would require that the applicant collect and analyze a one-time sample of all existing discharges from previous mining operations within the proposed permit and adjacent areas during the low baseflow season. Both the applicant and the regulatory authority would use the results of these analyses to identify any additional parameters of concern. Data from previous mining operations also can be helpful in preparing the determination of the probable hydrologic consequences of mining and the CHIA. Hydrologic data from both reclaimed and unreclaimed minesites can be extremely valuable in predicting the impacts of future mining.

Proposed Paragraph (e): Biological Condition Information for Streams

Proposed paragraph (e)(1) would require that each permit application include an assessment of the biological condition of each perennial and intermittent stream within the proposed permit and adjacent areas as well as an assessment of the biological condition of a representative sample of ephemeral streams within those areas. This requirement would not apply to a permit application for which the regulatory authority grants an exemption under proposed paragraph (h).

Proposed paragraph (e)(2) would require that persons conducting the assessment use a multimetric bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory report required under section 305(b) of the Clean Water Act [344] or other scientifically-valid multimetric bioassessment protocols used by agencies responsible for implementing the Clean Water Act. Multimetric indices include metrics such as species richness, complexity, and tolerance as well as trophic measures. They provide a quantitative comparison (often referred to as an index of biological or biotic integrity) of the ecological complexity of biological assemblages relative to a regionally-defined reference condition. However, we also propose to establish minimum standards that those protocols must meet. First, the bioassessment protocol must be based upon the measurement of an appropriate array of aquatic organisms, including benthic macroinvertebrates. Benthic macroinvertebrates are particularly useful for assessing the biological condition of the stream because certain species are highly sensitive to the presence of pollutants. Furthermore, we propose to require identification of benthic macroinvertebrates to the genus level because a bioassessment protocol that identifies macroinvertebrates only to the family level may not be capable of differentiating between pollution-tolerant and pollution-intolerant genera within the same family. On the other hand, a bioassessment protocol that identifies organisms to the species level may not be consistent with available indices of biological integrity.

Finally, proposed paragraph (e)(2) would require that the bioassessment protocol result in the calculation of index values for both habitat and macroinvertebrates and provide a correlation of index values to the capability of the stream to support designated uses under section 101(a) or 303(c) of the Clean Water Act, as well as any other existing or reasonably foreseeable uses. We seek comment on the effectiveness of using index scores from bioassessment protocols to ascertain impacts on existing, reasonably foreseeable, or designated uses. We also invite commenters to suggest other approaches that may be equally or more effective.

Proposed Paragraph (f): Geologic Information

Proposed paragraph (f) is substantively identical to the existing rules at 30 CFR 780.22(b) through (d), except as discussed below. We propose to eliminate the provision in existing 30 CFR 780.22(b)(2)(ii) that allows the regulatory authority to waive the requirement that the permit application include analyses of each stratum in the geological column for alkalinity-producing materials. We also propose to eliminate the provision in existing 30 CFR 780.22(b)(2)(iii) that allows the regulatory authority to waive the requirement that the permit application include an analysis of the coal seam for pyritic sulfur. Both analyses are necessary for a complete acid-base accounting, assessment of the potential for acid mine drainage, and prediction of the total dissolved solids content of postmining discharges. In addition, this information is necessary to prepare an accurate determination of the probable hydrologic consequences of mining under proposed 30 CFR 780.20 and the cumulative hydrologic impact assessment under proposed 30 CFR 780.21. Finally, the information is necessary to assist the regulatory authority in determining whether reclamation is possible and whether the proposed operation will create a long-term postmining discharge requiring treatment.

We invite comment on whether we should adopt provisions similar to proposed 30 CFR 777.13(b) to prescribe acceptable methodologies for the geochemical analyses required by proposed 30 CFR 780.19(f)(3)(ii) and (iii).

Proposed Paragraph (g): Cumulative Impact Area Information

Proposed paragraph (g) is substantively identical to existing 30 CFR 780.21(c), with the exception that we propose to clarify that the permit applicant may submit data and analyses from nearby mining operations if the site of those operations is representative of the proposed operations in terms of topography, hydrology, geology, geochemistry, and method of mining.

Proposed Paragraph (h): Exception for Operations That Avoid Streams

Proposed paragraph (h) would allow a permit applicant to request that the regulatory authority waive the biological condition information requirements of proposed 30 CFR 780.19(e). The regulatory authority may approve the request only if it determines that the applicant has demonstrated that the proposed operation will not mine through or bury a perennial or intermittent stream; create a point-source discharge to any perennial, intermittent, or ephemeral stream; or modify the baseflow of any perennial or intermittent stream.

Proposed Paragraph (i): Coordination With Clean Water Act Agencies

Proposed paragraph (i) would require that SMCRA regulatory authorities consult with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act and make best efforts to minimize differences in baseline data collection points and parameters to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations. Coordination could reduce the overall regulatory impact to the industry, reduce the workload of

[344] 33 U.S.C. 1315(b).

regulatory authorities, and expedite the permitting process. Applicants and permittees may use data already provided to or collected by a Clean Water Act agency to satisfy SMCRA requirements, provided that the data is reasonably current and of the type, scope, and quantity required for SMCRA purposes. Proposed paragraph (i) is consistent with the intent of section 713 of SMCRA,[345] which, among other things, promotes coordination of regulatory activities under SMCRA and the Clean Water Act.

Proposed Paragraph (j): Corroboration of Baseline Data

Proposed paragraph (j) would require that the regulatory authority either corroborate a sample of the baseline information in each permit application or arrange for a third party to conduct the corroboration at the applicant's expense. Corroboration may include, but is not limited to, simultaneous sample collection and analysis, use of field verification measurements, or comparison of application data with application or monitoring data from adjacent operations. The existing regulations at 30 CFR 777.13 already require that the permit applicant document and describe the methods and persons collecting and analyzing technical data. We interpret the existing regulations as meaning that the regulatory authority has an obligation to monitor the accuracy and completeness of data collection and analyses for permit applications. Proposed paragraph (j) would make this responsibility explicit.

Proposed Paragraph (k): Permit Nullification for Inaccurate Information

Proposed paragraph (k) specifies that a permit will be void from the date of issuance and have no legal effect if the permit issuance was based on substantially inaccurate baseline information. Under those circumstances, the proposed rule provides that the permittee must cease mining-related activities and immediately begin to reclaim the site. This measure would avoid or minimize the environmental harm that could result from initiation or continuation of an operation approved on the basis of substantially inaccurate data. We do not intend for this provision to apply in situations in which the application contains only minor omissions or errors. By ''substantially inaccurate,'' we mean situations such as missing or false chemical analyses of geologic strata or misrepresentation of data from another permit application as being collected from the proposed permit and adjacent areas. Adoption of proposed paragraph (k) would be in furtherance of section 102(a) of SMCRA,[346] which provides that one of the purposes of the Act is to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.

8. Section 780.20: How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

Proposed paragraph (a) would revise the requirements concerning preparation of the determination of the probable hydrologic consequences of mining in existing 30 CFR 780.21(f)(1) through (f)(3) by adding a requirement to consider the impacts of the proposed operation on the biological condition of perennial, intermittent, and ephemeral streams located within the proposed permit and adjacent areas, not just on the quantity and quality of surface water and groundwater as in the existing rule. Proposed paragraph (a)(1) would replace the requirement in existing 30 CFR 780.21(f)(3)(i) for a finding on whether the proposed operation may cause adverse impacts to the hydrologic balance with a requirement for a finding on whether the proposed operation may cause material damage to the hydrologic balance outside the permit area. These proposed changes would more closely tailor the PHC determination to both the definition of ''material damage to the hydrologic balance outside the permit area'' that we propose to add to 30 CFR 701.5 and the existing finding that the regulatory authority must make before approving a permit application under 30 CFR 773.15(e), which, in relevant part, requires a determination that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

Proposed paragraph (a)(4) would require a finding on whether the proposed operation would either intercept or create aquifers in surface mine spoil or underground mine voids. Surface mining frequently results in the formation of a new aquifer in spoil that is placed in either the backfill or an excess spoil fill. This aquifer may have substantially different quality and quantity characteristics than water found in undisturbed overburden strata. Underground mine voids can store large volumes of water in what are commonly known as mine pools. The storage volume and discharge rates of these pools may be orders of magnitude larger than those associated with aquifers in surface mine spoil because mine pools typically collect water from a much larger area than do surface mine spoil aquifers. Discharges from underground mine pools are frequently of relatively high volume because their recharge rate averages 0.47 gallons per minute per acre of mine voids.[347]

The quantity and quality of the groundwater that recharges the mine pool from overlying and underlying rock strata can significantly influence postmining water quality.[348] These mine pool aquifers may discharge directly to the land surface or to groundwater systems downgradient of the aquifer. The PHC determination must consider the timing, quality, quantity, and location of these discharges to adequately assess the probable impacts of the proposed operation on the hydrologic balance. The new finding also would require evaluation of the impacts of any temporary or permanent dewatering of aquifers, including underground mine pools, on the hydrologic balance.

Proposed paragraph (a)(5) would expand the finding in existing 30 CFR 780.21(f)(3)(iv) concerning what impact the proposed operation would have on specific water quality parameters to include the parameters for which baseline information would be required under proposed 30 CFR 780.19(b) and (c). Furthermore, we propose to add requirements in paragraph (a)(5) for findings on what impact the proposed operation would have on precipitation runoff patterns and characteristics; seasonal variations in streamflow; the magnitude and frequency of peak flows in perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas; and the biological condition of those streams. Finally, we propose to add a requirement in paragraph (a)(5)(iv) for a finding about the impact that any diversion of surface or subsurface flows to underground mine workings or any changes in watershed size as a result of the postmining surface configuration would have on the availability of surface water and groundwater. The changes in proposed paragraph (a)(5)

[345] 30 U.S.C. 1303.

[346] 30 U.S.C. 1202(a).

[347] Parizek, R.R., 1971. Prevention of Coal Mine Drainage Formation by Well Dewatering. Special Report of Research, The Pennsylvania State University, 73 p.

[348] See, *e.g.,* McDonald, L. M., J. Skousen, and J. Demchak, 2003, Longevity of Mine Discharges from Above-Drainage Underground Mines, in the Proceedings of the Twenty-Fourth West Virginia Surface Mine Drainage Task Force Symposium, Morgantown, WV, 54 pp.

would improve the comprehensiveness and predictive accuracy of the PHC determination. They also would provide a more scientifically sound basis for development of the CHIA required by proposed 30 CFR 780.21 and the hydrologic reclamation plan required by proposed 30 CFR 780.22.

Proposed paragraph (b) is substantively identical to existing 30 CFR 780.21(b)(3), with the exception that we propose to expand the conditions under which the regulatory authority may request that the applicant submit supplemental information to include those situations in which the PHC determination indicates that the proposed operation may result in adverse impacts to the biological condition of perennial or intermittent streams within the proposed permit area or the adjacent area. We also propose to clarify that the regulatory authority may request additional geochemical analyses of overburden materials and information concerning underground mine pools and their impacts. The new provisions are necessary to ensure that the PHC determination is sufficiently comprehensive to support development of the hydrologic reclamation plan required by 30 CFR 780.22 and the CHIA required by 30 CFR 780.21.

Proposed paragraph (c)(1) is substantively identical to existing 30 CFR 780.21(f)(4), which requires that the regulatory authority determine whether a new or updated PHC determination is needed as part of the process of evaluating permit revision applications. We propose to add paragraph (c)(2) to clarify that the applicant must prepare a new or updated PHC determination whenever a regulatory authority review finds that one is needed.

9. Section 780.21: What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?

Our existing regulations contain very few standards or criteria for preparation of the CHIA. Those regulations, which are located at 30 CFR 780.21(g)(1), provide that the regulatory authority must prepare an assessment of the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining upon surface-water and groundwater systems in the cumulative impact area. The regulations further state that the assessment must be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The lack of standards or content requirements for the CHIA, coupled with the lack of a definition of material damage to the hydrologic balance, is an impediment to stream protection under SMCRA because there are no objective criteria to apply.

We propose to remedy that problem, in part, by establishing more detailed content requirements for the CHIA, based on our experience as the regulatory authority in Tennessee and on Indian lands and on our experience in evaluating the implementation of state regulatory programs. Our proposed requirements would improve implementation of sections 507(b)(11) and 510(b)(3) of SMCRA,[349] which require that the regulatory authority prepare a CHIA and provide that the regulatory authority may not approve a permit application unless the application affirmatively demonstrates, and the regulatory authority finds in writing, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Section 201(c)(2) of SMCRA [350] directs the Secretary, acting through OSMRE, to ''publish such rules and regulations as may be necessary to carry out the purposes and provisions of the Act.'' This provision establishes statutory authority for the enhanced CHIA regulations in this proposed rule. The more detailed CHIA content requirements that we propose to adopt are prudent measures to ensure that the CHIA is adequate to prevent the approval or renewal of permits that would result in material damage to the hydrologic balance outside the permit area.

Proposed paragraph (a)(1) is substantively identical to existing 30 CFR 780.21(g)(1), with the exception that we propose to clarify that the CHIA must be in writing. We also propose to remove the sentence stating that the regulatory authority may allow the permit applicant to submit data and analyses relevant to the CHIA with the application. This sentence that we propose to delete is unnecessary because it is inherently true, whether stated or not. In addition, proposed paragraph (a)(3) effectively replaces this sentence.

Proposed paragraph (a)(2) would provide that, in preparing the CHIA, the regulatory authority must consider relevant information on file for other mining operations located within the cumulative impact area or in similar watersheds. This provision is intended to ensure that the regulatory authority considers all available information when preparing the CHIA.

Proposed paragraph (a)(3) would provide that the regulatory authority may not approve a permit application until it receives the hydrologic, geologic, and biological information needed to prepare the CHIA, either from other federal and state agencies or from the applicant. This provision is consistent with similar language in the provisos at the end of section 507(b)(11) of SMCRA.[351]

Proposed paragraph (b) would establish detailed content requirements for the CHIA to ensure that the assessment is sufficiently comprehensive to support the finding that the regulatory authority must make under section 510(b)(3) of SMCRA [352] and 30 CFR 773.15(e) regarding whether the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The new requirements correspond to elements of the proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5. By requiring the development of permit-specific, numerical material damage criteria, they also would facilitate implementation of the prohibition in section 510(b)(3) of SMCRA and 30 CFR 773.15(e) on approval of a permit application unless the CHIA demonstrates that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

Proposed paragraph (b)(1) would require that the CHIA contain a map of the cumulative impact area. The boundaries of this area may differ for surface water and groundwater, in which case proposed paragraph (b)(1)(i) would require that the map identify and display those differences. Proposed paragraphs (b)(1)(ii) through (iv) would require that the map identify the locations of all previous, current, and anticipated surface and underground mining, the locations of all baseline data collection sites under proposed 30 CFR 780.19, and designated uses of surface water under section 101(a) or 303(c) of the Clean Water Act.

Proposed paragraph (b)(2) would require that the CHIA contain a description of all previous, existing, and anticipated mining within the cumulative impact area, including, at a minimum, the coal seam or seams mined, the extent of mining, and the reclamation status of each operation.

[349] 30 U.S.C. 1257(b)(11) and 1260(b)(3).

[350] 30 U.S.C. 1211(c)(2).

[351] 30 U.S.C. 1257(b)(11).

[352] 30 U.S.C. 1260(b)(3).

Proposed paragraph (b)(3) would require that the CHIA contain a description of the baseline hydrologic information collected from the proposed permit and adjacent areas under proposed 30 CFR 780.19. This description would include the quality and quantity of surface water and groundwater and seasonal variations therein; quantitative information about existing usage of surface water and groundwater, as well as information defining the quality of water required for each existing and reasonably foreseeable use of groundwater and surface water and each designated use of surface water under section 101(a) or 303(c) of the Clean Water Act; a description and map of the local and regional groundwater systems; and the biological condition of perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas. The requirements of proposed paragraph (b)(3) would not apply to the entire cumulative impact area.

Proposed paragraph (b)(4) would require that the CHIA contain a discussion of any potential concerns identified in the PHC determination prepared under proposed 30 CFR 780.20 and how those concerns have been or will be resolved.

Proposed paragraph (b)(5) would require that the CHIA contain a qualitative and quantitative assessment of how all anticipated surface and underground mining may impact water quality in surface water and groundwater in the cumulative impact area, expressed in terms of each baseline parameter identified under 30 CFR 780.19.

Proposed paragraph (b)(6) would require that the CHIA contain criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis and that these numerical criteria be incorporated into the permit to ensure that they are enforceable. Proposed paragraphs (b)(6)(i) through (iii) would require that the criteria be expressed in numerical terms for each parameter of concern, that they take into consideration the biological requirements of any species listed as threatened or endangered under the Endangered Species Act when those species or designated critical habitat are present within the cumulative impact area, and that they identify the portion of the cumulative impact area to which the criteria apply and the locations at which impacts will be monitored. The regulatory authority may establish different criteria for subareas within the cumulative impact area when appropriate. Water quality standards established under the Clean Water Act or in the NPDES permit for the operation might suffice for some parameters of concern, but NPDES permits do not address cumulative impacts and are not necessarily structured to prevent material damage to the hydrologic balance outside the permit area.

We invite comment on whether the rule also should require that the regulatory authority establish lower corrective action thresholds to identify the point at which the permittee must take action to minimize the potential that adverse trends will continue and ultimately cause material damage to the hydrologic balance outside the permit area. In particular, we are interested in whether corrective action thresholds would be both more effective and more efficient in preventing material damage to the hydrologic balance outside the permit area, as required by SMCRA, and in avoiding designation of streams as impaired under section 303(d) of the Clean Water Act.[353]

Proposed paragraph (b)(7) would require an assessment of how all anticipated surface and underground mining may affect groundwater movement and availability within the cumulative impact area. This information is important in the determination of whether adverse impacts on groundwater would be severe enough to result in material damage to the hydrologic balance outside the permit area.

Proposed paragraph (b)(8) would require an evaluation of whether the CHIA will support a finding that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area, as required by 30 CFR 773.15(e) and section 510(b)(3) of SMCRA.[354] This evaluation would have to contain supporting data and analyses. Proposed paragraph (b)(8) also would require that the CHIA include certain documented determinations as a prerequisite for a finding that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

Proposed paragraph (b)(8)(i) would require a determination that, during all phases of mining and reclamation and at all times of the year, variations in streamflow and groundwater availability resulting from the operation, as well as variations in the amount and concentration of parameters of concern in discharges from the operation to groundwater and surface water, would not—

- Result in conversion of a perennial or intermittent stream to an ephemeral stream or conversion of a perennial stream to an intermittent stream. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream may be acceptable, provided the conversion would not disrupt or preclude any existing, reasonably foreseeable, or designated use of the stream under section 101(a) or 303(c) of the Clean Water Act and would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act. We also are considering replacement of ''would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act'' with ''would not jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of designated critical habitat in violation of the Endangered Species Act.'' The second alternative would parallel the language of existing and proposed 30 CFR 816.97(b) and 817.97(b).
- Result in an exceedance of applicable water quality standards in any stream located outside the permit area.
- Disrupt or preclude any existing or reasonably foreseeable use of surface water outside the permit area or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act[355] outside the permit area, except as provided in water supply replacement provisions of proposed 30 CFR 780.22(b) and 816.40.

Proposed paragraph (b)(8)(ii) would require a determination that the operation has been designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in damage from flooding, when compared with premining conditions.

Proposed paragraph (b)(8)(iii) would require a determination that perennial and intermittent streams located outside the permit area but within the cumulative impact area would continue to have sufficient baseflow and recharge capacity to maintain their premining flow regime both during and after mining and reclamation. In other words, the regulatory authority must find that

[353] 33 U.S.C. 1313(d).

[354] 30 U.S.C. 1260(b)(3).

[355] 33 U.S.C. 1251(a) and 1313(c).

perennial stream segments will retain perennial flows and intermittent stream segments will retain intermittent flows during and after mining and reclamation. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream may be acceptable, provided the conversion would not disrupt or preclude any existing, reasonably foreseeable, or designated use of the stream under section 101(a) or 303(c) of the Clean Water Act and would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act. We also are considering replacement of ''would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act'' with ''would not jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of designated critical habitat in violation of the Endangered Species Act.'' The second alternative would parallel the language of existing and proposed 30 CFR 816.97(b) and 817.97(b).

Proposed paragraph (b)(8)(iv) would require a determination that the operation has been designed to protect the quantity and quality of water in any aquifer that significantly ensures the prevailing hydrologic balance.

Proposed paragraph (c)(1) would require that the regulatory authority review each application for a significant permit revision to determine whether a new or updated CHIA is needed. This paragraph is similar to existing 30 CFR 780.21(g)(2), except that we propose to add a requirement that the regulatory authority document the review, including the analysis and conclusions, together with the rationale for the conclusions, in writing. In addition, we propose to require this review only for applications for significant permit revisions, not for all applications for any type of permit revisions as under the existing rule. We are not aware of any situation in which a non-significant permit revision application has required an update of the CHIA under the existing rules. Therefore, conducting this review of non-significant permit revision applications is not a meaningful or productive use of regulatory authority resources.

Proposed paragraph (c)(2) would add a requirement that the regulatory authority reevaluate the CHIA during the permit renewal process or every 5 years, whichever is more frequent, to determine whether the CHIA remains accurate and whether the material damage criteria in the CHIA and the permit are adequate to ensure that material damage to the hydrologic balance outside the permit area will not occur. This evaluation must include a review of all water monitoring data from both the operation in question and all coal mining operations within the cumulative impact area. We invite comment on whether this 5-year review frequency for water monitoring data is adequate to detect adverse trends in a timely manner or whether more frequent reviews, such as during midterm permit review, should be required. In addition, we invite comment on whether the permittee also should be required to conduct this review.

Proposed paragraph (c)(3) would require preparation of a new or updated CHIA whenever the regulatory authority finds that one is needed based on the evaluation required by proposed paragraph (c)(2). Proposed paragraphs (c)(2) and (c)(3) are logical extensions of the finding that the regulatory authority must make under section 510(b)(3) of SMCRA [356] and 30 CFR 773.15(e) regarding whether the operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

10. Section 780.22: What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water resources?

Proposed paragraph (a) would be substantively identical to the hydrologic reclamation plan requirements in existing 30 CFR 780.21(h), except as discussed below. Proposed paragraph (a)(2)(v) would replace the existing requirement for measures to avoid acid or toxic drainage with a requirement for preventive and remedial measures to avoid acid or toxic discharges to surface water and to avoid (or, if avoidance is not possible, minimize) degradation of groundwater. The new language reflects the nature of the surface mining process, which typically converts solid rock to highly-fragmented spoil, thus altering groundwater composition and quality.

Proposed paragraph (a)(3) would require that the hydrologic reclamation plan address the impacts of any transfers of water among active and abandoned mines within the proposed permit and adjacent areas. The transfer of water between mines, whether intentional through direct connections or unintentional through leakage, can have substantial impacts on the availability, quality, and distribution of groundwater and surface water in the permit and adjacent areas, which in turn may have a substantial impact on users of groundwater and surface water. For example, a reduction in baseflow of a stream would reduce the assimilative capacity of the stream. In addition, increases in the hydrostatic head elevations of underground mine pools might cause blowouts or landslides or have other adverse impacts on land and water resources.

Proposed paragraph (a)(4) would add a requirement for a description of the steps that the permittee will take during mining and reclamation through final bond release to protect and enhance aquatic life and related environmental values to the extent possible using the best technology currently available. This requirement would more completely implement section 515(b)(24) of SMCRA,[357] which provides that surface coal mining and reclamation operations must use the best technology currently available to minimize disturbances and adverse impacts to fish, wildlife, and related environmental values to the extent possible and enhance those resources where practicable.

Proposed paragraph (b) would replace and expand the alternative water source information required by existing 30 CFR 780.21(e) if the proposed operation may result in contamination, diminution, or interruption of a protected water supply. Proposed paragraph (b)(1) would require that the applicant identify alternative water sources that are available, feasible to develop, and suitable in quality and sufficient in quantity to support premining uses and approved postmining land uses. Proposed paragraph (b)(2) would prohibit any mining that would contaminate, diminish, or interrupt a protected water supply if the applicant is unable to identify any suitable alternative water sources. These provisions are intended to prevent situations in which high-quality water from a spring is replaced with well water that requires substantial treatment.

When a suitable alternative water source is available, proposed paragraph (b)(3) would require that the permittee develop and install the alternative water supply on a permanent basis before adversely affecting an existing water supply protected under proposed 30 CFR 816.40. This provision would not apply if the permittee demonstrates, and the regulatory authority finds, that the proposed operation also would adversely affect the replacement supply.

[356] 30 U.S.C. 1260(b)(3).

[357] 30 U.S.C. 1265(b)(24).

In that case, the proposed rule would require that the permittee provide a temporary replacement water supply until it is safe to install the permanent replacement water supply.

Finally, proposed paragraph (b)(4) would require a description of how the applicant would provide both temporary and permanent replacements for any unexpected losses of protected water supplies in accordance with the timeframes and other requirements of proposed 30 CFR 816.40.

Proposed paragraph (b) is intended to more completely implement the water supply replacement requirements of sections 717(b) and 720(a)(2) of SMCRA.[358]

11. Section 780.23: What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

Paragraphs (b)(1) and (2) of section 517 of SMCRA [359] provide authority for the adoption of regulations establishing monitoring requirements for surface coal mining and reclamation operations. Among other things, paragraph (b)(1) provides that ''the regulatory authority shall require any permittee to . . . install, use, and maintain any necessary monitoring equipment or methods [and] evaluate results in accordance with such methods, at such locations, intervals, and in such manner as a regulatory authority shall prescribe.'' Paragraph (b)(2) includes the following additional provisions:

> [F]or those surface coal mining and reclamation operations which remove or disturb strata that serve as aquifers which significantly insure the hydrologic balance of water use either on or off the mining site, the regulatory authority shall specify those—
>
> (A) monitoring sites to record the quantity and quality of surface drainage above and below the minesite as well as in the potential zone of influence;
>
> (B) monitoring sites to record level, amount, and samples of ground water and aquifers potentially affected by the mining and also directly below the lowermost (deepest) coal seam to be mined;
>
> (C) records of well logs and borehole data to be maintained; and
>
> (D) monitoring sites to record precipitation.
>
> The monitoring data collection and analysis required by this section shall be conducted according to standards and procedures set forth by the regulatory authority in order to assure their reliability and validity.

Proposed 30 CFR 780.23 would establish more detailed requirements for groundwater and surface-water monitoring plans than those that appear in existing 30 CFR 780.21(i) and (j). Thus, they would more completely implement the statutory provisions described and quoted above. Furthermore, our proposed enhanced monitoring requirements are intended to ensure that, as required by section 515(b)(24) of SMCRA,[360] surface coal mining and reclamation operations are conducted so as to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Finally, our proposed enhanced monitoring requirements would be consistent with both the more comprehensive baseline information that we propose to require in 30 CFR 780.19 and the definition of ''material damage to the hydrologic balance outside the permit area'' that we propose to adopt in 30 CFR 701.5. Comprehensive baseline information and monitoring are critical to evaluating the impact of the mining operation on the hydrologic balance, which in turn is essential to preventing the occurrence of material damage to the hydrologic balance outside the permit area, consistent with section 510(b)(3) of SMCRA.[361]

Proposed Paragraphs (a): Groundwater Monitoring Plan

Proposed paragraph (a) would include the groundwater monitoring plan requirements in existing 30 CFR 780.21(i). We propose to revise those requirements by adding more specific minimum requirements for the groundwater monitoring plan to ensure that the plan is adequate to evaluate the impacts of the mining operation on groundwater in the proposed permit and adjacent areas and to identify adverse trends in sufficient time to initiate corrective action to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The following discussion highlights the more significant elements of proposed paragraph (a).

Proposed paragraph (a)(1)(iii)(A) would require that each groundwater monitoring plan include monitoring wells (or equivalent monitoring points with direct groundwater discharges, such as springs) located upgradient and downgradient of the proposed operation to facilitate identification of potential mining-related changes in groundwater quantity or quality and to assist in an evaluation of whether any downgradient changes are the result of the mining and reclamation activities. The proposed rule would require separate wells for each aquifer above or immediately below the lowest coal seam to be mined. This provision would ensure identification of impacts on each aquifer, consistent with section 517(b)(2)(B) of SMCRA, which requires monitoring of ''aquifers potentially affected by the mining and also directly below the lowermost (deepest) coal seam to be mined.''

Proposed paragraph (a)(1)(iii)(B) would require placement of monitoring wells in backfilled portions of the permit area after backfilling and grading of all or a portion of the permit area is completed. The purpose of these wells is to identify how infiltration through the spoil may alter groundwater levels and quality. The proposed rule would allow the regulatory authority to waive placement of monitoring wells in the backfilled area if it finds that wells in the backfilled area are not necessary to determine or predict the future impact of the mining operation on groundwater quality.

Finally, to monitor impacts on underground mine pools, proposed paragraph (a)(1)(iii)(C) would require placement of monitoring wells in any existing underground mine workings that would have a direct hydrological connection to the proposed operation. These mine pools may serve as municipal, industrial, or residential water supplies. In addition, sudden, unplanned releases of the water in those mine pools can result in flooding damage or adverse impacts on receiving streams.

Proposed paragraph (a)(1)(iv) would require that the plan describe how the monitoring data will be used to determine the impacts of the operation upon the hydrologic balance and the biological condition of perennial and intermittent streams within the permit and adjacent areas, as well as to prevent material damage to the hydrologic balance outside the permit area.

Proposed paragraph (a)(1)(v) would require that the plan describe how monitoring practices will comply with the sampling, analysis, and reporting requirements of proposed 30 CFR 777.13(a) and (b) to ensure that samples are collected and analyzed in a legally and scientifically valid manner. Proposed paragraph (a)(1)(v) is consistent with the requirement in the text after section 517(b)(2)(D) of SMCRA [362] that the regulatory authority set forth standards and procedures for monitoring data collection and analysis

[358] 30 U.S.C. 1307(b) and 1309a(a)(2).

[359] 30 U.S.C. 1267(b)(1) and (2).

[360] 30 U.S.C. 1265(b)(24).

[361] 30 U.S.C. 1260(b)(3).

[362] 30 U.S.C. 1267(b)(2)(D).

to assure the reliability and validity of the data.

Proposed paragraph (a)(2)(i) would require that the groundwater monitoring plan provide for the monitoring of parameters that could be affected by the proposed operation if those parameters relate to the findings and predictions in the PHC determination prepared under 30 CFR 780.20, the biological condition of perennial and intermittent streams and other surface-water bodies that receive discharges from groundwater within the proposed permit and adjacent areas, the suitability of the groundwater for existing and reasonably foreseeable uses, and the suitability of the groundwater to support the premining and postmining land uses. Monitoring of these parameters would assist the permittee and regulatory authority in preventing material damage to the hydrologic balance outside the permit area and in determining compliance with the water supply protection and postmining land use requirements of SMCRA and its implementing regulations.

Proposed paragraph (a)(2)(ii) would require quarterly monitoring of 14 specific parameters, including, among others, selenium and the minimum water-quality parameters required by existing 30 CFR 780.21(i)(1) (pH, total iron, total manganese, and total dissolved solids or specific conductance). As summarized in Part II of this preamble, selenium can have deleterious effects upon fish and human health. In addition, this proposed paragraph would require quarterly monitoring of major anions (including, at a minimum, bicarbonate, chloride, and sulfate), major cations (including, at a minimum, calcium, magnesium, potassium, and sodium), and the cation-anion balance. As summarized in Part II of this preamble, these anions and cations form salts that can alter water chemistry in a manner that sometimes has a substantial adverse impact on aquatic life. With respect to water quantity, proposed paragraph (a)(2)(ii) would require quarterly measurement of water levels, discharge rates, or yield rates. Existing 30 CFR 780.21(i) only requires monitoring of water levels, which may not be sufficient to fully evaluate groundwater quantity and availability in all cases. Finally, proposed paragraph (a)(2)(ii) would require quarterly monitoring of certain metals (if present in discharges from prior underground mines) and any other parameters of local significance, as determined by the regulatory authority based upon the information collected and the analyses conducted under proposed 30 CFR 780.19 through 780.21.

Proposed paragraph (a)(3) would require that the regulatory authority reconsider the adequacy of the groundwater monitoring plan at two points during the permit application review process. The first reconsideration would occur after the regulatory authority completes the technical review of the application. At that point, the regulatory authority may require that the permit applicant revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance. The second reconsideration would occur after preparation of the CHIA under proposed 30 CFR 780.21. At that point, the regulatory authority would be responsible for ensuring that the groundwater monitoring plan requires monitoring of all parameters for which the CHIA establishes material damage criteria; *i.e.*, all parameters of concern. These reconsiderations are intended to ensure that the monitoring plans are designed to provide sufficiently comprehensive monitoring data to enable both the permittee and the regulatory authority to identify any adverse impacts on groundwater in time to take corrective action to prevent material damage to the hydrologic balance outside the permit area.

Finally, proposed paragraph (a)(4) would modify the provision in existing 30 CFR 780.21(i)(2) that authorizes a groundwater-monitoring exception for any water-bearing stratum that does not serve as an aquifer that significantly ensures the hydrologic balance within the cumulative impact area. Specifically, proposed paragraph (a)(4) would allow a groundwater-monitoring exception for a water-bearing stratum that does not serve as an aquifer that significantly ensures the hydrologic balance within the cumulative impact area only if that stratum has no existing or foreseeable use for agricultural or other human purposes or for fish and wildlife purposes. The addition of this requirement would more fully implement the environmental protection purposes set forth in sections 102(a) and (d) of SMCRA.[363] We recognize that the proposed new criterion does not appear in section 517(b)(2) of SMCRA.[364] However, addition of the new criterion is appropriate because use of water for agricultural or fish and wildlife purposes impacts land use capability and productivity and would assist in the implementation of the postmining land use requirements of section 515(b)(2) of SMCRA[365] and the fish and wildlife protection and enhancement requirements of section 515(b)(24) of SMCRA.[366]

Proposed Paragraph (b): Surface-Water Monitoring Plan

Proposed paragraph (b) would include the surface-water monitoring plan requirements in existing 30 CFR 780.21(j). We propose to revise those requirements by adding more specific minimum requirements for the surface-water monitoring plan to ensure that the plan is adequate to evaluate the impacts of the mining operation on streams and other surface-water bodies in the proposed permit and adjacent areas and to identify adverse trends in sufficient time to initiate corrective action to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The following discussion highlights the more significant elements of proposed paragraph (b).

Proposed paragraph (b)(1)(ii) would require on-site measurement of precipitation amounts at specified locations within the permit area, using self-recording devices. Measurement of precipitation amounts at the minesite is an important component of the surface water runoff control plan required under proposed 30 CFR 780.29. We propose to require that precipitation measurements continue through Phase II bond release under proposed 30 CFR 800.42(c) or for any longer period specified by the regulatory authority. Phase II bond release is the point at which revegetation has been established.

Proposed paragraph (b)(1)(iv) would require that, at a minimum, each surface-water monitoring plan include monitoring of point-source discharges from the proposed operation as well as monitoring points located upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas to facilitate identification of potential mining-related changes in surface-water quantity or quality and to assist in an evaluation of whether any downgradient changes are the result of the mining and reclamation activities. This provision would be consistent with section 517(b)(2)(A) of SMCRA, which requires

[363] 30 U.S.C. 1202(a) and (d).

[364] 30 U.S.C. 1267(b)(2).

[365] 30 U.S.C. 1265(b)(2).

[366] 30 U.S.C. 1265(b)(24).

that the regulatory authority specify ''monitoring sites to record the quantity and quality of surface drainage above and below the minesite as well as in the potential zone of influence.'' Point-source discharges would be located within the potential zone of influence.

Proposed paragraph (b)(1)(v) would require that the plan describe how the monitoring data will be used to determine the impacts of the operation upon the hydrologic balance and the biological condition of perennial and intermittent streams within the permit and adjacent areas, as well as to prevent material damage to the hydrologic balance outside the permit area.

Proposed paragraph (b)(1)(vi) would require that the plan describe how surface-water monitoring practices will comply with the sampling, analysis, and reporting requirements of proposed 30 CFR 777.13(a) and (b) to ensure that samples are collected and analyzed in a legally and scientifically valid manner. Proposed paragraph (b)(1)(vi) is consistent with the requirement in the text after section 517(b)(2)(D) of SMCRA that the regulatory authority set forth standards and procedures for monitoring data collection and analysis to assure the reliability and validity of the data.

Proposed paragraph (b)(2)(i) would require that the surface-water monitoring plan provide for the monitoring of parameters that could be affected by the proposed operation if those parameters relate to applicable effluent limitation guidelines under 40 CFR part 434, the findings and predictions in the PHC determination prepared under 30 CFR 780.20, the surface-water runoff control plan prepared under proposed 30 CFR 780.29, the biological condition of perennial and intermittent streams and other surface-water bodies within the proposed permit and adjacent areas, the suitability of the surface water for existing and reasonably foreseeable uses as well as designated uses under section 101(a) or 303(c) of the Clean Water Act, and the suitability of the surface water to support the premining and postmining land uses. Monitoring of these parameters would assist the permittee and regulatory authority in preventing material damage to the hydrologic balance outside the permit area and in determining compliance with the water supply protection and postmining land use requirements of SMCRA and its implementing regulations.

Proposed paragraph (b)(2)(ii) would require quarterly monitoring of 15 specific parameters, including, among others, selenium and the minimum water-quality parameters required by existing 30 CFR 780.21(j)(2)(i) (pH, total iron, total manganese, total suspended solids, and total dissolved solids or specific conductance). As summarized in Part II of this preamble, selenium can have deleterious effects upon fish and human health. In addition, this proposed paragraph would require quarterly monitoring of major anions (including, at a minimum, bicarbonate, chloride, and sulfate), major cations (including, at a minimum, calcium, magnesium, potassium, and sodium), and the cation-anion balance. As summarized in Part II of this preamble, these anions and cations form salts that can alter water chemistry in a manner that sometimes has a significant adverse impact on aquatic life. With respect to water quantity, proposed paragraphs (b)(2)(ii)(A) and (iii)(B), like existing 30 CFR 780.21(j)(2)(i), would require quarterly measurement of flow rates. We propose to require use of generally-accepted professional flow measurement techniques, rather than subjective visual observations that involve no actual measurements and that will vary from observer to observer. Finally, proposed paragraph (b)(2)(ii) would require quarterly monitoring of certain metals (if present in discharges from prior underground mines) and any other parameters of local significance, as determined by the regulatory authority based upon the information collected and the analyses conducted under proposed 30 CFR 780.19 through 780.21.

Proposed paragraph (b)(2)(iii) would not require that point-source discharges be monitored for the parameters listed in proposed paragraph (b)(2)(ii). Instead, as in existing 30 CFR 780.21(j)(2)(ii), the proposed rule would defer to the National Pollutant Discharge Elimination System permitting authority's determinations of which parameters must be monitored. We invite comment on whether, in the final rule, we should require monitoring of some or all of the parameters listed in proposed paragraph (b)(2)(ii) in point-source discharges to establish a more definitive connection between discharges from the minesite and trends observed at downgradient monitoring locations.

To promote coordination of permitting and monitoring requirements under SMCRA and the Clean Water Act, proposed paragraph (b)(2)(iv) would require that the surface-water monitoring plan be revised to include any site-specific monitoring requirements imposed by the National Pollutant Discharge Elimination System permitting authority or the agency responsible for administration of section 404 of the Clean Water Act.[367] This provision recognizes that this information may not be available at the time of application for the SMCRA permit and, thus, may need to be added later via a permit revision.

Proposed paragraph (b)(3) would require that the regulatory authority reconsider the adequacy of the surface-water monitoring plan at two points during the permit application review process. The first reconsideration would occur after the regulatory authority completes the technical review of the application. At that point, the regulatory authority may require that the permit applicant revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance. The second reconsideration would occur after preparation of the CHIA under proposed 30 CFR 780.21. At that point, the regulatory authority would be responsible for ensuring that the surface-water monitoring plan requires monitoring of all parameters for which the CHIA establishes material damage criteria; *i.e.,* all parameters of concern. These reconsiderations are intended to ensure that the monitoring plans are designed to provide sufficiently comprehensive monitoring data to enable both the permittee and the regulatory authority to identify any adverse impacts on surface water in time to take corrective action to prevent material damage to the hydrologic balance outside the permit area.

Proposed Paragraph (c): Biological Condition Monitoring Plan

Proposed paragraph (c)(1) would require that each permit application include a plan for monitoring the biological condition of perennial and intermittent streams within the proposed permit area and the adjacent area. The proposed rule would require that the plan be adequate to evaluate the impacts of the mining operation on the biological condition of those streams and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area.

Proposed paragraph (c)(2)(i) would specify that the plan must require use of a multimetric bioassessment protocol that meets the requirements of proposed 30 CFR 780.19(e)(2). In essence, this provision requires use of a multimetric

[367] 33 U.S.C. 1344.

bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory report required under section 305(b) of the Clean Water Act [368] or other scientifically-valid, multimetric bioassessment protocols used by agencies responsible for implementing the Clean Water Act. The bioassessment protocol must be based upon the presence or absence, population levels, and biomass of an appropriate array of aquatic organisms, including benthic macroinvertebrates. It must require identification of macroinvertebrates to the genus level because a bioassessment protocol that requires identification of aquatic organisms only to the family level may not be capable of differentiating between pollution-tolerant and pollution-intolerant genera within the same family, while a bioassessment protocol that identifies organisms to the species level may not be consistent with available indices of biological integrity. Finally, the protocol must result in the calculation of index values for both habitat and macroinvertebrates and provide a correlation of index values to the capability of the stream to support designated uses under section 101(a) or 303(c) of the Clean Water Act.

Proposed paragraph (c)(2)(ii) would require that the plan identify biological condition monitoring locations in each perennial and intermittent stream within the proposed permit and adjacent areas. Proposed paragraph (c)(2)(iii) would require that the plan establish a sampling frequency that must be no less than annual, but not so frequent as to unnecessarily deplete the populations of the species being monitored. Proposed paragraph (c)(2)(iv) would provide that the plan must require submission of biological condition monitoring data to the regulatory authority on an annual basis.

Proposed paragraph (c)(3) would require that the regulatory authority reconsider the adequacy of the biological condition monitoring plan after completing preparation of the CHIA under proposed 30 CFR 780.21. The proposed rule would require that, if necessary, the regulatory authority issue an order to the applicant to revise the plan to correct any deficiencies.

The monitoring requirements in proposed paragraph (c) would assist in more completely implementing section 515(b)(24) of SMCRA,[369] which requires that surface coal mining and reclamation operations be conducted so as to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available. Proposed paragraph (c) also would provide a means of implementing the definition of ''material damage to the hydrologic balance outside the permit area'' that we propose to adopt in 30 CFR 701.5, which relies in part upon designated uses of surface water under section 101(a) or section 303(c) of the Clean Water Act. The biological condition of perennial and intermittent streams and other surface waters determines whether those waters are capable of attaining their designated uses.

Proposed Paragraph (d): Exceptions

Proposed paragraph (d)(1) would allow potential permit applicants to request that the regulatory authority modify the groundwater and surface-water monitoring plan requirements of proposed paragraphs (b) and (c) and modify or waive the biological condition monitoring plan requirements of proposed paragraph (c) if the proposed permit area includes only lands eligible for remining. The proposed rule would allow the regulatory authority to approve the request if it determines that an alternative monitoring plan will be adequate to monitor the impacts of the proposed operation on groundwater and surface water, based upon an evaluation of the quality of groundwater and surface water and the biological condition of the receiving stream at the time of application. The exception for remining operations would provide an incentive to mine and reclaim previously mined areas without the use of public funds. Streams in the vicinity of previously mined areas also are likely to be of lower quality than streams in unmined watersheds because of the adverse impacts of previous mining.

Proposed paragraph (d)(2) would allow permit applicants to request that the regulatory authority waive the biological condition monitoring plan requirements of proposed paragraph (c) if the applicant demonstrates, and the regulatory authority finds in writing, that the proposed operation will not mine through or bury a perennial or intermittent stream; create a point-source discharge to any perennial, intermittent, or ephemeral stream; or modify the baseflow of any perennial or intermittent stream. If the applicant meets all requirements except the one concerning a point-source discharge, the proposed rule would allow the regulatory authority to approve limiting the biological condition monitoring plan requirements to only the stream that will receive the point-source discharge.

Proposed Paragraph (e): Coordination With Clean Water Act Agencies

Proposed paragraph (e) would require that SMCRA regulatory authorities consult with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act and make best efforts to minimize differences in monitoring locations and reporting requirements and to share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations. Coordination could reduce both costs and the overall regulatory impact to the industry, as well as improving regulatory efficiency. In addition, the proposed requirement would be consistent with the intent of the regulatory coordination provisions of section 713 of SMCRA.[370]

12. Section 780.24: What requirements apply to the postmining land use?

Proposed 30 CFR 780.24 would consolidate the requirements for approval of postmining land uses that appear in existing 30 CFR 780.23(b), 816.133(b), and 816.133(c). We also propose to add a surface mining counterpart to the interpretive rules concerning postmining land use changes in existing 30 CFR 784.200(a) and 817.200(d)(1). In addition, we propose to revise existing 30 CFR 780.24 to improve consistency with SMCRA and its legislative history and to more completely implement the environmental protection purposes of SMCRA, including the fish and wildlife protection and enhancement requirements of section 515(b)(24) of SMCRA,[371] while remaining mindful of the requirement in section 508(a)(3) of SMCRA [372] to consider the comments of the surface owner and state and local governments and agencies. Our proposed revisions to the existing requirements also are consistent with section 515(b)(23) of SMCRA,[373] which provides that surface coal mining and reclamation operations must ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.''

[368] 33 U.S.C. 1315(b).

[369] 30 U.S.C. 1265(b)(24).

[370] 30 U.S.C. 1303.

[371] 30 U.S.C. 1265(b)(24).

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[372] 30 U.S.C. 1258(a)(3).

[373] 30 U.S.C. 1265(b)(23).

Proposed Paragraph (a): What postmining land use information must my application contain?

Section 515(b)(2) of SMCRA [374] requires that surface coal mining and reclamation operations ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood.'' Section 508(a)(3) of SMCRA [375] requires that each reclamation plan include a statement of ''the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses.'' Combining these two statutory provisions, proposed paragraph (a)(1) would require that each permit application include both a description and a map of the proposed postmining land use or uses and a discussion of the utility and capability of the reclaimed land to support a variety of other uses, including the uses that the land was capable of supporting before any mining, as identified in the narrative analysis required under 30 CFR 779.22.

Proposed paragraph (a)(2) would require that the land use or uses be described in terms of the categories listed in our definition of ''land use'' in 30 CFR 701.5, which would assist the regulatory authority in determining compliance with provisions of our regulations that are tied to land use; *e.g.,* alternative postmining land uses, revegetation standards, and exceptions from approximate original contour restoration requirements, and provide a baseline for application of these provisions on a national basis.

Proposed paragraph (a)(3) would require that the application explain how the proposed postmining land use is consistent with existing state and local land use policies and plans. Addition of this requirement would be consistent with section 508(a)(3) of SMCRA,[376] which requires that the reclamation plan include an explanation of the relationship of the proposed postmining land use to existing land use policies and plans. That section of SMCRA also requires that the application include comments from state and local governments or agencies that would have to approve or authorize the proposed land use. Furthermore, section 515(b)(2) of SMCRA [377] prohibits the approval of alternative postmining land uses that are ''inconsistent with applicable land use policies and plans.'' Therefore, it would be reasonable to conclude that Congress intended for all postmining land uses to be consistent with state and local land use policies and plans, especially since regulation of land use has traditionally been the province of state and local governments.

Proposed paragraph (a)(4) is substantively identical to the corresponding existing rule at 30 CFR 780.23(c). Proposed paragraph (a)(5) is substantively identical to the corresponding existing rule at 30 CFR 780.23(b)(1) with the exception that the proposed rule clarifies that the permit applicant must identify any support facilities (not just activities as in the existing rule) needed to achieve the postmining land use. (Support facilities are equipment repair areas, mine offices, parking lots, and other surface areas upon which are sited structures, facilities, or other property or material resulting from or incident to the activities listed in paragraph (a) of the definition of ''surface coal mining operations'' in 30 CFR 700.5.) The regulatory authority needs this information when evaluating whether the proposed postmining land use can be achieved and in deciding whether to allow mining-related structures to be retained as part of the postmining land use.

Proposed paragraph (a)(6)(i) would specify that the application must provide the demonstration required under proposed paragraph (b)(1) if the applicant proposes to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses rather than to a condition capable of supporting the use or uses that the land supported before any mining. This provision is substantively identical to existing 30 CFR 780.23(b)(2) except as discussed in the preamble to proposed paragraph (b) below.

Proposed paragraph (a)(6)(ii) would require that an applicant requesting approval of a higher or better alternative postmining land use disclose any monetary compensation, item of value, or other consideration offered to the landowner by the applicant or the applicant's agent in exchange for the landowner's agreement to a postmining land use that differs from the premining use. Adoption of this provision is supported by section 515(b)(2) of SMCRA, which requires that surface coal mining and reclamation operations—

> restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probably hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of Federal, State, or local law.

Disclosure of whether a landowner has been provided with or is reasonably expected to be provided with compensation or other consideration for any postmining land use changes would allow the regulatory authority to better understand whether the proposed postmining land use change is one that the landowner genuinely desires on its own merits and is reasonably likely to be achieved, or whether the landowner agreed to the land use change for short-term financial gain or other reasons. This type of short-term land use decision-making is contrary to the broader purposes identified in SMCRA, such as ''protect[ing] society and the environment from the adverse effects of surface mining coal operations'' in section 102(a) and assuring that ''operations are conducted as to protect the environment'' in section 102(d).

Proposed Paragraph (b): What requirements apply to the approval of alternative postmining land uses?

Existing 30 CFR 780.23(b)(2) provides that the application must include all materials needed for approval of an alternative postmining land use under 30 CFR 816.133 if the proposed postmining land use differs from the premining use. Existing 30 CFR 816.133(b) further provides that the ''premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land has not been previously mined and has been properly managed.'' In new section 780.24, we propose to require compliance with the alternative postmining land use approval requirements only when the applicant or permittee proposes to restore the land to a condition capable of supporting higher or better uses (a term that we define in 30 CFR 701.5) rather than to a condition capable of supporting the uses that it could support before any mining. The proposed language better tracks the underlying statutory provision in section 515(b)(2) of SMCRA,[378] as quoted above. In addition, it is consistent with the legislative history of section 508(a) of SMCRA: [379]

[374] 30 U.S.C. 1265(b)(2).

[375] 30 U.S.C. 1258(a)(3).

[376] 30 U.S.C. 1258(a)(3).

[377] 30 U.S.C. 1265(b)(2).

[378] 30 U.S.C. 1265(b)(2).

[379] 30 U.S.C. 1258(a).

The description [of premining land use capability] is to serve as a benchmark against which the adequacy of reclamation and the degradation resulting from the proposed mining may be measured. It is important that the potential utility which the land had for a variety of uses be the benchmark rather than any single, possibly low value, use which by circumstances may have existed at the time mining began.[380]

By requiring approval only when the change is to a higher or better use, our proposed rule also would avoid unnecessary paperwork on the part of permit applicants and conserve often-scarce regulatory authority resources.

We propose to delete the provision in existing 30 CFR 816.133(b) requiring that the land be properly managed before the premining land use may be compared with the proposed alternative postmining land use. There is no statutory counterpart to this provision of the existing rule, nor is it supported by the legislative history of SMCRA. Furthermore, the criteria for approval of proposed alternative postmining land uses in existing 30 CFR 816.133(c) bear no relationship to whether the land was properly managed before mining. In addition, proper management is a subjective determination. To the extent that this provision could be construed as requiring that the regulatory authority reject a proposed higher or better postmining land use that involves less intensive management than the premining use, the existing rule is inconsistent with the preamble to our definition of ''land use'' in 30 CFR 701.5, which states that the land use categories in the definition are not hierarchical.[381] Consistent with that statement, the same rulemaking defined ''higher or better uses'' as meaning ''postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the premining land uses.'' We are not proposing any changes to that definition. Therefore, the provision in existing 30 CFR 816.133(b) requiring that the land be properly managed before the premining land use may be compared with the proposed alternative postmining land use has no statutory basis and, in any case, is not feasible.

Proposed paragraph (b) combines existing 30 CFR 780.23(b)(2), which requires that the permit application include all materials needed for approval of an alternative postmining land use under 30 CFR 816.133, with the alternative postmining land use approval criteria of 30 CFR 816.133(c). Proposed paragraph (b)(1) sets forth permit application requirements, while proposed paragraph (b)(2) contains requirements applicable to the regulatory authority's decision-making process. In essence, proposed paragraph (b)(1), like existing 30 CFR 780.23(b)(2), requires that the permit applicant submit a demonstration that the request for an alternative postmining land use meets the criteria for approval, while proposed paragraph (b)(2), like existing 30 CFR 816.133(c), specifies when the regulatory authority may approve a request for an alternative postmining land use.

Proposed paragraph (b)(1) would retain the criteria in the corresponding existing rules at 30 CFR 816.133(c) for approving alternative postmining land uses, while requiring that the permit applicant demonstrate compliance with both those criteria and several new criteria intended to promote environmental protection and restoration of fish and wildlife habitat consistent with section 515(b)(24) of SMCRA [382] and the purposes in paragraphs (a), (d), and (f) of section 102 of SMCRA.[383] Addition of the new criteria also would be consistent with section 515(b)(23) of SMCRA,[384] which requires that surface coal mining and reclamation operations ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.''

As previously stated, proposed paragraph (b)(1)(i) would retain the provision in the corresponding existing rules at 30 CFR 816.133(c)(1) that there must be a reasonable likelihood of achievement of the proposed higher or better alternative postmining land use. However, we propose to expand upon this requirement by adding language that would require the applicant to document that a reasonable likelihood of achieving the higher or better use exists through submission of, for example, real estate and construction contracts, plans for installation of any necessary infrastructure, procurement of any necessary zoning approvals, landowner commitments, economic forecasts, and studies by land use planning agencies, as applicable. The additional language would flesh out the requirement in section 515(b)(2) of SMCRA [385] that there be a reasonable likelihood of achievement of the proposed land use. In the past, approved alternative postmining land uses have not been implemented on some reclaimed minesites, including some sites for which the regulatory authority approved a variance from approximate original contour restoration requirements for the purpose of achieving a particular alternative postmining land use. Our proposed rule changes concerning the reasonable likelihood of achievement of the alternative postmining land use are intended to prevent recurrences of situations in which the regulatory authority approves an alternative postmining land use that has little chance of being implemented in the reasonably foreseeable future. The proposed rule changes thus would improve compliance with the conditions for approval of higher or better uses under section 515(b)(2) of SMCRA [386] and the approximate original contour restoration requirements of section 515(b)(3) of SMCRA.[387]

We propose to add paragraphs (b)(1)(iii)(E) through (G) to better implement the environmental protection purposes in paragraphs (a), (d), and (f) of section 102 of SMCRA [388] and the prohibition in section 510(b)(3) of SMCRA [389] on the approval of any permit application unless the regulatory authority finds that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Specifically, these proposed paragraphs would require that the applicant for an alternative postmining land use demonstrate that the proposed use would not—

- Result in changes in the size or frequency of peak flows from the reclaimed area to the extent that the changes would cause an increase in damage from flooding compared to the conditions that would exist if the land were restored to a condition capable of supporting the uses that it was capable of supporting before any mining.
- Cause the total volume of flow from the reclaimed area, during every season of the year, to vary in a way that would preclude any existing or reasonably foreseeable use of surface water or groundwater or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.[390]
- Cause a change in the temperature or chemical composition of the water

[380] S. Rept. 95–128, 95th Cong., 1st Sess. 76–77 (1977).

[381] 48 FR 39893 (Sept. 1, 1983).

[382] 30 U.S.C. 1265(b)(24).

[383] 30 U.S.C. 1202(a), (d), and (f).

[384] 30 U.S.C. 1265(b)(23).

[385] 30 U.S.C. 1265(b)(2).

[386] *Id.*

[387] 30 U.S.C. 1265(b)(3).

[388] 30 U.S.C. 1202(a), (d), and (f).

[389] 30 U.S.C. 1260(b)(3).

[390] 33 U.S.C. 1251(a) and 1313(c).

that would preclude any existing or reasonably foreseeable use of surface water or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.[391]

Proposed paragraph (b)(2) would allow the regulatory authority to approve a request for an alternative postmining land use if it first consults with the landowner or the land management agency having jurisdiction over the lands to which the use would apply and finds in writing that the applicant has made the demonstration required under proposed paragraph (b)(1). These proposed provisions are substantively identical to the corresponding existing rules at 30 CFR 816.133(c), with the exception of the proposed requirement that the finding be in writing and the addition of the new and modified criteria in paragraph (b)(1) as discussed above.

Proposed Paragraph (c): What requirements apply to permit revision applications that propose to change the postmining land use?

Proposed paragraph (c) would provide that, consistent with the decision in *PSMRL I, Round II,*[392] permittees may use the permit revision process to change the postmining land use after permit issuance. The proposed rule would specify that the application for a permit revision must be processed as a significant revision if the permittee proposes to restore the land to a condition capable of supporting higher or better uses rather than to a condition capable of supporting the uses that it was capable of supporting before any mining.

Proposed paragraph (c) would provide a surface mining counterpart to the interpretive rules for underground mines at 30 CFR 784.200 and 817.200(d)(1), which specify that the requirements for approval of an alternative postmining land use may be met via the permit revision process rather than as part of the original permit application. We do not now interpret our existing surface mining rules as prohibiting permittees from submitting permit revision applications to change the postmining land use after permit issuance, nor have we interpreted those rules as doing so in the past. Therefore, the only effect of proposed paragraph (c) would be to require that a proposed change to a higher or better postmining land use be processed as a significant revision. As provided in 30 CFR 774.13(a)(2), an application for a significant permit revision must comply with the public notice and public participation requirements that apply to an application for a new permit.

Unlike existing 30 CFR 784.200 and 817.200(d)(1), which classify any change in postmining land use as a significant permit revision, we propose to apply this requirement only to a proposed change to a higher or better use. A change from one postmining land use that the land was capable of supporting prior to mining to another postmining land use that the land was capable of supporting prior to mining would no longer require approval as an alternative postmining land use, nor would a request for such a change need to be processed as a significant permit revision.

Our proposed rule would improve consistency with section 515(b)(2) of SMCRA,[393] which requires that surface coal mining and reclamation operations ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood.'' The statutory provision distinguishes only between uses that the land was capable of supporting before mining and higher or better uses; *i.e.,* it establishes criteria for approval of higher or better uses, but no criteria for approval of any of the uses that the land was capable of supporting before mining.

Proposed Paragraph (d): What restrictions apply to the retention of mining-related structures?

Proposed paragraph (d) would establish new requirements pertinent to the retention of mining-related structures in support of the postmining land use. First, the applicant or permittee would have to demonstrate, and the regulatory authority would have to find in writing, that the size and characteristics of mining-related structures (other than roads and impoundments) proposed for retention for potential use as part of the postmining land use are consistent with and proportional to the needs of the postmining land use. For example, retention of an entire coal preparation plant building as a storage facility for an agriculture or silvicultural postmining land use would be disproportionate to the needs for the postmining land use. Second, the amount of bond required for the permit must include the cost of removing the structure and reclaiming the land to a condition capable of supporting the premining uses. Third, the reclamation plan must specify that the permittee will remove any structure not in use as part of the approved postmining land use by the end of the revegetation responsibility period and reclaim the land upon which it was located.

These measures are intended to ensure that only mining-related structures with a bona fide role in supporting the postmining land use are retained. These provisions should minimize the number of mining-related structures that are retained, ostensibly to support the postmining land use, but that are abandoned after final bond release and become safety hazards, attractive nuisances, or a visual blight on the landscape. Thus, proposed paragraph (d) would more fully implement section 102(a) of SMCRA,[394] which provides that one of the purposes of SMCRA is to protect society and the environment from the adverse effects of surface coal mining operations. In addition, section 515(b)(2) of SMCRA [395] allows the approval of higher or better postmining land uses only if they do not present any actual of probable hazard to public health or safety. Logically, the same requirement should apply to retention of mining-related structures that did not exist prior to mining.

Proposed Paragraph (e): What special provisions apply to previously mined areas?

Proposed paragraph (e) would contain the postmining land use requirements for previously mined areas, as that term is defined in 30 CFR 701.5. They do not differ substantively from the corresponding requirements in the last sentence of the existing rules at 30 CFR 816.133(b) except for the proposed addition of a requirement that the revegetation plan require the use of native tree and shrub species for revegetation of all portions of the proposed permit area that were forested at the time of application or that would revert to forest under conditions of natural succession, provided that the planting of trees and shrubs on those lands would not be inconsistent with achievement of the proposed postmining land use. The added requirement would more fully implement section 515(b)(19) of SMCRA,[396] which requires establishment of a diverse, effective, permanent vegetative cover of the same seasonal variety native to the area, and the fish and wildlife protection and

[391] *Id.*

[392] *PSMRL I, Round II,* 1980 U.S. Dist. LEXIS 17660 at *20 (D.D.C. 1980), 19 Env't Rep. Cas. (BNA) 1477.

[393] 30 U.S.C. 1265(b)(2).

[394] 30 U.S.C. 1202(a).

[395] 30 U.S.C. 1265(b)(2).

[396] 30 U.S.C. 1265(b)(19).

enhancement requirements of section 515(b)(24) of SMCRA.[397]

13. Section 780.25: What information must I provide for siltation structures, impoundments, and refuse piles?

Changes To Conform With the 1983 Revisions to Definitions and Performance Standards

On September 26, 1983 (48 FR 44006), we revised the definitions and performance standards in our regulations relating to coal mine waste to be more consistent with the terminology used by the Mine Safety and Health Administration (MSHA). As we stated at 48 FR 44009, ''[i]t is undesirable to have two regulatory programs for the same subject that contain conflicting standards or which use fundamentally different terminology.''

Among other things, we adopted definitions of three new terms in 30 CFR 701.5. *Coal mine waste* is defined as ''coal processing waste and underground development waste.'' *Impounding structure* is defined as ''a dam, embankment, or other structure used to impound water, slurry, or other liquid or semi-liquid material.'' *Refuse pile* is defined as ''a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material.'' The latter two terms are consistent with the terminology of MSHA's regulations. ''Refuse pile'' replaces the term ''coal processing waste bank'' that we used in our previous regulations, while the term ''impounding structure'' includes, but is not limited to, all structures that our rules previously referred to as coal processing waste dams or embankments.

In concert with the new definition of coal mine waste, we revised our performance standards at 30 CFR 817.71 through 817.74 to eliminate the language that combined underground development waste with excess spoil for purposes of performances standards for underground mines. Because the definition of coal mine waste includes underground development waste, we revised our regulations to specify that the disposal of underground development waste is subject to the performance standards for refuse piles at 30 CFR 817.83 rather than the performance standards for the disposal of excess spoil that applied under the old rules.

However, we did not revise our permitting requirements in a similar fashion at that time. Therefore, we now propose to modify 30 CFR parts 780 and 784 to harmonize the terminology in those rules with our 1983 changes to the definitions and performance standards concerning coal mine waste. In essence, we propose to (1) replace the term ''coal processing waste banks'' with ''refuse piles'' and (2) replace the term ''coal processing waste dams and embankments'' with references to coal mine waste impounding structures.

Proposed Paragraph (a): General Requirements

In addition to the changes in terminology, we propose to revise existing paragraph (a)(1)(iii) to require that the general plan for each proposed siltation structure, impoundment, or refuse pile include the hydrologic and geologic information needed to assess the hydrologic impact of the structure. The existing rule requires submission of only ''preliminary'' hydrologic and geologic information. We propose to remove the word ''preliminary'' because preliminary information typically would not be sufficient to assess the hydrologic impact of a proposed structure.

We propose to revise existing paragraph (a)(1)(iv) to require that the general plan for each proposed siltation structure, impoundment, or refuse pile contain a report describing the results of a geotechnical investigation of the potential effect on the structure if subsurface strata should subside as a result of past, current, or future underground mining operations beneath or within the proposed permit and adjacent areas. Geotechnical investigations may include site reconnaissance, drilling, or some combination of these with geophysical investigations (ground-penetrating radar, seismic investigations, etc.). The existing rule requires only a survey describing the potential effect of subsidence resulting from past underground mining operations. A survey alone would provide insufficient information to evaluate the potential effects of subsidence.

Therefore, to promote long-term structural stability, we propose to require a geotechnical investigation instead of a survey and we propose to require consideration of the potential effects of subsidence from past, existing, and future underground mining operations, beneath or within the proposed permit and adjacent areas, not just the potential effects of past underground mining operations within an unspecified area. The design needs to ensure that the structure will be capable of withstanding all potential impacts of any subsidence that may occur during the life of the proposed structure. We propose to add the reference to the proposed permit and adjacent areas to ensure that the investigation includes all underground mining operations that have the potential to cause subsidence that may affect the proposed structure, not just operations within the proposed permit area.

Finally, we propose to specify that the investigation report must identify design and construction measures that would prevent adverse subsidence-related impacts on the structure whenever impacts of that nature are a possibility. In short, proposed paragraph (a)(1)(iv) is intended to protect against failure of the impoundment embankment or other impoundment failures as a result of subsidence. Impoundment stability, especially for large impoundments, is important to protect the public, private and public property, and the environment from the adverse effects of flooding and other consequences of impoundment failure, consistent with the purposes of SMCRA in paragraphs (a) and (d) of section 102 of the Act.[398]

We propose to redesignate existing paragraph (a)(1)(v) as paragraph (a)(1)(vi) and add a new paragraph (a)(1)(v) to require that the general plan for each impoundment include an analysis of the potential for the impoundment to drain into subjacent underground mine workings, together with an analysis of the impacts of such drainage. The Martin County Slurry Spill incident in Martin County, Kentucky on October 11, 2000, illustrates the magnitude of environmental damage that can result when impounded coal refuse slurry breaks through into adjacent underground mine workings that open to the surface. In this case, the mine openings discharged 306 million gallons of slurry into two tributaries of the Tug Fork River (Coldwater Fork and Wolf Creek). The slurry covered nearby residents' yards to a depth of as much as 5 feet, visibly polluted more than 100 miles of waterways, including the Big Sandy and Ohio Rivers, and devastated aquatic life in 70 miles of stream. Six public water intakes were adversely affected and alternative water supplies had to be arranged for 27,000 residents. Cleanup costs were approximately $59 million.[399]

Proposed paragraph (a)(1)(v) is intended to ensure that all types of

[397] 30 U.S.C. 1265(b)(24).

[398] 30 U.S.C. 1202(a) and (d).

[399] See *http://www.sourcewatch.org/index.php?title=Martin_County_sludge_spill* (last accessed February 4, 2015) and *http://www.jackspadaro.com/news_articles/2003/10_12_03/herald-leader10_12_03.html* (last accessed February 4, 2015).

impoundments constructed for coal mining purposes are designed to prevent similar breakthroughs. This design requirement would reduce the probability of breakthroughs into underground mine workings, thus benefiting the public, the environment, and mine operators by avoiding the environmental and property damage and cleanup expenses that may result from those breakthroughs, consistent with the purposes of SMCRA in paragraphs (a) and (d) of section 102 of the Act.[400]

Paragraph (a)(2) sets forth design requirements for all impoundments other than low-hazard impoundments. We propose to revise the introductory text of existing paragraph (a)(2) for clarity and redesignate that text as paragraph (a)(2)(i). Proposed paragraph (a)(2)(i) would specify that the detailed design plan requirements of proposed paragraph (a)2)(ii) would apply to all structures meeting the MSHA criteria of 30 CFR 77.216(a), as well as to all structures that meet the Significant Hazard Class or High Hazard Class criteria for dams in NRCS publication Technical Release No. 60, ''Earth Dams and Reservoirs,'' regardless of whether those structures meet the MSHA criteria of 30 CFR 77.216(a).

We propose to revise redesignated paragraph (a)(2)(i) to update the incorporation by reference of the NRCS publication ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, October 1985), by replacing the reference to the October 1985 edition with a reference to the superseding July 2005 edition. Consistent with the terminology in the newer edition, we propose to replace references to Class B or C dam criteria with references to Significant Hazard Class or High Hazard Class dam criteria, respectively. Only the terminology has changed—the actual criteria remain the same as before. The newer publication is not available from the National Technical Information Service, but is available online from the NRCS (the successor to the Soil Conservation Service). Consequently, we propose to delete the ordering information pertinent to the National Technical Information Service and replace it with the Internet address at which the publication may be reviewed and from which it may be downloaded without charge. We also propose to update the address and location of our administrative record room and the Internet address information for the National Archives and Records Administration.

In addition, we propose to redesignate existing paragraphs (a)(2)(i) through (iv) as paragraphs (a)(2)(ii)(A) through (D) and add introductory text to proposed paragraph (a)(2)(ii). The introductory text is a revised version of the last sentence of the introductory text of existing paragraph (a)(2), modified to be consistent with proposed paragraph (a)(2)(i). As it currently exists, redesignated paragraph (a)(2)(ii)(B) requires that the detailed design plan include any geotechnical investigation, design, and construction requirements. This language is ambiguous because it does not identify the geotechnical investigation, design, and construction requirements to which it refers. Therefore, we propose to revise redesignated paragraph (a)(2)(ii)(B) to require that the detailed design plan for any structure that meets the applicability provisions of proposed paragraph (a)(2)(i) incorporate any design and construction measures identified in the geotechnical investigation report prepared under 30 CFR 780.25(a)(1)(iv) as necessary to protect against potential adverse impacts from subsidence resulting from underground mine workings underlying or adjacent to the structure. These measures might include grouting or backstowing of mine voids or surface mining of seams within the impoundment safety zone. In short, proposed paragraph (a)(2)(ii)(B) would operate in conjunction with proposed paragraph (a)(1)(iv) to protect against failure of the impoundment embankment or other impoundment failures as a result of subsidence. Impoundment stability, especially for large impoundments, is important to protect the public, private and public property, and the environment from the adverse effects of flooding and other consequences of impoundment failure, consistent with the purposes of SMCRA in paragraphs (a) and (d) of section 102 of the Act.[401]

We propose to reinstate former paragraph (a)(3), which was erroneously removed as part of the codification process for a rule published December 12, 2008 (73 FR 75814). This paragraph contains detailed design plan requirements for structures not covered under paragraph (a)(2).

Proposed Paragraph (c): Permanent and Temporary Impoundments

Both the existing and proposed versions of paragraph (c) contain design requirements that apply to all impoundments. To improve clarity and consistency with other regulations, we propose to revise existing paragraph (c)(2) by replacing the term ''Mine Safety and Health Administration'' with a citation to 30 CFR 77.216(a), which contains the MSHA impoundment criteria to which paragraph (c)(2) refers. As revised, proposed paragraph (c)(2) would require that plans for impoundments meeting MSHA criteria comply with MSHA's impoundment design requirements at 30 CFR 77.216–2. We propose to delete the requirement that those plans also comply with 30 CFR 77.216–1. The requirement that we propose to delete is not germane to permit applications and plans because it contains signage requirements that apply only to impoundments that already exist or are under construction. In the second sentence, we propose to delete an obsolete cross-reference to paragraph (a).

We also propose to revise paragraph (c)(2) to clarify that the requirement that the permit application include the plan submitted to MSHA applies only to those portions of the plan that are complete at the time of submission of the SMCRA permit application. Impoundment plans normally are submitted to MSHA in stages; they may not be complete or even started at the time that the applicant submits an application for the SMCRA permit. SMCRA-related permit application information requirements are sufficiently comprehensive that the regulatory authority does not need the MSHA plan to process the SMCRA permit application or to ensure the stability of proposed structures.

We propose to redesignate existing paragraph (f) as paragraph (c)(4). That paragraph applies only to impoundments that meet certain criteria in Technical Release No. 60 or the MSHA criteria of 30 CFR 77.216(a). It has no relevance to the other structures to which 30 CFR 780.25 applies (low-hazard impoundments and refuse piles). Therefore, it is more appropriate to include the stability analysis requirements of existing paragraph (f) as part of proposed paragraph (c), which applies only to impoundments, including coal mine waste impoundments. We also propose to revise this paragraph to be consistent with the terminology in the July 2005 edition of Technical Release No. 60 by replacing references to Class B or C dam criteria with references to Significant Hazard Class or High Hazard Class dam criteria, respectively. Only the terminology would change; the actual criteria would remain the same as before. Finally, we propose to revise this paragraph to clarify that the stability analyses that it requires must address

[400] 30 U.S.C. 1202(a) and (d).

[401] 30 U.S.C. 1202(a) and (d).

static, seismic, and post-earthquake (liquefaction) conditions because those conditions are all part of a comprehensive stability analysis.

Proposed Paragraph (d): Coal Mine Waste Impoundments and Refuse Piles

As discussed in the introductory portion of the preamble to this section, we propose to modify 30 CFR parts 780 and 784 to harmonize the terminology in those rules with our 1983 changes to the definitions and performance standards concerning coal mine waste. In essence, ''refuse pile'' would replace the term ''coal processing waste bank'' as used in existing parts 780 and 784, while the term ''impounding structure'' would include all structures that existing parts 780 and 784 refer to as coal processing waste dams or embankments. We also use the term ''coal mine waste impoundment'' to refer to the impounding structure in combination with the basin behind the impounding structure. We propose to combine existing paragraph (d), which contains design requirements for coal processing waste banks, and existing paragraph (e), which contains design requirements for coal processing waste dams and embankments, into a revised paragraph (d) that uses the newer terminology. Proposed paragraph (d) would apply to any application that proposes to place coal mine waste in a refuse pile or impoundment or use coal mine waste to construct an impounding structure. We are adding the language concerning use of coal mine waste to construct an impounding structure because proposed paragraph (d) is the permitting counterpart of the performance standards for coal mine waste disposal in 30 CFR 816.81 through 816.84. Section 816.84 applies to both impounding structures constructed of coal mine waste and impounding structures intended to impound coal mine waste. Our proposed revision would expand the scope of proposed paragraph (d) to coincide with the scope of the corresponding performance standards.

Proposed paragraph (d)(1) corresponds to existing paragraph (d), which requires that coal processing waste banks be designed to comply with the requirements of 30 CFR 816.81 through 816.84. Proposed paragraph (d)(1) would require that refuse piles (the successor term to ''coal processing waste banks'') be designed to comply with the requirements of 30 CFR 780.28, 816.81, and 816.83. We propose to delete the cross-reference to 30 CFR 816.84 found in existing paragraph (d) because proposed paragraph (d)(1) would pertain only to refuse piles, not to the impounding structures to which 30 CFR 816.84 applies. The proposed deletion is not a substantive change because the corresponding provision of the existing rules does not pertain to impounding structures either, despite the cross-reference. We propose to add the cross-reference to 30 CFR 780.28 to emphasize the need for compliance with that section whenever a refuse pile would be located in or within 100 feet of a perennial or intermittent stream.

Proposed paragraph (d)(2) corresponds to existing paragraph (e), which requires that coal processing waste dams and embankments be designed to comply with the requirements of 30 CFR 816.81 through 816.84, among other things. Proposed paragraph (d)(2)(i) would require that impounding structures constructed of or intended to impound coal mine waste (the successor terminology to ''coal processing waste dams and embankments'') be designed to comply with the requirements of 30 CFR 780.28, 816.81, and 816.84. We propose to delete the cross-reference to 30 CFR 816.83 found in existing paragraph (e) because proposed paragraph (d)(2) would pertain only to impounding structures, not to the refuse piles to which 30 CFR 816.83 applies. The proposed deletion is not a substantive change because the corresponding provision of the existing rules does not pertain to refuse piles either, despite the cross-reference. We also propose to add a cross-reference to the impoundment requirements of 30 CFR 816.49(a) and (c). This proposed addition likewise is not a substantive change because 30 CFR 816.84(b)(1) already includes an identical cross-reference to 30 CFR 816.49(a) and (c), which would apply by operation of the cross-reference to 30 CFR 816.84 in proposed paragraph (d)(2)(i). We propose to add this cross-reference only as a matter of clarity and ease of use.

Finally, we propose to add the cross-reference to 30 CFR 780.28 to emphasize the need for compliance with that section whenever an impounding structure constructed of or intended to impound coal mine waste would be located in or within 100 feet of a perennial or intermittent stream. While coal mine waste impoundments may not be retained as permanent impoundments, they typically are converted to refuse piles and retained as permanent features, which means that the stream segment that they cover is not restored. Hence, proposed paragraph (d)(2)(i) and proposed 30 CFR 780.28 would apply the same requirements to coal mine waste impoundments as would apply to refuse piles with respect to the approval of such structures in perennial or intermittent streams.

Proposed paragraph (d)(2)(ii) would require that the design plan for any impounding structure constructed of or intended to impound coal mine waste comply with the MSHA requirements of 30 CFR 77.216–2 if the structure meets the criteria of 30 CFR 77.216(a). The corresponding provision of existing paragraph (e) also required compliance with 30 CFR 77.216–1. We propose to delete this cross-reference because 30 CFR 77.216–1 does not include any design requirements. Instead, that rule consists solely of MSHA requirements for signage for existing impoundments and impoundments under construction. Those requirements are not relevant to preparation of plans or permit applications for proposed impoundments or impounding structures. Proposed paragraph (d)(2)(ii) would retain the requirement that each plan for an impounding structure comply with 30 CFR 77.216–2, which contains MSHA design requirements for impoundments and impounding structures.

Proposed paragraph (d)(2)(iii) is substantively identical to the corresponding portion of existing paragraph (e), which requires that the application include a geotechnical investigation of the foundation area and that the investigation be planned and supervised by an engineer or engineering geologist. We propose to redesignate existing paragraphs (e)(1) through (4), which establish minimum requirements for that investigation, as paragraphs (d)(2)(iii)(A) through (D).

Proposed paragraph (d)(2)(iv) would require that the design ensure that at least 90 percent of the water stored in the impoundment during the design precipitation event will be removed within a 10-day period. This requirement is substantively identical to existing 30 CFR 816.84(e). We propose to move it to 30 CFR 780.25(d)(2)(iv) as part of our ongoing efforts to move permitting requirements currently located in subchapter K to subchapter G.

14. Section 780.28: What additional requirements apply to proposed activities in, through, or adjacent to streams?

Proposed 780.28 would establish standards for the review and approval of permit applications that propose to conduct surface mining activities in or through a perennial, intermittent, or ephemeral stream or that would disturb the surface of lands within 100 feet of a perennial, intermittent, or ephemeral stream. Consequently, we propose to move the permitting aspects of the

stream buffer zone rule, which is currently codified at 30 CFR 816.57(a) as part of the performance standards in subchapter K, to 30 CFR 780.28, which would be part of the permitting requirements of subchapter G. Existing 30 CFR 816.57(a) provides that the regulatory authority may authorize activities on the surface of lands within 100 feet of a perennial or intermittent stream only upon finding that (1) the activities will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream, and (2) if there will be a temporary or permanent stream-channel diversion, it will comply with 30 CFR 816.43.

Part II of this preamble summarizes the impacts of surface coal mining operations on streams, as documented by scientific studies. Our proposed rule is intended to prevent or minimize the adverse impacts documented in those studies.

The permitting requirements and performance standards in SMCRA contain limited direct references to streams, but SMCRA is replete with requirements to minimize or prevent adverse impacts on fish, wildlife, related environmental values, the quantity and quality of surface water and groundwater, and the hydrologic balance. See sections 507(b)(10), (11) and (14); 508(a)(9) and (13); 510(b); 515(b)(2), (4), (9), (10), (14), (17), and (24); 515(c)(4); 515(e)(3); 516(b)(4); and 516(b)(9) through (12).[402] To the extent that proposed 30 CFR 780.28 pertains to the impact of surface coal mining and reclamation operations on streams outside the permit area, section 510(b)(3) of SMCRA,[403] which prohibits issuance of a permit unless the applicant demonstrates, and the regulatory authority finds, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area, provides authority for this proposed rule.

In addition, section 102 of SMCRA [404] repeatedly identifies environmental protection as one of the purposes of SMCRA. In particular, section 102(a) [405] states that one of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Paragraph (c) [406] provides that another purpose is to ''assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible.'' Paragraph (d) [407] provides that still another purpose is to ''assure that surface coal mining operations are so conducted as to protect the environment.'' Paragraph (f) [408] states that one of the Act's purposes is to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' Together with section 201(c)(2) of SMCRA [409] and the provisions of title V of SMCRA discussed below, these statutory provisions provide adequate authority for the stream protection measures that we propose to adopt in 30 CFR 780.28 to remedy the environmental problems identified in Part II of this preamble. Section 201(c)(2) of SMCRA [410] provides that the Secretary of the Interior, acting through OSMRE, shall ''publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act.''

In an en banc ruling, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Secretary's authority to promulgate rules under the authority of section 201(c) of SMCRA [411] that impose permitting requirements in addition to those set forth in sections 507 and 508 of SMCRA: [412] ''We hold that the Act's explicit listings of information required of permit applicants are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act.'' [413] The court found that the Secretary's conclusion that additional information beyond that explicitly required in the Act was needed to effectively implement the Act was entitled to some deference.[414] Furthermore, the U.S. District Court for the District of Columbia has held that ''[a] court should sustain regulations when they reasonably relate to the purpose of the legislation.'' [415] The regulations that we propose in 30 CFR 780.28 clearly relate to and promote attainment of the environmental protection purposes of the Act, as well as the other provisions of SMCRA cited above that pertain to protection of fish, wildlife, related environmental values, the quantity and quality of surface water and groundwater, and the hydrologic balance. The proposed regulations also would implement section 515(b)(23) of SMCRA,[416] which provides that surface coal mining and reclamation operations must ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.''

In addition, the measures that we propose to adopt in 30 CFR 780.28 receive support from section 515(b)(2) of SMCRA,[417] which requires that surface coal mining and reclamation operations ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood.'' Perennial and intermittent streams provide important fish and wildlife habitat, which almost always is one of the uses that the land was capable of supporting before mining. Section 515(b)(10) of SMCRA [418] also provides statutory authority for proposed 30 CFR 780.28. In relevant part, section 515(b)(10) of SMCRA requires that surface coal mining and reclamation operations ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by . . . (G) such other actions as the regulatory authority may prescribe.''

Paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of SMCRA [419] provide support for the buffer zone protections that proposed 30 CFR 780.28 would afford to perennial and intermittent streams. Section 515(b)(10)(B)(i) of SMCRA,[420] which, in relevant part, requires that surface coal mining operations be conducted ''so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area,'' provides the primary

[402] 30 U.S.C. 1257(b)(10), (11), and (14); 1258(a)(9) and (13); 1260(b); 1265(b)(2), (4), (9), (10), (14), (17), and (24); 1265(c)(4) and (e)(3); 1266(b)(4) and (b)(9) through (12).

[403] 30 U.S.C. 1260(b)(3).

[404] 30 U.S.C. 1202.

[405] 30 U.S.C. 1202(a).

[406] 30 U.S.C. 1202(c).

[407] 30 U.S.C. 1202(d).

[408] 30 U.S.C. 1202(f).

[409] 30 U.S.C. 1211(c)(2).

[410] *Id.*

[411] 30 U.S.C. 1211(c).

[412] 30 U.S.C. 1257 and 1258.

[413] *In re Permanent Surface Mining Regulation Litig.,* 653 F.2d 514, 527 (D.C. Cir. 1981) (en banc).

[414] *Id.* at 522.

[415] *PSMRL I, Round I,* 1980 U.S. Dist. LEXIS 17722 at *85 (D.D.C. 1980), 14 Env't Rep. Cas. (BNA) 1083, 10 Envtl. L. Rep. (Envtl. Law Inst.) 20208 (citing to *Mourning* v. *Family Publ'n Serv.,* 411 U.S. 356, 372 (1973)).

[416] 30 U.S.C. 1265(b)(23).

[417] 30 U.S.C. 1265(b)(2).

[418] 30 U.S.C. 1260(b)(10).

[419] 30 U.S.C. 1265(b)(10)(B)(i) and (b)(24).

[420] 30 U.S.C. 1265(b)(10)(B)(i).

statutory authority for that minimum buffer width. The prohibition on disturbing the buffer zone also would implement section 515(b)(24) of SMCRA,[421] which provides that surface coal mining and reclamation operations must be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Proposed Paragraph (a): Clean Water Act Requirements

Proposed paragraph (a) would specify that a person may conduct surface mining activities in waters of the United States only if that person first obtains all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.* This proposed paragraph is an informational provision that would be consistent with section 702(a) of SMCRA,[422] which provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. Proposed paragraph (a) would operate in tandem with proposed 30 CFR 773.17(h), which would add a new permit condition requiring that the permittee obtain all necessary authorizations, certifications, and permits in accordance with Clean Water Act requirements before conducting any activities that require approval, authorization, or certification under the Clean Water Act. Permit conditions are directly enforceable under SMCRA. Therefore, addition of the permit condition in proposed 30 CFR 773.17(h) would mean that the SMCRA regulatory authority must take enforcement action if the permittee does not obtain all necessary Clean Water Act authorizations, certifications, and permits before beginning any activity under the SMCRA permit that also requires approval or authorization under the Clean Water Act.

Proposed Paragraph (b): When must I comply with this section?

Proposed paragraph (b)(1) would apply 30 CFR 780.28 to permit applications to conduct surface mining activities in or through a perennial, intermittent, or ephemeral stream or on the surface of lands within 100 feet, measured horizontally, of perennial or intermittent streams.[423] The 100-foot distance reflects the 100-foot buffer zone that 30 CFR 816.57(a) establishes for perennial and intermittent streams. The preamble to proposed 30 CFR 816.57(a) explains the rationale for the 100-foot buffer zone width. Activities include, but are not limited to, mining through or diverting streams; constructing sedimentation ponds, excess spoil fills, and coal mine waste disposal facilities in or near streams; and constructing stream crossings for roads and utilities, as well as the full range of mining and reclamation activities that the application may propose to take place outside the stream channel but on the surface of lands within 100 feet of the stream.

Proposed paragraph (b)(2), in combination with proposed paragraph (e)(2) and 30 CFR 816.57, would prohibit mining-related activities in or within 100 feet of perennial and intermittent streams unless the applicant demonstrates, and the regulatory authority finds in writing, that the proposed activity would not (i) preclude any premining use or any designated use under the Clean Water Act of the affected stream segment following the completion of mining and reclamation; (ii) result in the conversion of the affected stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral; (iii) cause or contribute to a violation of water quality standards under the Clean Water Act; or (iv) cause material damage to the hydrologic balance outside the permit area. Proposed paragraph (b)(2)(iv) would duplicate the finding required by 30 CFR 773.15(e). Proposed paragraphs (b)(2)(i) through (iii) are similar to subsets of the definition of material damage to the hydrologic balance outside the permit area, but they differ from the definition of that term and 30 CFR 773.15(e) in that they would apply within the permit area as well as outside it. Proposed paragraphs (b)(2)(i) and (ii) would apply to stream segments within the permit area only after the completion of mining and reclamation, consistent with section 515(b)(10) of SMCRA,[424] which provides for minimization, not prevention, of disturbances to the prevailing hydrologic balance at the minesite.

To enhance fish and wildlife habitat, as required by section 515(b)(24) of SMCRA,[425] proposed paragraph (b)(3)(i) would require that the permit application include plans for establishment of a riparian corridor at least 100 feet wide on each side of a perennial, intermittent, or ephemeral stream segment[426] that remains after mining or that is restored as part of the reclamation process. The preamble to proposed 30 CFR 780.16 explains why we selected the minimum 100-foot width for the riparian corridor.

Proposed paragraph (b)(3)(ii) would require that disturbed areas within the corridor be planted with native species, including species adapted to and suitable for planting in riparian zones within that corridor. It also would require use of native trees and shrubs in previously forested areas or in areas that would revert to forest under conditions of natural succession. Creation of a riparian corridor populated with native species is part of the best technology currently available to minimize adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources, as required by section 515(b)(24) of SMCRA.[427] Nothing in proposed paragraph (b)(3) would require planting of hydrophilic species in riparian corridors or portions of riparian corridors that are incapable of providing the necessary moisture or other growing conditions. In those situations, proposed paragraph (b)(3)(ii) would require that the riparian corridor be planted with native species appropriate to the conditions.

Proposed paragraph (b)(3)(iii) would provide that the proposed riparian corridor requirement would not apply to prime farmland historically used for cropland because 30 CFR 785.17(e)(1) provides that the postmining land use of prime farmland historically used for cropland must be cropland. The proposed riparian corridor requirement also would not apply to situations in which revegetation would be incompatible with an approved postmining land use that is implemented during the revegetation responsibility period before final bond release. Finally, the riparian corridor requirement would not apply to stream segments buried beneath an excess spoil fill or a coal mine waste disposal facility pursuant to proposed paragraph (d).

Proposed Paragraph (c): What additional requirements apply to an application that proposed to mine through or divert a perennial, intermittent, or ephemeral stream?

Proposed paragraph (c)(1) would require that the proposed postmining drainage pattern of perennial,

[421] 30 U.S.C. 1265(b)(24).

[422] 30 U.S.C. 1292(a).

[423] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[424] 30 U.S.C. 1265(b)(10).

[425] 30 U.S.C. 1265(b)(24).

[426] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[427] 30 U.S.C. 1265(b)(24).

intermittent, and ephemeral stream channels to be restored after the completion of mining be similar to the premining drainage pattern. In addition to its ecological benefits, this requirement would better implement the requirement in section 515(b)(3) of SMCRA [428] that the permittee ''restore the approximate original contour of the land.'' The proposed rule would allow the regulatory authority to approve deviations from the premining drainage pattern when necessary to ensure stability, to promote enhancement of fish and wildlife habitat consistent with sections 515(b)(24) and 516(b)(11) of SMCRA,[429] or to prevent or minimize excessive downcutting (deepening) of reconstructed stream channels. For example, additional meanders may be needed to minimize channel erosion and downcutting when restoring streams in areas with a badlands-type topography that existed prior to mining.

Proposed paragraph (c)(2) would establish additional requirements for permit applications that propose to mine through or permanently or temporarily divert a perennial or intermittent stream. Proposed paragraph (c)(2)(i) would reiterate that the applicant must meet the requirements of proposed paragraphs (a) through (c)(1). Proposed paragraph (c)(2)(ii) would require that the applicant demonstrate that there is no reasonable alternative that would avoid mining through or diverting the stream. Proposed paragraph (c)(2)(iii) would require that the operation be designed to minimize the extent to which the stream will be mined through or diverted. Proposed paragraph (c)(2)(iv) would require that the applicant demonstrate that the techniques in the reclamation plan will restore the form and ecological function of the affected stream segment, as required by 30 CFR 816.57(b).

Proposed paragraph (c)(2)(iv)(A) would require the selective placement of aquitards (barriers to groundwater infiltration) within the backfill or fill when necessary to restore perennial and intermittent streams. Placement of a layer of lower-permeability spoil or other material near the surface but below the root zone for trees and shrubs could provide the subsurface flow needed to restore flow in perennial and intermittent stream segments. Construction of aquitards would have the additional benefit of quickly removing water that otherwise would have infiltrated the fill and could have emerged as leachate with undesirable concentrations of total dissolved solids or other parameters that could degrade downstream waters.

Proposed paragraph (c)(2)(iv)(B) would require that the permit application include a separate bond calculation for the costs of restoring the ecological function of the stream. It also would require that, before permit issuance, the permit applicant post a surety bond, a collateral bond, or a combination of surety and collateral bonds to cover that cost. A self-bond is not appropriate to guarantee restoration of a stream's ecological function because of the risk that the company may cease to exist during the time required to accomplish that restoration. In addition, a self-bond does not require that the permittee file financial instruments or collateral with the regulatory authority, nor is there any third party obligated to complete the reclamation or pay the amount of the bond if the permittee defaults on reclamation obligations.

Proposed paragraph (c)(2)(v) would require that the applicant comply with the stream restoration and stream-channel diversion design requirements in existing 30 CFR 816.43. As part of our effort to consolidate permitting requirements in subchapter G of our regulations, we propose to move the stream-channel diversion design provisions in the last sentence of existing 30 CFR 816.43(a)(3) and in paragraphs (b)(2) through (b)(4) of existing 30 CFR 816.43 to 30 CFR 780.28(c)(2)(v) and (vi).

We also propose to extend the design requirements of proposed paragraph (c)(2)(v)(A) and the design certification requirements of proposed paragraph (c)(2)(vi) to perennial and intermittent stream channels to be restored after the completion of mining. Our existing rules do not address restored stream channels, an oversight that we propose to correct because there is no legal or scientific basis for the absence of standards for the restoration of stream channels. Restored stream channels and permanent stream-channel diversions are equally important in terms of their value to the fish, wildlife, and related environmental values protected by section 515(b)(24) of SMCRA.[430] In addition, there is no legal, technical, or scientific reason why designs for restored stream channels should be subject to less rigorous certification standards than designs for stream-channel diversions.

Proposed paragraph (c)(2)(v)(A) would require that designs for permanent stream-channel diversions, temporary stream-channel diversions that will be in use for 2 or more years, and stream channels that are to be restored after the completion of mining replicate or approximate the premining characteristics of the original stream channel to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement. This provision is similar to the last sentence of existing 30 CFR 816.43(a)(3), with a few exceptions.

First, the existing rule applies only to permanent stream-channel diversions. Applying the design requirements of proposed paragraph (c)(2)(v)(A) to temporary stream-channel diversions that will be in use for 2 or more years would reduce the damage to aquatic resources caused by temporary diversions that remain in use for extended periods, consistent with the requirement in section 515(b)(24) of SMCRA [431] to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. In recognition of the shorter lifespan of temporary diversions, we propose to specify that, for temporary stream-channel diversions that will remain in use for 2 or more years, the vegetation proposed for planting in the riparian zone need not include species that would not reach maturity until after the diversion is removed. In other words, faster-growing species like willows, alders, and poplars or early successional natural riparian vegetation would be acceptable.

Second, proposed paragraph (c)(2)(v)(A) would specify that the premining characteristics of the original stream channel include, but are not limited to, the baseline stream pattern, profile, dimensions, substrate, habitat, and natural vegetation growing in the riparian zone. The addition of this clarification is intended to make our regulations more consistent with similar requirements under section 404 of the Clean Water Act and its implementing regulations. It also would minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available, as required by section 515(b)(24) of SMCRA.[432]

Third, proposed paragraph (c)(2)(v)(A) would specify that the design must minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement. This provision would minimize adverse impacts on fish, wildlife, and related

[428] 30 U.S.C. 1265(b)(3).

[429] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[430] 30 U.S.C. 1265(b)(24).

[431] *Id.*

[432] *Id.*

environmental values to the extent possible, using the best technology currently available, as required by section 515(b)(24) of SMCRA,[433] because channel deepening or enlargement can reduce the frequency and volume of flows over the flood-plain and contribute sediment to streamflow and streambeds through streambank erosion.

Proposed paragraph (c)(2)(v)(B) would require that the stream-channel design ensure that the hydraulic capacity of all temporary and permanent stream-channel diversions is at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream from the diversion and no greater than the hydraulic capacity of the unmodified stream channel immediately downstream from the diversion. Existing 30 CFR 816.43(b)(2) applies the same standard for the hydraulic capacity of the diversion both upstream and downstream of the diversion; *i.e.,* the designed hydraulic capacity of the diversion must be at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream and downstream from the diversion. Our proposal to require that the designed hydraulic capacity of the diversion be no greater than (rather than at least equal to) the hydraulic capacity of the unmodified stream channel immediately downstream from the diversion would protect against the scouring and other adverse impacts that could result from a sudden constriction in channel capacity if the diversion was allowed to exceed the capacity of the unmodified stream channel downstream of the diversion. Therefore, proposed paragraph (c)(2)(v)(B) would be consistent with the requirement in section 515(b)(24) of SMCRA [434] to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

Proposed paragraph (c)(2)(v)(C) would require that all temporary and permanent stream-channel diversions be designed so that the combination of channel, bank, and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion. Proposed paragraph (c)(2)(v)(C) is substantively identical to existing 30 CFR 816.43(b)(3). We invite comment on whether the design event for a temporary diversion should be raised to the 25-year, 6-hour event to provide added safety and protection against overtopping.

Proposed paragraph (c)(2)(vi) would require submission of a certification from a qualified registered professional engineer that the designs for all stream-channel diversions and all stream channels to be restored after the completion of mining meet the design requirements of 30 CFR 780.28 and any additional design criteria established by the regulatory authority. Our proposed rule differs from the design certification elements of existing 30 CFR 816.43(b)(4) in that we propose to expand the design certification requirement to apply to all stream channels to be restored after the completion of mining, not just to stream-channel diversions as in the existing rule. As discussed above, there is no legal, technical, or scientific reason to apply less rigorous design and certification requirements to restored stream channels than to permanent stream-channel diversions. In addition, we propose to require that the engineer certify that the design meets the design requirements of 30 CFR 780.28, not the performance standards as in the existing rule, because performance standards do not apply directly to designs. Finally, we propose to specify that the certification may be limited to the location, dimensions, and physical characteristics of the stream channel; it need not include restoration of ecological function, which may be beyond the professional competency of an engineer.

Proposed Paragraph (d): What requirements apply to an application to construct an excess spoil fill or coal mine waste disposal facility in a perennial or intermittent streams?

Proposed paragraph (d)(1) would apply the requirements of proposed paragraph (d)(2) in place of the requirements of proposed paragraph (b)(2) if the applicant proposes to construct an excess spoil fill or coal mine waste disposal facility that would encroach upon any part of a perennial or intermittent stream. We are proposing paragraph (d) because we recognize that some of the requirements of proposed paragraph (b)(2) that would apply to activities in streams cannot be met with respect to a stream segment that is buried underneath an excess spoil fill or a coal mine waste disposal facility.

A permit application that contains a proposal to construct an excess spoil fill or a coal mine waste disposal facility that would not encroach upon any part of a perennial or intermittent stream would not be subject to the requirements of proposed paragraph (d)(2). However, if the proposed fill or disposal facility would disturb the surface of land within 100 feet of a perennial or intermittent stream,[435] the application would have to comply with the requirements of proposed paragraph (b)(2).

Proposed paragraph (d)(2) would identify the demonstrations that a permit application must include if the applicant proposes to construct an excess spoil fill or coal mine waste disposal facility in a perennial or intermittent stream. The legal authority for the proposed demonstration requirements is set forth in detail in the introductory paragraphs of the discussion of proposed 30 CFR 780.28 in this preamble and will not be repeated here. The demonstrations that we propose to require are a combination of other regulatory program and Clean Water Act requirements; measures that constitute the best technology currently available to minimize any adverse impacts on fish, wildlife, and related environmental values, as required by section 515(b)(24) of SMCRA; [436] and fish and wildlife enhancement measures intended to offset any unavoidable long-term damage to fish, wildlife, and related environmental values.

Proposed paragraph (d)(2)(i) would require that the applicant demonstrate that the operation has been designed to minimize the amount of excess spoil or coal mine waste generated, which would have the effect of minimizing the need for or the size of the excess spoil fill or coal mine waste disposal facility. This finding corresponds to proposed 30 CFR 780.35(b) for excess spoil. For coal mine waste, this finding in essence would require a description of the steps taken to minimize the amount of coal mine waste generated by the coal preparation process, such as the use of filter presses, or an explanation of why minimization measures are not practicable.

Proposed paragraph (d)(2)(ii) would require that the applicant demonstrate that, after evaluating all potential upland locations in the vicinity of the proposed operation, there is no practicable alternative that would avoid placement of excess spoil or coal mine waste in a perennial or intermittent stream. Potential upland locations that must be considered include, but are not limited to, abandoned mine lands and existing fills with excess capacity. The application must identify potential locations such as the examples

[433] *Id.*

[434] *Id.*

[435] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[436] *Id.*

mentioned above and explain why those locations are not suitable or practicable. We anticipate that, for excess spoil, the permit applicant and regulatory authority would conduct this analysis in a manner similar to that described in Kentucky Reclamation Advisory Memorandum (RAM) 145, which establishes a fill placement optimization process for steep-slope mining in Kentucky.[437] For coal mine waste, the application would have to explain why an alternative configuration, location, or coal mine waste disposal method is not practicable.

Proposed paragraph (d)(2)(iii) would require that the applicant demonstrate that, to the extent possible using the best technology currently available, the proposed excess spoil fill or coal mine waste disposal facility has been designed to minimize both placement of excess spoil or coal mine waste in a perennial or intermittent stream and adverse impacts on fish, wildlife, and related environmental values. This provision corresponds in part to the fill optimization requirements of proposed 30 CFR 780.35(c). We anticipate that the RAM 145 process mentioned above may assist in meeting this requirement. Proposed paragraph (d)(2)(iii) would implement, in part, section 515(b)(24) of SMCRA,[438] which provides that surface coal mining and reclamation operations must be conducted to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

Proposed paragraph (d)(2)(iv) would require that the applicant demonstrate that the fish and wildlife enhancement plan for the proposed operation includes measures that would fully and permanently offset any long-term adverse impacts that the fill, refuse pile, or coal mine waste impoundment would have on fish, wildlife, and related environmental values within the footprint of the fill, refuse pile, or coal mine waste impoundment. The regulatory authority would determine the meaning of ''fully and permanently offset'' on a case-by-case basis. At a minimum, riparian corridors must be protected by conservation easements (dedicated to an appropriate agency or organization) or deed restrictions so that the newly planted vegetation is not destroyed after bond release. We invite comment on whether the final rule could or should include more specific standards or criteria for determining the meaning of ''fully and permanently offset.'' We also invite comment on whether mitigation required pursuant to section 404 of the Clean Water Act[439] may satisfy this requirement and whether past Clean Water Act mitigation measures have been successful. We encourage submission of data to document the success or failure of those measures.

Proposed paragraph (d)(2)(v) would require that the applicant demonstrate that the excess spoil fill or coal mine waste disposal facility has been designed in a manner that will not cause or contribute to a violation of water quality standards or result in the formation of toxic mine drainage. The demonstration that this paragraph would require is intended to ensure the proposed operation will not cause material damage to the hydrologic balance outside the permit area. In particular, it is intended to ensure that discharges to surface water or groundwater from the excess spoil fill or coal mine waste disposal facility would not have a substantial adverse impact on water quality or aquatic biota in receiving streams. As defined in 30 CFR 701.5, toxic mine drainage means any discharge that ''contains a substance that through chemical or physical effects is likely to kill, injure, or impair biota commonly present in that area that might be exposed to it.''

Proposed paragraph (d)(2)(vi) would require that the applicant demonstrate that the revegetation plan submitted under proposed 30 CFR 780.12(g) requires reforestation of a completed excess spoil fill if the land is forested at the time of application or if it would revert to forest under conditions of natural succession. This measure is intended to minimize the adverse impacts of the fill on watershed hydrology, especially the quantity and quality of surface runoff, and aquatic life in the stream.

Proposed Paragraph (e): What are the regulatory authority's responsibilities?

Proposed paragraph (e)(1)(i) would require that the regulatory authority establish objective standards for determining when the ecological function of a restored or permanently-diverted perennial or intermittent stream has been restored. Objective standards are essential to fair enforcement of the requirement for restoration of the ecological function of streams and to enable permit applicants to develop appropriate and comprehensive reclamation plans. Proposed paragraph (e)(1)(ii) would require that, in establishing these standards, the regulatory authority coordinate with the Clean Water Act permitting authority to ensure compliance with all Clean Water Act requirements.

Proposed paragraph (e)(1)(iii) would specify that the standards established by the regulatory authority must comply with the functional restoration requirements of proposed 30 CFR 816.57(b)(2). In relevant part, proposed 30 CFR 816.57(b)(2) would require that a stream flowing through a restored stream channel or stream-channel diversion have a biological condition adequate to support the designated uses of the original stream segment under section 101(a) or 303(c) of the Clean Water Act[440] before mining. This provision may allow limited changes in the species composition of the array of insects, fish, and other aquatic organisms found in a stream flowing through a restored stream channel or stream-channel diversion, as long as the changes do not preclude existing uses or attainment of designated uses. Proposed 30 CFR 816.57(b)(2) also would require that the biological condition of the restored stream be determined using a protocol that meets the requirements of proposed 30 CFR 780.19(e)(2) and that populations of organisms used to determine the postmining biological condition of the stream segment be self-sustaining within that segment. We propose to include this provision because the presence of individual organisms that happen to drift into the reconstructed channel from other areas is not an indicator of restoration of the ecological function of the restored stream segment.

Proposed paragraph (e)(2) specifies that the regulatory authority may not approve an application that includes any activities included in proposed paragraph (a)(1) unless the regulatory authority first makes a written finding that the applicant has fully satisfied all applicable requirements of 30 CFR 780.28. It also would require that the finding be accompanied by a detailed explanation and rationale for the finding. These requirements are appropriate, given the purposes and provisions of SMCRA discussed in the introductory paragraphs of the preamble to 30 CFR 816.57 and the typically high value of perennial and intermittent streams to fish and wildlife.

[437] Kentucky Energy and Environment Cabinet, Department for Natural Resources, Reclamation Advisory Memorandum # 145 (December 16, 2009). Available at *http://minepermits.ky.gov/RAMS/RAM145.pdf* (last accessed June 25, 2015).

[438] *30 U.S.C. 1265(b)(24).*

[439] 33 U.S.C. 1344.

[440] 33 U.S.C. 1251(a) and 1313(c).

15. Section 780.29: What information must I include in the surface-water runoff control plan?

We propose to revise this section to require that each application include a surface-water runoff control plan. We propose to require this plan because uncontrolled surface-water runoff can and has been known to cause flooding downgradient of the operation, which in turn can result in material damage to the hydrologic balance outside the permit area, property damage, and loss of human life, as well as adverse impacts on fish, wildlife, and related environmental values. Section 510(b)(3) of SMCRA [441] provides that the regulatory authority may not approve a permit application unless the application affirmatively demonstrates and the regulatory authority finds in writing that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Section 515(b)(24) of SMCRA [442] requires that surface coal mining and reclamation operations minimize adverse impacts on fish, wildlife, and related environmental values.

Proposed paragraph (a)(1) specifies that the plan must explain how surface-water runoff will be handled in a manner that will prevent peak discharges from the proposed permit area, both during and after mining and reclamation, from exceeding premining peak discharges from the same area for the same-size precipitation event. Proposed paragraph (a)(1) also requires use of the appropriate regional NRCS synthetic storm distribution to estimate peak discharges. Design criteria for hydraulic structures intended to handle overland flow from precipitation events are based in part on the peak runoff rate and/or runoff volume from the area draining to the structure. Actual precipitation records for small drainage areas generally are not available, so engineers typically rely upon mathematical models instead. The distribution of rainfall intensities is one of the primary inputs to those models. We propose to require use of the appropriate regional NRCS synthetic storm distribution to determine runoff intensities and peak flows because it is a widely accepted, prudent engineering design methodology.

Maximum runoff from a drainage area occurs when the peak intensity of the rainfall event coincides with the time of concentration (the length of time between the beginning of the rainfall event and the time when runoff from the entire drainage area first arrives at the outlet for the drainage area). Typically, for precipitation events with the same return interval (2 years, 10 years, 100 years, etc.), peak intensity is much greater for storms of short duration—the shorter the duration, the greater the maximum intensity and the greater the amount of peak flow from surface runoff. Traditionally, peak stormwater runoff from a drainage area was determined using a storm duration approximately 1.7 times greater than the time of concentration. Use of the NRCS synthetic storm distribution accomplishes this determination automatically. For example, precipitation intensity during the 1-hour or 6-hour increment with the highest rainfall amount within the 24-hour 10-year synthetic distribution (theoretical storm event) is identical to precipitation intensity and total rainfall during traditional 1-hour and 6-hour 10-year events. Therefore, it is not necessary to select a storm duration related to the time of concentration to capture the greater intensities of events of shorter duration.

Proposed paragraph (a)(2) specifies that the explanation in paragraph (a)(1) must consider the findings in the PHC determination prepared under § 780.20.

Proposed paragraph (b) would require that the plan include a surface-water runoff monitoring and inspection program that would provide sufficient precipitation and stormwater discharge data for the proposed permit area to evaluate the effectiveness of surface-water runoff control practices. The surface-water runoff monitoring and inspection program must specify criteria for monitoring, inspection, and reporting consistent with 30 CFR 816.34(d), which contains the corresponding performance standards. The program must contain a monitoring point density that adequately represents the drainage pattern and drainage distribution across the entire proposed permit area, with a minimum of one monitoring point for each watershed discharge point. We invite comment on whether the proposed minimum monitoring point density standard is too high or too low.

Proposed paragraph (c) would require that the permit application include descriptions, maps, and cross-sections of all runoff control structures, including diversions and other channels used to collect and convey surface-water runoff. Existing 30 CFR 780.29 applies this requirement only to diversions, which, under 30 CFR 816.43, could be construed as excluding channels constructed to collect and convey surface runoff from the area to be disturbed by the mining operations. Under proposed paragraph (c), all such channels would have to be designed in accordance with the standards in 30 CFR 816.43. Proposed paragraph (c) is intended to ensure that these channels are safe, stable, and of adequate capacity.

16. Section 780.35: What information must I provide concerning the minimization and disposal of excess spoil?

We propose to revise, reorganize, and expand our existing rules governing permitting requirements for the disposal of excess spoil.

Background and Rationale for the Proposed Rule Changes

Disposal of excess spoil and coal mine waste often involves the filling of substantial portions of stream valleys, especially in central Appalachia. Based upon our regulatory experience, updated science, and modern engineering practices, we propose to revise our regulations to minimize the creation of excess spoil and to ensure that excess spoil fills and coal mine waste disposal facilities are located and designed to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available, as required by sections 515(b)(24) and 516(b)(11) of SMCRA.[443]

Our existing regulations pertaining to the disposal of excess spoil primarily focus on ensuring that fills are safe and stable. We propose to add several requirements intended to promote environmental protection, including minimization of the adverse environmental impacts of fill construction in perennial and intermittent streams. We recognize that section 515(b)(22) of SMCRA,[444] which establishes standards for the disposal of excess spoil, does not include any requirements specifically oriented toward environmental protection, but instead focuses on engineering standards intended to promote stability, prevent mass movement, and control infiltration of water. However, section 515(b)(24) of SMCRA [445] does require that surface coal mining and reclamation operations be conducted in a manner that minimizes disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the

[441] 30 U.S.C. 1260(b)(3).

[442] 30 U.S.C. 1265(b)(24).

[443] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[444] 30 U.S.C. 1265(b)(22).

[445] 30 U.S.C. 1265(b)(24).

best technology currently available. Section 515(b)(24)[446] applies to the disposal of excess spoil both by its own terms (disposal of excess spoil is a part of surface coal mining and reclamation operations) and through section 515(b)(22)(I),[447] which requires that the placement of excess spoil meet ''all other provisions of this Act.'' SMCRA contains numerous environmental protection requirements that apply to all surface coal mining and reclamation operations and all aspects of those operations, including the disposal of excess spoil. The fact that section 515(b)(22)[448] does not mention environmental protection in no way suggests that excess spoil fills need not comply with the environmental protection provisions of SMCRA or that we lack the authority to adopt regulations establishing environmental protection requirements for those structures.

The goal of the excess spoil minimization and fill size optimization requirements of proposed paragraphs (b) and (c) is to minimize fill footprints and thus minimize disturbances of forests, perennial and intermittent streams, and riparian vegetation, consistent with the requirement in sections 515(b)(24) and 516(b)(11) of SMCRA[449] to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

As part of our oversight activities, we conducted studies in 1999 in Kentucky, Virginia, and West Virginia to determine how state regulatory authorities were administering SMCRA regulatory programs regarding restoration of approximate original contour. From our review of permit files and reclaimed mines, we determined that, typically, some of the spoil placed in excess spoil fills could have been retained on or returned to mined-out areas. See ''An Evaluation of Approximate Original Contour and Postmining Land Use in Kentucky'' (OSMRE, September 1999); ''An Evaluation of Approximate Original Contour Variances and Postmining Land Uses in Virginia'' (OSMRE, September 1999); and ''Final Report: An Evaluation of Approximate Original Contour and Postmining Land Use in West Virginia'' (OSMRE, May 1999).

In many instances, we found that the permit application overestimated the anticipated volume of excess spoil that the operation would produce. In addition, fills were designed and constructed larger than necessary to accommodate the anticipated excess spoil, which resulted in the unnecessary disturbance of additional land. Kentucky, Virginia, and West Virginia worked with us to develop enhanced guidance on material balance determinations, spoil management, and approximate original contour determinations to correct these problems to the extent feasible under the existing regulations. The regulatory authorities in those states have adopted policies based on that guidance for use in reviewing permit applications.[450] We also developed guidance for use under the Tennessee federal regulatory program.[451]

If adopted, the rule that we are proposing today would provide further authority for the policies in place in Kentucky, Tennessee, Virginia, and West Virginia. It would strengthen the enforceability of decisions based on those policies and provide national consistency by ensuring that certain basic requirements will be applied nationwide, including in those states that have not adopted such policies. The environment, the public, and the regulated community are best served by the adoption of national regulations to clarify environmental considerations concerning the generation and disposal of excess spoil.

Proposed Paragraph (a): Applicability.

This proposed paragraph would clarify that the provisions of 30 CFR 780.35 apply only to permit applications that propose to generate excess spoil.

Proposed Paragraph (b): Demonstration of Minimization of Excess Spoil

Proposed paragraph (b)(1) would require a demonstration, with supporting calculations and other documentation, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate. Designing the operation in this fashion should ensure that the maximum amount of overburden is returned to the mined-out area. Our goal is to ensure that the volume of overburden placed in excess spoil fills is minimized to the maximum extent possible. Minimizing the volume of overburden placed in excess spoil fills is critical to minimizing the amount of undisturbed land affected by fill construction and to ensuring that those fills bury or otherwise impact the shortest length of stream possible.

Proposed paragraph (b)(2) would specify the factors that the permit applicant and the regulatory authority must consider in determining whether the proposed operation has been designed to minimize the creation of excess spoil to the extent possible. It requires consideration of safety and stability needs and requirements; revegetation and postmining land use needs and requirements; the need for drainage structures, access roads, and berms; applicable regulations concerning backfilling, compaction, grading, and restoration of the approximate original contour; and other relevant regulatory requirements, in particular those pertaining to protection of water quality and fish, wildlife, and related environmental values. Some or all of those factors may limit the amount of spoil that can be returned to the mined-out area, especially the requirements related to safety, stability, and postmining land use. Also, if the regulatory authority does not approve the proposed postmining land use, the applicant and the regulatory authority would need to revisit the demonstration to determine whether it must be revised to reflect the needs and attributes of the postmining land use that is finally approved.

In addition, proposed paragraph (b)(2)(iii) would specify that drainage structures, access roads, and berms on the perimeter of the backfilled area must not exceed a total width of 20 feet unless the permit applicant can demonstrate a need for a greater width. This restriction would maximize placement of overburden material on the mined-out area and minimize the generation and placement of excess spoil. In many cases, construction of access roads or drainage controls wider or larger than necessary prevents maximum spoil placement within the mined-out area, thus creating larger excess spoil fills and burial of a greater length of perennial or intermittent stream segments than absolutely necessary. We propose to select 20 feet as the maximum width because that is the typical width of a drainage bench on the face of a fill or embankment. Twenty feet should provide adequate room for drainage and sediment controls during the period between final grading and establishment of vegetation. Twenty feet also would afford adequate access for equipment in the event that maintenance is required before final bond release. We seek comment on

[446] *Id.*

[447] 30 U.S.C. 1265(b)(22)(I).

[448] 30 U.S.C. 1265(b)(22).

[449] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[450] Kentucky Department of Natural Resources Reclamation Advisory Memorandum No. 145 (2009), Virginia Department of Mines, Minerals and Energy Guidance Memorandum 4–02 (2002), West Virginia Department of Environmental Protection Final Approximate Original Contour Document Guidance Policy (''AOC+'') (1999).

[451] OSMRE Knoxville Field Office Engineering Procedure 2.1: Steep Slope Mining: AOC and Excess Spoil Determination (2001).

whether the maximum width should be larger or smaller than 20 feet.

To attain the goal of minimizing both the amount of land disturbed and the length of perennial and intermittent stream segments buried or otherwise adversely affected, proposed paragraph (b)(3) would clarify that premining elevations do not operate as a cap on the elevation of backfilled areas. Instead, the final elevation would be determined on the basis of the factors listed in proposed 30 CFR 780.35(b)(2), together with the requirement that the final surface configuration be compatible with the surrounding terrain and be consistent with natural premining landforms. For the same reason, proposed paragraph (b)(4) would prohibit the creation of a final-cut impoundment under 30 CFR 816.49(b) or the placement of coal combustion residues or noncoal materials in the mine excavation if doing so would displace spoil removed from the excavation to the extent that the displaced mine spoil would have to be placed in an excess spoil fill.

Proposed Paragraph (c): Fill Capacity Demonstration

Proposed paragraph (c) would require that the application include a demonstration, with supporting calculations and other documentation, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as calculated under paragraph (b). This requirement is intended to prohibit the practice of designing an operation with a larger number and greater size of excess spoil fills than necessary and then constructing only part of each fill. This practice results in the filling of a greater length of stream than would be necessary if each fill was used to its maximum capacity, especially when using a bottom-up method of fill construction in which the entire footprint of the fill is disturbed either before or shortly after initial placement of excess spoil in the fill. Adoption of proposed paragraph (c) would minimize the adverse impacts of the operation on fish, wildlife, and related environmental values, as required by section 515(b)(24) of SMCRA,[452] by minimizing the amount of land and water disturbed to construct excess spoil fills.

Proposed Paragraph (d): Requirements Related to Perennial and Intermittent Streams

Proposed paragraph (d) would specify that a permit applicant proposing to construct an excess spoil fill in or within 100 feet of a perennial or intermittent stream[453] must comply with the requirements of proposed 30 CFR 780.28 concerning activities in or near perennial or intermittent streams.

Proposed Paragraph (e): Location

Proposed paragraph (e)(1) would require that a permit applicant submit maps and cross-section drawings or models showing the location and profile of all proposed excess spoil fills. This requirement corresponds to the first sentence of existing paragraph (a), which we propose to modernize to allow the use of models at the discretion of the permit applicant and the regulatory authority. Models can be more detailed than either maps or cross-sections. We also propose to require that the application include a profile of each excess spoil fill so that the regulatory authority is able to determine whether the completed fill would meet all applicable surface configuration requirements.

Proposed paragraph (e)(2) would specify that fills must be located on the most moderately sloping and naturally stable areas available. It also would specify that the regulatory authority will determine which areas are available for excess spoil fill construction after considering other requirements of the Act and the regulatory program. This paragraph corresponds to part of existing 30 CFR 816.71(c), which we propose to move to 30 CFR 780.35 because it is a permitting requirement, not a performance standard. We propose to add the provision specifying that the regulatory authority will determine which areas are available for excess spoil fill construction to improve consistency with section 515(b)(22)(E) of SMCRA,[454] which requires that excess spoil be placed ''upon the most moderate slope among those upon which, in the judgment of the regulatory authority, the spoil could be placed in compliance with all the requirements of the Act.'' Because one of the requirements of the Act is the provision in section 515(b)(24)[455] specifying that surface coal mining and reclamation operations must be conducted so as to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available, the location with the most moderate slopes in the vicinity of the proposed operation may not be available if construction of the fill at that location would have greater adverse impact on fish, wildlife, and related environmental values than would construction of the fill at a different location with steeper slopes. In other words, the requirement to place excess spoil on the most moderate slope is subordinate to compliance with other requirements of the Act and regulatory program.

Proposed paragraph (e)(3) provides that, whenever possible, the permit applicant must place fills on or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement. This paragraph corresponds to the remainder of existing 30 CFR 816.71(c), which we propose to move to 30 CFR 780.35 because it is a permitting requirement, not a performance standard. Proposed paragraph (e)(3) is consistent with section 515(b)(22)(E) of SMCRA,[456] which requires that excess spoil be placed ''where possible, upon, or above, a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.'' However, spoil placement upon or above a natural terrace, bench, or berm may not always be possible because section 515(b)(24) of SMCRA[457] provides that surface coal mining and reclamation operations must minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. Implementation of that requirement may entail placement of spoil in a location other than on or above a natural terrace, bench, or berm, provided the alternative location is stable and would have lesser overall adverse impacts on fish, wildlife, and related environmental values.

Proposed Paragraph (f): Design Plans

Proposed paragraph (f) requires that an application for an operation that would generate excess spoil include detailed design plans for each excess spoil fill, prepared in accordance with the requirements of proposed 30 CFR 780.35 and 816.71 through 816.74. Proposed paragraph (f) corresponds to the portion of existing 30 CFR 780.35(a) that requires that the design comply with 30 CFR 816.71 through 816.74. For

[452] 30 U.S.C. 1265(b)(24).

[453] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[454] 30 U.S.C. 1265(b)(22)(E).

[455] 30 U.S.C. 1265(b)(24).

[456] 30 U.S.C. 1265(b)(22)(E).

[457] 30 U.S.C. 1265(b)(24).

clarity and completeness, we propose to add language also requiring compliance with the requirements of 30 CFR 780.35, although those design requirements would apply anyway in the absence of this provision. Proposed paragraph (f) also would require that the applicant design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority. That requirement appears in the first sentence of existing 30 CFR 816.71(b)(1), which we propose to move to 30 CFR 780.35 because it is a design requirement, not a performance standard.

Proposed Paragraph (g): Geotechnical Investigation

Proposed paragraph (g) would require that the application include the results of a geotechnical investigation, with supporting calculations and analyses, of the site of each proposed excess spoil fill, with the exception of those sites at which spoil will be placed only on a preexisting bench under 30 CFR 816.74. This provision corresponds to existing paragraph (b). We propose to add a requirement that the applicant submit supporting calculations and analyses with the geotechnical investigation of the site of each proposed excess spoil fill. The additional data is essential for the permit application reviewer to determine the stability of the proposed design.

Proposed paragraphs (g)(1) through (6) identify information that would have to be submitted with the application to document the geotechnical investigation and its results.

Proposed paragraph (g)(1) would require sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for the site of each fill. This requirement currently appears in existing 30 CFR 816.71(d)(1). We propose to move it to 30 CFR 780.35(g) consistent with our effort to consolidate design requirements in the permitting rules rather than splitting them between the permitting rules and the performance standards. The foundation investigation is an element of the geotechnical investigation that is required for approval of a proposed excess spoil fill in a permit application.

Proposed paragraphs (g)(2) through (6) correspond to, and are substantively identical to, existing paragraphs (b)(1) through (5), except as discussed below.

We propose to revise paragraph (g)(3) to require that the applicant provide the geographic coordinates and a narrative description, rather than just a survey, of all springs, seepage, mine discharges, and groundwater flow observed or anticipated during wet periods in the area of the proposed fill. The added precision will assist the regulatory authority in evaluating the adequacy of the excess spoil fill design.

Proposed paragraph (g)(4) would require that the applicant provide an analysis of the potential effects of any underground mine workings within the proposed permit and adjacent areas, including the effects of any subsidence that may occur as a result of previous, existing, and future underground mining operations. The proposed requirement is similar to the portion of existing 30 CFR 816.71(d)(1) that requires that the analyses of foundation conditions take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures. Existing 30 CFR 780.35(b)(3) also requires a survey of the potential effects of subsidence that may occur as a result of past and future underground mining operations. Our proposed revisions would require that the analysis also consider the potential effects of subsidence from existing underground mining operations, not just past and future operations. The design needs to be capable of withstanding all potential impacts of any subsidence that may occur during the life of the proposed structure. We propose to add the reference to the proposed permit and adjacent areas to ensure that the analysis includes all operations that have the potential to cause subsidence that may affect the proposed fill, not just operations within the proposed permit area.

Proposed paragraph (g)(6) is substantively identical to existing paragraph (b)(5), with the exception that we propose to revise this paragraph to clarify that the stability analyses that it requires must address static, seismic, and post-earthquake (liquefaction) conditions because those conditions are all part of a comprehensive stability analysis.

Proposed Paragraph (h): Operation and Reclamation Plans

Proposed paragraph (h) would require that the permit applicant submit plans for the construction, operation, maintenance, and reclamation of all excess spoil fills in accordance with the requirements of §§ 816.71 through 816.74. This requirement corresponds to a similar provision in existing paragraph (a). However, that provision includes a requirement for plans for the ''removal, if appropriate, of the site and structures.'' Because excess spoil fills are permanent, it is not appropriate to include plans for their removal in the application. Consequently, we propose to replace the requirement for plans for removal of the fills with a requirement for plans for their reclamation, which would consist of final site preparation and revegetation consistent with the approved postmining land use.

Proposed Paragraph (i): Additional Requirements for Bench Cuts or Rock-Toe Buttresses

Proposed paragraph (i) combines overlapping requirements in existing paragraph (c) and 30 CFR 816.71(d)(2) concerning application and design requirements for bench cuts or rock-toe buttresses. We propose to revise the existing requirements by replacing the term ''keyway cuts'' with ''bench cuts.'' The term ''keyway cut'' is technically a cut beneath a dam that is used to extend low-permeability fill material to, but not into, bedrock. The term ''bench cut'' is more appropriate here because it refers to cuts into bedrock, not just down to bedrock, which is essential in the context of fill construction under steep-slope conditions.

Proposed Paragraph (j): Design Certification

Proposed paragraph (j) would require that the application include a certification by a qualified registered professional engineer experienced in the design of earth and rock fills that the design of all fills and appurtenant structures meets the requirements of 30 CFR 780.35. This requirement currently appears in the second sentence of existing 30 CFR 816.71(b)(1), which we propose to move to 30 CFR 780.35 consistent with our effort to consolidate design requirements in the permitting rules rather than splitting them between the permitting rules and the performance standards. We propose no substantive changes to this provision.

17. Section 780.37: What information must I provide concerning access and haul roads?

We propose to revise and reorganize existing paragraphs (a)(1), (2), (3), and (5) into proposed paragraphs (a)(1) and (2) to improve clarity and to eliminate redundancies and unnecessary cross-references. Proposed paragraph (a)(3) would require that the applicant demonstrate how all proposed roads will comply with the applicable requirements of 30 CFR 780.28 (activities in, through, or near streams), 816.150 (general performance standards for roads), and 816.151 (performance standards for primary roads). Section

780.28 is an element of the rule that we are proposing today, while 30 CFR 816.150 and 816.151 are existing rules.

We propose to add paragraph (a)(4) to require that the application identify each road that would be located in or within 100 feet of the channel of a perennial or intermittent stream,[458] each proposed ford of a perennial or intermittent stream that would be used as a temporary route during road construction, any plans to alter or relocate a natural stream channel, and each proposed low-water crossing of a perennial or intermittent stream channel. The regulatory authority would need this information to determine compliance with the applicable requirements of proposed 30 CFR 780.28 and existing 30 CFR 816.150, and 816.151.

We also propose to add paragraph (a)(5) to require that the applicant explain why any proposed fords, alterations or relocations of natural stream channels, or low-water crossings are necessary and how they comply with the applicable requirements of proposed 30 CFR 780.28 and section 515(b)(18) of the Act.[459] Section 515(b)(18) of SMCRA [460] provides that surface coal mining and reclamation operations must ''refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water.''

The proposed revisions are needed to ensure that the stream protection requirements of proposed 30 CFR 780.28 are applied to roads, which can have very damaging environmental impacts on streams.

H. Part 783: Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions

Part 783 contains the minimum requirements for information on environmental resources and environmental conditions when preparing applications for underground mining operations. It is the counterpart to part 779 for applications for surface mining operations. In general, part 783 is substantively identical to part 779, except for the substitution of ''underground mining activities'' for ''surface mining activities,'' the replacement of references to surface mining regulations with references to the corresponding underground mining regulations, and changes of a similar nature. Our proposed revisions to part 783 are similarly substantively identical to the corresponding revision that we propose in part 779. Therefore, this portion of the preamble discusses only those proposed revisions to part 783 that differ from the proposed revisions to the corresponding provisions of part 779. Otherwise, the rationale that we provide for the proposed revisions to part 779 applies with equal effect to our proposed revisions to part 783.

We also call attention to our proposed revisions to the definition of ''adjacent area'' in 30 CFR 701.5, which clarifies the size and extent of the area to which certain of the information requirements of part 783 would apply. As revised, the definition would include all areas that could experience adverse impacts from either a surface coal mining operation or underground mining activities, including potential impacts from any subsidence that may occur as a result of underground mining activities. The existing definition is limited to areas that either would be adversely impacted or could reasonably be expected to be adversely impacted. If adopted as proposed, the revised definition would ensure the collection of baseline and other data from all areas where adverse impacts are possible, not just from those areas where adverse impacts are probable. In other words, our proposed definition of ''adjacent area'' would include, at a minimum, the entire area overlying the proposed underground workings plus the area within a reasonable angle of draw from the perimeter of those workings.

1. Section 783.24: What maps, plans, and cross-sections must I submit with my permit application?

We propose to apply the requirements of 30 CFR 783.24(a)(5) to include the location of surface and subsurface man-made features within, passing through, or passing over the proposed permit and adjacent areas, rather than just the proposed permit area as in the corresponding proposed surface mining rules at 30 CFR 779.24(a)(5). The regulatory authority would need this information when evaluating the potential impacts of both the proposed underground mining operation and subsidence resulting from that operation on those features.

Proposed 30 CFR 783.24(a)(11) would be the underground mining counterpart to proposed 30 CFR 779.24(a)(11), which, as previously discussed, would add a new provision requiring mapping of all wellhead protection zones [461] located within one-half mile of the proposed permit area for surface mining operations. Proposed 30 CFR 783.24(a)(11) would expand that requirement to include all wellhead protection zones located within one-half mile of either the proposed permit area of an underground mine or the area overlying the proposed underground workings. This expansion is warranted to ensure that the permit application review process includes consideration of the potential impact of underground mining activities, and subsidence resulting from those activities, on these important zones and the water supplies that they protect. However, this provision is not intended to prohibit underground mining operations within wellhead protection zones when those operations can be conducted in a manner that will not endanger public water supplies or when the permit applicant can identify suitable alternative sources of water capable of providing water of equivalent quantity and quality.

Proposed 30 CFR 783.24(a)(13) also would require that the map include the location of any discharge into or from an active, inactive, or abandoned underground or surface mine when the discharge is located within one-half mile of the area overlying the proposed underground workings, rather than just when the discharge is located within one-half mile of the proposed permit area as in our proposed surface mining rules at 30 CFR 779.24(a)(13). The larger area is appropriate because the permit area for an underground mine does not include the area overlying the underground workings unless the mine disturbs the surface of those lands. However, the regulatory authority needs the discharge information from the expanded area to fully evaluate the potential impacts of the proposed underground mining operation on the hydrologic balance and to prepare the CHIA.

We propose to lift the suspension of existing 30 CFR 783.25(a)(3), (a)(8), and (a)(9) and remove those provisions from our rules. Our proposed actions are consistent with *PSMRL I, Round II,* in which the court remanded those provisions, which were then located at 30 CFR 783.25(c), (h), and (i), for further rulemaking proceedings because the preamble provided insufficient justification of the need for or usefulness of that information for

[458] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[459] 30 U.S.C. 1265(b)(18).

[460] *Id.*

[461] A wellhead protection zone or area is a surface and subsurface land area regulated under the Safe Drinking Water Act (42 U.S.C. 330f–300j) to prevent contamination of a well or well-field supplying a public water system.

proposed underground mining operations.[462] As discussed below in the context of 30 CFR 783.24(a)(21), (25), and (26), we are re-proposing those elements of the suspended rules that are relevant to underground mining operations and necessary or useful in the review of permit applications for underground mining operations.

Proposed 30 CFR 783.24(a)(21) would require that the application include information concerning the nature, depth, thickness, and commonly used names of the coal seams to be mined. Except for the names of the coal seams, this information currently is part of suspended 30 CFR 783.25(a)(3). Information concerning the depth and thickness of the coal seam would assist the regulatory authority in reviewing the subsidence control plan. Chemical characteristics of the coal seam play an important role in determining whether acid mine drainage may be a problem. The name of the coal seam would allow the regulatory authority to compare reported data with data representative of that seam. The remaining information required by suspended 30 CFR 783.25(a)(3) either is not relevant to underground mining or is covered by the geologic information requirements in proposed 30 CFR 784.19(f), which corresponds to existing 30 CFR 784.22.

Proposed 30 CFR 783.24(a)(23) would require that the application include a map and cross-sections showing the location and extent of known workings of active, inactive, or abandoned underground mines located either within the proposed permit area or within a 2,000-foot radius in any direction of the proposed underground workings. Existing 30 CFR 783.25(a)(5) applies this requirement to the permit and adjacent areas. The additional specificity in our proposed rule would ensure that the application contains location information for all other underground mine workings that could either impact or be impacted by the proposed operation.

Proposed 30 CFR 783.24(a)(25), like suspended 30 CFR 783.25(a)(8), would require that the application include maps identifying the location and extent of existing or previously surface-mined areas within the proposed permit area. This information is important in determining which postmining surface configuration and revegetation success standards apply, as well as evaluating eligibility for the remining provisions of 30 CFR 785.25.

Proposed 30 CFR 783.24(a)(26) closely resembles suspended 30 CFR 783.24(a)(9). It would require that the application include a map with the location and dimensions of existing areas of spoil, coal mine waste, noncoal waste disposal sites, dams, embankments, other impoundments, and water treatment facilities within the proposed permit area. Those features would affect the reclamation plan, and possibly the operations plan, for the mine, so they should be included on the permit application maps. The proposed rule differs from the suspended rule in that the proposed rule does not include ''waste,'' which is an undefined term of uncertain meaning. The proposed rule uses updated terminology concerning coal mine waste and, for the reasons discussed in the part of this preamble that explains our proposed removal of existing 30 CFR 780.15, it does not include air pollution control facilities.

Finally, proposed 30 CFR 783.24(a)(27), which corresponds to existing 30 CFR 783.25(a)(10), would expand the scope of the existing rule to include conventional gas and oil wells within both the proposed permit and adjacent areas, rather than just within the proposed permit area. As in the proposed surface mining counterpart rule at 30 CFR 779.24(a)(27), we also propose to require that the map include the extent of any directional or horizontal drilling for hydrocarbon extraction operations within both the proposed permit and adjacent areas. The permit area for an underground mine does not include the area overlying the underground workings or other areas where subsidence may occur. Therefore, the regulatory authority needs the information in proposed 30 CFR 783.24(a)(27) for both the proposed permit area and the adjacent area, not just the proposed permit area, when evaluating what impacts the proposed underground mining operation and any potential subsidence resulting from that operation may have on oil and gas operations.

I. Part 784: Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans

Part 784 contains the minimum requirements for operation and reclamation plans when preparing applications for underground mining operations. It is the counterpart to part 780 for applications for surface mining operations. In general, part 784 is substantively identical to part 780, except for the substitution of ''underground mining activities'' for ''surface mining activities,'' the replacement of references to surface mining regulations with references to the corresponding underground mining regulations, and changes of a similar nature. Our proposed revisions to part 784 are similarly substantively identical to the corresponding revisions that we propose in part 780. Therefore, this portion of the preamble discusses only those proposed revisions to part 784 that differ from the proposed revisions to the corresponding provisions of part 780. Otherwise, the rationale that we provide for the proposed revisions to part 780 applies with equal effect to our proposed revisions to part 784.

We also call attention to our proposed revisions to the definition of ''adjacent area'' in 30 CFR 701.5, which could significantly affect the scope of some of the plans that part 784 requires. As revised, the definition would include all areas that could experience adverse impacts from either a surface coal mining operation or underground mining activities, including potential impacts from any subsidence that may occur as a result of underground mining activities. At a minimum, this area would include the entire area overlying proposed underground workings plus the area encompassed by an appropriate angle of draw from the perimeter of those workings. It also would include all areas with underground mine pools that could be affected as well as areas that could be affected by any mine pool that forms after closure of the underground mine and any areas that could be affected by landslides or blowouts resulting from the formation of that mine pool.

The existing definition is limited to areas that either would be adversely impacted or could reasonably be expected to be adversely impacted. If adopted as proposed, the revised definition would require that the reclamation plan address all areas where adverse impacts are possible, not just those areas where adverse impacts are probable.

1. Section 784.11: What must I include in the general description of my proposed operation?

We propose to add language in paragraph (b)(5) to clarify that the narrative required by paragraph (b) must address underground mine ventilation boreholes, fans, and access roads.

2. Section 784.13: What additional maps and plans must I include in the reclamation plan?

Proposed 30 CFR 784.13(a)(4), which would combine existing 30 CFR 784.23(b)(1) and (13), would require that the application include a map showing the location of all buildings, utility corridors, and other facilities to be used or constructed within the proposed

[462] *PSMRL I, Round II,* 1980 U.S. Dist. LEXIS 17660 at *23–24 (D.D.C. 1980), 19 ERC (BNA) 1477.

permit area, together with identification of each facility that will remain as a permanent feature after the completion of underground mining activities.

We also propose to remove existing 30 CFR 784.23(b)(11), which requires a cross-section profile of the anticipated final surface configuration of the affected area, because this requirement duplicates part of proposed 30 CFR 784.12(d).

The preamble to 30 CFR 780.13 includes a discussion of the proposed removal of existing 30 CFR 780.13(b)(7) concerning air pollution. There is no counterpart to existing 30 CFR 780.13(b)(7) in the underground mining regulations at 30 CFR 784.23, so the discussion of our proposed removal of that paragraph does not pertain to proposed 30 CFR 784.13. Paragraph numbering adjustments need to be made accordingly when applying the discussion in this preamble concerning 30 CFR 780.13 to 30 CFR 784.13.

3. Section 784.19: What baseline information on hydrology, geology, and aquatic biology must I provide?

Proposed paragraph (a) differs from its counterpart in proposed 30 CFR 780.19(a) only in that it contains an additional requirement in paragraph (a)(5) that the baseline information collected be in sufficient detail to assist in preparing the subsidence control plan under 30 CFR 784.30. In the existing rules, this requirement appears in 30 CFR 784.22(a)(4) and applies only to geologic information.

Proposed paragraph (c) is substantively identical to its counterpart in proposed 30 CFR 780.19(c) with the exception that we propose to add paragraph (c)(3)(D) to the surface-water quantity description. This new paragraph would require that the description include seepage-run sampling determinations, if the application proposes to deploy a longwall panel beneath a perennial or intermittent stream or employ other types of full-extraction mining methods beneath a perennial or intermittent stream. Seepage runs are a series of in-stream flow measurements taken to determine the discharge rate of the stream at various points. The measurement begins upstream of any probable impacts from the proposed underground mine, proceeds through the reach of the stream that lies above the proposed mine workings, and continues to a point in the stream downgradient of any probable impacts from the proposed mine. At each measurement point, the stream width is divided into segments and an average velocity is measured for each segment. The average velocity is determined by either a single measurement taken at a point located six-tenths of the distance from the surface of the stream to the bottom of the stream or an average of two measurements taken at two-tenths and eight-tenths of the distance from the surface of the stream to the bottom of the stream. The discharge rate of each stream segment then is calculated based on the cross-sectional area and the average velocity. The sum of the discharge rates for all stream segments is the total streamflow at that point.

Subsidence resulting from longwall mining can cause a loss of part or all of the streamflow. Where the overburden is sufficiently thick (>100 to 150 meters), streamflow may be diverted into dilated fractures in the rocks immediately underlying the stream. This is especially true for sandstone units which, when fractured, tend to remain open, allowing significant transmission of streamflow to groundwater. Groundwater flow through fractures behaves in a cubic-root function in that doubling of the size of a fracture aperture enables the fracture to transmit approximately eight times the original flow.[463] The dilation of fractures caused by subsidence resulting from longwall mining can and frequently does result in diversion of surface streamflow into the groundwater via these fractures. Where this happens, the loss may be spatially limited; *i.e.,* once the stream passes beyond the impact footprint of the mine, the flow generally returns to the surface at a level expected at that point based on area-normalized flow criteria (*e.g.,* liters per minute per hectare drained).

Seepage-run determinations are necessary to accurately determine the impacts of longwall mining on streamflow. Minor to moderate loss of streamflow often is not noticeable by visual observation. So, seepage run determinations are needed to quantify the impacts. Seepage run determinations also are needed to quantify streamflow should it return in reaches that are beyond the impact of mining.

Proposed paragraph (e) sets forth the baseline information on the biological condition of streams that the application must include. The proposed requirements are substantively identical for both surface and underground mining operations, with the exception that applicants for underground mining operations must submit the required information for all perennial and intermittent streams within the adjacent area that might possibly be impacted by subsidence resulting from the proposed operation. As discussed in the preamble to our proposed definition of material damage to the hydrologic balance outside the permit area in 30 CFR 701.5, the regulatory authority may not approve any proposed operation that is predicted to cause subsidence that would result in the dewatering of perennial or intermittent streams or that is predicted to result in other adverse impacts that would cause the stream to no longer be capable of supporting existing or reasonably foreseeable uses or that would preclude attainment of designated uses under section 101(a) or 303(c) of the Clean Water Act.[464] However, the regulatory authority still would need the information that this paragraph would require for both the area overlying the proposed underground workings and the area within a reasonable angle of draw from the perimeter of those workings to determine whether the operation has created material damage to the hydrologic balance outside the permit area as a result of unanticipated subsidence. This information also would provide a standard for determining when any material damage to the stream has been corrected under 30 CFR 817.121(a).

We propose to add paragraph (f)(1)(iv) to the requirements for baseline geologic information for proposed underground mining operations. The new paragraph would require a description of the composition of the base of each perennial and intermittent stream within the proposed permit and adjacent areas, together with a prediction of how that base would be affected by subsidence and how subsidence of the streambed would impact streamflow. This information would be of value in preparation of the PHC determination under proposed 30 CFR 784.20 and the CHIA under proposed 30 CFR 784.21 and in determining whether the proposed operation may result in material damage to the hydrologic balance outside the permit area.

Proposed paragraph (h) establishes conditions under which the regulatory authority may grant an exception from the requirement to provide baseline information on the biological condition of streams. It is substantively identical to proposed 30 CFR 780.19(h)(2), except that it includes a provision clarifying that the exception is not available if the proposed operation could cause

[463] Witherspoon, P.A., J.S.K. Wang, K. Iwai, and J.E. Gale, 1979. Validity of Cubic Law for Fluid Flow in a Deformable Rock Fracture, *Water Resources Research,* Vol. 16, No. 6, pp. 1016–1024.

[464] 33 U.S.C. 1251(a) and 1313(c).

subsidence resulting in changes in the base flow of perennial or intermittent streams or in pooling of those streams.

Unlike proposed 30 CFR 780.19(h), proposed 30 CFR 784.19(h) does not include an exception for proposed operations for which the area from which coal is to be extracted includes only lands eligible for remining. The purpose of this exception for surface mining operations under proposed 30 CFR 780.19(h)(1) is to provide an incentive to remine previously mined areas by surface mining methods and then reclaim the redisturbed acreage with no expenditure of public funds. However, underground mining operations do not involve surface mining, apart from preparation of the face-up for the underground mine entries. Therefore, underground mining operations are unlikely to result in the remining and reclamation of previously mined areas to any significant extent. Thus, an exception intended to promote the remining and reclamation of previously mined areas would serve little purpose in rules that apply only to underground mining operations.

4. Section 784.20: How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

Proposed section 784.20, which appears at 30 CFR 784.14(e) in the existing rules, is substantively identical to the corresponding proposed rule concerning surface mining at 30 CFR 780.20, with the exception of paragraphs (a)(3), (a)(6), and (a)(7). Proposed paragraph (a)(3), like the existing rule at 30 CFR 784.14(e)(3)(iv), includes provisions consistent with the water replacement requirements of section 720 of SMCRA [465] for underground operations rather than the water replacement requirements of section 717(b) of SMCRA,[466] which apply only to surface mines. We propose to add paragraph (a)(6) to require that the PHC determination include a finding on what impact subsidence resulting from the proposed operation may have on perennial and intermittent streams. This finding is critical to a determination of whether the proposed operation would cause material damage to the hydrologic balance outside the permit area, as required by 30 CFR 773.15(e) and section 510(b)(3) of SMCRA.[467]

In addition, we propose to add paragraph (a)(7), which would require that the PHC determination include a finding on whether the proposed underground workings would flood after mine closure and, if so, a statement and explanation of the highest anticipated potentiometric surface of the mine pool after closure; whether, where, and when the mine pool is likely to result in a surface discharge; and the predicted quality of any discharge from the mine pool. The regulatory authority would use this information, in combination with models and calculations of void space and adjacent mine barrier seepage, to predict the probability of a blowout, where and when blowouts might occur, and the likelihood that water discharged as a result of the blowout will require treatment to meet water quality standards or any applicable effluent limitations.

The biggest environmental threat from an underground mine is the formation of a post-closure point-source discharge or baseflow discharge that is acidic in character (and thus usually high in metal concentrations) or that contains high total dissolved solids, which result in elevated electrical conductivity in receiving streams. Either characteristic can substantially degrade water quality and the biological condition of streams. Our proposed requirement that the PHC determination include information and a finding on mine pools should enable the applicant to make a business decision as to whether revenue from the proposed operation would be sufficient to justify the cost of preventing future noncompliant discharges of a perpetual nature. It also would enable the regulatory authority to prepare a better CHIA and require the applicant to take discharge prevention measures or change the mining plan to avoid creating a post-closure discharge that would cause material damage to the hydrologic balance outside the permit area in violation of section 510(b)(3) of SMCRA.[468]

Proposed paragraph (a)(7) also would require that the PHC determination include a statement and explanation of the predicted impact of the mine pool on the hydrologic balance of the proposed permit and adjacent areas after the mine pool reaches equilibrium, the potential for a mine pool blowout or other hydrologic disturbances, the potential for the mine pool to destabilize surface features, and the potential impact of roof collapses on mine pool behavior and equilibrium. Both the permit applicant and the regulatory authority need this information to determine whether any preventive or remedial measures are necessary to address adverse impacts related to mine pools.

5. Section 784.21: What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?

Proposed 30 CFR 784.21 is substantively identical to the CHIA requirements for surface mine permits in proposed 30 CFR 780.21, with one exception: Our proposed CHIA requirements for a permit for an underground mine do not contain a counterpart to the requirement in proposed 30 CFR 780.21(b)(8)(iv) that the regulatory authority find that the proposed operation has been designed to protect the quantity and quality of water in any aquifer that significantly ensures the prevailing hydrologic balance. That provision does not apply to underground mines because section 516(b)(9) of SMCRA,[469] which is the underground mining counterpart to section 515(b)(10),[470] does not include a counterpart to section 515(b)(10)(D), which requires restoration of the recharge capacity of the mined area to approximate premining conditions. As Congress further recognized in adopting section 720 of SMCRA,[471] underground mining operations will necessarily dewater some aquifers. In those situations, section 720 specifies what actions the permittee must take to replace water supplies protected under that section of the law.

6. Section 784.22: What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water resources?

Proposed 30 CFR 780.22(a) is substantively identical to the corresponding requirements for surface mine permit applications in proposed 30 CFR 780.22(a), with one exception: Our proposed hydrologic reclamation plan requirements for a permit application for an underground mine do not contain a counterpart to the requirement in proposed 30 CFR 780.22(a)(2)(ix) that the plan demonstrate how the operation will restore the approximate premining recharge capacity. Not including a counterpart to this provision in the underground mining rules is consistent with the difference between sections 515 and 516 of SMCRA,[472] as discussed above in the preamble to proposed 30

[465] 30 U.S.C. 1309a.

[466] 30 U.S.C. 1307(b).

[467] 30 U.S.C. 1260(b)(3).

[468] 30 U.S.C. 1260(b)(3).

[469] 30 U.S.C. 1266(b)(9).

[470] 30 U.S.C. 1265(b)(10).

[471] 30 U.S.C. 1309a.

[472] 30 U.S.C. 1265 and 1266.

CFR 784.21. Section 515(b)(10)(D) of SMCRA [473] requires that surface coal mining operations restore the recharge capacity of the mined area to approximate premining conditions. However, this requirement does not appear in the corresponding provision for underground coal mining operations in section 516(b)(9) of SMCRA.[474]

We also propose to add paragraph (b) to require that an underground mining permit application contain information on alternative water sources. The existing rules concerning underground mining permit applications do not include a similar provision. However, the addition of this requirement would enhance the ability of both the permittee and the regulatory authority to ensure that the water supply replacement requirements of 30 CFR 817.40 and section 720 of SMCRA [475] are properly implemented. Proposed paragraph (b) is substantively identical to the corresponding proposed surface mining requirement at 30 CFR 780.22(b), with the exception that paragraph (b)(1) of section 784.22 reflects the different scope of water supply replacement requirements for underground mining operations, as specified in 30 CFR 817.40 and section 720 of SMCRA.[476]

7. Section 784.23: What information must I include in my plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

Proposed 30 CFR 784.23 is substantively identical to the corresponding monitoring plan requirements for surface mine permit applications in proposed 30 CFR 780.23, except as discussed below.

Proposed 30 CFR 784.23(a)(1)(iii) does not include a requirement that the groundwater monitoring plan provide for monitoring wells to be placed in backfilled portions of the permit area. We did not include this requirement because surface excavations associated with underground mining operations typically are small in size relative to surface mines and do not involve ongoing backfilling and grading activities. Any changes in water quality detected by wells placed in backfilled areas would not be useful in planning changes in future phases of the operation, because there would be no future phases. Instead, we propose to require that the groundwater monitoring plan include at least one monitoring well to be located in the mine pool after mine closure. This requirement would allow both the permittee and the regulatory authority to monitor changes in mine pool elevation and to evaluate the accuracy of the PHC determination's prediction of whether the mine pool ultimately will rise to the level that a surface discharge will result. This information is important because water quality in mine pools is often poor,[477] which means that any surface discharge would need to be treated, potentially in perpetuity.

Proposed paragraphs (a)(1)(iii) and (b)(1)(iv) would require that upgradient and downgradient monitoring points for groundwater and surface water be located at a distance sufficiently close to the underground mine workings to detect changes as the mining operation progresses. The plan must include a schedule and map for moving these sites as the underground workings advance. Without this provision, the upgradient and downgradient monitoring points could be located so far away from the active underground workings that they would provide no meaningful data for purposes of analyzing impacts of current operations on groundwater or surface water.

Proposed paragraph (d) establishes conditions under which the regulatory authority may grant an exception from the requirement to monitor the biological condition of streams. It is substantively identical to proposed 30 CFR 780.23(d)(2), except that it includes a provision clarifying that the exception is not available if the proposed operation could cause subsidence resulting in changes in the base flow of a perennial or an intermittent stream or in pooling of a perennial or an intermittent stream.

Unlike proposed 30 CFR 780.23(d) for permit applications for surface mines, proposed 30 CFR 784.23(d) does not include an exception for proposed underground mining operations for which the area from which coal is to be extracted includes only lands eligible for remining. The purpose of this exception for surface mining operations under proposed 30 CFR 780.23(d)(1) is to provide an incentive to remine previously mined areas by surface mining methods and then reclaim the redisturbed acreage with no expenditure of public funds. However, underground mining operations do not involve surface mining, apart from preparation of the face-up or mine entries, which means that any redisturbance–and hence reclamation—of previously mined areas would be comparatively minimal. Therefore, an exception intended to promote the surface mining and reclamation of previously mined areas would serve no purpose in rules that apply only to underground mining operations.

8. Section 784.24: What requirements apply to the postmining land use?

Proposed section 784.24 is substantively identical to its proposed surface mining counterpart in 30 CFR 780.24. Both proposed 30 CFR 780.24 and 784.24 would include a modified version of the interpretive rules concerning postmining land use changes for underground mines at 30 CFR 784.200 and 817.200(d)(1), which we propose to remove in concert with this rule change. Please refer to the preamble to proposed 30 CFR 780.24(c) for a discussion of this proposed rule change.

9. Why are we proposing to remove existing 30 CFR 784.26?

We propose to remove existing 30 CFR 784.26 because the references to fugitive dust and cross-references to 30 CFR 817.95 in the existing rule refer to provisions that we removed in 1983 in response to a court decision striking down our authority to regulate air pollution under SMCRA, except for air pollution attendant to erosion. The court held that ''the legislative history indicates that Congress only intended to regulate air pollution related to erosion'' [478] and that ''the Secretary's authority to regulate [air] pollution is limited to activities related to erosion.'' [479] The court remanded former 30 CFR 816.95 and 817.95 (1979), which contained performance standards for fugitive dust control, for revision. However, the court did not address the parallel permitting requirements at 30 CFR 780.15 and 784.26.

The 1983 rulemaking removed all requirements in 30 CFR 817.95 for fugitive dust control practices, including requirements for monitoring of fugitive dust to determine compliance with federal and state air quality standards. That rulemaking also changed the section heading of 30 CFR 817.95 from ''Air resources protection'' to ''Stabilization of surface areas'' and replaced the air quality performance standards formerly located in 30 CFR 817.95 with soil stabilization

[473] 30 U.S.C. 1265(b)(10)(D).

[474] 30 U.S.C. 1266(b)(9).

[475] 30 U.S.C. 1309a.

[476] *Id.*

[477] Donovan, J. J., B. Leavitt, E. Werner, E. Perry, and K. McCoy, 2000, Long-term Hydrogeological and Geochemical Response to Flooding of an Abandoned Below-drainage Pittsburgh Coal Mine, in the Proceedings of the Twenty-First West Virginia Surface Mine Drainage Task Force Symposium, Morgantown, WV, pp. 139–160.

[478] *PSMRL I, Round II,* 1980 U.S. Dist. LEXIS 17660 at *43–44, 19 Env't Rep. Cas. (BNA) 1477.

[479] *Id.* at *42.

requirements that contain no mention of fugitive dust or air quality monitoring. See 48 FR 1160–1163 (Jan. 10, 1983).

However, the 1983 rulemaking did not remove the parallel permitting requirements in 30 CFR 784.26. Instead, we stated in the preamble to that rulemaking that we agreed with a commenter that we also needed to amend the permit application rules at 30 CFR 780.15 and 784.26 for consistency with the revisions to 30 CFR 816.95 and 817.95, and that we would do so in a subsequent independent rulemaking.[480] Adoption of this proposed rule would fulfill that long-delayed commitment.

With respect to air pollution attendant to erosion, proposed 30 CFR 784.12(f) would add a permitting counterpart to the existing performance standard at 30 CFR 817.95(a), which provides that all exposed surface areas must be protected and stabilized to effectively control erosion and air pollution attendant to erosion. We also propose to add cross-references to the dust control performance standards for roads in 30 CFR 817.150 and 817.151.

We also propose to redesignate existing 30 CFR 784.25, which contains requirements pertaining to the return of coal processing waste to abandoned underground mine workings, as new 30 CFR 784.26.

10. Section 784.26: What information must I provide if I plan to return coal processing waste to abandoned underground workings?

We propose to redesignate existing 30 CFR 784.25 as 30 CFR 784.26. We propose to revise redesignated 30 CFR 784.26 by replacing the word ''backfill'' and its variants with ''backstow'' or equivalent terminology to avoid any confusion with the process of backfilling open pits or our proposed definition of ''backfill'' in 30 CFR 701.5. Proposed paragraph (b)(2) would add a requirement for a description of all chemicals used to process the coal, the quantity of those chemicals remaining in the coal processing waste, and the likely impact of those chemicals on groundwater and any persons, aquatic life, or wildlife using or exposed to that groundwater. We propose to revise paragraph (c) to require that the backstowing plan include plans for monitoring the chemicals contained in the coal processing waste and a description of the anticipated effect on biological communities. The regulatory authority needs the information described above to determine whether the proposed backstowing operation would cause material damage to the hydrologic balance outside the permit area in violation of section 510(b)(3) of SMCRA.[481]

We propose to add paragraph (c)(6), which would require that the backstowing plan submitted to the regulatory authority include the measures to be taken to comply with the underground mine discharge requirements of 30 CFR 817.41, when applicable. The inclusion of this provision would serve as a reminder that the permitting requirements of 30 CFR 784.26 are not the only regulations that may apply to review of applications of this nature.

We also propose to revise paragraph (d) to clarify that the surface-water and groundwater monitoring plans for the proposed backstowing operation must comply with the requirements of 30 CFR 784.23, which apply to all operations subject to part 784.

Finally, we propose to revise paragraph (e) to specify that the regulatory authority may exempt pneumatic backstowing operations from compliance with these requirements if the applicant demonstrates, and the regulatory authority finds in writing, that the proposed pneumatic backstowing operation will not adversely impact surface water, groundwater, or water supplies. The corresponding existing rule at 30 CFR 784.25(e) lacks any requirement for a demonstration by the applicant and it has no criteria for determining when the regulatory authority may grant an exception. Such an open-ended provision is not consistent with the environmental protection purposes and provisions of SMCRA. We invite comment on whether any of the requirements of paragraphs (a) through (d) should apply to all pneumatic backstowing operations, either because the regulatory authority needs that information to decide whether to grant an exemption or because those requirements are needed to ensure that the operation is conducted in an environmentally sound manner.

We also invite comment on whether we should adopt similar requirements that would apply to backstowing of coal processing waste in abandoned underground mines when that activity occurs in connection with either a surface coal mine or a coal preparation plant regulated under 30 CFR 785.21.

11. Section 784.28: What additional requirements apply to proposed surface activities in, through, or adjacent to streams?

Proposed 30 CFR 784.28 is substantively identical to its surface mining counterpart at proposed 30 CFR 780.28, except that proposed 30 CFR 784.28 includes language clarifying that it applies to activities conducted on the land surface. Like existing 30 CFR 784.28, proposed 30 CFR 784.28 would not apply to activities conducted underground or to surface impacts resulting from subsidence caused by underground workings.

12. Section 784.30: When must I prepare a subsidence control plan and what information must that plan include?

We propose to redesignate existing 30 CFR 784.20 as 30 CFR 784.30. Proposed 30 CFR 784.30 is substantively identical to existing 30 CFR 784.20. However, existing 30 CFR 784.20(a)(3) contains language that we suspended on December 22, 1999 (64 FR 71652–71653), in response to a court order vacating those provisions.[482] We propose to lift the suspension and then remove the previously suspended language. Specifically, we propose to delete the language in existing 30 CFR 784.20(a)(3) that requires a pre-subsidence survey of the condition of all noncommercial buildings or occupied residential dwellings and related structures that might be materially damaged by subsidence, or have their reasonably foreseeable value diminished by subsidence, within the area encompassed by the angle of draw. Proposed 30 CFR 784.30(a)(3) would retain the requirement in existing 30 CFR 784.20(a)(3) for a pre-subsidence survey of the condition of the quantity and quality of all drinking, domestic, and residential water supplies within the proposed permit area and the adjacent area.

13. Section 784.35: What information must I provide concerning the minimization and disposal of excess spoil?

Proposed 30 CFR 784.35 is substantively identical to its proposed surface mining counterpart at 30 CFR 780.35. Existing 30 CFR 784.19, which is the current underground mining counterpart to 30 CFR 780.35, contains an ambiguous cross-reference to the requirements of 30 CFR 780.35, ''if appropriate.'' We propose to replace this cross-reference with actual regulatory text and thus eliminate the ambiguity.

[480] 48 FR 1161 (Jan. 10, 1983).

[481] 30 U.S.C. 1260(b)(3).

[482] *Nat'l Mining Ass'n* v. *Babbitt,* 173 F.3d 906 (D.C. Cir. 1999).

Proposed 30 CFR 784.35 also contains revisions to provide consistency with the definition of coal mine waste in 30 CFR 701.5, which we adopted on September 26, 1983 (48 FR 44006). Among other things, that definition reclassified underground development waste as coal mine waste, which means that fills constructed of underground development waste must adhere to the requirements for refuse piles instead of the requirements applicable to excess spoil fills. At the same time that we adopted the definition of coal mine waste in 1983, we revised our performance standards at 30 CFR 817.71 through 817.74 to eliminate the language that combined underground development waste with excess spoil for purposes of performance standards for underground mines. Because the definition of coal mine waste includes underground development waste, the disposal of underground development waste is subject to the performance standards for refuse piles at 30 CFR 817.83 rather than the performance standards for the disposal of excess spoil that applied under the pre-1983 rules.

The design requirements for fills in existing 30 CFR 784.19 apply to both underground development waste and excess spoil, which means that those permitting requirements are inconsistent with the 1983 changes to the corresponding performance standards. Proposed 30 CFR 784.35 would apply only to the disposal of excess spoil, consistent with the 1983 changes to our definitions and performance standards regarding coal mine waste. For the same reason, we propose to remove all references to underground development waste in existing 30 CFR 784.19 and to revise the section heading accordingly in concert with our proposed redesignation of existing 30 CFR 784.19 as 30 CFR 784.35. Under proposed 30 CFR 784.35, the permitting requirements for refuse piles in proposed 30 CFR 784.25, not the excess spoil requirements of proposed 30 CFR 784.35, would govern the disposal of underground development waste.

Proposed 30 CFR 784.35 parallels proposed 30 CFR 780.35, which contains the permit application requirements for the disposal of excess spoil generated by surface mining activities. As noted above, the existing rule at 30 CFR 784.19 includes those requirements by cross-reference in a somewhat ambiguous fashion. Adding specific language in place of the cross-reference to 30 CFR 780.35 in the existing rule would be consistent with the pattern established in most of our other rules for surface and underground mines, in which separately codified provisions for surface and underground mines are nearly identical except for cross-references and the type of operation to which they apply. In addition, adding specific language in place of the cross-reference to 30 CFR 780.35 will allow the inclusion of cross-references to the appropriate underground mining performance standards in part 817 rather than having to use the cross-references in 30 CFR 780.35 to the surface mining performance standards in part 816.

14. Why are we proposing to remove existing 30 CFR 784.200?

Existing 30 CFR 784.200 contains only one interpretive rule, which addresses the use of the permit revision process for postmining land use changes for underground mines. We propose to include this interpretive rule in 30 CFR 784.24 in revised form to the extent that it contains unique provisions not already present in other regulations. Specifically, proposed 30 CFR 784.24(c) would require that any proposed change to a higher or better postmining land use must be processed as a significant permit revision. Please refer to the preamble to proposed 30 CFR 780.24(c) for a discussion of this proposed rule change. We will remove 30 CFR 784.200 if we adopt proposed 30 CFR 784.24(c).

J. Part 785: Requirements for Permits for Special Categories of Mining

1. Section 785.14: What special provisions apply to proposed mountaintop removal mining operations?

We propose to revise and reorganize 30 CFR 785.14 in accordance with plain language principles. However, we will not discuss those changes here because they are nonsubstantive in nature.

With regard to substantive changes, we propose to move existing paragraph (b) to 30 CFR 701.5 as part of our proposed definition of mountaintop removal mining. In proposed paragraph (b)(1), which corresponds to existing paragraph (c)(1), we propose to replace ''land to be affected'' with ''land to be disturbed'' to be consistent with the definitions of ''affected area'' and ''disturbed area'' in 30 CFR 701.5. This change also would reflect the fact that only lands to be disturbed by the mining operation would have a proposed postmining land use.

We propose to remove existing 30 CFR 785.14(c)(3), which provides that the requirements of 30 CFR part 824 must be made a specific condition of the permit. This provision is redundant and unnecessary because the performance standards of 30 CFR part 824 are independently enforceable. Making those performance standards a specific condition of the permit condition adds nothing of value. Furthermore, nothing in SMCRA requires this permit condition. Proposed 30 CFR 785.14(b)(8), like existing 30 CFR 785.14(c)(2), would continue to require that the applicant demonstrate, and the regulatory authority find, that the proposed operation has been designed to comply with the requirements of 30 CFR part 824.

Proposed paragraph (b)(9) would replace existing 30 CFR 824.11(a)(9), which prohibits damage to natural watercourses below the lowest coal seam to be mined. We propose to delete the clause limiting the scope of that prohibition to watercourses below the lowest coal seam to be mined because that clause does not appear in the underlying statutory provision. Instead, section 515(c)(4)(D) of SMCRA [483] provides that ''no damage will be done to natural watercourses.'' However, SMCRA does not define either ''damage'' or ''natural watercourses.''

Proposed paragraph (b)(9) would specify that we will consider no damage to have occurred to other natural watercourses if the applicant demonstrates and the regulatory authority finds in writing that all the following conditions exist:

- The proposed operation will not increase the amount or concentration of parameters of concern in discharges to groundwater and surface water from the proposed permit area, when compared to the discharges that would occur if the operation were designed to adhere to approximate original contour restoration requirements.
- The proposed operation will not result in changes in the size or frequency of peak flows from the proposed permit area that would cause an increase in damage from flooding, when compared to the impacts that would occur if the operation were designed to adhere to approximate original contour restoration requirements.
- The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that would adversely affect any existing or reasonably foreseeable use of surface water or groundwater or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.[484]

[483] 30 U.S.C. 1265(c)(4)(D).

[484] 33 U.S.C. 1251(a) and 1313(c), respectively.

These requirements are intended to ensure that the proposed operation is designed to prevent material damage to the hydrologic balance outside the permit area, as required by 30 CFR 773.15(e) and section 510(b)(3) of SMCRA,[485] and as we propose to define that term in 30 CFR 701.5.

We invite comment on whether we can or should instead adopt a rule that would allow the approval of mountaintop removal mining operations that would damage natural watercourses within the permit area if the applicant can demonstrate that the damage will be fully offset by implementation of the fish and wildlife enhancement measures proposed under 30 CFR 780.16.

Under proposed paragraph (b)(10), the revegetation plan proposed under 30 CFR 780.12(g) for the operation would have to require that those portions of the proposed permit area that are forested at the time of application or that would revert to forest under conditions of natural succession be revegetated using native tree and understory species to the extent that this requirement is not inconsistent with attainment of the proposed postmining land use. Addition of this requirement would improve implementation of the revegetation requirements of section 515(b)(19) of SMCRA.[486] It also would be consistent with section 515(b)(24) of SMCRA,[487] which provides that, to the extent possible, surface coal mining and reclamation operations must minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values and enhance those resources where practicable, using the best technology currently available.

Proposed paragraph (b)(11) would require that the bond posted for the permit under part 800 of this chapter include an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented before expiration of the revegetation responsibility period under § 816.115. As an alternative to requiring posting of this bond amount at the time of permit issuance, we are considering adopting a rule that would prohibit release of any bond amount for the entire permit until the approved postmining land use has been implemented. We invite comment on which alternative would be more effective in preventing abuse of this exception from the AOC restoration requirements of SMCRA.

Proposed paragraph (b)(13) would require that the permit clearly identify the acreage and location of mountaintop removal mining areas. Many permits include several types of mining, so the permittee, the regulatory authority, and other interested persons need this information to determine which portions of the permit area are subject to the mountaintop removal mining provisions.

Finally, in proposed paragraph (c), we propose to replace the permit review requirements of existing paragraphs (d)(1) and (2) with a cross-reference to the permit review requirements of proposed 30 CFR 774.10(a)(2). Existing paragraph (d)(1) requires a permit review within the sixth month preceding the third year from the date of permit issuance, before each permit renewal, and not later than the middle of each permit term. Proposed 30 CFR 774.10(a)(2) would replace both this provision and a corresponding provision in existing 30 CFR 774.10(a)(3) with language that is consistent with the underlying statutory provision in section 515(c)(6) of SMCRA,[488] which requires that permits of this type be reviewed not more than 3 years from the date of permit issuance, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the approved schedule and reclamation plan. This review is a one-time requirement, not a recurring event.

2. Section 785.16: What special requirements apply to proposed variances from approximate original contour restoration requirements for steep-slope mining?

Proposed Paragraph (a): Application and Approval Requirements

We propose to revise 30 CFR 785.16(a) to clarify that a variance approved under this section may apply to only a portion of the permit area rather than to the entire permit area. This change would emphasize that a variance should be limited to the smallest area necessary to accommodate the proposed postmining land use for which the variance is granted.

We propose to include the criteria in existing 30 CFR 816.133(d) and 817.133(d) for approval of a variance from approximate original contour requirements in 30 CFR 785.16 because those variances may be granted only for steep-slope mining operations. Consolidation of all steep-slope variance provisions into 30 CFR 785.16 would make our regulations easier to understand and more user-friendly.

Proposed paragraph (a)(8) would allow approval of a variance only if the variance will not result in the construction of a fill in a perennial or an intermittent stream. Sacrificing perennial or intermittent stream segments for the purpose of creating a different postmining land use is neither appropriate nor warranted in view of paragraphs (a) and (d) of section 102 of SMCRA.[489] Those paragraphs provide that two of the purposes of SMCRA are to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and to assure that those operations are conducted in a manner that protects the environment.

Proposed paragraph (a)(8) is consistent with section 515(b)(23) of SMCRA,[490] which requires that surface coal mining and reclamation operations ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.'' Addition of this provision also would be consistent with sections 515(b)(24) and 516(b)(11) of SMCRA,[491] which require that surface coal mining and reclamation operations be conducted so as to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

Proposed paragraph (a)(9) would revise the criteria in existing 30 CFR 785.16(a)(3) for determining when the watershed of the proposed permit area and the adjacent area will be deemed improved by the proposed operation. The proposed revisions, which we summarize and discuss below, would promote environmental protection in keeping with the purposes of SMCRA in paragraphs (a), (d), and (f) of section 102 of the Act.[492] They also would be consistent with our proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5.

Proposed paragraph (a)(9)(i) would require a demonstration that the proposed operation would reduce the amount or concentration of total suspended solids or other parameters of concern in discharges to groundwater or surface water. The proposed rule corresponds to the first part of existing

[485] 30 U.S.C. 1260(b)(3).

[486] 30 U.S.C. 1265(b)(19).

[487] 30 U.S.C. 1265(b)(24).

[488] 30 U.S.C. 1265(c)(6).

[489] 30 U.S.C. 1202(a) and (d).

[490] 30 U.S.C. 1265(b)(23).

[491] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[492] 30 U.S.C. 1202(a), (d), and (f).

30 CFR 785.16(a)(3)(i), which does not mention concentration. We propose to add a reference to concentration because the concentration of parameters of concern in discharges may be more ecologically important than actual amounts under certain conditions. In addition, the existing rule refers to pollutants rather than parameters of concern. We propose to replace ''pollutants'' with ''parameters of concern'' because the latter term potentially encompasses a broader range of ecologically important discharge characteristics than would the term ''pollutants.'' We also propose to delete the somewhat ambiguous language in the existing rule that refers to improvement of public or private uses or the ecology of the water. The language proposed for deletion is not necessary because the critical factor is whether the proposed operation would reduce the amount or concentration of parameters of concern.

We propose to revise paragraph (a)(9)(ii), which corresponds to the last part of existing 30 CFR 785.16(a)(3)(i), by adding a reference to the ''size or frequency'' of peak-flow discharges. Both size and frequency factor into damage from floods, so the applicant and the regulatory authority should consider both factors.

Proposed paragraph (a)(9)(iv) would add a requirement for a demonstration that the proposed operation would result in a lesser adverse impact on the aquatic ecology of the cumulative impact area than would occur if the area were to be mined and restored to its approximate original contour.

Proposed paragraph (a)(9)(v) would add a requirement for a demonstration that the proposed operation would result in less impact on perennial and intermittent streams than would occur if the land were to be mined and restored to its approximate original contour. The proposed rule would allow the regulatory authority to consider fish and wildlife enhancement measures approved under proposed 30 CFR 780.16 and 784.16 in making this determination. However, fish and wildlife enhancement measures approved under proposed 30 CFR 780.16 and 784.16 may not be used to avoid the prohibition on excess spoil fills in proposed paragraph (a)(8).

Proposed paragraphs (a)(10)(i) and (ii) contain the same surface owner consent provisions as existing 30 CFR 785.16(a)(4). We propose to add paragraph (a)(10)(iii), which would specify that the surface owner has not and will not receive any monetary compensation, item of value, or other consideration in exchange for requesting the variance. Proposed paragraph (a)(10)(iii) is consistent with section 102(b) of SMCRA,[493] which provides that one of the purposes of the Act is to assure that the rights of surface landowners are fully protected from surface coal mining operations. It also is consistent with section 102(a) of SMCRA,[494] which seeks to ''protect society and the environment from the adverse effects of surface mining,'' by ensuring that variances are requested because they are necessary and appropriate to achieve the approved postmining land use and not due to coercion, deception, or monetary compensation.

Proposed paragraph (a)(11) would require a demonstration that the proposed deviations from the premining surface configuration are necessary and appropriate to achieve the approved postmining land use. The intent of this provision is to ensure that variances are granted only for the area necessary to accommodate legitimate postmining land use needs.

Proposed paragraph (a)(12) would require the use of native tree and understory species to revegetate all portions of the permit area that are forested at the time of the application or that would revert to forest under conditions of natural succession. This requirement would not apply to permanent impoundments, roads and other impervious surfaces to be retained following the completion of mining and reclamation. It also would not apply to those portions of the permit area covered by the variance if compliance with this requirement would be inconsistent with the attainment of the postmining land use. The intent of this provision is to encourage reforestation of reclaimed lands, where appropriate, and to minimize adverse impacts on fish, wildlife, and related environmental values, as required by sections 515(b)(24) and 516(b)(11) of SMCRA.[495]

Proposed paragraph (a)(13) would require that the performance bond posted for the permit include an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented before expiration of the revegetation responsibility period under 30 CFR 816.115 or 817.115. The intent of this proposed provision is to ensure that variances are granted only for legitimate immediate postmining land use needs. If the postmining land use is not implemented before expiration of the revegetation responsibility period, the proposed rule would require that the regulatory authority order the permittee to restore the variance area to approximate original contour and plant it with the vegetation that would have been required had no variance been granted. The bond that this proposed paragraph would require would ensure that the regulatory authority has sufficient funds to complete the reclamation in the event that the permittee fails to do so.

As an alternative to requiring posting of this bond amount at the time of permit issuance, we are considering adopting a rule that would prohibit release of any bond amount for the entire permit area until the postmining land use for which the variance was granted has been implemented. We invite comment on which alternative would be more effective in preventing abuse of this exception from the AOC restoration requirements of SMCRA.

Proposed Paragraph (b): Regulatory Authority Responsibilities

We propose to remove existing paragraph (b)(1), which provides that the requirements of 30 CFR 816.133(d) or 817.133(d) must be included as a specific permit condition. There is no counterpart in SMCRA for this provision. Performance standards are just as enforceable as permit conditions, so there is no reason why these particular performance standards should be made a permit condition.

Proposed paragraph (b)(2) would replace the permit review requirements of existing paragraphs (c) and (d) with a cross-reference to the corresponding permit review requirements of 30 CFR 774.10(a), which we propose to revise to be consistent with the underlying statutory provisions in section 515(e)(6) of SMCRA.[496]

Proposed paragraphs (b)(3) and (4) would include existing paragraphs (e) and (f), respectively, in substantively identical form.

Proposed paragraph (b)(5) would require that, before approving a steep-slope variance from approximate original contour, the regulatory authority find and document in writing that the surface-owner consent requirements of proposed paragraph (a)(10) have been met. Proposed paragraph (b)(5) is consistent with section 102(b) of SMCRA,[497] which provides that one of the purposes of the Act is to assure that the rights of surface landowners are fully protected from

[493] 30 U.S.C. 1202(b).

[494] 30 U.S.C. 1202(a).

[495] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[496] 30 U.S.C. 1265(e)(6).

[497] 30 U.S.C. 1202(b).

surface coal mining operations. It also is consistent with section 102(a) of SMCRA,[498] which seeks to ''protect society and the environment from the adverse effects of surface mining,'' by ensuring that variances are requested because they are necessary and appropriate to achieve the approved postmining land use and not due to coercion, deception, or monetary compensation.

3. Section 785.25: What special provisions apply to proposed operations on lands eligible for remining?

We propose to revise 30 CFR 785.25 to improve clarity and to specify that the potential environmental and safety problems that could reasonably be anticipated to occur must be the result of prior mining activities within the proposed permit area. In addition, we propose to specify that the identification of these anticipated problems may be based upon, among other things, a record review of operations near the site and any relevant available information, including data from prior mining activities and remining operations on similar sites.

Finally, we propose to delete the term ''mitigative'' when referring to the measures that will be taken to ensure that reclamation requirements will be met. Mitigation refers to measures to be taken to compensate for the inability to meet reclamation requirements. Hence, the term is not appropriate in the context in which it is used in existing 30 CFR 785.25.

K. Part 800: Bond, Financial Assurance, and Liability Insurance Requirements for Surface Coal Mining and Reclamation Operations.

We propose to revise part 800 by adding provisions for the use of financial assurances to guarantee treatment of long-term discharges, modifying the provisions governing alternative bonding systems, and adding more specific criteria and procedures to the provisions governing bond release. In the latter case, we propose to split existing 30 CFR 800.40 into five separate sections (30 CFR 800.40 through 800.44) that address various aspects of the bond release process in greater detail. We also propose to adopt other changes and clarifications, which we discuss below on a section-by-section basis. In addition, for the reasons explained in Part VIII of this preamble, we propose to revise elements of part 800 in accordance with plain language principles.

[498] 30 U.S.C. 1202(a).

1. How do we propose to guarantee treatment of long-term discharges?

We propose to add 30 CFR 800.18 and revise other sections of part 800 as appropriate to require that permittees post suitable financial instruments (known as ''financial assurances'') to guarantee that sufficient funds will be available for the treatment of long-term or perpetual discharges for which a surface or underground coal mine or other facility regulated under SMCRA is responsible. We also propose to add a definition of financial assurance in 30 CFR 800.5 and include necessary and appropriate references to, and provisions for, financial assurances in proposed 30 CFR 800.1, 800.4, 800.13, 800.15, 800.30, and 800.42.

Under 30 CFR 773.15(e) and section 510(b)(3) of SMCRA,[499] the regulatory authority may not issue a permit unless the application demonstrates, and the regulatory authority finds, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. In addition, under 30 CFR 773.15(b) and section 510(b)(2) of SMCRA,[500] the regulatory authority may not issue a permit unless the application demonstrates, and the regulatory authority finds, that reclamation as required by the Act and the applicable regulatory program can be accomplished under the reclamation plan approved in the permit. Further, the policy entitled ''Hydrologic Balance Protection: Policy Goals and Objectives on Correcting, Preventing, and Controlling Acid/Toxic Mine Drainage'' [501] that we issued on March 31, 1997, states, ''[i]n no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a postmining pollutional discharge that would require continuing long-term treatment without a defined endpoint.'' [502]

Improved permitting practices and advances in predictive techniques have almost eliminated acid mine drainage with respect to surface mining permits issued in the last three decades. For example, in Pennsylvania, a state in which acid mine drainage has historically been a widespread and significant problem, a 1999 study [503] found that only 17 (one percent) of the 1,699 surface mining permits issued in Pennsylvania between1987 and1996 had long-term postmining discharges that required treatment. In contrast, long-term postmining discharges that required treatment developed on an average of 17 percent of permits issued between1977 and 1983 before the introduction of a science-based permit review program in 1984.

However, legacy discharges from older mines remain a concern, as do potential discharges from underground mines after closure. Long-term discharges vary in quality and rate of attenuation. According to one study and literature review, ''surface mines and below-drainage underground mines improve in discharge quality relatively rapidly (20–40 years), [but] above-drainage underground mines are not as easily predicted.'' [504] The researchers examined discharges from 44 underground mines in the Pittsburgh and Upper Freeport coal seams in 1968 and again in 1999–2000. During the intervening 30+ years, there were no significant changes in pH, but iron decreased an average of 80 percent, sulfate decreased between 50 percent and 75 percent on average, and total acidity decreased between 56 percent and 79 percent on average.[505] While 34 of the 44 mines showed significant improvement in total acidity, 10 showed no change, and 3 became much worse.[506] This variability supports our proposal to require that financial assurances for long-term discharges be calculated using a worst-case scenario (treatment in perpetuity) to ensure that sufficient funds will be available for treatment at all times. In addition, there are few studies evaluating the length of time treatment may be needed for other parameters of concern.

Section 509(e) of SMCRA [507] requires that the regulatory authority adjust the amount of bond or deposit required and the terms of acceptance of the bond ''where the cost of future reclamation changes.'' This requirement applies whenever an unanticipated discharge requiring long-term treatment develops. However, conventional bond instruments (surety bonds, collateral bonds, and self-bonds) are not optimal for this purpose because, under conditions of forfeiture, they provide a one-time lump sum payout rather than the income stream needed to fund

[499] 30 U.S.C. 1260(b)(3).

[500] 30 U.S.C. 1260(b)(2).

[501] See *www.osmre.gov/lrg/docs/amdpolicy033197.pdf (last accessed August 6, 2014).*

[502] *Id.,* p. 5.

[503] Pennsylvania Department of Environmental Protection, ''Evaluation of Mining Permits Resulting in Acid Mine Drainage 1987–1996: A Post Mortem Study'' (March 1999).

[504] Demchak, J.; J. Skousen; and L. M. McDonald. Longevity of Acid Discharges from Underground Mines Located above the Regional Water Table, *J. Environ. Qual.* 33:656–668 (2004), p. 656.

[505] *Id.*

[506] *Id.*

[507] 30 U.S.C. 1259(e).

treatment of long-term discharges. Surety bonds and self-bonds are especially ill-suited for this purpose because (1) the need for discharge treatment may outlast the surety or the permittee and (2) neither a surety bond nor a self-bond requires that funds or other assets be physically placed with the regulatory authority or in an account dedicated solely to the regulatory authority, which means that funds would not necessarily be available to continue treatment if the surety and the permittee go out of business before the need for treatment ends. Furthermore, surety companies normally do not underwrite a bond when there is no expectation of release of liability, as would be the case with almost all long-term discharges because there is no reliable prospect of fully abating the source of the discharge.

Section 509(c) of SMCRA [508] provides that ''the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section.'' This provision affords statutory authority for our proposal in 30 CFR 800.18 to allow the use of financial assurances in place of conventional bonds when a continuing income stream is needed to meet ongoing treatment requirements for long-term discharges. Existing 30 CFR 800.11(e), which we propose to redesignate as 30 CFR 800.9, provides that, to meet the objectives and purposes of the bonding program, the alternative system (1) ''must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time;'' and (2) ''must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.'' Establishment of a financial assurance in the form of a trust fund or annuity would satisfy the first criterion, while the permittee's provision of the moneys needed to establish the trust fund or annuity and the express terms of the trust would satisfy the second criterion.

We relied upon this statutory authority to adopt similar financial assurance provisions at 30 CFR 942.800 as part of the Tennessee federal regulatory program.[509] As we did in the Tennessee rulemaking, we propose to elaborate upon and incorporate into regulation pertinent elements of the policy entitled ''Hydrologic Balance Protection: Policy Goals and Objectives on Correcting, Preventing, and Controlling Acid/Toxic Mine Drainage'' [510] that we adopted on March 31, 1997. Specifically, Objective 2 under the ''Environmental Protection'' policy goal includes the following strategies:

> Strategy 2.2—If, subsequent to permit issuance, monitoring identifies acid- or toxic-forming conditions which were not anticipated in the mining and operation plan, the regulatory authority should require the operator to adjust the financial assurance.
>
> Strategy 2.3—Where inspections conducted in response to bond release requests identify surface or subsurface water pollution, bond in an amount adequate to abate the pollution should be held as long as water treatment is required, unless a financial guarantee or some other enforceable contract or mechanism to ensure continued treatment exists.[511]

The policy acknowledges that ''the required financial assurance may take a form other than those associated with a traditional performance bond.'' [512] In 2002, we published an advance notice of proposed rulemaking entitled ''Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Pollutional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues.'' See 67 FR 35070 (May 17, 2002). In that notice, we sought comments on, among other things, the form and amount of financial assurance that should be required to guarantee treatment of postmining discharges. Commenters disagreed as to whether financial assurance should be required, but they largely agreed that, if it was, surety bonds are not the best means—or even an appropriate means—of accomplishing that purpose because a surety bond is not designed to provide the income stream needed to fund ongoing treatment.

We provided the following explanation of the statutory basis for the requirement that permittees post financial guarantees for treatment of long-term discharges.

> Section 509(a) of the Act requires that each permittee post a performance bond conditioned upon faithful performance of all the requirements of the Act and the permit. Paragraph (b) of this Section of the Act specifies that ''[t]he amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.'' The hydrologic reclamation plan is part of the reclamation plan to which this section refers. Section 519(c) of SMCRA authorizes release of this bond only when the regulatory authority is satisfied that the reclamation required by the bond has been accomplished, and paragraph (c)(3) specifies that ''no bond shall be fully released until all reclamation requirements of this Act are fully met.'' Furthermore, section 519(b) of the Act provides that whenever a bond release is requested, the regulatory authority must conduct an inspection to evaluate the reclamation work performed, including ''whether pollution of surface or subsurface water is occurring, the probability of continuance of future occurrence of such pollution, and the estimated cost of abating such pollution.'' Therefore, there is no doubt that, under SMCRA, the permittee must provide a financial guarantee to cover treatment of postmining discharges when such discharges develop and require treatment.[513]

The financial assurance elements of this proposed rule rely upon the same rationale. In addition, our financial assurance requirements in proposed 30 CFR 800.18 derive support from the following discussion in a Federal district court decision affirming our disapproval of a West Virginia regulatory program amendment that would have authorized final bond release upon installation of a passive treatment system for long-term discharges:

> SMCRA and its accompanying regulations comprise an intricate and complicated scheme, which contains a wealth of Congressional policies and purposes. *See, e.g.,* 30 U.S.C. 1201, 1202. Further, the overriding policies of SMCRA, minimization of environmental damage and maximization of coal production, necessarily are in tension with each other. It is within this delicate framework that OSM regulates.
>
> * * * * *
>
> The balance in the Director's approach, consistent with congressional direction, is readily ascertainable. The Director begins with the proposition that complete prevention of AMD [acid mine drainage] *during mining and reclamation* may not be possible and the associated environmental burden, with treatment, is judged tolerable resulting in a permit being issued. At this interim juncture, then, environmental considerations give way to the goal of maximizing coal production for the nation's energy requirements. Once an operator decides to close up shop and leave, however, it then would be inconsistent to allow the treatment guarantee to lapse, potentially saddling the taxpayers and adjoining landowners with a perpetual financial and environmental problem that should have been internalized by the operator. At this final stage, environmental considerations and cost internalization assume ultimate priority over the goal of maximization of production to require the total abatement of AMD.
>
> The Director has thus struck a reasonable balance in the face of Congressional ambiguity and difficult, conflicting policy considerations. Given satisfaction of the

[508] 30 U.S.C. 1259(c).

[509] 72 FR 9616 (Mar. 2, 2007).

[510] See *www.osmre.gov/lrg/docs/amdpolicy033197.pdf (last accessed August 6, 2014).*

[511] *Id.,* p. 6.

[512] Id., p. 15 (response to comment 16).

[513] *Id.,* pp. 14–15 (response to comment 16).

Chevron inquiry, the Court is bound to defer to that interpretation.[514]

The court noted that ''a bedrock principle of SMCRA is the obligation of the mine operator to bear the costs associated with surface mining, from the permitting of a mining operation through to the conclusion of the reclamation process.'' [515] In a footnote, the court observed that—

Even were treatment acceptable for bond release, the lingering difficulty with the proposed amendment is its hands-off approach to passive treatment. An operator conceivably could erect a passive treatment system, gain release and the system could later fail, leaving the taxpayers and adjoining landowners with a burden contrary to the policy of cost internalization. Such a burden could not have been intended by Congress.[516]

Proposed 30 CFR 800.18 seeks to avoid precisely this burden and result.

Finally, finding 1.b.(2) in the preamble to the document announcing our decision on another West Virginia program amendment provision contains the following rationale for requiring that permittees post performance bonds adequate to guarantee ongoing treatment of discharges:

For conventional bonds, 30 CFR 800.14(b) provides that ''the amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.'' Under 30 CFR 780.18(b)(9), 780.21(h), 784.13(b)(9), and 784.14(g), the reclamation plan must include the steps to be taken to comply with all applicable effluent limitations and State and Federal water quality laws and regulations. These steps include treatment. Therefore, when the mining and reclamation plan indicates that treatment will be needed on a temporary basis during mining and the early stages of reclamation, the bond must be calculated to include an amount adequate to provide for continued temporary treatment in the event forfeiture occurs within the timeframe during which treatment is needed. Also, under 30 CFR 800.15(a), the regulatory authority is required to adjust the amount and terms of a conventional bond whenever the cost of future reclamation changes. Therefore, if an unanticipated treatment need arises, the regulatory authority has an obligation to order an increase in the minimum bond required for the site. This amount must be adequate to cover all foreseeable treatment costs. This interpretation is consistent with the preamble to 30 CFR 800.17, which under the heading ''Section 800.17(c)'' states that:

''Performance bonding continues to be required at § 800.17(a) for surface disturbances incident to underground mining to ensure that the reclamation plan is completed for those areas. Completion of the reclamation plan as it relates to mine drainage and protection of the hydrologic balance would continue to be covered by the bond with respect to requirements included in § 784.14. 48 FR 32948, July 19, 1983.''

Sections 780.21(h) and 784.14(g) require a hydrologic reclamation plan showing how surface and underground mining operations will comply with applicable State and Federal water quality laws and regulations. Furthermore, section 519(b) of SMCRA requires the regulatory authority, when evaluating bond release requests, to consider whether pollution of surface and ground water is occurring, the probability of any continuing pollution, and the estimated cost of abating such pollution. Section 519(c)(3) of SMCRA and the implementing regulations at 30 CFR 800.40(c)(3) provide that no bond shall be fully released until all the reclamation requirements of the Act, the regulatory program, and the permit have been met. These requirements include abatement of surface and ground water pollution resulting from the operation.[517]

While proposed 30 CFR 800.18 focuses on financial assurance instruments (trust funds and annuities) to provide the necessary income stream, it also recognizes that collateral bonds can, under certain circumstances, be a satisfactory means of guaranteeing treatment of long-term discharges because collateral bonds require the posting of cash, securities, or other collateral. Specifically, proposed 30 CFR 800.18(b)(2) would allow the use of collateral bonds provided that the amount of the collateral bond posted includes the cost of treating the discharge during the time required to collect and liquidate the bond and convert the proceeds to a financial instrument that will generate interest in an amount sufficient to cover future treatment costs and associated administrative expenses.

2. How do we propose to revise the definitions in 30 CFR 800.5?

We propose to revise existing 30 CFR 800.5(b)(6), which is part of the definition of ''collateral bond,'' to delete the reference to ''investment-grade rated securities having a rating of AAA, AA, or A or an equivalent rating issued by a nationally recognized securities rating service.'' According to the Department of the Treasury regulations at 12 CFR 16.2, a security is considered investment grade if it is rated in one of the top four rating categories by each nationally recognized statistical rating organization that has rated the security. Our rules include only those securities with ratings in the top three categories. In addition, unlike the Treasury regulations, we do not require that the security receive these ratings from all organizations that have rated the security. Therefore, we propose to revise 30 CFR 800.5(b)(6) to eliminate the reference to ''investment-grade'' securities and to instead use language consistent with a similar provision in 30 CFR 800.23(b)(3)(i). We also propose to replace the term ''nationally recognized securities ratings service'' with the term found in the Credit Rating Agency Reform Act of 2006 (Pub. L. 109–291) and used by the Securities and Exchange Commission: ''Nationally recognized statistical rating organization.'' As revised, our proposed rule would include securities with a rating of ''A'' or higher from either Moody's Investors Service or Standard and Poor's or an equivalent rating issued by any other nationally recognized statistical rating organization registered with the Securities and Exchange Commission.

In existing paragraph (d), we propose to define ''financial assurance'' as ''a trust fund, an annuity, or a combination thereof.'' We invite comment on whether there are other investment vehicles that could provide the income stream needed to guarantee treatment of long-term discharges and therefore should be included in this definition.

3. Section 800.9: What requirements apply to alternative bonding systems?

We propose to redesignate the provisions for alternative bonding systems in existing 30 CFR 800.11(e) as new 30 CFR 800.9(a). Proposed 30 CFR 800.9(b) would clarify that the alternative bonding system will apply in lieu of the performance bond requirements of part 800 to the extent specified in the regulatory program and the document in which we approve the alternative bonding system as part of a state or federal program. Proposed paragraph (b) also would specify that all alternative bonding systems must include provisions analogous to the bond release provisions of proposed 30 CFR 800.40 through 800.44 and the bond forfeiture provisions of 30 CFR 800.50. This provision is necessary to ensure that the regulatory program, including the alternative bonding system, remains consistent with section 519 of SMCRA,[518] which governs bond release, which in turn determines when the regulatory authority may terminate jurisdiction over the operation in accordance with 30 CFR 700.11(d). Proposed 30 CFR 800.9(c) would clarify that an alternative bonding system may be structured to include only certain

[514] *West Virginia Mining and Reclamation Ass'n et al.* v. *Babbitt,* 970 F. Supp. 506, 517, 518 (S.D. W.Va. 1997).

[515] *Id.* at 512 (citing *Cat Run Coal Co.* v. *Babbitt,* 932 F.Supp. 772, 780–81 (S.D.W.V 1996)).

[516] *Id.* at 517, n. 12.

[517] 60 FR 51902 (Oct. 4, 1995).

[518] 30 U.S.C. 1269.

phases of reclamation under proposed 30 CFR 800.42, provided that the other phases are covered by one of the forms of bond listed in 30 CFR 800.12. This provision would ensure that the entire operation has bond coverage, as required by section 509 of SMCRA.[519]

Proposed 30 CFR 800.9(d)(1) would prohibit an alternative bonding system from covering restoration of the ecological function of a stream under 30 CFR 780.28, 784.28, 816.57, and 817.57. Alternative bonding systems are not appropriate or reliable mechanisms to guarantee restoration of the ecological function of a stream, given the length of time that we anticipate will be required to restore that function. Furthermore, restoration should be the responsibility of the individual, company, or other mining entity that makes the decision to mine through a stream. Existing alternative bonding systems were not established with the expectation that they might have to cover the costs of restoring the ecological function of a stream. Exposing those systems to these unanticipated costs could compromise their fiscal integrity.

Proposed 30 CFR 800.9(d)(2)(i) would prohibit an alternative bonding system from covering treatment of long-term discharges that come into existence after the effective date of paragraph (d), unless, upon discovery of the discharge, the permittee contributes an amount sufficient to cover all costs that the alternative bonding system will incur to treat the discharge in perpetuity and the alternative bonding system sets that money aside in a separate account dedicated solely to treatment of that discharge. Otherwise, consistent with proposed 30 CFR 800.18, the permittee would be required to post a financial assurance, a collateral bond, or a combination thereof to cover this obligation. Financial assurances are preferred because they produce an income stream, but the permittee has the option of posting a sufficiently large collateral bond to cover all foreseeable treatment and reclamation costs.

Self-bonds are neither appropriate nor reliable for this purpose because they do not require the deposit of any funds with the regulatory authority or under the control of the regulatory authority. Therefore, the regulatory authority may not be able to recover the necessary funds if the permittee goes out of business. In that case, there would be no dedicated funding set aside to ensure continued treatment of the discharge, which means either that treatment would cease, resulting in environmental damage, or that a governmental entity would assume treatment, meaning that the public would bear the cost of avoiding environmental damage.

Under proposed 30 CFR 800.9(d)(2)(ii), long-term discharges that came into existence before the effective date of paragraph (d) would continue to be covered by any applicable state alternative bonding system unless the regulatory authority amends its program to specifically establish an earlier effective date. The proposed rule would require that the permittee of a site with a discharge subject to paragraph (d)(2)(ii) contribute to the alternative bonding system an amount sufficient to cover all costs that the regulatory authority estimates that the alternative bonding system will incur to treat the discharge for as long as the discharge requires active or passive treatment to meet Clean Water Act standards or pertinent SMCRA-related requirements. The proposed rule would require that the alternative bonding system place that amount in a separate account available only for treatment of the discharge for which the contribution is made. The proposed rule further provides that a permittee unable to make this contribution must post a financial assurance, a collateral bond, or a combination thereof to cover this obligation.

4. Section 800.11: When and how must I file a bond?

We propose to redesignate existing 30 CFR 800.11(e) as 30 CFR 800.9. We propose to streamline the remaining provisions of existing 30 CFR 800.11 and improve the wording and structure to clarify their meaning. We also propose to add a requirement that the bond be filed in the amount that the regulatory authority determines necessary under 30 CFR 800.14.

In addition, we propose to delete a mostly obsolete provision in existing 30 CFR 800.11(c) specifying that an operator ''may not extend any underground shafts, tunnels or operations'' before the regulatory authority accepts the performance bond required for that area. This provision is inconsistent with section 509(a) of SMCRA,[520] which requires a performance bond only for that area of land within the permit area upon which the operator will conduct surface coal mining and reclamation operations. Paragraphs (27) and (28) of section 701 of SMCRA [521] define surface coal mining and reclamation operations, in relevant part, as ''activities conducted on the surface of lands'' and ''the areas upon which such activities occur or where such activities disturb the natural land surface.'' Therefore, SMCRA does not require posting of performance bond for underground workings.

Proposed paragraph (d) would replace the mostly obsolete provision in existing paragraph (c) with a prohibition on disturbing any surface area (by any type of surface coal mining operation) or extending any vertical underground mine shaft or other vertical underground mine opening for which a performance bond is required before the regulatory authority accepts the performance bond required for that area or extension. A performance bond is required for extension of vertical underground mine shafts and other vertical underground mine openings because those openings must be filled upon the completion of mining and the depth of the opening will affect the cost of reclamation.

5. Section 800.12: What form of bond is acceptable?

The first sentence of existing 30 CFR 800.12 provides that the regulatory authority must prescribe the form of the bond. We propose to redesignate this sentence as paragraph (a). The remainder of existing 30 CFR 800.12 provides that the regulatory authority may allow the permittee to post a surety bond, a collateral bond, a self-bond, or a combination of these forms of bond. We propose to redesignate this provision as paragraph (b) and add paragraphs (c) through (e) to identify exceptions and special requirements. Proposed paragraph (c) would clarify that an alternative bonding system approved under proposed 30 CFR 800.9 is not subject to 30 CFR 800.12. Proposed paragraph (d) reflects the fact that proposed 30 CFR 800.18 would require that a permittee post either a financial assurance or a collateral bond to guarantee treatment of a long-term discharge.

Consistent with proposed 30 CFR 780.28(c), 784.28(c), 816.57(b), and 817.57(b), proposed paragraph (e) would require that the permittee post a surety bond, a collateral bond, or a combination thereof to guarantee restoration of the ecological function of a stream segment. A self-bond is not an appropriate mechanism to guarantee restoration of a stream's ecological function because of the risk that the company may cease to exist during the time required to accomplish that restoration. In addition, a self-bond does not require that the permittee file financial instruments or collateral with the regulatory authority, nor is there any third party obligated to complete the

[519] 30 U.S.C. 1259.

[520] 30 U.S.C. 1259(a).

[521] 30 U.S.C. 1291(27) and (28).

reclamation or pay the amount of the bond if the permittee defaults on reclamation obligations.

6. Section 800.13: What is the liability period for a bond?

Existing 30 CFR 800.13(b) allows separate bonding of isolated and clearly defined portions of the permit area that require extended liability. We propose to revise this paragraph to allow those provisions to apply to the bond posted to guarantee restoration of a stream's ecological function under proposed 30 CFR 780.28, 784.28, 816.57, and 817.57. The proposed addition would recognize that restoring the premining ecological function of a stream segment is a lengthy process. We also propose to revise paragraph (b) to require that access routes to any separately bonded areas be included within those areas. Under the existing rule, bonding of these routes is discretionary on the part of the regulatory authority. However, we see no basis under section 509 of SMCRA to exclude any disturbed areas from bonding requirements unless those areas are fully reclaimed and are no longer used for any activity related to mining and reclamation.

Existing paragraph (d) provides that the permittee is responsible under the bond for restoring the disturbed area to a condition capable of supporting the approved postmining land use. It further provides that the permittee's responsibility does not extend to actual implementation of the approved use. We propose to revise this paragraph to reflect the proposed revisions to 30 CFR 785.16(a)(13), which would impose alternative reclamation requirements on the permittee if the postmining land use forming the basis for a variance from the approximate original contour restoration requirements is not implemented by the end of the revegetation responsibility period. We also propose to add a provision clarifying that proposed 30 CFR 800.18 would govern the liability period for long-term treatment of discharges.

7. Section 800.14: How will the regulatory authority determine the amount of bond required?

We propose to revise existing 30 CFR 800.14(a) by adding the biological condition of perennial and intermittent streams within the permit area to the list of factors that the regulatory authority must consider in establishing bond amounts. This revision is consistent with our proposal to require restoration of the ecological function of perennial and intermittent streams under 30 CFR 780.28, 784.28, 816.57, and 817.57. Streams with a more pristine biological condition may be more difficult to restore and thus may require a higher bond amount.

We propose to revise existing 30 CFR 800.14(b) by adding paragraph (b)(2) to require that the calculations used to determine the bond amount specifically identify the amount of bond needed to restore stream function. Under proposed paragraph (b)(2), the permittee then would have the option of either posting a separate bond for that amount or incorporating it into the bond posted for the entire permit or increment.

We propose to redesignate existing 30 CFR 800.14(c) as paragraph (f) and add a new paragraph (c) to reflect the proposed revisions to 30 CFR 785.16(a)(13), which would impose alternative reclamation requirements on the permittee if the postmining land use forming the basis for a variance from approximate original contour restoration requirements is not implemented by the end of the revegetation responsibility period. Specifically, we propose to require that the amount of the bond be sufficient to restore the variance area to its approximate original contour if the approved postmining land use is not implemented by the end of the applicable revegetation responsibility period. This proposed requirement is intended to minimize any potential abuse of the steep-slope variance provision.

Proposed 30 CFR 800.14(d) would clarify that proposed 30 CFR 800.18 would govern the amount of the financial assurance required to guarantee long-term treatment of discharges.

Proposed 30 CFR 800.14(e) is substantively identical to the provision in existing paragraph (b) establishing that the total bond posted for the entire area under one permit may not be less than $10,000, as required by the last clause of section 509(a) of SMCRA.[522]

8. Section 800.15: When must the regulatory authority adjust the bond amount and when may I request adjustment of the bond amount?

We propose to revise existing 30 CFR 800.15(a) to more clearly distinguish between bond adjustments under section 509(e) of SMCRA [523] and bond releases under section 519 of SMCRA.[524] Specifically, as discussed below, we propose to incorporate into regulation our interpretation of section 509(e) of SMCRA,[525] which we explain in the preamble to the existing rules and in Directive TSR–1, ''Handbook for Calculation of Reclamation Bond Amounts.'' [526] Section 509(e) of SMCRA provides that ''[t]he amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.'' The preamble to existing 30 CFR 800.15(c) states that ''reduction of bond is considered a bond adjustment if the reduction is based on a change in method of operation or other circumstances which reduces the estimated cost for the regulatory authority to reclaim.'' [527] It further states that ''any reduction in bond amount for reclamation work performed on disturbed areas'' does not qualify as a bond adjustment because ''bond for disturbed areas can only be released or reduced through formal release procedures of § 800.40.'' [528]

Proposed 30 CFR 800.15(a) would clarify that, consistent with existing policy, the changes in the cost of reclamation to which section 509(e) of SMCRA [529] refers are limited to decreases in the cost of future reclamation as a result of (1) the approval of revisions to the operation and reclamation plan in the permit or (2) changes in the unit costs of future reclamation; *e.g.,* the cost of moving a cubic yard of spoil *x* number of feet, the cost of planting *x* number of trees, or the hourly cost to operate a specified piece of equipment. Situations that qualify for bond reduction through the bond adjustment process on this basis would include technological advances that would reduce the unit costs of reclamation, approved revisions to the operation plan (such as a decision not to remove the lowest coal seam) that would result in an operation of more limited extent than originally approved and bonded, and approved revisions to the reclamation plan (such as an alteration in the postmining land use) that would reduce reclamation costs.

A bond reduction under 30 CFR 800.15 on the basis of a change in the cost of reclamation must be justified solely upon a demonstration that the reclamation cost estimates that form the basis for the existing bond amount are no longer valid for reasons other than completion of elements of the reclamation process. We propose to add language specifying that the bond

[522] 30 U.S.C. 1259(a).

[523] 30 U.S.C. 1259(e).

[524] 30 U.S.C. 1269.

[525] 30 U.S.C. 1259(e).

[526] *http://www.osmre.gov/LRG/docs/directive882.pdf* (last accessed October 28, 2014).

[527] 48 FR 32944 (Jul. 19, 1983).

[528] *Id.* at 32945.

[529] 30 U.S.C. 1259(e).

adjustment provisions may not be used to reduce the amount of the performance bond to reflect decreases in the cost of future reclamation as a result of completion of activities required under the reclamation plan approved in the permit. Bond reduction for completed reclamation activities such as backfilling or topsoil replacement may be accomplished only in accordance with the bond release requirements and procedures of proposed 30 CFR 800.40 through 800.44. Any bond reduction requested as a result of reclamation work performed must be submitted and processed as an application for bond release under proposed 30 CFR 800.40 through 800.44.

Under proposed 30 CFR 800.15(e), the regulatory authority would have to require that appropriate bond or financial assurance be posted in accordance with proposed 30 CFR 800.18 whenever a discharge that will require long-term treatment is identified.

Proposed 30 CFR 800.15(f) would prohibit reduction of the bond amount to reflect the failure of the permittee to restore the approximate original contour or when the reclamation plan was improperly modified to reflect the level of reclamation completed rather than the level of reclamation required under the regulatory program.

9. Section 800.16: What are the general terms and conditions of the bond?

Existing 30 CFR 800.16(e) states that the bond must provide a mechanism for banks and sureties to give prompt notice to the regulatory authority and the permittee of any action filed alleging the insolvency or bankruptcy of the permittee, bank, or surety or alleging any violations that would result in suspension or revocation of the bank's or surety's license or charter to do business. We propose to revise this paragraph so that it would apply not just to banks and sureties, but also to any other responsible financial entity that issues bonds. We see no logical or legal reason to limit the scope of this requirement to banks and sureties.

We also propose to move existing 30 CFR 800.16(e)(2), which sets forth the actions that the permittee and regulatory authority must take in the event of incapacity of a bank or surety, to 30 CFR 800.30(b). This provision is not a term or condition of the bond. Therefore, it is more appropriately located in 30 CFR 800.30, which is the section that contains requirements for replacement of bonds.

10. Why are we proposing to remove existing 30 CFR 800.17?

Existing 30 CFR 800.17 contains bond requirements for underground coal mines and long-term coal-related surface facilities and structures. We propose to remove this section because it largely duplicates provisions of other sections of part 800. The only unique provision authorizes the posting of bond instruments with defined expiration dates, provided the bond is conditioned upon extension, replacement, or payment in full 30 days before the expiration date. The rule also requires that the regulatory authority initiate bond forfeiture proceedings if the permittee has not filed a term extension or a replacement bond 30 days before the expiration date.

This provision was originally adopted under the authority of section 516(d) of SMCRA,[530] which requires consideration of ''the distinct difference between surface and underground coal mining'' in developing regulations applying the bond requirements of section 509 of SMCRA [531] to underground mines. Specifically, section 800.17 provides a limited exception to the following provision in section 509(b) of SMCRA: ''Liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with [the] operator's responsibility for revegetation requirements in section 515.'' This exception is no longer necessary because underground mines can obtain letters of credit and other bonds just as other surface coal mining operations do.

11. Section 800.18: What special provisions apply to financial guarantees for treatment of long-term discharges?

Proposed 30 CFR 800.18 would establish performance bond and financial assurance requirements that would apply whenever any discharge from a surface or underground coal mine or other facility regulated under SMCRA requires treatment and continues or may reasonably be expected to continue after the completion of mining, backfilling, grading, and the establishment of revegetation. Part IX.K.1. of this preamble explains the rationale for requiring a bond or financial assurance to guarantee treatment of long-term discharges and for the use of financial assurances in place of conventional bond instruments.

We also propose to apply these requirements to situations in which the regulatory authority finds that a discharge requiring long-term treatment will develop in the future, provided that the quantity and quality of the future discharge can be determined with reasonable probability. In these situations, it would be prudent to require that the permittee establish a trust fund or annuity during the mining phase when revenues are available. If the regulatory authority does not require establishment of a trust fund or annuity until the discharge actually develops, the permittee may no longer be in business or may lack the resources to establish a trust fund or annuity. One example of an operation that would meet these criteria is an underground mine that creates a mine pool that will reach surface elevations and begin to discharge at some point after mine closure.

Proposed paragraph (b) would specify that only financial assurances and collateral bonds are acceptable forms of bond to guarantee treatment of long-term discharges. As discussed in Part IX.K.1. of this preamble, surety bonds and self-bonds are not appropriate instruments because neither would produce the income stream needed to cover treatment expenses and because there is a distinct possibility that the discharge would outlast both the permittee and the surety. If the permittee elects to post a collateral bond rather than a financial assurance, the rule would require that the amount of the collateral bond include the cost of treating the discharge during the time needed to collect and liquidate the bond and convert the proceeds to a financial instrument that will generate interest in an amount sufficient to cover future treatment costs and associated administrative expenses. To minimize threats to the solvency of alternative bonding systems, we propose to prohibit those systems from covering treatment of long-term discharges unless the permittee posts an amount equal to the cost of treating the discharge in perpetuity and the alternative bonding system places that money in a separate account dedicated solely to treatment of that discharge. However, the proposed rule would grandfather in operations with discharges covered by an alternative bonding system on the effective date of this new provision.

Proposed paragraph (c) would specify that the amount of financial assurance or collateral bond required must include the cost of treating the discharge to meet all applicable numerical standards or limits that are in effect at the time that the regulatory authority issues an order requiring posting of a financial assurance or bond. The numerical

[530] 30 U.S.C. 1266(d).

[531] 30 U.S.C. 1259.

standards or limits may be established in a SMCRA permit (the criteria for material damage to the hydrologic balance outside the permit area), in a permit or authorization issued under the Clean Water Act (an NPDES permit, a section 404 dredge or fill permit or authorization, or a section 401 water quality certification), or in regulations implementing the Clean Water Act.

Proposed paragraph (d) would establish requirements for the financial assurance instrument itself. We based these provisions on the experience of the Pennsylvania and Tennessee regulatory authorities in establishing and managing trust funds and annuities to guarantee long-term treatment of discharges. Proposed paragraph (d) would require that the trust fund or annuity be in a form approved by the regulatory authority and contain all terms and conditions required by the regulatory authority. The trust fund or annuity would have to be established in a manner that guarantees that sufficient moneys will be available when needed to pay for treatment costs in perpetuity (unless the permittee demonstrates, and the regulatory authority finds, based on scientifically proven facts, that treatment will be needed for a lesser time, either because the discharge will attenuate or because its quality will improve); periodic maintenance, renovation, and replacement of treatment and support facilities; final reclamation of the sites upon which treatment facilities are located and areas used in support of those facilities; and administrative costs incurred by the regulatory authority or trustee. Calculations of the amount required for the trust fund or annuity would have to be based on a conservative anticipated rate of return on the proposed investments that is consistent with long-term historical rates of return for similar investments. The regulatory authority would be required to specify the investment objectives of the trust fund or annuity to ensure that those objectives are consistent with production of an income stream adequate to meet ongoing treatment needs. The trust fund or annuity must irrevocably establish the regulatory authority as the beneficiary of the trust fund or of the proceeds from the annuity for the purpose of treating mine drainage or other mining-related discharges to protect the environment and users of surface water.

Proposed paragraph (d)(1)(i) would allow permittees a reasonable time to fully fund trust funds and annuities rather than requiring a lump-sum deposit as would be required for collateral bonds. Under the proposed rule, the regulatory authority could accept an arrangement by which the permittee builds the amount of the trust fund or annuity over time, provided that the permittee continues to treat the discharge during that time; and the regulatory authority retains all performance bonds posted for the permit until the trust fund or annuity reaches a self-sustaining level as determined by the regulatory authority. This provision is needed because some permittees may require additional time to obtain the financing needed to establish a trust fund or annuity for treatment of unanticipated discharges. Insisting on immediate funding of the full cost of a trust fund or annuity could force the permittee into a default on reclamation or other obligations, which could be counterproductive if it results in the permittee ceasing treatment or if it disrupts or precludes the allocation of funds for treatment or other reclamation activities.

Proposed paragraph (d)(6) would require that the trust fund or annuity provide that disbursement of money from the trust fund or annuity may be made only upon written authorization of the regulatory authority or according to a schedule established in the agreement accompanying the trust fund or annuity. We anticipate that a fully funded trust or annuity may include provisions for disbursements to the permittee as a mechanism to cover the cost of water treatment, especially for those permittees no longer generating income from the mining of coal. Disbursements from the income stream of a fully funded trust fund or annuity would not be considered a bond release or a bond forfeiture because we propose to adopt these financial assurance provisions as an alternative bonding system for the specific purpose of producing the income stream needed to pay for treatment and related costs.

Proposed paragraph (d)(7) would provide that the financial institution or company serving as a trustee or issuing an annuity must be one of the following:

- A national bank chartered by the Office of the Comptroller of the Currency.
- An operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency.
- A bank or trust company chartered by the state in which the operation is located.
- An insurance company licensed or authorized to do business in the state in which the operation is located or designated by the pertinent regulatory body of that state as an eligible surplus lines insurer.
- Any other financial institution or company with trust powers and with offices located in the state in which the operation is located, provided that the institution's or company's activities are examined or regulated by a state or federal agency.

This proposed restriction is intended to ensure that only competent, reliable, and properly capitalized and insured companies are eligible for selection as trustees. We invite comment on whether the proposed list is too inclusive or exclusive.

Proposed paragraph (e) would allow termination of a trust fund or annuity only upon the demise of the trustee or the company issuing the annuity or as specified by the regulatory authority upon a determination that one of the following situations exists:

- No further treatment or other reclamation measures are necessary.
- A satisfactory replacement bond or financial assurance has been posted.
- The terms of the trust fund or annuity establish conditions for termination and those conditions have been met.
- The trustee's administration of the trust fund or annuity is unsatisfactory to the regulatory authority, in which case the permittee or the regulatory authority must procure a new trustee.

We invite comment on whether there are any other situations in which termination should be allowed or required.

Proposed paragraph (f) would require that the regulatory authority establish a schedule for reviewing the performance of the trustee, the adequacy of the trust fund or annuity, and the accuracy of the assumptions upon which the trust fund or annuity is based. We propose to require that these reviews occur on at least an annual basis, but we invite comment on whether a different review frequency would be more appropriate and why. The rule would require that the regulatory authority order the permittee to provide additional resources to the trust fund or annuity whenever the review or any other information available to the regulatory authority at any time demonstrates that the financial assurance is no longer adequate to meet the purpose for which it was established.

Proposed paragraph (g) provides that the bond replacement provisions of 30 CFR 800.30(a) would govern the replacement of any financial assurance.

Proposed paragraph (h) specifies that release of reclamation liabilities and obligations under financial assurances would be subject to the applicable bond release provisions of proposed 30 CFR 800.40 through 800.44.

Proposed paragraph (i) provides that the permittee may apply for, and the regulatory authority may approve, release of any bonds posted for the permit or permit increment for which the regulatory authority has approved a financial assurance, provided that the permittee and the regulatory authority comply with the bond release requirements and procedures in proposed §§ 800.40 through 800.44. This provision would apply only if the financial assurance is in place and fully funded, the permit or permit increment fully meets all applicable reclamation requirements (with the exception of the discharge and the presence of associated treatment and support facilities), and the financial assurance will serve as the bond for reclamation of the portion of the permit area required for postmining water treatment facilities and access to those facilities. Release of all other bonds for the site would be appropriate under these conditions because the fully funded trust fund or annuity would be available to fund treatment and reclamation activities in the event of a permittee's bankruptcy or dissolution.

12. Section 800.21: What additional requirements apply to collateral bonds?

We propose to revise existing 30 CFR 800.21(a)(3) to allow the acceptance of certificates of deposit issued by financial institutions other than banks. We also propose to revise existing 30 CFR 800.21(a)(4) and (d)(4) to eliminate references to the now-defunct Federal Savings and Loan Insurance Corporation and references to the obsolete $100,000 maximum on the amount insured by the Federal Deposit Insurance Corporation. The proposed revisions would make this section consistent with the current structure and nomenclature of the financial industry and its regulators.

13. Section 800.23: What additional requirements apply to self-bonds?

We propose to revise existing 30 CFR 800.23(b)(3)(i) to allow the use of any nationally recognized statistical rating organization (NRSRO) registered with the Securities and Exchange Commission in determining whether a corporation is eligible to self-bond. The existing rule allows use of only Moody's Investors Service and Standard and Poor's. The proposed revision is consistent with the Credit Rating Agency Reform Act of 2006 (Pub. L. 109–291), which facilitated the entry of new credit rating organizations into the market by abolishing the authority of the Securities and Exchange Commission (SEC) to designate NRSROs by no-action letters and replacing that process with a provision that, to be recognized as an NRSRO, a rating agency must register with the SEC. As stated in section 2(5) of the Credit Rating Agency Reform Act of 2006, ''the 2 largest credit rating agencies serve the vast majority of the market, and additional competition is in the public interest.'' Therefore, our existing rule requiring use of either Moody's or Standard and Poor's in determining self-bonding eligibility is no longer appropriate.

14. Section 800.30: When may I replace a bond or financial assurance instrument and when must I do so?

We propose to revise this section by combining existing 30 CFR 800.30(a) and (b) into paragraph (a) and by deleting an unnecessary sentence in existing 30 CFR 800.30(b) stating that replacement of a performance bond does not constitute bond release. We also propose to extend the applicability of this section to financial assurances under proposed 30 CFR 800.18, and to redesignate the mandatory bond replacement provisions of existing 30 CFR 800.16(e)(2) as 30 CFR 800.30(b).

Proposed paragraph (a) would allow the regulatory authority to decline to accept a proffered replacement surety bond if, in the judgment of the regulatory authority, the new surety does not have adequate reinsurance or other resources sufficient to cover the default of one or more mining companies for which the surety has provided bond coverage. This proposed provision is intended to avoid a repeat of the situation involving Frontier Insurance Company in the 1980s in which the surety could not meet its obligations.

Proposed paragraph (b) would extend the applicability of existing 30 CFR 800.16(e)(2) to include other responsible financial entities issuing bonds. The existing language in 30 CFR 800.16(e)(2) applies only to banks and sureties, but we see no logical reason to exclude other bond-issuing entities from the scope of this paragraph. We also propose to revise this paragraph to clarify that failure to replace a bond within the specified time is a violation for which the regulatory authority must issue a notice of violation. Operating without bond coverage would be a violation of the permit condition required under 30 CFR 773.17(a).

15. Section 800.40: How do I apply for release of all or part of a bond?

We propose to redesignate existing 30 CFR 800.40(a) as new section 800.40, with two substantive revisions. First, we propose to require that the applicant submit a certified copy of the required newspaper advertisement. Addition of the certification requirement would provide independent documentation that the newspaper advertisement has indeed been published for the required 4 weeks. Second, we propose to require that the description of the results achieved under the approved reclamation plan include an analysis of the results of the monitoring of groundwater, surface water, and the biological condition of perennial and intermittent streams under 30 CFR 816.35 through 816.37 or 817.35 through 817.37. This analysis is critical to a determination of whether reclamation requirements relating to protection of the hydrologic balance have been met.

16. Section 800.41: How will the regulatory authority process my application for bond release?

We propose to redesignate existing 30 CFR 800.40(b)(1) as section 800.41 and restructure the existing rule as paragraphs (a) and (b) of section 800.41. We also propose two substantive revisions. First, proposed paragraph (a)(1) would specify that the regulatory authority's clock for processing the application begins only upon submittal of a complete application rather than upon receipt of any application. Second, proposed paragraph (a)(2) would clarify that a complete application for bond release is one that includes all items required under 30 CFR 800.40. The proposed additions would benefit both the applicant and the regulatory authority by ensuring that an application is complete before the review process begins, which would have the additional benefit of promoting the efficient use of resources.

17. Section 800.42: What are the criteria for bond release?

We propose to redesignate existing 30 CFR 800.40(c) as 30 CFR 800.42, with a number of substantive revisions. Proposed paragraph (a) sets forth the general requirements that would have to be met before the regulatory authority may approve an application for bond release and release all or part of the bond in accordance with the other paragraphs of 30 CFR 800.42. Proposed paragraph (a) would apply to all types of bond release applications (Phase I through Phase III). In general, sections 509(a) and 519(b) of SMCRA [532] provide authority for the proposed revisions. Section 509(a) [533] provides, in relevant part, that the amount of bond in place for a surface coal mining and

[532] 30 U.S.C. 1259(a) and 1269(b).

[533] 30 U.S.C. 1259(a).

reclamation operation ''shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.'' The new requirements in proposed paragraphs (a)(2) through (a)(6) are intended to ensure that the regulatory authority retains sufficient bond to complete the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture. Section 519(b) of SMCRA [534] provides that the regulatory authority's evaluation of a bond release application must ''consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of continuance of future occurrence of such pollution, and the estimated cost of abating such pollution.'' Proposed paragraphs (a)(2) through (a)(6) are intended to ensure that the regulatory authority takes these factors into consideration.

Proposed paragraph (a)(2) would not allow the regulatory authority to release any bond if, after an evaluation of the monitoring data for groundwater, surface water, and the biological condition of perennial and intermittent streams submitted under proposed 30 CFR 816.35 through 816.37 or 817.35 through 817.37, it determines that adverse trends exist that may result in material damage to the hydrologic balance outside the permit area. This provision is intended to prevent premature release of bond that may be needed to correct potentially expensive damage to the hydrologic balance. This proposed requirement is consistent with section 515(b)(23) of SMCRA,[535] which requires that surface coal mining and reclamation operations ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.''

Proposed paragraph (a)(3) would prohibit the release of any portion of the bond unless and until the permittee posts a financial assurance or collateral bond under proposed 30 CFR 800.18 if a discharge requiring long-term treatment exists either on the permit area or at a point that is hydrologically connected to the permit area. Adoption of this proposed paragraph would incorporate into regulation one of the strategies in the policy entitled ''Hydrologic Balance Protection: Policy Goals and Objectives on Correcting, Preventing, and Controlling Acid/Toxic Mine Drainage'' that we issued on March 31, 1997. Specifically, Strategy 2.3 of Objective 2 under the ''Environmental Protection'' goal provides that—

> Strategy 2.3—Where inspections conducted in response to bond release requests identify surface or subsurface water pollution, bond in an amount adequate to abate the pollution should be held as long as water treatment is required, unless a financial guarantee or some other enforceable contract or mechanism to ensure continued treatment exists.[536]

Proposed paragraph (a)(4) would apply whenever the permit area or increment includes a variance under 30 CFR 785.16 from restoration of the approximate original contour. In that case, the proposed rule would prohibit release of the portion of the bond described in proposed 30 CFR 785.16(a)(13), in whole or in part, until the approved postmining land use is implemented or until the site is restored to the approximate original contour and revegetated in accordance with 30 CFR 816.111 and 816.116 or 817.111 and 817.116. This provision is intended to prevent abuse of the steep-slope variance provision and to ensure that variances are requested and granted only when there is a reasonable likelihood of achieving the alternative postmining land use, as provided in the requirements for approval of higher or better land uses under section 515(b)(2) of SMCRA.[537] Authority for this provision derives in part from section 515(e)(5) of SMCRA,[538] which provides that the regulatory authority ''shall promulgate specific regulations to govern the granting of variances in accord with the provision of this subsection, and may impose such additional requirements as he deems to be necessary.''

Proposed paragraph (a)(5) pertains to buildings and structures to be retained as part of the approved postmining land use. It would prohibit release of the bond amount described in proposed 30 CFR 780.24(d)(2) or 784.24(d)(2) either until the structure is in use as part of the postmining land use or until the structure is removed and the site upon which it was located is reclaimed in accordance with part 816 or part 817. This provision is intended to ensure that only structures with actual utility for the postmining land use are retained. Unused and unmaintained mine buildings can become dangerous attractive nuisances and a visual blight on the landscape. There would be no funds available to remove structures retained as part of the postmining land use at the time of bond release if they subsequently deteriorate.

Proposed 30 CFR 800.42(a)(6) would require that the regulatory authority consider the results of the evaluation required under proposed 30 CFR 816.41(a)(3) when determining the amount of bond to release. Proposed 30 CFR 816.41(a)(3) requires that the evaluation consider, among other factors, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution. The factors listed in the proposed rule are identical to the factors listed in section 519(b) of SMCRA.[539]

Proposed paragraph (b) would include the criteria for Phase I bond release in existing 30 CFR 800.40(c)(1). We propose to revise the existing criteria by adding a provision clarifying that restoration of the form of perennial and intermittent stream segments mined through under 30 CFR 816.57 or 817.57 is part of the backfilling and grading process and therefore must be accomplished before the area is eligible for Phase I bond release. We also propose to add a provision stating that the amount of bond that the regulatory authority retains after Phase I release must be adequate to ensure that the regulatory authority will have sufficient funds for a third party to complete the remaining portion of the reclamation plan, including restoration of the ecological function of perennial and intermittent streams under 30 CFR 816.57 or 817.57 and completion of any fish and wildlife enhancement measures required in the permit in accordance with 30 CFR 780.16 or 784.16, in the event of forfeiture. The proposed additional requirements are necessary and appropriate to ensure compliance with section 509(a) of SMCRA,[540] which provides, in relevant part, that the amount of bond in place for a surface coal mining and reclamation operation ''shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.''

[534] 30 U.S.C. 1269(b).

[535] 30 U.S.C. 1265(b)(23).

[536] ''Policy Goals and Objectives on Correcting, Preventing and Controlling Acid/Toxic Mine Drainage,'' OSMRE, March 31, 1997. Available at *www.osmre.gov/lrg/docs/amdpolicy033197.pdf* (last accessed August 27, 2014), p. 6.

[537] 30 U.S.C. 1265(b)(2).

[538] 30 U.S.C. 1265(e)(5).

[539] 30 U.S.C. 1269(b).

[540] 30 U.S.C. 1259(a).

Section 519(c)(1) of SMCRA [541] authorizes ''release of 60 per centum of the bond or collateral for the applicable permit area'' upon the completion of backfilling, grading, and drainage control. Proposed paragraph (b) would clarify that section 519(c)(1) of SMCRA [542] does not stand alone; *i.e.,* that release of the entire 60 percent is neither required nor allowed if releasing that amount of money would result in retention of insufficient bond to cover remaining reclamation costs, as required by section 509(a) of SMCRA.[543]

Proposed paragraph (c) would include the criteria for Phase II bond release in existing 30 CFR 800.40(c)(2). Proposed paragraph (c)(1) would revise the existing criteria by adding a requirement that the regulatory authority establish standards for determining when revegetation has been successfully established for purposes of this paragraph. Establishment connotes an element of permanence. However, except for prime farmland, revegetation need not meet the entire suite of revegetation success standards under 30 CFR 816.116 or 817.116 to qualify for Phase II bond release. Otherwise, there would be little practical difference between the criteria for Phase II and Phase III bond release if the revegetation responsibility period must expire before a site is eligible for Phase II bond release. We invite comment on whether we should provide national standards for establishment of revegetation for purposes of Phase II bond release or whether this decision is best left to the judgment of the regulatory authority, based on local conditions.

We also propose to add a provision in proposed paragraph (c)(2) stating that the amount of bond that the regulatory authority retains after Phase II release must be adequate to ensure that the regulatory authority will have sufficient funds for a third party to complete the remaining portion of the reclamation plan, including restoration of the ecological function of perennial and intermittent streams under 30 CFR 816.57 or 817.57 and completion of any fish and wildlife enhancement measures required in the permit in accordance with 30 CFR 780.16 or 784.16, in the event of forfeiture. The proposed additional requirements are necessary and appropriate to ensure compliance with section 509(a) of SMCRA,[544] which provides, in relevant part, that the amount of bond in place for a surface coal mining and reclamation operation ''shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.''

Proposed paragraph (c)(5) would replace the reference to ''subchapter K of this chapter'' in existing 30 CFR 800.40(c)(2) with more specific cross-references to the regulations pertaining to permanent impoundments; *i.e.,* 30 CFR 816.49(b) and 816.56 or 817.49(b) and 817.56. We invite comment on the meaning of ''silt dam'' as used in proposed paragraph (c)(5) and in section 519(c)(2) of SMCRA.[545]

Proposed paragraph (d) would include the criteria for Phase III (final) bond release in existing 30 CFR 800.40(c)(3). We propose to add language in proposed paragraph (d)(2) emphasizing that Phase III reclamation is not completed until the permittee restores the ecological function of perennial and intermittent streams under 30 CFR 816.57 or 817.57 and completes any fish and wildlife enhancement measures required in the permit in accordance with 30 CFR 780.16 or 784.16.

18. Section 800.43: When and how must the regulatory authority provide notification of its decision on a bond release application?

Proposed 30 CFR 800.43(a) is substantively identical to existing 30 CFR 800.40(b)(2). Proposed 30 CFR 800.43(b) and (c) are substantively identical to existing 30 CFR 800.40(d) and (e), respectively.

19. Section 800.44: Who may file an objection to a bond release application and how must the regulatory authority respond to an objection?

Proposed 30 CFR 800.44 is comprised of paragraphs (a) through (c), which are substantively identical to existing 30 CFR 800.40(f) through (h), respectively.

L. Part 816: Permanent Program Performance Standards—Surface Mining Activities

In this preamble, we typically discuss only those sections and paragraphs for which we propose substantive revisions. For the reasons explained in Part VIII of this preamble, we propose to revise other sections and paragraphs within this part in accordance with plain language principles, to update cross-references, and to improve consistency. In general, we do not discuss those proposed changes because no substantive change in meaning is intended.

1. Section 816.1: What does this part do?

Existing 30 CFR 816.1 provides that part 816 sets forth the minimum environmental protection performance standards to be adopted and implemented under regulatory programs for surface mining activities. However, the content requirements and approval criteria for state regulatory programs are located at 30 CFR parts 730 through 732. Therefore, we propose to revise this section to simply state that it sets forth the environmental protection performance standards for surface mining activities under the Act.

2. Section 816.2: What is the objective of this part?

Existing 30 CFR 816.2 provides that the objective of part 816 is to ensure that all surface mining activities are conducted in a manner that preserves and enhances environmental and other values in accordance with the Act. However, SMCRA does not require preservation and enhancement of all values in all cases. Instead, as stated in section 102(f) of the Act,[546] one of the purposes of the Act is to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' Therefore, we propose to revise 30 CFR 816.2 to state that the objective of part 816 is to ensure that surface mining activities are conducted in an environmentally sound manner in accordance with the Act.

3. Section 816.11: What signs and markers must I post?

The existing rules contain four requirements to mark buffer zones for perennial and intermittent streams—one in the stream buffer zone rule for surface mining operations at 30 CFR 816.57(b), one in the stream buffer zone rule for underground mining operations at 30 CFR 817.57(b), one in the requirements for signs and markers for surface mining operations at 30 CFR 816.11(e), and one in the requirements for signs and markers for underground mining operations at 30 CFR 817.11(e). We propose to consolidate those requirements into 30 CFR 816.11(e) and 817.11(e). Proposed 30 CFR 816.11(e) would provide that the boundaries of any buffer to be maintained between surface mining activities and perennial or intermittent streams in accordance with proposed 30 CFR 780.28 and 816.57 must be clearly marked to avoid disturbance by surface mining activities.

[541] 30 U.S.C. 1269(c)(1).

[542] 30 U.S.C. 1269(c)(1).

[543] 30 U.S.C. 1259(a).

[544] 30 U.S.C. 1259(a).

[545] 30 U.S.C. 1269(c)(2).

[546] 30 U.S.C. 1202(f).

4. Section 816.22: How must I handle topsoil, subsoil, and other plant growth media?

General Discussion of Basis for Proposed Revisions

In general, our proposed revisions to this section would improve implementation of section 515(b)(6) of SMCRA,[547] which requires that surface coal mining operations ''restore the topsoil or the best available subsoil which is best able to support vegetation,'' and section 515(b)(5) of SMCRA,[548] which states that surface coal mining operations must—

> remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation, except if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation.

Existing 30 CFR 816.22 focuses primarily on topsoil handling. We propose to revise this section and its permitting counterpart at 30 CFR 780.12(e) to require salvage, protection, and redistribution of soil materials in addition to the topsoil to ensure that the reconstructed soil on the reclaimed minesite provides a root zone of sufficient depth and comprised of appropriate soil and overburden materials that will create a plant growth medium suitable for the vegetation to be planted. The existing regulations are either unclear on this point (see existing paragraphs (a)(1)(ii) and (2), which sometimes have been interpreted as meaning that soil materials other than topsoil need be salvaged, stored, and redistributed only if the topsoil is less than 6 inches thick or is of poor quality) or, in the case of existing paragraph (e), make salvage of soil materials other than topsoil discretionary on the part of the regulatory authority.

The revised performance standards in proposed paragraphs (a), (b), and (e) of 30 CFR 816.22 and the soil-handling plan required by proposed 30 CFR 780.12(e) would require salvage, protection, storage, and redistribution of whatever soil materials are necessary to ensure that the site will be restored ''to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood,'' as required by section 515(b)(2) of SMCRA,[549] and to ensure that the site will be able to meet the revegetation requirements of paragraphs (b)(19) and (20) of section 515 of the Act.[550] The preamble discussion of proposed 30 CFR 780.12(e), to which we are proposing to move paragraphs (b) and (e) of existing 30 CFR 816.22 in revised form, provides additional background on the basis and purpose for the proposed revisions. In addition, Forest Reclamation Advisory No. 8 (one of the publications implementing and supporting the Forestry Reclamation Approach) states that deep soil is required for productive tree growth and that ''[s]alvaging and re-spreading only the upper few inches or horizons of soil is unlikely to restore premining capability unless additional materials suitable for reforestation are added.'' [551]

Furthermore, the following excerpt from a U.S. District Court for the District of Columbia decision in *PSMRL I, Round I* concerning the 1979 version of our regulations at 30 CFR 816.22(d), which required segregation of the B horizon and portions of the C horizon if the regulatory authority determined that those materials were necessary or desirable to ensure soil productivity, provides support for our proposed revisions:

> Section 515(b)(5) [of SMCRA] authorizes segregation [of materials other than topsoil] if the topsoil cannot sustain vegetation or if other strata enhance post-mining vegetation. This is essentially what the regulations command. They focus on ''soil productivity,'' and grant the regulatory authority power to require segregation if necessary to improve such productivity.[552]

Proposed Paragraph (a): Removal and Salvage

Proposed paragraph (a) would require that the permittee separately remove and salvage all topsoil and other soil materials identified for salvage and use as postmining plant growth media in the soil-handling plan approved in the permit under § 780.12(e). The rule would require completion of removal and salvage of these materials from the area to be disturbed before any drilling, blasting, mining, or other surface disturbance takes place on that area. Like the existing rule, it provides an exemption for minor disturbances.

The proposed rule differs from the existing rule primarily in that it requires removal and salvage of all topsoil and other soil and overburden materials needed to reconstruct a suitable postmining plant growth medium throughout the root zone required to support the vegetation to be planted after the completion of mining. The existing rule requires removal and salvage of only topsoil, topsoil substitutes, or the top 6 inches of material when the topsoil is less than 6 inches in depth. As discussed above, in most cases, that material would result in a postmining plant growth medium of insufficient depth to support all land uses that the land was capable of supporting before any mining, which would be inconsistent with section 515(b)(2) of SMCRA.[553]

Proposed Paragraph (b): Storage

The stockpiling requirements and temporary distribution provisions of proposed paragraph (b) are substantively identical to those of existing paragraph (c), with the exception that we propose to add a requirement that any species used to establish a vegetative cover on stockpiles be non-invasive to avoid endangering the success of efforts to revegetate the site with plants native to the area.

Proposed Paragraph (c): Soil Substitutes and Supplements

Proposed paragraph (c) provides that when the soil handling plan approved in the permit in accordance with § 780.12(e) provides for the use of substitutes for or supplements to the existing topsoil or subsoil, the permittee must salvage, store, and redistribute the overburden materials selected and approved for that purpose in a manner consistent with paragraphs (a), (b), and (e) of section 816.22. It is the counterpart to existing paragraph (a)(1)(ii), but differs in that it applies to all soil substitutes and supplements, not just to topsoil substitutes and supplements. We propose to move the approval standards for soil substitutes and supplements from existing paragraph (b) to 30 CFR 780.12(e) as part of our effort to consolidate permitting requirements in subchapter G rather than having them split between

[547] 30 U.S.C. 1265(b)(6).

[548] 30 U.S.C. 1265(b)(5).

[549] 30 U.S.C. 1265(b)(2).

[550] 30 U.S.C. 1265(b)(19) and (20).

[551] Skousen, J., C. Zipper, J. Burger, C. Barton, and P. Angel. ''Forest Reclamation Advisory No. 8: Selecting Materials for Mine Soil Construction when Establishing Forests on Appalachian Mine Sites.'' (July 2011), p. 2. Available at *http://arri.osmre.gov/FRA/Advisories/FRA_No.8%20Soil%20Materials.pdf* (last accessed November 19, 2014).

[552] *PSMRL I, Round I, Mem. Op. at 54.*

[553] 30 U.S.C. 1265(b)(2).

the permitting requirements of subchapter G and the performance standards of subchapter K.

Proposed Paragraph (d): Site Preparation

Proposed paragraph (d)(1) would require that the permittee minimize grading of backfilled areas to avoid compaction of the reconstructed root zone, as specified in the soil-handling plan approved in the permit in accordance with § 780.12(e). The rule would allow compaction only to the extent necessary to ensure stability and to comply with water-quality standards.

Loosely graded soil materials have less compaction, greater water infiltration, and less erosion than more intensely graded soil materials.[554] Greater infiltration generally makes more water available for plant growth and less erosion may result in a reduced frequency for cleanouts of sedimentation ponds.[555] As stated in one research report:

> Third-year results show that intensive grading did not result in better ground cover establishment or erosion control. In fact, erosion was highest on the intensively graded plots.[556]

Limited compaction is also more favorable to tree root growth, which will increase survival and growth rates and promote the establishment of productive forest land on reclaimed minesites.[557]

Proposed paragraph (d)(2) would require that, if necessary, the permittee rip, chisel-plow, or otherwise mechanically treat backfilled and graded areas before topsoil redistribution to reduce potential slippage of redistributed material placed on slopes and to promote root penetration. This provision is substantively identical to existing paragraph (d)(2) except that we propose to specify that the treatment must be mechanical in nature (ripping and chisel-plowing are the two most common methods) because we are not aware of any other effective type of treatment.

Proposed Paragraph (e): Redistribution

Proposed paragraph (e) includes soil redistribution requirements analogous to those of existing paragraph (d)(1). The proposed rule differs from the redistribution requirements in the existing rule primarily in that the proposed rule would apply to all salvaged soil and soil substitute materials, not just to topsoil and topsoil substitutes and supplements, as in the existing rule. In addition, the proposed rule not only would require minimization of compaction to the extent possible (a requirement that is similar to the existing rule's ban on excess compaction); it would require that the permittee take measures to alleviate any excess compaction that does occur, which would minimize adverse impacts on site productivity and plant growth.

We propose to remove existing paragraph (d)(4), which requires application of nutrients and soil amendments to initially-redistributed soil material when necessary to reestablish vegetative cover. The revegetation component of the reclamation plan required under proposed 30 CFR 780.12 governs the use of nutrients and soil amendments.

Finally, proposed paragraph (e) would require use of a statistically-valid sampling technique to document that soil materials have been redistributed in the locations and to the depths required by the soil-handling plan approved in the permit in accordance with § 780.12(e). We encourage use of EPA's Data Quality Objectives model,[558] which is a seven-step method to assist in assuring that the appropriate type, quantity, and quality of data are collected for decision-making purposes. Site-specific variability should be taken into account when designing a sampling program and caution is recommended in the selection of composite versus discrete sampling methods for certain soil constituents. We invite comment on whether use of the EPA Data Quality Objectives model or its equivalent should be mandatory.

Proposed Paragraph (f): Organic Matter

Proposed paragraph (f) would require the salvage of organic matter found on the site, including duff, other organic litter, and vegetative materials such as tree tops, small logs, and root balls. We propose to prohibit the burning or burying of these materials. Instead, for the reasons discussed at slightly greater length in the preamble to proposed 30 CFR 780.12(e), proposed paragraph (f) would require that the permittee redistribute the salvaged materials across the regraded surface or incorporate them into the soil to control erosion, promote growth of vegetation, serve as a source of native plant seeds and inoculants such as mycorrhizae, speed restoration of the soil's ecological community and ecosystem processes, and increase the moisture retention capability of the soil. Proposed paragraph (f) is consistent with Forest Reclamation Advisory No. 8, which states that ''[w]hen soil is obtained from forested areas prior to mining, the salvage operation should take stumps, roots, and woody debris left on the site, transport them to the reclaimed area, and re-spread them with the soil.'' [559] The rule also would allow the use of woody debris for stream restoration purposes and to construct fish and wildlife habitat enhancement features.

Proposed paragraph (f) would enhance implementation of section 515(b)(19) of SMCRA,[560] which requires that surface coal mining and reclamation operations establish ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession.'' It also would improve implementation of section 515(b)(24) of SMCRA,[561] which requires that surface coal mining and reclamation operations, ''to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.''

5. Section 816.34: How must I protect the hydrologic balance?

This new section would incorporate, reorganize, and consolidate paragraphs (a), (b), and (d) of existing 30 CFR 816.41. Those paragraphs contain general requirements for protection of the hydrologic balance as well as provisions specific to protection of groundwater and surface water.

Proposed Paragraph (a)

Proposed paragraph (a) is primarily comprised of existing 30 CFR 816.41(a). However, proposed paragraph (a)(3) would add a requirement to protect streams within the permit area, unless

[554] Sweigard, R., J. Burger, C. Zipper, J. Skousen, C. Barton, and P. Angel. ''Forest Reclamation Advisory No. 3: Low Compaction Grading to Enhance Reforestation Success on Coal Surface Mines'' (July 2007), pp. 1 and 6. Available at *http://arri.osmre.gov/FRA/Advisories/FRA_No.3.pdf* (last accessed November 19, 2014).

[555] *Id.*

[556] Torbert, J. L. and J. A. Burger, Influence of Grading Intensity on Ground Cover Establishment, Erosion, and Tree Establishment on Steep Slopes, Virginia Polytechnic Institute and State University, in ''Proceedings of the International Land Reclamation and Mine Drainage Conference and the Third International Conference on the Abatement of Acidic Drainage,'' 1994, p. 230.

[557] Sweigard, *op. cit.*

[558] ''Guidance on Systematic Planning Using the Data Quality Objectives Process,'' (EPA QA/G–4), EPA/240/B–06/001, February 2006; available at *http://www.epa.gov/quality/qa_docs.html* (last accessed August 7, 2014).

[559] Skousen, et al. (2011), *op. cit.* at 3.

[560] 30 U.S.C. 1265(b)(19).

[561] 30 U.S.C. 1265(b)(24).

otherwise approved in the permit in accordance with proposed 30 CFR 780.28 and 816.57. This provision would enhance implementation of section 515(b)(24) of SMCRA,[562] which requires that surface coal mining and reclamation operations be conducted to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

In addition, proposed paragraphs (a)(4) and (5) would clarify and refine the scope of existing 30 CFR 816.41(a), which requires the ''protection or replacement of water rights.'' Proposed paragraph (a)(4) would require that the permittee assure the protection or replacement of water supplies to the extent required by 30 CFR 816.40. Proposed paragraph (a)(5) would require that the permittee protect existing water rights under state law. (Water rights are determined by state law.) Proposed paragraphs (a)(4) and (5) better reflect the provisions of section 717 of SMCRA,[563] which contains the water rights and water supply replacement requirements applicable to surface mines. With respect to water rights, section 717(a)[564] provides that nothing in SMCRA ''shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation.'' With respect to water supply replacement, section 717(b)[565] provides that—

> The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation.

Proposed paragraph (a)(4) relates to section 717(b) of SMCRA,[566] while proposed paragraph (a)(5) relates to section 717(a) of SMCRA.[567]

Proposed paragraphs (a)(8) and (10) correspond to existing 30 CFR 816.41(b)(1) and (d)(1), respectively. We propose to revise the existing rules by adopting language that more closely follows the language of section 515(b)(10)(A) of SMCRA.[568] Specifically, we propose to replace requirements in the existing rules to minimize acidic or toxic drainage with requirements to avoid acid or toxic mine drainage. In addition, we propose to add a requirement for use of the best technology currently available. Section 515(b)(10) of SMCRA[569] uses this phrase only in paragraph (B)(i), which pertains to suspended solids. However, proposed paragraphs (a)(8) and (10) of this rule would require use of the best technology currently available to meet the requirements of section 515(b)(10)(A)[570] as well. Application of this standard to all surface-water and groundwater protection activities is appropriate because section 515(b)(24) of SMCRA[571] requires use of the best technology currently available to minimize adverse impacts on fish, wildlife, and related environmental values. Surface water and groundwater quality are related environmental values in this context.

In proposed paragraph (a)(11), which is the counterpart to existing 30 CFR 816.41(d)(2), we propose to add a cross-reference to the surface-water runoff control plan that would be required by proposed 30 CFR 780.29.

Proposed Paragraph (b)

Proposed paragraph (b)(1) is substantively identical to the last sentence in existing 30 CFR 816.41(a) except that we propose to expand its scope to include a requirement that the permittee use mining and reclamation practices that minimize adverse impacts on stream biota rather than relying upon water treatment to minimize those impacts. The existing rule applies only to water pollution and changes in flow. We also propose to revise the existing rule to clarify that this requirement is not absolute and that it applies only to the maximum extent practicable.

The addition of a reference to streams and their biota recognizes the importance of those features to the hydrologic balance, watershed ecology, and environmental values related to fish and wildlife. This requirement also would benefit the permittee because using mining and reclamation practices that avoid the creation of discharges requiring treatment is economically advantageous, especially for selenium where recent settlement agreements and court orders have resulted in the construction of treatment plants and implementation of treatment plans that will cost tens of millions of dollars.

Proposed paragraph (b)(2) is substantively identical to the last sentence of existing 30 CFR 816.41(d)(1).

Proposed Paragraph (c)

Proposed paragraph (c) is substantively identical to the middle sentence of existing 30 CFR 816.41(a).

Proposed Paragraph (d)

Proposed paragraph (d) would establish examination and reporting requirements for the surface-runoff control structures identified in the surface-water runoff control plan approved in the permit under proposed 30 CFR 780.29. Section 515(b)(10)(B)(i) of SMCRA,[572] which requires that surface coal mining operations be conducted ''so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area,'' provides legal authority for adoption of these requirements.

In general, hydraulic structures for sediment control are designed to retain surface runoff from the 10-year, 24-hour precipitation event within the permit area and then discharge the retained runoff at a rate that does not exacerbate downstream and off-permit impacts. In other words, by retaining surface runoff on the minesite, peak flow, stream scour, and sediment deposition in receiving streams does not increase beyond the level that would occur in the absence of mining. The structures act as ''flow equalization chambers.''

Proposed paragraph (d)(1) would require that the permittee examine the entire surface-water control system promptly after the cessation of each precipitation event of a specified size. The size of the precipitation event generating the examination would differ depending on average annual precipitation amounts. For consistency, we propose to use the same average annual precipitation amounts as section 515(b)(20) of SMCRA[573] uses to determine the length of revegetation responsibility periods; *i.e.,* our proposed examination requirements would differ depending on whether the permit lies in an area with average annual precipitation of 26.0 inches or less.

Bankfull flow in a stream in an area with an average annual precipitation of more than 26.0 inches generally occurs in response to a precipitation event with a recurrence interval between 1.5 and 2 years. Bankfull flow is the stage at which water in the stream just fills the stream channel to the top of its banks;

[562] 30 U.S.C. 1265(b)(24).
[563] 30 U.S.C. 1307.
[564] 30 U.S.C. 1307(a).
[565] 30 U.S.C. 1307(b).
[566] 30 U.S.C. 1307(b).
[567] 30 U.S.C. 1307(a).
[568] 30 U.S.C. 1265(b)(10)(A).
[569] 30 U.S.C. 1265(b)(10).
[570] 30 U.S.C. 1265(b)(10)(A).
[571] 30 U.S.C. 1265(b)(24).
[572] 30 U.S.C. 1265(b)(10)(B)(i).
[573] 30 U.S.C. 1265(b)(20).

i.e., it is the point at which any further increase in the elevation of streamflow would cause water to begin to flow onto the flood plain. Under natural conditions, any precipitation event greater than the 2-year event would be expected to result in some flooding—and possibly flood-related damage. However, the more modest flows from smaller, more frequent events often transport the greatest quantity of sediment material over time.[574]

Hydraulic structures for surface coal mining and reclamation operations are typically designed with a combination of sediment and stormwater runoff storage capacity well in excess of the estimated surface runoff from the 2-year event. Failure to maintain these structures by removing accumulated sediment can result in a reduction of stormwater storage capacity, which in turn may result in a discharge that causes property damage or material damage to the hydrologic balance outside the permit area.

Therefore, for areas with an average annual precipitation of more than 26.0 inches, proposed paragraph (d)(1)(i) would apply the examination and reporting requirements to all precipitation events that equal or exceed the 2-year recurrence interval. We invite comment on whether a precipitation event with a 2-year recurrence interval is an appropriate threshold for requiring examination of sediment control systems in mesic regions or whether we should allow variations based upon differences in terrain, storm frequency, the nature of sedimentation control structures, and the frequency with which discharges from sedimentation control structures occur.

In contrast, our experience indicates that discharges from sedimentation ponds are extremely rare in areas with an average annual precipitation of 26.0 inches or less. A review of representative mines in the West determined that approximately one percent of all impoundments discharge in any single year. Another survey indicated that discharges occurred in only one of the past 10 years. Therefore, for areas with an average annual precipitation of 26.0 inches or less, proposed paragraph (d)(1)(ii) would apply the examination and reporting requirements only to significant precipitation events. The regulatory authority would be responsible for establishing that threshold, either as part of the regulatory program or in the permit. We invite comment on whether we should establish more specific criteria for examination of hydraulic structures in arid and semiarid regions.

Proposed paragraph (d)(2) would require that the permittee prepare a report after the occurrence of each precipitation event that equals or exceeds the applicable threshold. The proposed rule would require that the report discuss the performance of the hydraulic structures, identify and describe any material damage to the hydrologic balance outside the permit area that occurred, and identify and describe the remedial measures taken in response to that damage. The proposed rule also would require that the report be certified by a registered professional engineer and be submitted to the regulatory authority within 48 hours of cessation of the applicable precipitation event to ensure that the regulatory authority has the ability to take prompt action to correct any deficiencies.

6. Section 816.35: How must I monitor groundwater?

Proposed 30 CFR 816.35 is substantively identical to existing 30 CFR 816.41(c), except as discussed below.

Proposed Paragraph (a)

Proposed paragraph (a)(1)(i) is substantively identical to the first sentence of existing 30 CFR 816.41(c)(1). Proposed paragraph (a)(1)(ii) would require adherence to the data collection, analysis, and reporting requirements of proposed 30 CFR 777.13(a) and (b) when conducting groundwater monitoring. This provision would be consistent with section 517(b)(2) of SMCRA, which requires that monitoring data collection and analysis ''be conducted according to standards and procedures set forth by the regulatory authority in order to assure their reliability and validity.''

Proposed paragraph (a)(2) includes the requirement in existing 30 CFR 816.41(c)(3) that groundwater monitoring proceed through mining and continue during reclamation until bond release. However, we propose to revise the existing language to clarify that monitoring must continue until the entire bond amount for the monitored area has been fully released under proposed 30 CFR 800.42(d), not just partial or Phase I or II bond release. This change is appropriate because the time required to achieve saturation of backfilled areas or underground mine voids typically is measured in years, which means that mining-related impacts on groundwater outside the permit area may not occur until years after completion of mining and land reclamation. Even after complete saturation, groundwater migration rates typically are measured in only feet per day.

Therefore, proposed paragraph (a)(2) would require that groundwater monitoring continue through mining and during reclamation until the entire bond amount for the monitored area has been fully released under proposed 30 CFR 800.42(d), which generally will not occur until expiration of the revegetation responsibility period. In addition, proposed 30 CFR 800.42(a) would provide that the regulatory authority may not release any portion of the bond if an evaluation of monitoring data indicates that adverse trends exist that could result in material damage to the hydrologic balance outside the permit area. Any shorter time could result in a failure to detect impacts, given the combination of slow saturation and migration rates.

Proposed Paragraphs (b) and (c)

Proposed paragraphs (b) and (c) are substantively identical to existing 30 CFR 816.41(c)(2).

Proposed Paragraph (d)

Proposed paragraph (d) is the counterpart to those elements of existing 30 CFR 816.41(c)(3) that pertain to modification of the groundwater monitoring plan. We propose to remove existing 30 CFR 816.41(c)(3)(ii) because it provides that the regulatory authority may approve a permit revision that would allow the cessation of groundwater monitoring based on a finding that monitoring is no longer necessary to achieve the purposes of the monitoring plan. As discussed in the preamble to proposed paragraph (a) above, cessation of monitoring before the entire bond amount for the monitored area has been fully released under proposed 30 CFR 800.42(d) is inappropriate, based on the time required for saturation of the backfill and slow groundwater migration rates. Proposed paragraph (d) would continue to allow the regulatory authority to approve a permit revision to otherwise modify the parameters monitored and the sampling frequency under certain conditions. We invite comment on whether we should establish a minimum sampling frequency or place other restrictions on the regulatory authority's ability to modify monitoring requirements.

However, to supplement the demonstrations required by existing 30 CFR 816.41(c)(3)(i) before the regulatory authority may approve a permit revision of this nature, we propose to add requirements that the permittee demonstrate that future changes in

[574] Rosgen, Dave. ''Applied River Morphology.'' Wildland Hydrology (1996).

groundwater quantity or quality are unlikely and that the operation has preserved or restored the biological condition of perennial and intermittent streams with base flows originating in whole or in part from groundwater within the permit or adjacent areas. See proposed paragraphs (d)(1) and (2)(iii). The additional criteria are intended to ensure that groundwater monitoring requirements are not reduced or modified prematurely.

In addition, we propose to replace the requirement in existing 30 CFR 816.41(c)(3)(i) for a demonstration that the water quantity and quality are suitable to support approved postmining land uses with a requirement for a demonstration that the operation has maintained the availability and quality of groundwater in a manner that can support existing and reasonably foreseeable uses. Our proposed replacement language parallels the terminology in our proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5.

Proposed Paragraph (e)

Proposed paragraph (e) corresponds to the second sentence of existing 30 CFR 816.41(c)(1), which provides that the regulatory authority may require additional monitoring when necessary. We propose to modify the existing language to specify that the regulatory authority must require additional monitoring when information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, detect hydrologic changes, or meet other requirements of the regulatory program. We also propose to specify that the regulatory authority must issue a permit revision order under § 774.10(b) when requiring changes to the monitoring plan approved in the permit.

Proposed Paragraph (f)

Like existing 30 CFR 816.41(c)(4), proposed paragraph (f) would require that the permittee install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring groundwater. We propose to add cross-references to 30 CFR 816.13 and 816.39, which also contain requirements pertinent to the closure or disposition of monitoring wells.

7. Section 816.36: How must I monitor surface water?

Proposed 30 CFR 816.36 is substantively identical to existing 30 CFR 816.41(e), except as discussed below.

Proposed Paragraph (a)

Proposed paragraph (a)(1)(I) is substantively identical to the first sentence of existing 30 CFR 816.41(e)(1). Proposed paragraph (a)(1)(ii) would require adherence to the data collection, analysis, and reporting requirements of proposed 30 CFR 777.13(a) and (b) when conducting groundwater monitoring. This provision would be consistent with section 517(b)(2) of SMCRA, which requires that monitoring data collection and analysis ''be conducted according to standards and procedures set forth by the regulatory authority in order to assure their reliability and validity.''

Proposed paragraph (a)(2) includes the requirement in existing 30 CFR 816.41(e)(3) that surface-water monitoring proceed through mining and continue during reclamation until bond release. However, we propose to revise the existing language to remove any ambiguity concerning the meaning of ''bond release'' and clarify that monitoring must continue until the entire bond amount posted for the monitored area has been fully released under proposed 30 CFR 800.42(d), not just partial or Phase I or II bond release. As discussed above in the portion of the preamble concerning proposed 30 CFR 816.35(a), this change is appropriate because the time required to achieve saturation of backfilled areas or underground mine voids typically is measured in years, which means that mining-related impacts on groundwater, and hence surface water fed by groundwater, outside the permit area may not occur until years after the completion of mining and land reclamation. Even after complete saturation, groundwater migration rates typically are measured in only feet per day.

Therefore, proposed paragraph (a)(2) would require that surface-water monitoring continue through mining and during reclamation until the entire bond amount posted for the monitored area has been fully released under proposed 30 CFR 800.42(d), which generally will not occur until expiration of the revegetation responsibility period. In addition, proposed 30 CFR 800.42(a) would provide that the regulatory authority may not release any portion of the bond if an evaluation of monitoring data indicates that adverse trends exist that could result in material damage to the hydrologic balance outside the permit area. Any shorter time could result in a failure to detect impacts on surface water fed by groundwater, given the combination of slow saturation and migration rates for groundwater.

Proposed Paragraphs (b) and (c)

Proposed paragraphs (b) and (c) are substantively identical to existing 30 CFR 816.41(e)(2).

Proposed Paragraph (d)

Proposed paragraph (d) would be the counterpart to those elements of existing 30 CFR 816.41(e)(3) that pertain to modification of the surface-water monitoring plan. We propose to remove existing 30 CFR 816.41(e)(3)(ii) because it provides that the regulatory authority may approve a permit revision that would allow the cessation of surface-water monitoring based on a finding that monitoring is no longer necessary to achieve the purposes of the monitoring plan. As discussed in the preamble to paragraph (a) above, cessation of monitoring before the entire bond amount for the monitored area has been fully released under proposed 30 CFR 800.42(d) is inappropriate, based on the time required for saturation of the backfill and slow groundwater migration rates. Proposed paragraph (d) would continue to allow the regulatory authority to approve a permit revision to otherwise modify the parameters monitored and the sampling frequency under certain conditions. We invite comment on whether we should establish a minimum sampling frequency or place other restrictions on the regulatory authority's ability to modify monitoring requirements.

However, as in the similar provision in proposed 30 CFR 816.35 relating to groundwater monitoring, we propose to add requirements that the permittee demonstrate that future changes in surface-water quantity or quality are unlikely and that the operation has preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas. See proposed paragraphs (d)(1) and (2)(iii). The additional criteria are intended to ensure that surface-water monitoring requirements are not reduced or modified prematurely.

In addition, we propose to replace the requirement in existing 30 CFR 816.41(e)(3)(i) for a demonstration that the water quantity and quality are suitable to support approved postmining land uses with a requirement for a demonstration that the operation has maintained the availability and quality of surface water in a manner that can support existing and reasonably foreseeable uses and that does not preclude attainment of designated uses under section 101(a) or 303(c) of the Clean Water Act.[575] Our

[575] 33 U.S.C. 1251(a) and 1313(c), respectively.

proposed replacement language parallels the terminology of our proposed definition of material damage to the hydrologic balance outside the permit area in 30 CFR 701.5, which also relies upon existing, reasonably foreseeable, and designated uses under section 101(a) or 303(c) of the Clean Water Act. We propose to retain the requirement in the last clause of existing 30 CFR 816.41(e)(3)(i) for a demonstration that the water rights of other users have been protected or replaced.

Proposed Paragraph (e)

Proposed paragraph (e) corresponds to the second sentence of existing 30 CFR 816.41(e)(1), which provides that the regulatory authority may require additional monitoring when necessary. We propose to modify the existing language to specify that the regulatory authority must require additional monitoring when information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, detect hydrologic changes, or meet other requirements of the regulatory program. We also propose to specify that the regulatory authority must issue a permit revision order under § 774.10(b) when requiring changes to the monitoring plan approved in the permit.

Proposed Paragraph (f)

Like existing 30 CFR 816.41(e)(4), proposed paragraph (f) would require that the permittee install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring surface water.

8. Section 816.37: How must I monitor the biological condition of streams?

We propose to add this section to require monitoring of the biological condition of perennial and intermittent streams, consistent with the monitoring plan approved in the permit in accordance with proposed 30 CFR 780.23(c). The proposed rule would require annual monitoring during mining and reclamation until the entire bond amount for the monitored area has been fully released under proposed 30 CFR 800.42(d). The annual frequency is intended to provide sufficient data to evaluate the impacts of mining and reclamation without depleting the stream segment of aquatic life, as more frequent sampling might do. Monitoring would enable the permittee and the regulatory authority to determine whether the predictions in the permit application are accurate and to take timely corrective measures if the predictions turn out to be inaccurate. The proposed monitoring requirements generally parallel the requirements for water monitoring under 30 CFR 816.35 and 8816.36, but in simplified form.

9. Section 816.38: How must I handle acid-forming and toxic-forming materials?

Proposed section 816.38 would replace and revise existing 30 CFR 816.41(f), which requires that drainage from acid-forming and toxic-forming materials into surface water and groundwater be avoided by appropriate storage, burial, and treatment practices. We propose to flesh out the existing rule to more completely implement section 515(b)(14) of SMCRA,[576] which requires that all acid-forming materials and toxic materials be ''treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters,'' and section 515(b)(3) of SMCRA,[577] which provides that ''overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution.'' Proposed 30 CFR 816.38 also would more completely implement section 515(b)(10) of SMCRA,[578] which provides that surface coal mining and reclamation operations must be conducted to ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by *** avoiding acid or other toxic mine drainage.''

We propose to revise the introductory text of 30 CFR 816.38 to require that the permittee use the best technology currently available to handle acid-forming and toxic-forming materials in a manner that will avoid the creation of acid or toxic mine drainage into surface water and groundwater. The phrase ''best technology currently available'' does not appear in the sections of SMCRA mentioned above. However, application of this standard to the handling of acid-forming and toxic-forming materials is appropriate because section 515(b)(24) of SMCRA [579] requires use of the best technology currently available to minimize adverse impacts on fish, wildlife, and related environmental values. The handling of acid-forming and toxic-forming materials would affect surface-water and groundwater quality, which are related environmental values in the context of fish and wildlife.

Proposed paragraphs (a) through (f) contain more specific provisions on how the permittee must implement this requirement.

Proposed paragraph (a) would require that the permittee identify potential acid-forming and toxic-forming materials in overburden strata and the stratum immediately below the lowest coal seam to be mined. We invite comment on whether there are generally-accepted tests for potential acid-forming and toxic-forming materials in overburden strata that the final rule should require.

Proposed paragraph (a) also would require that the permittee cover exposed coal seams and the stratum immediately beneath the lowest coal seam mined with a layer of compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil to minimize contact and interaction with water. Covering the coal seam and the underlying stratum with material that has a lower permeability than the adjacent spoil would reduce the amount of water that could either reach or leave the coal seam and underlying stratum. Reduced water transmission will inhibit both the creation and migration of acid or toxic mine drainage. Use of materials with such a great difference in permeability should result in the low-permeability material behaving as an aquitard. The groundwater and infiltrating surface water should preferentially flow through the surrounding high-permeability material and not through the low-permeability material encapsulating the acid-forming or toxic-forming materials.

Proposed paragraph (b) would require that the permittee identify the anticipated postmining groundwater level for all locations at which acid-forming or toxic-forming materials are to be placed. This information is critical to a determination of whether the materials will remain in an environment that will prevent formation or migration of acid or toxic mine drainage.

Proposed paragraph (c) would require that the permittee selectively handle and place acid-forming and toxic-forming materials within the backfill in accordance with the plan approved in the permit, unless the permit allows placement of those materials in an excess spoil fill or a coal mine waste refuse pile. Proposed paragraph (c) identifies three acceptable handling techniques for acid-forming and toxic-forming materials to be placed in the

[576] 30 U.S.C. 1265(b)(14).
[577] 30 U.S.C. 1265(b)(3).
[578] 30 U.S.C. 1265(b)(10).
[579] 30 U.S.C. 1265(b)(24).

backfill: (1) Complete isolation of acid-forming and toxic-forming materials from contact or interaction with surface water or groundwater by surrounding those materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil; (2) placement of acid-forming and toxic-forming materials in a location below the water table where they will remain fully saturated at all times, provided that the permittee demonstrates, and the regulatory authority finds in writing in the permit, that complete saturation will prevent the formation of acid or toxic leachate; and (3) treatment to neutralize the acid-forming and toxic-forming potential of those materials. The last technique may be used in combination with either of the first two methods. Under the proposed rule, the permittee must use the technique or combination of techniques approved in the permit in accordance with proposed 30 CFR 780.12(d)(4). The permittee must demonstrate and the regulatory authority must confirm that the selected technique will be effective for each parameter of concern. For example, a technique that may be effective in preventing the formation of acid drainage might not be effective in preventing leaching of selenium. The regulatory authority may require that the permittee or permit applicant submit additional information, including fate and transport modeling, if deemed necessary.

Isolation of acid-forming and toxic-forming materials from contact with groundwater or surface water can be accomplished by completely surrounding those materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil to minimize interaction with water. Situations requiring saturation rather than isolation arise most frequently in the relatively flat terrain of coalfields in the Midwest and the West. Saturation may not be suitable for materials with the potential for forming toxic compounds through processes other than pyritic oxidation.

Proposed paragraph (d) would allow placement of acid-forming and toxic-forming materials in an excess spoil fill or a coal mine waste refuse pile when approved in the permit. The proposed rule would require the use of isolation or treatment or a combination of those techniques whenever the permittee places acid-forming or toxic-forming materials in an excess spoil fill or a coal mine waste refuse pile. The proposed rule would not authorize use of the saturation technique because saturation could jeopardize the stability of the fill or refuse pile. Saturation also could result in discharges with high levels of total dissolved solids, which in turn could adversely impact the biological condition of streams and cause material damage to the hydrologic balance outside the permit area.

Alternatively, prohibition of placement of acid-forming or toxic-forming materials in an excess spoil fill would provide an additional layer of protection against the development of seeps containing acid or toxic mine drainage. We invite comment on whether we should revise our rule to include such a prohibition.

Proposed paragraph (e) would modify the requirements in existing 30 CFR 816.41(f)(1)(ii) for temporary storage of acid-forming and toxic-forming materials to emphasize that storage may be used only when the regulatory authority specifically approves temporary storage as necessary and finds in writing in the permit that the proposed storage method will protect surface water and groundwater by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water into aquifers. The proposed rule would require that the regulatory authority specify a maximum time for temporary storage, which may not exceed the period until burial first becomes feasible. We also propose to add a provision prohibiting temporary storage if doing so would result in a risk of adverse impacts to the biological condition of perennial or intermittent streams. Minimizing the need for, and duration of, temporary storage is critical because the oxidation of pyritic materials continues while the material is exposed. Precipitation may infiltrate and percolate through the pile, which can result in an increase in the concentration of total dissolved solids leaving the site. The weathering products of pyrite oxidation essentially become ''stored acidity,'' which presents a greater risk to the hydrologic balance if the permanent placement technique ultimately is not successful. Our proposed revisions to the temporary storage requirements for acid-forming and toxic-forming materials would improve implementation of section 515(b)(10) of SMCRA.[580]

Proposed paragraph (f) would require that disposal, treatment, and storage practices for acid-forming and toxic-forming materials be consistent with other material handling and disposal provisions of the regulatory program. This paragraph is substantively identical to existing 30 CFR 816.41(f)(2).

10. Section 816.40: What responsibility do I have to replace water supplies?

Proposed 30 CFR 816.40 would replace and revise existing 30 CFR 816.41(h), which contains performance standards to implement section 717(b) of SMCRA.[581] That paragraph of SMCRA provides that—

> The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation.

Proposed 30 CFR 816.40 would further flesh out the requirements of this statutory provision by incorporating paragraphs (a) and (b) of the existing definition of ''replacement of water supply'' in 30 CFR 701.5. We propose to move those paragraphs to 30 CFR 816.40(a)(2) through (4) because they effectively function as performance standards and are not definitional in nature. We also propose to require adherence to the water supply replacement provisions of proposed 30 CFR 780.22(b) when the permit anticipates that damage to water supplies will occur. Finally, we propose to add the following provisions that would apply when unanticipated damage to a protected water supply occurs:

- The permittee would have to provide an emergency temporary water supply within 24 hours of notification of unanticipated damage to a protected water supply. The temporary supply must be adequate in quantity and quality to meet normal household needs.
- The permittee would have to develop and submit a plan for a permanent replacement supply to the regulatory authority within 30 days of receiving notice of unanticipated damage.

[580] 30 U.S.C. 1265(b)(10). This provision of SMCRA specifies that surface coal mining and reclamation operations must be conducted to—

minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to—

(i) preventing or removing water from contact with toxic producing deposits[.]

[581] 30 U.S.C. 1307(b).

• The permittee would have to provide a permanent replacement water supply within 2 years of receiving notice of unanticipated damage.

The proposed timeframes for replacement of water supplies for which damage is unanticipated differ somewhat from those set forth in the preamble to the existing definition of ''replacement of water supply'' in 30 CFR 701.5. That preamble defines prompt replacement as providing an emergency drinking water supply within 48 hours of notification, a temporary water supply hookup within 2 weeks of notification, and a permanent replacement supply within 2 years of notification.[582] We propose to replace the timeframes in that preamble with the times set forth in proposed 30 CFR 816.40 as discussed above. The proposed timeframes would better protect society and the environment from the adverse effects of surface coal mining operations, in keeping with the purpose of SMCRA set forth in section 102(a) of the Act.[583]

11. Section 816.41: Under what conditions may I discharge to an underground mine?

Proposed section 816.41 would inlude existing 30 CFR 816.41(i) and add four new requirements that must be met before the regulatory authority may approve a proposed discharge to any type of underground mine. First, proposed paragraph (a)(1)(ii) would require a demonstration that the discharge will be made in a manner that will prevent material damage to the hydrologic balance of the area in which the underground mine receiving the discharge is located. Second, proposed paragraph (a)(1)(iii) would require a demonstration that the discharge will be made in a manner that will not adversely impact the biological condition of perennial or intermittent streams. Third, proposed paragraph (a)(3)(ii) would allow the regulatory authority to approve discharges of water that exceed the effluent limitations for pH and total suspended solids only if available evidence indicates that there is no direct hydrologic connection between the underground mine and other waters and that the discharge would not cause material damage to the hydrologic balance outside the permit area. All three of the proposed revisions discussed above are intended to more fully implement section 510(b)(3) of SMCRA,[584] which prohibits approval of a permit application unless the applicant demonstrates, and the regulatory authority finds, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

The fourth proposed revision would add paragraph (a)(5), which would require that the permit applicant obtain written permission from the owner of the mine into which the discharge is to be made and provide a copy of that authorization to the regulatory authority.

12. Section 816.42: What are my responsibilities to comply with water quality standards and effluent limitations?

We propose to redesignate existing 30 CFR 816.42 as paragraph (a) of this section. We also propose to revise this paragraph by replacing the reference to the effluent limitations in 40 CFR part 434 with a reference to the effluent limitations established in the NPDES permit for the operation. This change would make our regulations consistent with the policy and practice of the EPA, which recognizes only the effluent limitations in the NPDES permit as being enforceable.

Proposed paragraph (b) would require that discharges of overburden (including excess spoil), coal mine waste, and other materials into waters of the United States be made in compliance with section 404 of the Clean Water Act[585] and its implementing regulations. While the language would be new, the requirement would not—SMCRA permittees always have been required to comply with the Clean Water Act, as emphasized in section 702(a) of SMCRA,[586] which provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act (33 U.S.C. 1251 *et seq.*), any rule or regulation adopted under the Clean Water Act, any state laws enacted pursuant to the Clean Water Act, ''or other Federal laws relating to preservation of water quality.'' We invite comment on whether the provisions of proposed paragraph (b) should be considered informational in nature like the provisions of section 702(a) of SMCRA[587] or whether they should be directly enforceable under SMCRA.

Proposed paragraphs (c) through (e) would establish enforceable performance standards requiring proper operation and maintenance of water treatment facilities and environmentally appropriate disposition of precipitates from those facilities. They are intended to improve implementation of section 515(b)(10)(A)(ii) of SMCRA,[588] which requires that surface coal mining and reclamation operations avoid acid or other toxic mine drainage by ''treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses.''

Specifically, proposed paragraph (c) would require the permittee to construct water treatment facilities for discharges from the operation as soon as the need for those facilities becomes evident. Proposed paragraph (d) would require that the permittee remove precipitates and otherwise maintain all water treatment facilities involving the use of settling ponds or lagoons as necessary to maintain the functionality of the ponds or lagoons. The permittee would be required to dispose of the precipitates removed either in an approved solid waste landfill or in a location within the permit area. Proposed paragraph (e) would require that the permittee operate and maintain water treatment facilities until the regulatory authority authorizes their removal based upon monitoring data demonstrating that influent to the facilities meets all applicable water quality standards and effluent limits without treatment.

13. Section 816.43: How must I construct and maintain diversions and other channels to convey water?

We propose to revise this section to reflect plain language principles. In addition, we propose several substantive changes. First, proposed paragraph (a)(3) would require the construction of channels that meet temporary diversion design criteria to convey surface runoff to siltation structures whenever the sedimentation control plan approved in the permit pursuant to 30 CFR 816.45 involves the use of siltation structures. This requirement would not apply if the entire disturbed area would naturally drain to the siltation structure without the construction of channels. Requiring that these channels meet temporary diversion design criteria would minimize the potential for failure and the resulting possibility of offsite impacts. Diversion failures have resulted in subsequent failures of larger structures. For example, in West Virginia in 2003, the failure of a diversion ditch caused erosion and the breaching of a reclaimed impoundment, resulting in a flow of water, slurry, and coarse refuse downstream. This event

[582] 60 FR 16727 (Mar. 31, 1995).

[583] 30 U.S.C. 1202(a).

[584] 30 U.S.C. 1260(b)(3).

[585] 33 U.S.C. 1344.

[586] 30 U.S.C. 1292(a).

[587] *Id.*

[588] 30 U.S.C. 1265(b)(10)(A)(ii).

isolated residents along Ned's Branch, blocked roads and a major railroad, and contaminated the Guyandotte River.

Existing 30 CFR 816.43(a) requires that diversions be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas. Proposed paragraph (a)(4)(ii) would clarify that this provision includes a requirement to minimize adverse impacts to perennial and intermittent streams within that area.

Existing 30 CFR 816.43(a) requires that diversions be designed to ''prevent material damage outside the permit area.'' Proposed paragraph (a)(4)(iii) would revise this language to require that diversions be designed to prevent material damage to the hydrologic balance outside the permit area. The revised language would make this provision consistent with the terminology of 30 CFR 773.15(e) and section 510(b)(3) of SMCRA,[589] which require that surface coal mining and reclamation operations be designed to prevent material damage to the hydrologic balance outside the permit area.

We propose to combine existing 30 CFR 816.43(a)(2)(ii) and (c)(3) into a new paragraph (a)(5)(ii). Existing paragraph (a)(2)(ii) provides that each diversion and its appurtenant structures must be designed, located, constructed, maintained, and used to provide protection against flooding and resultant damage to life and property. Existing paragraph (c)(3) states that this requirement will be deemed met when the combination of channel, bank, and floodplain configuration is adequate to safely pass the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion. Proposed paragraph (a)(5)(ii) would replace existing paragraph (a)(2)(ii) with a slightly modified version of existing paragraph (c)(3) because existing paragraph (c)(3) effectively negates existing paragraph (a)(2)(ii). Proposed paragraph (a)(5)(ii) would not contain the reference to floodplain configuration in existing paragraph (c)(3) because use of a floodplain to convey flows from storm runoff is appropriate in naturally-functioning streams and in restored streams, but not with temporary or permanent diversions.

Proposed paragraph (a)(5)(ii) also would require that each diversion be designed using the appropriate regional NRCS synthetic storm distribution to determine peak flows. The preamble to proposed 30 CFR 780.29 explains the rationale for this proposed requirement.

Proposed paragraph (a)(5)(iii) would include existing paragraph (a)(2)(iii). We propose to add a reference to runoff outside the permit area to be consistent with the underlying statutory provision in section 515(b)(10)(B)(i) of SMCRA,[590] which requires that surface coal mining operations be conducted ''so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area.''

The last sentence of existing paragraph (a)(3) and the entirety of existing paragraph (b) contain approval, design, and construction requirements for temporary and permanent diversions of perennial, intermittent, and ephemeral streams. We propose to move the approval and design provisions to 30 CFR 780.28(c) and the construction requirements to 30 CFR 816.57(b) to consolidate requirements concerning activities in, through, or adjacent to streams in those sections. Proposed paragraph (b) would specify that 30 CFR 780.28 and 816.57 contain additional requirements applicable to diversions of perennial and intermittent streams.

Lastly, we propose to revise paragraph (c)(1) of the existing rules to limit the scope of paragraph (c), which applies to diversions of miscellaneous flows, to surface-water flows other than perennial and intermittent streams. The existing rule is internally inconsistent in that it specifically includes groundwater discharges, but expressly excludes perennial and intermittent streams. However, any flow resulting from a groundwater discharge would be a perennial or intermittent stream under both the existing and proposed definitions of those terms in 30 CFR 701.5. Therefore, diversions of groundwater discharges would be subject to the stream-channel diversion requirements referenced in proposed paragraph (b) rather than standards for miscellaneous flows under paragraph (c).

We invite comment on whether we should revise paragraph (c) to apply the same design events for temporary and permanent diversions of miscellaneous flows as apply to temporary and permanent diversions of perennial and intermittent streams because there is no readily apparent hydrologic reason to apply different standards based on the flow regime of the stream. Instead, it may be more logical to prescribe design events based upon the length of time that the diversion is expected to remain in existence; *i.e.,* whether it is temporary or permanent. Under this approach, temporary diversions of miscellaneous flows would have to be designed and constructed to safely pass the peak runoff from the 10-year, 6-hour precipitation event rather than the 2-year, 6-hour event. Similarly, permanent diversions of miscellaneous flows would have to be designed and constructed to safely pass the peak runoff from the 100-year, 6-hour precipitation event rather than the 10-year, 6-hour event. We also invite comment on whether we should raise the design event for temporary diversions to the 25-year, 6-hour event to provide an added margin of safety.

14. Section 816.45: What sediment control measures must I use?

We propose to remove the second sentence of 30 CFR 816.45(b), which reads as follows: ''The sedimentation storage capacity of practices in and downstream from the disturbed areas shall reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment.'' The meaning of this sentence is unclear, but it appears to be predicated on the assumption that all mines will have a sedimentation pond or other siltation structure located downstream of the disturbed area. That assumption is inconsistent with the court decision remanding former 30 CFR 816.46(b)(2) (1983).[591] Furthermore, not all sediment control practices include sedimentation storage capacity. Therefore, we propose to remove this sentence to avoid any conflict with either the court decision or current technology.

15. Section 816.46: What requirements apply to siltation structures?

We propose to remove existing paragraph (b)(1) of this section because it duplicates 30 CFR 816.45(a)(1), both of which require use of the best technology currently available to prevent additional contributions of suspended solids to streamflow or runoff outside the permit area to the extent possible. Section 816.45 is the more appropriate location for this provision because section 816.46 covers only siltation structures, whereas section 816.45 encompasses all methods of sediment control. Section 816.45 sets forth various measures and techniques that may constitute the best technology currently available for sediment control,

[589] 30 U.S.C. 1260(b)(3).

[590] 30 U.S.C. 1265(b)(10)(B)(i).

[591] *PSMRL II, Round III,* 620 F. Supp. 1519, 1566–1568 (D.D.C. 1985), as discussed at 73 FR 75854 (Dec. 12, 2008). See also 51 FR 41961 (Nov. 20, 1986).

although applicants and regulatory authorities are not limited to those measures and techniques.

Paragraph (b)(2) of 30 CFR 816.46 and 817.46 (1983) required that all surface drainage from the disturbed area be passed through a siltation structure before leaving the permit area. In essence, that paragraph prescribed siltation structures (sedimentation ponds and other treatment facilities with point-source discharges) as the best technology currently available for sediment control. However, paragraph (b)(2) was struck down upon judicial review because the court found that the preamble to the rulemaking in which it was adopted did not articulate a sufficient basis for the rule under the Administrative Procedure Act. The court stated that the preamble did not adequately discuss the benefits and drawbacks of siltation structures and alternative sediment control methods and did not enable the court ''to discern the path taken by [the Secretary] in responding to commenters' concerns'' that siltation structures in the West are not the best technology currently available. See *In re: Permanent Surface Mining Regulation Litigation II, Round III,* 620 F. Supp. 1519, 1566–1568 (D.D.C. July 15, 1985).

On November 20, 1986 (51 FR 41961), we suspended the rules struck down by the court. In a technical rule that corrected various errors in citations, cross-references, and other inadvertent errors, we lifted that suspension and removed paragraph (b)(2) from our regulations on September 29, 2010 (75 FR 60272, 60275). However, on February 14, 2014, the court's decision in *NPCA* reinstated the version of 30 CFR 816.46(b) in effect before adoption of the stream buffer zone rule on December 12, 2008. This action had the effect of reinstating the suspension, which we codified in a final rule published on December 22, 2014. See 79 FR 76227–76233. We now propose to lift this suspension, remove paragraph (b)(2) of sections 816.46 and 817.46, and redesignate the remaining paragraphs of those sections accordingly.

In addition, we propose to redesignate as paragraph (b)(1) the provision in existing paragraph (b)(3) requiring that the permittee construct siltation structures for an area before initiating any surface mining activities in the area. We also propose to revise this paragraph to clarify that the requirement to construct siltation structures applies only when the approved permit requires the use of siltation structures to achieve the sediment control requirements of 30 CFR 816.45. This revision is needed because, as the courts have recognized, siltation structures are not always the best technology currently available for sediment control.[592] Proposed paragraph (b)(2) would retain only the requirement in existing paragraph (b)(3) that the construction of siltation structures be certified by a qualified registered professional engineer or a qualified registered professional land surveyor.

Finally, we propose to—

- Revise existing paragraph (b)(5), which we propose to redesignate as paragraph (b)(4), to remove the prohibition on removing siltation structures sooner than 2 years after the last augmented seeding. The standard is too inflexible and it is arguably inconsistent with the decision in *PSMRL II, Round III* discussed above, in which the court held that we had not demonstrated that siltation structures are always the best technology currently available to control sediment in runoff from the minesite. Applying that rationale, the permittee should have the option of using other methods of sediment control in lieu of retaining the siltation structures for 2 years after the last augmented seeding. In addition, the remaining standard in the rule, which prohibits removal of siltation structures until the disturbed area is stabilized and revegetated, is sufficient to ensure an appropriate level of environmental protection.
- Revise existing paragraph (b)(6), which we propose to redesignate as paragraph (b)(5), to clarify that the exemption for sedimentation ponds approved by the regulatory authority for retention as permanent impoundments under 30 CFR 816.49(b) is contingent upon meeting the maintenance requirements of 30 CFR 800.42(c)(5). The latter rule implements the statutory provision in section 519(c)(2) of SMCRA [593] establishing bond release requirements for silt dams to be retained as permanent impoundments.
- Remove existing paragraph (c)(1)(i), which provides that sedimentation ponds must be used individually or in series. This provision adds nothing meaningful to our regulations because there is no other way in which sedimentation ponds could be used.
- Revise existing paragraph (c)(1)(ii), which we propose to redesignate as paragraph (c)(1)(i), to provide that the prohibition on locating sedimentation ponds in stream channels applies to both perennial and intermittent stream channels, not just to perennial stream channels as in the existing rule. In addition, we propose to clarify that any exceptions to this prohibition must comply with 30 CFR 780.28, which contains the permitting requirements for activities in, through, or adjacent to perennial and intermittent streams, and the performance standards concerning sedimentation control structures in streams in 30 CFR 816.57(c). The statutory basis for these proposed changes is the same as the statutory basis for the stream protection measures proposed in 30 CFR 780.28.
- Revise existing paragraph (c)(1)(iii)(H), which we propose to redesignate as paragraph (c)(1)(ii)(H), to replace the prohibition on the use of acid-forming or toxic-forming coal processing waste in the construction of sedimentation ponds with a prohibition on the use of any acid-forming or toxic-forming materials in the construction of sedimentation ponds. This change is both appropriate and necessary because coal processing waste is not the only form of acid-forming or toxic-forming materials that could conceivably be used in the construction of sedimentation ponds. The proposed change also would better implement section 515(b)(10)(A)(i) of SMCRA,[594] which requires the avoidance of acid or other toxic mine drainage by ''preventing or removing water from contact with toxic producing deposits.''

16. Section 816.47: What requirements apply to discharge structures for impoundments?

We propose to revise this section by updating the terminology to reflect our 1983 rulemaking in which we introduced the term ''coal mine waste'' and replaced the term ''coal processing waste dams and embankments'' with coal mine waste impounding structures. See 48 FR 44006 (Sept. 26, 1983).

17. Section 816.49: What requirements apply to impoundments?

We propose to update the hazard classifications and incorporations by reference in existing paragraph (a)(1) of this section to be consistent with those in 30 CFR 780.25, which contains the permitting requirements for impoundments. Specifically we propose to update the incorporation by reference of the NRCS publication ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, October 1985), by replacing the reference to the October 1985 edition with a reference to the superseding July 2005 edition. Consistent with the terminology in the newer edition, we proposed to replace

[592] *PSMRL II, Round III,* 620 F. Supp. 1519, 1566–1568 (D.D.C. 1985), as discussed at 73 FR 75854 (Dec. 12, 2008).

[593] 30 U.S.C. 1269(c)(2).

[594] 30 U.S.C. 1265(b)(10)(A)(i).

references to Class B or C dam criteria throughout section 816.49 with references to Significant Hazard Class or High Hazard Class dam criteria, respectively. Only the terminology has changed—the actual criteria remain the same as before. The newer publication is not available from the National Technical Information Service, but is available online from the NRCS. Consequently, we propose to delete the ordering information pertinent to the National Technical Information Service and replace it with the URL (Internet address) at which the publication may be reviewed and from which it may be downloaded without charge.

We propose to revise our permanent impoundment requirements in paragraph (b) by adding three new criteria for approval of permanent impoundments. Proposed paragraph (b)(7) would require a demonstration that approval of the impoundment would not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour. Proposed paragraph (b)(8) would require a demonstration that approval of the impoundment would not result in the creation of an excess spoil fill elsewhere within the permit area. These two proposed changes are intended to provide a safeguard against the retention of final-cut impoundments and associated spoil ridges that are inconsistent with the requirement in section 515(b)(3) of SMCRA [595] to ''restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated.''

Proposed paragraph (b)(9) would require a demonstration that the impoundment has been designed with dimensions and other characteristics that would enhance fish and wildlife habitat to the extent that doing so is not inconsistent with the intended use of the impoundment. This provision would improve implementation of section 515(b)(24) of SMCRA,[596] which requires use of the best technology currently available to the extent possible to enhance fish, wildlife, and related environmental values where practicable.

18. Section 816.57: What additional performance standards apply to activities in, through, or adjacent to a perennial or intermittent stream?

General Discussion of Basis for Proposed Changes

We propose to replace existing 30 CFR 816.57 with provisions that would better protect perennial and intermittent streams, consistent with the June 11, 2009, MOU discussed in Part VI of this preamble. Part II of this preamble summarizes both the terrestrial impacts of surface coal mining operations and the impacts of those operations on streams, as documented by scientific studies. Among other things, our proposed rule is intended to prevent or minimize the adverse impacts on fish, wildlife, and related environmental values, including streams, documented in those studies. The authority for our proposed revisions to 30 CFR 816.57 is identical to our authority for the corresponding permitting requirements in proposed 30 CFR 780.28 and is discussed at length in the introductory portion of the preamble to that proposed rule.

Proposed Paragraph (a)

Existing paragraph (a) provides that ''[n]o land within 100 feet of a perennial or intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream.'' The rule further specifies that the regulatory authority may provide that authorization only upon finding that the activities will not cause or contribute to the violation of applicable state or federal water quality standards and that they will not adversely affect the water quantity and quality or other environmental resources of the stream. The regulatory authority also must find that if there will be a temporary or permanent stream-channel diversion, it will comply with 30 CFR 816.43, which contains the performance standards for diversions.

As described in more detail in Part VI of this preamble, existing paragraph (a) has been subject to differing interpretations over the years. In an effort to provide greater clarity, proposed paragraph (a)(1) would retain only the provision that prohibits disturbance of land within 100 feet of a perennial or intermittent stream without regulatory authority approval. We propose to replace the criteria for regulatory authority approval in the existing rule with new permit application requirements and approval criteria and requirements in 30 CFR 780.28. We also propose to expand protections for perennial and intermittent streams, as discussed below.

Proposed paragraph (a)(1) would prohibit the conduct of surface mining activities in or through a perennial or intermittent stream, or that would disturb the surface of land within 100 feet, measured horizontally,[597] of a perennial or intermittent stream, unless the regulatory authority authorizes those activities in the permit after making the findings that would be required by proposed 30 CFR 780.28. Part VI of this preamble discusses the history of stream buffer zone rules under SMCRA, all of which have established a minimum buffer zone width of 100 feet on either side of the stream. The preamble to our 1979 rules explains the rationale for that width. See 44 FR 15176–15177 (Mar. 13, 1979). A more recent literature review documents that a vegetative filter strip width of 100 feet generally will attenuate sediment in runoff from disturbed areas.[598]

Section 515(b)(10)(B)(i) of SMCRA,[599] which, in relevant part, requires that surface coal mining operations be conducted ''so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area,'' provides the primary statutory authority for the minimum buffer width that we propose to establish in paragraph (a)(1). The prohibition on disturbing the buffer zone also would implement section 515(b)(24) of SMCRA,[600] which provides that surface coal mining and reclamation operations must be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Proposed paragraph (a)(2) would reiterate that surface mining activities may be conducted in waters of the United States only if the permittee first obtains all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.* This proposed paragraph is an informational provision that would be consistent with section 702(a) of SMCRA,[601] which provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act, any rule or regulation adopted under the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. Proposed paragraph (a)(2) would operate in tandem with proposed 30

[595] 30 U.S.C. 1265(b)(3).

[596] 30 U.S.C. 1265(b)(24).

[597] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[598] Wenger, S. ''A Review of the Scientific Literature of Riparian Buffer Width, Extent and Vegetation.'' Institute of Ecology, University of Georgia, Athens, GA, 1999.

[599] 30 U.S.C. 1265(b)(10)(B)(i).

[600] 30 U.S.C. 1265(b)(24).

[601] 30 U.S.C. 1292(a).

CFR 773.17(h), which would add a new permit condition requiring that the permittee obtain all necessary authorizations, certifications, and permits in accordance with Clean Water Act requirements before conducting any activities that require approval or authorization under the Clean Water Act. Permit conditions are directly enforceable under SMCRA. Therefore, addition of the permit condition in proposed 30 CFR 773.17(h) would mean that the SMCRA regulatory authority must take enforcement action if the permittee does not obtain all necessary Clean Water Act authorizations, certifications, and permits before beginning any activity under the SMCRA permit that also requires approval, authorization, or certification under the Clean Water Act.

Proposed Paragraph (b)

Existing paragraph (b) requires that the permittee mark the buffer zone that is not to be disturbed. We propose to move this provision to 30 CFR 816.11(e), which contains a similar requirement, to consolidate the marking requirement in the signs and markers section.

Proposed paragraph (b) would establish requirements specific to mining through or diverting perennial or intermittent streams. Proposed paragraph (b)(1) would require compliance with the design and construction and maintenance plans approved in the permit. Proposed paragraph (b)(2) would require that the permittee restore the hydrological form and ecological function of the stream segment as expeditiously as practicable. In essence, this provision would require that the permittee take timely steps to restore the stream, first by constructing an appropriate channel as soon as surface mining is completed in the area in which the channel is to be located, then by planting appropriate vegetation in the riparian corridor in the first appropriate season following channel construction, followed by whatever other action may be needed to restore the stream's ecological function.

Proposed paragraph (b)(2) does not mean that we anticipate rapid restoration of the ecological function of the stream. We recognize that a considerable amount of time may be needed to accomplish that requirement, particularly if restoration of the ecological function requires establishment of substantial canopy cover. Appendix B of a 2012 EPA publication describes a scenario in which high-gradient stream channels devoid of aquatic life on an abandoned minesite in West Virginia may be restored to biological health in an estimated 10 years.[602] This time is roughly consistent with the time required for restoration of low-gradient streams in Illinois and Indiana, as discussed in Part II of this preamble. Other studies suggest that a much longer, as-yet-undetermined length of time may be needed to restore formerly high-quality Appalachian streams to a biological condition comparable to their premining biological condition.[603] However, as discussed in connection with proposed paragraph (b)(2)(ii), re-establishment of the premining biological condition is not necessarily required to restore the ecological function of the stream.

Proposed paragraph (b)(2)(i) would provide that a restored stream channel or a stream-channel diversion need not exactly replicate the channel morphology that existed before mining, but it must have a channel morphology comparable to the premining form of the affected stream segment in terms of baseline stream pattern, profile, and dimensions, including channel slope, sinuosity, water depth, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate. These characteristics are critical to restoration of the premining hydrological form or the ecological function of the stream or both. The proposed paragraph also would use terminology that would improve consistency with corresponding requirements under section 404 of the Clean Water Act. Finally, proposed paragraph (b)(2)(i) would include a clause specifying that, for degraded streams, the enhancement provisions of proposed paragraph (b)(4) would apply in place of the requirement in proposed paragraph (b)(2)(i) for restoration of streams to their premining form. This clause is necessary to ensure that the proposed rule would not require restoration of a degraded stream to its degraded premining form and condition.

Proposed paragraph (b)(2)(ii)(A) would specify that a stream flowing through a restored stream channel or a stream-channel diversion must meet the functional restoration criteria established by the regulatory authority in consultation with the Clean Water Act agency under proposed 30 CFR 780.28(e)(1). Proposed paragraph (b)(2)(ii)(B) would clarify that a stream flowing through a restored stream channel or a stream-channel diversion need not contain precisely the same biota or have the same biological condition as the original stream segment did before mining, but it must have a biological condition that is adequate to support the uses that existed before mining and that would not preclude attainment of the designated uses of the original stream segment under section 101(a) or 303(c) of the Clean Water Act[604] before mining. This provision is intended to allow some change in the species composition of the array of insects, fish, and other aquatic organisms found in a stream flowing through a restored stream channel or stream-channel diversion, provided that the change in species composition would preclude neither any use that existed before mining nor attainment of any designated use before mining.

Proposed paragraph (b)(2)(ii)(C) would require that the biological condition of the restored stream be determined using a protocol that meets the requirements of proposed 30 CFR 780.19(e)(2). In effect, it would require use of a scientifically-valid multimetric bioassessment protocol used by agencies responsible for implementing the Clean Water Act, with modifications to meet SMCRA-related needs. At a minimum, the protocol must be based upon the measurement of an appropriate array of aquatic organisms, including benthic macroinvertebrates. It must require identification of benthic macroinvertebrates to the genus level; result in the calculation of index values for both habitat and macroinvertebrates; and provide a correlation of index values to the capability of the stream to support designated uses under section 101(a) or 303(c) of the Clean Water Act, as well as any other existing or reasonably foreseeable uses. We seek comment on the effectiveness of using index scores from bioassessment protocols to ascertain impacts on existing, reasonably foreseeable, or designated uses. We also invite commenters to suggest other approaches that may be equally or more effective.

Finally, proposed paragraph (b)(2)(ii)(D) would specify that populations of organisms used to determine the postmining biological condition of the stream segment must be self-sustaining within that segment. We

[602] Harman, W., R. Starr, M. Carter, K. Tweedy, M. Clemmons, K. Suggs, C. Miller. 2012. *A Function-Based Framework for Stream Assessment and Restoration Projects.* U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, Washington, DC EPA 843–K–12–006, pp. 336–339.

[603] See, *e.g.,* Pond, G.J., M.E. Passmore, N.D. Pointon, J.K. Felbinger, C.A. Walker, K.J.G. Krock, G.B. Fulton, and W.L. Nash. 2014. Long-Term Impacts on Macroinvertebrates Downstream of Reclaimed Mountaintop Mining Valley Fills in Central Appalachia. *Environmental Management 54*(4), 919–933.

[604] 33 U.S.C. 1251(a) and 1313(c).

propose to include this provision because the presence of individual organisms that happen to drift into the reconstructed channel from other areas is not an indicator of restoration of the ecological function of the restored stream segment.

Our proposed performance standards in paragraph (b) would complement our proposed permitting requirements at 30 CFR 780.12(b)(3) (one of the steps in the reclamation timetable is restoration of the form of perennial and intermittent stream segments), 780.12(b)(7) (one of the steps in the reclamation timetable is restoration of the ecological function of perennial and intermittent stream segments), 780.12(h) (the reclamation plan must include a detailed stream restoration plan), 780.28(c) (detailed permit application requirements for mining through or diverting a perennial or intermittent stream segment), and 780.28(e)(2) (the regulatory authority must make a specific written finding before approving mining through or diversion of a perennial or intermittent stream segment).

Proposed paragraph (b)(2)(iii)(A) would require that performance bond calculations for the operation include a specific line item for restoration of the ecological function of the stream segment. See also proposed 30 CFR 800.14(b)(2). In addition, proposed paragraph (b)(2)(iii)(B) would require that the permittee post a surety bond, a collateral bond, or a combination of surety and collateral bonds to cover the cost of restoration of the ecological function of the stream segment. A self-bond is not an appropriate mechanism to guarantee restoration of a stream's ecological function because of the risk that the company may cease to exist during the time required to accomplish that restoration. In addition, a self-bond does not require that the permittee file financial instruments or collateral with the regulatory authority, nor is there any third party obligated to complete the reclamation or pay the amount of the bond if the permittee defaults on reclamation obligations.

Proposed paragraph (b)(2)(iii)(C) would require that the permittee demonstrate full restoration of the physical form of the restored stream segment before the site would qualify for final bond release under proposed 30 CFR 800.42(d). Proposed 30 CFR 800.42(b)(1) would define Phase I reclamation as including restoration of the form of perennial and intermittent streams, which means that no bond could be released until the permittee restores the hydrological form of any stream segment within the area to which the bond release application applies.

Proposed paragraph (b)(2)(iii)(D) would require that the permittee demonstrate full restoration of the ecological function of the restored stream segment before the site would qualify for final bond release under proposed 30 CFR 800.42(d). Under proposed 30 CFR 800.42(b)(2) and (c)(2), the amount of bond retained following Phase I and II reclamation, respectively, must be sufficient to restore the ecological function of the stream segments that were restored in form as part of Phase I reclamation.

Proposed paragraph (b)(3) would specify that, upon completion of construction of a stream-channel diversion or restored stream channel, the permittee must obtain a certification from a qualified registered professional engineer that the stream-channel diversion or restored stream channel meets all construction requirements of this section (except those pertaining to restoration of the ecological function) and is in accordance with the design approved in the permit. A similar requirement appears in existing 30 CFR 816.43(b)(4). We propose to move it to 30 CFR 816.57 to consolidate performance standards for the diversion and restoration of perennial and intermittent streams. We also propose to expand its scope to include restored stream channels because proper construction of those channels is no less important in terms of stability, hydraulic capacity, and ecological restoration than is construction of stream-channel diversions. This certification requirement applies only to the construction of the channel; it does not extend to restoration of ecological function or biological requirements, which may lie beyond the engineer's sphere of professional competence.

Finally, proposed paragraph (b)(4) would provide that if the stream segment to be mined through or diverted is in a degraded condition before mining, the permittee must implement measures to enhance the form and ecological function of the segment as part of the restoration or diversion process. This provision is intended to ensure that stream segments degraded by prior mining or other human activities are improved to the fullest extent possible, not just restored to the condition that existed before the current mining operation. It also would implement section 515(b)(24) of SMCRA,[605] which provides that surface coal mining and reclamation operations must ''achieve enhancement'' of fish, wildlife, and related environmental values where practicable, to the extent possible using the best technology currently available.

Nothing in our proposed stream restoration requirements would exempt the permittee from meeting any additional onsite or offsite mitigation requirements that the U.S. Army Corps of Engineers may require under section 404 of the Clean Water Act.[606]

We invite commenters to—

- Identify studies pertinent to restoration of the functions of perennial and intermittent streams, particularly headwaters streams, after mining or similar disturbances.
- Weigh in on whether our rule should differentiate between low-gradient and high-gradient streams on the theory that high-gradient streams are more difficult to restore in backfilled areas because of the lack of a competent substrate and the removal of perched aquifers.

Proposed Paragraph (c)

Proposed paragraph (c)(1) would prohibit the use of perennial or intermittent streams as waste treatment systems to convey surface runoff from the disturbed area to a sedimentation pond. It also would prohibit construction of a sedimentation pond in a perennial or an intermittent stream. Almost all perennial and intermittent streams are of high value to fish and wildlife. Therefore, prohibiting the use of those streams for sedimentation control purposes is consistent with section 515(b)(24) of SMCRA,[607] which provides that to the extent possible, surface coal mining and reclamation operations must use the best technology currently available to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values. Our experience indicates that there are almost always reasonable alternatives to using perennial and intermittent streams as waste treatment systems.

However, in steep-slope areas, those alternatives may not have the least overall adverse impact on fish, wildlife, and related environmental values because of the extensive disturbance and excavation that would be needed to construct diversions and sedimentation ponds outside streams in that topography. Therefore, proposed paragraph (c)(2) would exempt excess spoil fills or coal mine waste disposal facilities in steep-slope areas from this prohibition when use of a perennial or intermittent stream segment as a waste treatment system for sediment control and construction of a sedimentation

[605] 30 U.S.C. 1265(b)(24).

[606] 33 U.S.C. 1344.

[607] 30 U.S.C. 1265(b)(24).

pond in a perennial or an intermittent stream would have less overall adverse impact on fish, wildlife, and related environmental values than construction of diversions and sedimentation ponds on slopes above the stream.

Proposed paragraph (c)(3) would require that the adverse impacts of using a stream segment as a waste treatment system on fish, wildlife, and related environmental values be minimized by keeping the length of the stream segment used as a waste treatment system as short as possible and, when practicable, maintaining an undisturbed buffer at least 100 feet in width along that segment. The proposed rule would require placement of the sedimentation pond as close to the toe of the excess spoil fill or coal mine waste disposal structure as possible. We also propose to require that the permittee remove the sedimentation pond and restore the hydrological form and ecological function of the stream segment in accordance with proposed paragraph (b)(2) following the completion of construction and revegetation of the fill or coal mine waste disposal structure.

Both the 1979 and 1983 versions of our permanent regulatory program regulations prohibit the placement of sedimentation ponds in perennial streams unless approved by the regulatory authority. See 30 CFR 816.46(a)(2) (1979) and 816.46(c)(1)(ii) (1983). However, the preamble to the 1979 rules explains that construction of sedimentation ponds in streams typically is a necessity in steep-slope mining conditions:

> Sedimentation ponds must be constructed prior to any disturbance of the area to be drained into the pond and as near as possible to the area to be disturbed. [Citation omitted.] Generally, such structures should be located out of perennial streams to facilitate the clearing, removal and abandonment of the pond. Further, locating ponds out of perennial streams avoids the potential that flooding will wash away the pond. However, under design conditions, ponds may be constructed in perennial streams without harm to public safety or the environment. Therefore, the final regulations authorize the regulatory authority to approve construction of ponds in perennial streams on a site-specific basis to take into account topographic factors.
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> Commenters suggested allowing construction of sedimentation ponds in intermittent and perennial streams. Because of the physical, topographic, or geographical constraints in steep slope mining areas, the valley floor is often the only possible location for a sediment pond. Since the valleys are steep and quite narrow, dams must be high and must be continuous across the entire valley in order to secure the necessary storage.
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> The Office recognizes that mining and other forms of construction are presently undertaken in very small perennial streams. Many Soil Conservation Service (SCS) [now the Natural Resources Conservation Service] structures are also located in perennial streams. Accordingly, OSM believes these cases require thorough examination. Therefore, the regulations have been modified to permit construction of sedimentation ponds in perennial streams only with approval by the regulatory authority.

44 FR 15159–15160 (Mar. 13, 1979) (citations omitted).

In short, what was true in 1979 remains true today; *i.e.,* sedimentation ponds must be constructed where there is sufficient storage capacity, which, in narrow valleys lacking natural terraces, typically means in the stream.

Our proposed rule is consistent with a March 1, 2006, letter from Benjamin Grumbles, Assistant Administrator of the EPA, to John Paul Woodley, Assistant Secretary of the Army (Civil Works). Among other things, that letter states that the sedimentation pond must be constructed as close to the toe of the fill as practicable to minimize temporary adverse environmental impacts associated with construction and operation of the waste treatment system.

19. Section 816.71: How must I dispose of excess spoil?

We propose to revise our excess spoil rules to minimize the extent to which excess spoil fills adversely impact perennial and intermittent streams, to improve fill stability, and to enhance fill aesthetics and compatibility with surrounding landforms. As previously discussed in the portions of this preamble concerning 30 CFR 780.35, we propose to move paragraphs (b)(1) (design certification), (c) (location), and (d)(1) (foundation investigations) of the existing version of 30 CFR 816.71 to 30 CFR 780.35 as part of our effort to place provisions that are solely design considerations and requirements in our permitting regulations in subchapter G rather than in the performance standards in subchapter K.

Proposed Paragraph (a): General Requirements

Both the existing and proposed versions of paragraph (a) require that excess spoil be placed in a controlled manner. However, we propose to revise the introductory language of this paragraph to specifically require that excess spoil be transported and placed by mechanical means. The added language is intended to more fully implement 515(b)(22)(A) of SMCRA,[608] which requires that excess spoil be ''transported and placed in a controlled manner in position for concurrent compaction and in such a way to assure mass stability and to prevent mass movement.'' Our existing rules at 30 CFR 816.73 allow end-dumping of excess spoil down steep slopes into a valley. This practice relies upon gravity transport, rather than mechanical transport, of spoil to its final location. We no longer consider gravity transport of spoil to its final location to be controlled placement under section 515(b)(22)(A) of SMCRA.[609] The preamble to our proposed removal of 30 CFR 816.73 explains the shortcomings of end-dumping and durable rock fills in greater detail. However, nothing in the proposed revisions to our excess spoil requirements would prohibit the construction of valley fills, head-of-hollow fills, sidehill fills, or any type of fill other than durable rock fills.

We propose to revise existing paragraphs (a)(1) through (3) and add paragraphs (a)(4) through (7) as follows:

- Proposed paragraph (a)(1) is substantively identical to existing paragraph (a)(1) except that we propose to add a requirement that excess spoil placement will minimize adverse effects of leachate and surface-water runoff on the biological condition of perennial and intermittent streams within the permit area, not just adverse effects on surface water and groundwater as in the existing rule. The new requirement would implement section 515(b)(24) of SMCRA [610] more fully by minimizing adverse impacts of the operation on fish, wildlife, and related environmental values.
- Proposed paragraph (a)(2) is substantively identical to existing paragraph (a)(2).
- We propose to revise paragraph (a)(3) to be more consistent with the underlying requirement in section 515(b)(22)(G) of SMCRA,[611] which provides that excess spoil must be placed in a manner that will ensure that ''the final configuration is compatible with the natural drainage pattern and surroundings and suitable for intended uses.'' As revised, proposed paragraph (a)(3) would require that the final surface configuration of the fill be suitable for revegetation and the postmining land use or uses and be compatible with the natural drainage pattern and surroundings. The existing

[608] 30 U.S.C. 1265(b)(22)(A).

[609] *Id.*

[610] 30 U.S.C. 1265(b)(24).

[611] 30 U.S.C. 1265(b)(22)(G).

rule does not mention the final configuration of the fill or the natural drainage pattern. Our proposed revisions would correct those omissions.

• Proposed paragraph (a)(4) would add a requirement that excess spoil be placed in a manner that would minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. This provision parallels the language of section 515(b)(24) of SMCRA,[612] which applies to all aspects of surface coal mining and reclamation operations, including the disposal of excess spoil.

• Proposed paragraph (a)(5) would require that excess spoil be placed in a manner that would ensure that the fill will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in damage from flooding when compared with the impacts of premining peak flows.

• Proposed paragraph (a)(6) would require that excess spoil be placed in a manner that would ensure that the fill will not preclude any existing or reasonably foreseeable use of surface water or groundwater or, for surface water downstream of the fill, preclude attainment of any designated use under section 101(a) or 303(c) of the Clean Water Act.[613] The proposed language parallels the terminology in our proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5, which relies in large measure upon the status of existing, reasonably foreseeable, and designated uses of water.

• Proposed paragraph (a)(7) would require that excess spoil be placed in a manner that would ensure that the fill will not cause or contribute to an exceedance of any applicable federal, state, or tribal water quality standards.

Proposed paragraphs (a)(5) through (7) would more fully implement sections 510(b)(3) and 515(b)(10) of SMCRA.[614] Section 510(b)(3)[615] prohibits approval of a permit application unless the applicant demonstrates and the regulatory authority finds that the proposed operation ''has been designed to prevent material damage to the hydrologic balance outside the permit area.'' Section 515(b)(10)[616] requires that surface coal mining and reclamation operations be conducted so as to ''minimize disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' The proposed revisions also are consistent with our proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5, which focuses on mining-related impacts to uses of groundwater and surface water.

Proposed Paragraph (b): Stability Requirements

We propose to move existing paragraph (b))(1), which pertains to certification of the design for the excess spoil fill and appurtenant structures, to 30 CFR 780.35 as part of our effort to move permitting requirements from the performance standards of subchapter K to the permitting provisions of subchapter G. We propose to redesignate existing paragraph (b)(2) as paragraph (b)(1) and revise it to require that the fill not only be designed to attain a minimum static safety factor of 1.5 as required by the existing rules, but that the fill actually be constructed to attain that safety factor. This change is consistent with section 515(b)(22)(A) of the Act,[617] which requires that all excess spoil be placed in a way that ensures mass stability and prevents mass movement.

We also propose to redesignate existing paragraph (d)(2), which requires keyway cuts for excess spoil fills built on steep slopes, as paragraph (b)(2). In addition, we propose to replace the term ''keyway cuts'' with ''bench cuts.'' The term ''keyway cut'' is technically a cut beneath a dam that is used to extend low-permeability fill material to, but not into, bedrock. The term ''bench cut'' is more appropriate here because it refers to cuts into bedrock, not just down to bedrock. Fill construction under steep-slope conditions requires that cuts be made into bedrock, not just down to bedrock, to ensure stability. Therefore, our proposed revisions would provide greater fill stability than the existing regulations.

Proposed Paragraph (c): Compliance With Permit

We propose to move the fill location requirements of existing paragraph (c) to 30 CFR 780.35 because those requirements pertain primarily to the fill design and thus are more appropriately codified as part of the permitting provisions of subchapter G. We propose to replace those requirements with a performance standard reminding the permittee that the fill must be constructed in accordance with the design and plans approved in the permit. Proposed paragraph (c) would require that fills be built on the sites selected under section 780.35 in a manner consistent with the designs submitted under those sections and approved as part of the permit.

Proposed Paragraph (d): Requirements for Handling of Organic Matter and Soil Materials

We propose to move the foundation investigation requirements of existing paragraph (d)(1) to 30 CFR 780.35 to consolidate those provisions with a similar and overlapping foundation investigation requirement in that section. We also propose to redesignate existing paragraph (d)(2) as paragraph (b)(2) as discussed above.

We propose to redesignate existing paragraph (e)(1) as new paragraph (d). Proposed paragraph (d) would require that soil and organic matter, including vegetative materials, in the footprint of excess spoil fills be salvaged, stored, and redistributed or otherwise used in a manner consistent with our proposed revisions to 30 CFR 780.12(e) and 816.22.

Proposed Paragraph (e): Surface Runoff Control Requirements

As discussed above, we propose to redesignate existing paragraph (e)(1) as new paragraph (d). In addition, we propose to redesignate existing paragraphs (e)(2) through (5) as paragraphs (g)(1), (h), (i), and (g)(3), respectively.

We propose to redesignate existing 30 CFR 816.72(a) as 30 CFR 816.71(e) and revise it to apply to all fills because control of surface-water runoff from the fill and adjacent areas is critical to the stability of all types of fills, not just valley and head-of-hollow fills. Proposed paragraph (e)(1), like existing 30 CFR 816.72(a), would require that runoff from areas above the fill and runoff from the surface of the fill be directed into stabilized channels designed to meet the requirements of 30 CFR 816.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event. We do not consider surface runoff diversions constructed under proposed 30 CFR 816.71(e)(1) to be stream-channel diversions or restored streams, nor would they qualify as offsetting fish and wildlife enhancement measures under proposed 30 CFR 780.28(d)(2).

In proposed paragraph (e)(1)(ii), we propose to add a requirement that those

[612] 30 U.S.C. 1265(b)(24).

[613] 33 U.S.C. 1251(a) and 1313(c), respectively.

[614] 30 U.S.C. 1265(b)(3) and (10).

[615] 30 U.S.C. 1265(b)(3).

[616] 30 U.S.C. 1265(b)(10).

[617] 30 U.S.C. 1265(b)(22)(A).

channels be designed using the appropriate regional NRCS synthetic storm distribution. The preamble to proposed 30 CFR 780.29 explains the rationale for this proposed requirement.

Like its counterpart in existing 30 CFR 816.72(a), proposed paragraph (e)(2) would prohibit directing uncontrolled surface runoff over the outslope of the fill. Like the existing rule, it also would require that the permittee grade the top surface of a completed fill such that the final slope after settlement will be toward properly designed drainage channels.

Proposed Paragraph (f): Control of Water Within the Footprint of the Fill

Our proposed revisions to this paragraph focus on underdrain requirements, with particular emphasis on ensuring the use of hard, weather-resistant materials and construction techniques that will promote long-term stability. We propose to require that the underdrain system be designed to carry the anticipated infiltration of water due to precipitation, snowmelt, and water from seeps and springs in the foundation of the disposal area away from the excess spoil fill. This requirement would minimize the phreatic level within the fill. We also propose to require that the underdrain system be protected from material piping, clogging, and contamination by an adequate filter system designed and constructed using current, prudent engineering practices to ensure the long-term functioning of the underdrain system. A long-term functioning filter using natural materials generally requires multiple lifts of material specifically sized, graded, and placed so that the overlying lift is progressively smaller in diameter. Geotextile material may be used for filter construction. Filter construction is vital to providing a long-term functioning underdrain.

We propose to prohibit the use of perforated pipe as an alternative to hard, weather-resistant rock for two reasons. First, minor shifts within a fill mass can result in a broken and consequently dysfunctional pipe underdrain, but a rock underdrain of sufficient size is likely to be flexible enough to retain sufficient continuity to transport infiltrated water from the fill. Second, a pipe with small perforations and limited to a single flow-through orifice is more likely to clog than a porous rock underdrain with multiple alternative pathways for water transport.

Future changes in local surface-water and groundwater hydrology may result in water infiltration into the fill in excess of what is anticipated. Therefore, we propose to allow the use of perforated pipe in an underdrain system only for the purpose of enhancing the capability of the underdrain to pass water in excess of the anticipated maximum infiltration. However, the rock underdrain must be capable of transporting the anticipated maximum water infiltration out of the fill independent of the presence of the perforated pipe. In addition, the perforated pipe must be made of materials that are not susceptible to corrosion (not just corrosion-resistant materials as in the existing rules) and sufficiently crush-resistant to withstand pressures at the depth at which the pipe will be buried.

Finally, we propose to specify that only hard rock that is resistant to weathering, for example, well-cemented sandstone and massive limestone, and that is not acid-forming or toxic-forming may be used to construct durable rock underdrains. The proposed rule would require that the underdrain be free of both soil and fine-grained, clastic rocks such as siltstone, shale, mudstone, and claystone. All rock used to construct underdrains would have to meet the criteria in the following table:

Test	ASTM standard	AASHTO standard	Acceptable results
Los Angeles Abrasion	C 131 or C 535	T 96	Loss of no more than 50 percent of test sample by weight.
Sulfate Soundness	C 88 or C 5240	T 104	Sodium sulfate test: Loss of no more than 12 percent of test sample by weight. Magnesium sulfate test: Loss of no more than 18 percent of test sample by weight.

Section 515(b)(22) of SMCRA [618] and most of the rules implementing that statutory provision focus on the long-term stability of excess spoil fills. Long-term stability is of great importance because the industry does not provide maintenance for fills following final bond release, nor does the regulatory authority monitor fills after final bond release. An effective underdrain system is a critical factor in ensuring fill stability.

A functional underdrain system allows water from surface-water infiltration into the fill mass and from seeps and springs in the fill's foundation to freely pass from the fill. The absence of an effective underdrain can result in the formation of a phreatic surface and the associated potential for destabilization because of increased pore-water pressures within the fill mass. The effectiveness of an underdrain depends on whether the material is sufficiently permeable or hydraulically conductive to convey all subsurface water from the fill. This in turn depends on the presence of large and interconnected pores or voids between the material particles. For this reason, it is important that the underdrains be composed of large, blocky rock. For an underdrain to function well over the long term, the rock must be resistant to weathering and hard enough to withstand the effects of blasting and conveyance from the blast site to the site at which the underdrain system is being constructed. Rock that is not resistant to weathering effects, *i.e.,* rock that is not ''sound,'' will disintegrate into fragments too small to act as an effective filter and consequently make the underdrain much less permeable.

Historically, the criterion governing whether rock is suitable as underdrain material has been its ''durability.'' Existing 30 CFR 816.71(f)(3) requires that the rock underdrains of excess spoil fills ''be constructed of durable, nonacid-, nontoxic-forming rock (*e.g.,* natural sand and gravel, sandstone, limestone, or other durable rock) that does not slake in water or degrade to soil material, and which is free of coal, clay or other nondurable material.'' Similar language appears in existing 30 CFR 816.73(b) for durable rock fills. The durable rock fill construction technique has been the predominant construction method for the last 30 years. Unlike other construction methods, it does not require underdrain construction prior to spoil placement or bottom-to-top spoil placement in thin lifts. Instead, spoil is end-dumped into valleys in a single lift or multiple lifts, during which gravity segregation theoretically forms a free-draining zone of large-sized rock in the lower one-third of the fill.

The existing regulations do not specify how the durability of rock is to

[618] 30 U.S.C. 1265(b)(22).

be determined. In general, both the mining industry and regulatory authorities have relied upon the slake durability index (SDI) for this purpose. This test involves the placement of oven-dried rock samples in 2 mm wire mesh drums 1/3 immersed in water, which are then rotated at 20 rpm for 10 minutes for two cycles. The weight of the sample remaining in the drum is divided by the weight of the original sample and multiplied by 100 to obtain a percentage. SDI values of 90 percent or more are generally considered durable.

OSMRE studies and inspection reports indicated that some of the rock material being used in durable rock fill construction was weak and non-durable despite documentation in the permit that the materials being used were considered durable based on SDI tests. The apparent failure of the SDI tests to adequately distinguish between durable and nondurable rock was attributed to the nature of the test and the behavior of shale and other mudstones as they slake or disintegrate into soil. Frequently, samples with those geologic compositions would turn into loose flakes or mud balls that would not pass through the wire mesh during the test. State and federal regulatory authorities have developed a broad consensus that the SDI test is not adequate for surface coal mining and excess spoil fill construction purposes.

In response, we developed and tested an alternative testing protocol and classification system called the ''Strength Durability Classification'' (Welsh et al., 1991).[619] The initial phase of the Strength Durability Classification protocol, the jar-slake test, consists of soaking oven-dried rock samples in water for 24 hours to identify very low-durability rock by its short-term slaking behavior. Samples with minimal breakdown are then subjected to a second phase of free-swell and point-load tests. The free-swell test entails measuring the swell of an oven-dried sample immersed in water for 4 hours. The degree of swell reflects the amount of water absorbed into the void spaces of the rock. Rocks that absorb more water generally weather more rapidly. The point-load strength test involves placing samples between opposite conical platens that are pressed or ''loaded'' against the sample until it fails. The amount of load needed to generate failure is the point-load strength of the sample. The test is performed on at least 20 samples for statistical validity. After plotting the point-load strength and swell-test data on a graph, the points are compared to two ''zones'' on the same graph representing the acceptable value ranges for durable rock fill underdrains and more conventional, selectively placed rock underdrains. The Strength Durability Classification protocol has proven to be more discriminating than the SDI, but some critics claim that its durability standards are unrealistically stringent.

In 2002, we conducted a study in which we visually estimated the percent of durable rock in 44 durable rock fills under construction and judged whether a discernible underdrain was forming by gravity segregation. Of 44 fills under construction, 28 appeared to have less than 80 percent durable rock and 5 fills showed no visual evidence of having a functioning underdrain. The study found that excess spoil fills in Appalachia generally have been stable, but it recommended improvement in the design, construction, and regulation of fills to ensure long-term stability. One recommendation urged continued work on the development of a more discriminating method for determining rock durability. The study suggested that the amount of sandstone available at a minesite should be one criterion for approving a proposed durable rock fill. It also stated that it might be feasible to develop a quantitative method of assessing gravity-segregated underdrain formation.[620]

In a 2006 special study, we and the Kentucky Department of Surface Mine Reclamation and Enforcement found that 4 of 29 durable rock fills evaluated had ''questionable'' underdrains.[621]

Given the problems with rock durability determination discussed above, application of the SDI or other tests of comparable rigor will not ensure a functioning underdrain in any type of fill. While the SDI can distinguish rocks that will quickly slake or disintegrate into soil material, it does not adequately assess whether they can withstand crushing or weakening from blasting and handling in a mine operation or resist the long-term effects of weathering. Although the Strength Durability Classification protocol is somewhat more discriminatory than the SDI, it also is not sufficiently representative of the short-term and long-term dynamics of a surface mine site. The jar-slake and free-swell tests in particular do not adequately assess the long-term weathering resistance of the rock and the point-load test may not be sufficiently representative of the dynamic effects of blasting, collision, and abrasion.

Although there are other classification systems relating to rock durability in the literature, many are designed for rocks unlike those encountered in coal mining. Other protocols apply only to shale, include SDI in addition to other tests or indices, or measure the properties of in-place rock slopes.

Therefore, we propose to base the acceptability of rock for use in underdrains on the rock's hardness and resistance to weathering. Underdrains in a fill constructed in lifts occupy narrow corridors within the fill mass even when properly sized to handle anticipated maximum drainage discharge. Any clogging within these limited zones will quickly engender fill instability. Consequently, criteria for underdrain materials must be selected with the goal of ensuring that the underdrain system will remain effective on a long-term basis, not just until final bond release.

Our proposed rule would establish criteria based on rock lithology and the results of two methods that measure the rock's hardness and soundness via laboratory tests. First, materials used to construct underdrains must consist of hard rock that is resistant to weathering, such as well-cemented sandstone and massive limestone, and that is not acid-forming or toxic-forming (and thus would not result in acid or toxic mine drainage). In addition, materials used to construct underdrains must be free of both soil and fine-grained, clastic rocks such as siltstone, shale, mudstone, and claystone, which generally are weaker and more prone to rapid weathering than sandstones and limestone. Fine-grained rocks also are problematic in that they produce a fine-grained, impermeable soil when highly weathered. From field observations of durable rock fills under construction, we know that the appearance of shale boulders can be deceptive. Large shale particles that appear competent soon after being end-dumped often quickly disintegrate from natural weathering processes, the stress resulting from being buried at depth, and abrasion

[619] Welsh, R.A., Jr., Vallejo, L.E., Lovell, L.W., and Robinson, M.K., 1991, The U.S. Office of Surface Mining (OSM) Proposed Strength-Durability Classification System, in ''Proceedings of Symposium on Detection of and Construction at the Soil/Rock Interface'' (W.F. Kane and B. Amadei, eds.), ASCE Geotechnical Special Publication No. 28, American Society of Civil Engineers, New York, NY, pp. 19–24.

[620] Office of Surface Mining, ''Long-Term Stability of Valley Fills'' (2002) in Appendices A, B, and C of ''Draft Programmatic Environmental Impact Statement—Mountaintop Mining/Valley Fills in Appalachia,'' U.S. Environmental Protection Agency, 2003, EPA 9–03–R–00013, EPA Region 3, Philadelphia, PA, available at *http://www.epa.gov/region3/mtntop/eis2003.htm.*

[621] Kentucky Department of Natural Resources and U.S. Office of Surface Mining, ''Excess Spoil Fill Stability,'' Evaluation Year 2006 Special Study, OSM open file report, Lexington, KY, 2006.

from handling. Even if tests find some shale to be hard and sound enough for underdrain material, the certifying engineer would have difficulty ensuring that all rock placed in the underdrain was correctly selected.

Second, the materials must meet certain threshold criteria as determined by the Los Angeles abrasion test and either the sodium sulfate or magnesium sulfate soundness test.[622] Highway departments frequently use both tests to assess the suitability of rock for the construction of roads and riprap-lined drainage channels. The Los Angeles abrasion test focuses on rock hardness. It consists of placement of the rock sample in a steel drum containing a prescribed number of steel spheres. After rotating the drum 1,000 times, the sample is removed and sieved. The amount of degradation of the sample is reported as the percent (by weight) of the sample lost through the sieve. The shocks, collisions, and abrasions that the sample experiences are reasonably representative of the dynamics and handling of materials at a minesite.

The sodium sulfate and magnesium sulfate soundness tests measure the susceptibility of rock to weathering. In these tests, the rock sample is immersed in a saturated solution of sodium sulfate or magnesium sulfate, after which the sample is placed in an oven to dehydrate the salts, which precipitate in the voids between the rock particles. The process is then repeated on the sample for a specified number of cycles to simulate freezing and thawing. The external expansive force of the salt crystals during the immersion phase of each cycle simulates the expansion of water upon freezing. We acknowledge that freezing of water in rocks and soil does not occur in all climates. Furthermore, its occurrence is limited to a relatively shallow depth below the surface and consequently is not a process that would affect most of the buried underdrain. However, an underdrain is only as good as its weakest point and, like the natural weathering process, this test exploits openings and weaknesses in rock such as fractures and the porous zones of weakly cemented grains. The sulfate soundness tests measure the rock's ability to withstand repeated freeze-thaw cycles and thus facilitate identification of those rock materials most likely to remain competent on a long-term basis.

[622] See *http://www.pavementinteractive.org/index.php?title=Sulfate_Soundness_Test* (last accessed January 19, 2015).

Proposed Paragraph (g): Placement of Excess Spoil

Proposed paragraph (g)(1) is the counterpart to existing paragraph (e)(2). We propose to move the provision of existing paragraph (e)(2) requiring that the fill be covered with topsoil or other suitable materials to proposed paragraph (d), which contains all requirements related to soils. We also propose to eliminate the provision in existing paragraph (e)(2) that would allow the regulatory authority to approve an exception to the requirement that excess spoil be placed in horizontal lifts of no more than 4 feet in thickness. Placement in lifts exceeding 4 feet in thickness will not uniformly result in the concurrent compaction necessary to minimize the volume of void spaces in the fill. Minimization of the volume of void spaces is critical to minimizing the adverse impact on fish and wildlife because the volume of void spaces correlates directly with the amount of dissolved solids that migrate from the fill into the receiving stream. An increase in dissolved solids can have a substantial adverse impact on aquatic life.

Proposed paragraph (g)(1) would require the use of mechanized equipment to transport and place excess spoil. Similarly, proposed paragraph (g)(2) would prohibit the use of any excess spoil transport and placement technique that involves end-dumping, wing-dumping, cast-blasting, gravity placement, or casting spoil downslope, all of which are not conducive to concurrent compaction or placement in lifts no greater than 4 feet in thickness. As noted above, section 515(b)(22)(A) of SMCRA [623] provides that all excess spoil material resulting from surface coal mining operations must be ''transported and placed in a controlled manner in position for concurrent compaction and in such a way to assure mass stability and to prevent mass movement.'' Our proposed prohibition on the placement of excess spoil in horizontal lifts greater than 4 feet in thickness would improve implementation of this provision of SMCRA, especially the requirements for controlled placement and concurrent compaction. As explained in our discussion of proposed paragraph (a), our existing rules at 30 CFR 816.73 allow end-dumping of excess spoil down steep slopes into a valley. This practice relies upon gravity transport of spoil to its final location. We no longer consider gravity transport of spoil to its final location to be controlled placement under section 515(b)(22)(A) of SMCRA.[624] Only mechanical transport meets that statutory requirement. The preamble to our proposed removal of 30 CFR 816.73 explains the shortcomings of end-dumping and durable rock fills in greater detail.

[623] 30 U.S.C. 1265(b)(22)(A).

Furthermore, we have found that gravity placement in single or large lifts has resulted in elevated suspended solids during storm events because of the flushing of fine material from the loose-dumped excess spoil and from the typically large unvegetated active free face associated with this construction method. Placement in smaller lifts with concurrent compaction would decrease the permeability of the fill, inhibiting infiltration, allowing revegetation of the fill face concurrent with construction of the fill, and reducing discharges of both suspended and dissolved solids.

Proposed paragraph (g)(3) is the counterpart to existing paragraph (e)(5). Proposed paragraph (g)(3)(i) would require that acid-forming and toxic-forming materials be handled and placed in accordance with 30 CFR 816.38 and in a manner that will minimize adverse effects on plant growth and the approved postmining land use. Under proposed 30 CFR 816.38(d), the only acceptable techniques for the placement of acid-forming and toxic-forming materials would be isolation and treatment. The proposed rule would not authorize use of saturation techniques because of the stability risk that saturation poses for fills and because of the possibility that use of saturation techniques would increase discharges of total dissolved solids, which could have adverse impacts on aquatic life in streams that receive those discharges. Proposed paragraph (g)(3)(ii) would require that the permittee cover combustible materials with noncombustible materials in a manner that will prevent sustained combustion and minimize adverse effects on plant growth and the approved postmining land use.

Proposed paragraph (g)(3) is consistent with section 515(b)(14) of SMCRA,[625] which requires that all acid-forming materials and toxic materials be ''treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters'' and which requires that materials constituting a fire hazard be treated or buried to prevent sustained combustion. Section 515(b)(22)(I) of SMCRA,[626] which provides that excess spoil must be placed in a manner that meets ''all other

[624] *Id.*

[625] 30 U.S.C. 1265(b)(14).

[626] 30 U.S.C. 1265(b)(22)(I).

requirements of this Act,'' provides additional authorization for proposed paragraph (g)(3).

Proposed Paragraph (h): Final Configuration

Proposed paragraph (h) is the counterpart to existing paragraph (e)(3), which requires that the final configuration of the fill be suitable for the approved postmining land use. Proposed paragraph (h)(1) would add requirements that the final configuration of the fill be compatible with the natural drainage pattern and the surrounding terrain and, to the extent practicable, consistent with natural landforms. The added provisions would better implement section 515(b)(22)(G) of SMCRA,[627] which requires that the final configuration be ''compatible with the natural drainage pattern and surroundings and suitable for intended uses.''

Proposed paragraph (h)(2) is substantively identical to the provisions of existing paragraph (e)(3) concerning terracing.

Proposed paragraph (h)(3)(i) would add a new requirement for the use of geomorphic reclamation principles for the final surface configuration of the fill. Specifically, it would require that the top surface of the fill be graded to create a topography that includes ridgelines and valleys with varied hillslope configurations when practicable, compatible with stability and postmining land use considerations, and generally consistent with the premining topography. Geomorphic reclamation principles are intended to produce a final surface configuration with greater erosional stability and more ecological benefits than other techniques. Proposed paragraph (h)(3)(ii) would allow the final surface elevation of the fill to exceed the elevation of the surrounding terrain when necessary to minimize placement of excess spoil in perennial and intermittent streams, provided the final configuration complies with the compatibility and postmining land use requirements of proposed paragraphs (a)(3) and (h)(1).

Sections 515(b)(10)(B)(i) and 515(b)(24) of SMCRA provide the primary statutory authority for proposed paragraphs (h)(3)(i) and (ii). Section 515(b)(10)(B)(i) of SMCRA[628] requires that surface coal mining operations be conducted to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area. Section 515(b)(24) of SMCRA[629] requires that, to the extent possible using the best technology currently available, surface coal mining and reclamation operations be conducted so as to minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable.

Finally, we propose to add paragraph (h)(3)(iii), which would provide that the geomorphic reclamation requirements of paragraph (h)(3)(i) do not apply in situations in which they would result in burial of a greater length of perennial or intermittent streams than traditional fill design and construction techniques. Allowing use of reclamation techniques that would bury a greater length of stream than other techniques would not be consistent with section 515(b)(24) of SMCRA as discussed above.

Proposed Paragraph (i): Impoundments and Depressions

Proposed paragraph (i) is the counterpart to existing paragraph (e)(4), which prohibits the construction of permanent impoundments on the completed fill and establishes criteria for the construction of small depressions on the surface of the fill. The proposed rule is substantively identical to the existing rule with the exception that we propose to further restrict the conditions under which small depressions may be constructed or retained on the completed fill. Specifically, we propose to allow small depressions only when they are consistent with the hydrologic reclamation plan approved in the permit in accordance with 30 CFR 780.22 and when infiltration resulting from those depressions would not result in elevated levels of parameters of concern (especially sulfate and other ions that increase specific conductance and electrical conductivity in streams) in discharges from the fill. The proposed revisions would assist in ensuring that discharges from the fill will not cause material damage to the hydrologic balance outside the permit area, in compliance with section 510(b)(3) of SMCRA.[630] It also would minimize ''disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems'' as required by section 515(b)(10) of SMCRA.[631]

Proposed Paragraph (j): Surface Area Stabilization

Proposed paragraph (j) is substantively identical to existing paragraph (g).

Proposed Paragraph (k): Inspections and Examinations

Proposed paragraph (k) is the counterpart to existing paragraph (h), which establishes inspection requirements for excess spoil fills. We propose to revise the professional inspection requirements for excess spoil fills by specifying that the engineer or other specialist must conduct additional complete inspections during critical construction periods to ensure that the fill is constructed properly. Proposed paragraphs (k)(2)(i) and (ii) would require that the engineer or specialist conduct daily examinations during placement and compaction of fill materials and maintain a log of those examinations. Proposed paragraph (k)(3)(iii) would require that the certified report that the engineer or specialist submits for each complete inspection include a review and summary of the daily examination logs. If the report identifies any evidence of instability, structural weakness, or other hazardous conditions, proposed paragraph (k)(3)(ii) would require that the permittee submit an application for a permit revision that includes appropriate remedial design specifications. The proposed revisions are intended to ensure that excess spoil fills are constructed in compliance with the stability requirements of section 515(b)(22) of SMCRA.[632]

Placement of the underdrain and the placement of the filter are each considered critical construction phases. Therefore, two separate inspections are required if the underdrain is constructed first and the filter system is constructed later. However, these two phases can be concurrent, in which case one inspection may suffice for both phases. We invite comment on whether the rule should require additional specific oversight by the engineer when segregated, graded, natural material is used to construct the filter system.

Finally, we propose to remove existing paragraph (h)(3)(ii), which pertains to durable rock fills constructed under 30 CFR 816.73, consistent with our proposal to prohibit that method of fill construction. The preamble concerning our proposed removal of 30 CFR 816.73 explains our rationale for that proposed action.

[627] 30 U.S.C. 1265(b)(22)(G).

[628] 30 U.S.C. 1265(b)(10)(B)(i).

[629] 30 U.S.C. 1265(b)(24).

[630] 30 U.S.C. 1260(b)(3).

[631] 30 U.S.C. 1265(b)(10).

[632] 30 U.S.C. 1265(b)(22).

Proposed Paragraph (l): Coal Mine Waste

Proposed paragraph (l) would establish requirements for the disposal of coal mine waste in excess spoil fills. Proposed paragraph (l) is substantively identical to existing paragraph (i) except that we propose to add proposed paragraph (l)(1), which would allow disposal of coal mine waste in excess spoil fills only if the permittee demonstrates, and the regulatory authority finds in writing, that there is no credible evidence that the disposal of coal mine waste in the excess spoil fill will cause or contribute to a violation of applicable water quality standards or effluent limitations or result in material damage to the hydrologic balance outside the permit area. The proposed addition would assist in ensuring that the hydrologic balance protection requirements of sections 510(b)(3) and 515(b)(10) of SMCRA are met.[633] In addition, we propose to add a cross-reference to 30 CFR 816.81 to clarify that the coal mine waste must be placed in accordance with the general coal mine waste disposal requirements of 30 CFR 816.81, not just the refuse pile requirements of 30 CFR 816.83.

Proposed Paragraph (m): Underground Disposal

Proposed paragraph (m) is substantively identical to existing paragraph (j).

20. Why are we proposing to remove the provisions for rock-core chimney drains in existing 30 CFR 816.72(b)?

We propose to remove existing 30 CFR 816.72(b) because mine operators are no longer constructing fills with rock-core chimney drains. A rock-core chimney drain is a vertical column of durable rock extending from the toe of the fill to the head of the fill and from the base of the fill to the surface of the fill. A few small fills constructed decades ago included rock-core chimney drains, but, to the best of our knowledge, the technique has not been used recently or on large fills.

Our proposed removal of 30 CFR 816.72(b) would not prohibit the construction of head-of-hollow or valley fills without rock-core chimney drains. However, all proposed head-of-hollow and valley fills would have to meet the permitting requirements of proposed 30 CFR 780.28 and 780.35. If approved, these fills would have to comply with the performance standards of proposed 30 CFR 816.71.

21. Why are we proposing to remove the provisions for durable rock fills in existing 30 CFR 816.73?

Existing 30 CFR 816.73 allows excess spoil fills to be constructed by end-dumping, in which overburden is pushed or dumped over the side of the mountain to cascade into the valley below. In theory, the larger rocks roll to the bottom of the valley to form an underdrain by gravity segregation. We propose to remove this section for four reasons. First, further scrutiny of the statutory provisions governing disposal of excess spoil indicates that this method of fill construction does not comply fully with section 515(b)(22)(A) of SMCRA.[634] That provision of SMCRA requires that surface coal mining and reclamation operations place all excess spoil material in such a manner that the ''spoil is transported and placed in a controlled manner in position for concurrent compaction and in such a way [as] to assure mass stability and to prevent mass movement.'' End-dumping of excess spoil relies upon gravity both for transport after dumping and to determine final placement, which does not comport well with the statutory requirement for transport and placement in a controlled manner.

Second, as discussed in the preamble to proposed 30 CFR 816.71(f), we have observed inconsistent formation of underdrains in durable rock fills. Non-functional underdrains may compromise the stability of the fill by raising the moisture content of the fill material, which increases the ability of that material to move. Saturated fills are prone to buckling and landslides.

Third, as discussed in detail below, durable rock fills may increase the risk of flooding and associated damage because of the large size of the fill face and the length of time that the face remains unvegetated.

Fourth, the lack of compaction during the construction of durable rock fills creates the potential for increased levels of total dissolved solids in discharges from those fills because of the greater amount of pore space and reactive surface compared with other types of fills. Higher levels of total dissolved solids in discharges from the fill translate to elevated electrical conductivity in streams downgradient of the fill. As summarized in Part II of this preamble, elevated electrical conductivity can adversely impact the capability of the stream to support certain species of benthic macroinvertebrates, which in turn reduces the capability of the stream to support species of fish dependent upon those macroinvertebrates as a food source.

Therefore, we propose to refine our existing regulations by removing 30 CFR 816.73, which allows construction of durable rock fills by gravity transport and placement. With respect to other types of excess spoil fills, proposed 30 CFR 816.71(g) would require use of mechanized equipment to transport and place the excess spoil in lifts no greater than 4 feet, which would greatly increase both control and compaction. Increased compaction of the spoil placed in the fill would increase the density of each unit of excess spoil and thus decrease the amount of space that it occupies. The resulting reduction in the amount of spoil storage space needed would (or at least could) reduce the footprint of the fill, which should reduce the number and length of stream segments buried by the fill.

Increased compaction also should reduce discharges of total dissolved solids and other parameters of concern, thus minimizing the adverse impacts on fish, wildlife, and related environmental values as required by section 515(b)(24) of the Act.[635] Finally, construction of fills using mechanized methods of transport and placement would facilitate the special handling of acid-forming and toxic-forming materials, which should result in a reduction in the concentration and volume of toxic materials, such as selenium, in water discharged from the fill, which would further minimize adverse impacts on fish, wildlife, and related environmental values.

As mentioned above, some durable rock fills have exacerbated flooding during and after precipitation events. Flooding may threaten public safety and cause property damage downstream of the fill. The following case studies describe how durable rock fills may contribute to flooding and damage from flooding.

Snap Creek, West Virginia

On June 13, 2010, an area near the town of Man in Logan County, West Virginia, received approximately 4.8 inches of rain within 24 hours. Flood-related damage occurred downstream from an end-dumped durable rock fill on the Snap Creek minesite (Permit S–5013–96) south of Man. Stormwater runoff flowing down the face of the fill completely filled the sedimentation pond near the toe of the fill. The sediment-laden runoff then scoured the flood plain of the Left Fork of Rich Creek down to bedrock for a distance of

[633] 30 U.S.C. 1260(b)(3) and 1265(b)(10).

[634] 30 U.S.C. 1265(b)(22)(A).

[635] 30 U.S.C. 1265(b)(24).

approximately 0.25 mile. The scoured material, along with spoil from the face of the fill, was deposited on the flood plain and along the stream channel for an additional 0.25 mile to its confluence with Rich Creek. Sedimentation continued along Rich Creek approximately 0.25 mile further to the stream's confluence with the Guyandotte River. No one was injured and little property damage occurred because most of the affected areas were uninhabited.

The fill was being graded to its final configuration when the rainfall event occurred. The finer fractions of the soil exposed on the face of an end-dumped fill during final grading are very susceptible to erosion, particularly during heavy rainfall events. Protecting downstream areas from this type of mudflow at this stage of fill construction is nearly impossible, which provides additional justification for prohibiting the construction of durable rock fills.

Kayford South, West Virginia

On June 13, 2010, a significant rainfall event occurred near the town of Dorothy in Raleigh County, West Virginia, resulting in flooding, erosion, and deposition of eroded mine spoil downstream from a durable rock fill associated with a surface mine (Permit S–3008–00). The event eroded the face of the fill, which was being graded for reclamation, with the sediment completely filling the sedimentation pond below the toe of the fill. After filling the pond, water and mobilized sediment flowed down Gardner Branch approximately 0.5 mile to the confluence with the Clear Fork of the Coal River. The flow scoured the stream channel and deposited sediment along the length of Gardner Branch. In this case, no one was injured and little property damage occurred because the affected areas were uninhabited.

The fill was being graded to its final configuration when the rainfall event occurred. A primary issue at this site and other durable rock fills is the time lag between completion of excess spoil placement and final grading because of the top-down construction method. In this case, the lag was more than 2 years. During this time, the face of the fill was completely exposed and susceptible to erosion.

Lyburn, West Virginia

On July 19, 2002, a flood event on Winding Shoals Branch in Lyburn, Logan County, West Virginia, destroyed ten residences and damaged vehicles and property. Stormwater runoff, rock, mud, and debris from a surface mine (Permit S–5023–93) flooded the narrow stream valley. The primary cause of the significant damage at Lyburn was the condition of the durable rock fill and its proximity to structures. At the time of the storm, the company was reclaiming this end-dumped fill. As is typical of an end-dumped durable rock fill during reclamation, soil and small rock particles on the face of the fill were exposed and highly susceptible to erosion.

Our proposal to remove 30 CFR 816.73 and the authority that it provides to construct durable rock fills using end-dumping and gravity segregation is intended to prevent the recurrence of events like those discussed above. Fills constructed from the bottom up in accordance with 30 CFR 816.71 are much less susceptible to erosion and much less likely to contribute to flooding than are durable rock fills, which are constructed from the top down. The faces of fills constructed in accordance with 30 CFR 816.71 can be reclaimed and revegetated in stages, which reduces surface runoff and susceptibility to erosion, while the faces of durable rock fills cannot be reclaimed and revegetated until the fill is completed.

22. Section 816.74: What special requirements apply to the disposal of excess spoil on a preexisting bench?

We propose to revise 30 CFR 816.74(a) to clarify that the term ''preexisting bench'' applies only to features located on previously mined areas or on bond forfeiture sites. This term does not apply to benches created as part of an earlier phase of the mining operation that generated the excess spoil to be disposed of under this provision.

We propose to revise 30 CFR 816.74(b) for consistency with our proposed changes to 30 CFR 780.12(e) and 816.22 concerning the removal, salvage, storage, and redistribution of soil and organic matter. We propose to revise 30 CFR 816.74(c) by adding a requirement that underdrains comply with proposed 30 CFR 816.71(f)(3). In addition, proposed 30 CFR 816.74(e)(2), which is the counterpart to existing 30 CFR 816.74(d)(2), would require the use of all reasonably available spoil to eliminate all preexisting highwalls, consistent with the regulations governing backfilling and grading of previously mined areas under 30 CFR 816.106.

Finally, we propose to remove the gravity-transport provisions in 30 CFR 816.74(h) because this method of transporting spoil from one bench to another is not fully consistent with section 515(b)(22)(A) of SMCRA,[636] which provides that all excess spoil material resulting from surface coal mining operations must be ''transported and placed in a controlled manner in position for concurrent compaction and in such a way to assure mass stability and to prevent mass movement.'' Gravity transport is not transport in a controlled manner.

23. Section 816.81: How must I dispose of coal mine waste?

Proposed Paragraph (a): General Requirements

Proposed paragraph (a) is substantively identical to the first sentence of existing paragraph (a), except that we propose to add language requiring compliance with the refuse pile requirements of 30 CFR 816.83 and the coal mine waste impounding structure requirements of 30 CFR 816.84 when applicable.

Proposed Paragraph (b): Basic Performance Standards

Proposed paragraph (b) would include the remaining provisions of existing paragraph (a). Proposed paragraph (b)(1) would revise existing paragraph (a)(1) to require that the coal mine waste disposal facility minimize adverse effects not only on the quality and quantity of surface water and groundwater as in the existing rule, but also on the biological condition of perennial and intermittent streams within the permit area to the extent possible, using the best technology currently available. Our proposed revisions are consistent with section 515(b)(24) of SMCRA,[637] which requires that, to the extent possible using the best technology currently available, surface coal mining and reclamation operations be conducted so as to minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable.

We propose to add paragraph (b)(6), which would require that the coal mine waste disposal facility not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in increased damage from flooding when compared with the impacts of premining peak flows. We also propose to add paragraph (b)(7), which would require that the coal mine waste disposal facility not preclude any existing or reasonably foreseeable use of surface water or groundwater or, for surface wates downstream of the

[636] 30 U.S.C. 1265(b)(22)(A).

[637] 30 U.S.C. 1265(b)(24).

facility, preclude attainment of any designated use under section 101(a) or 303(c) of the Clean Water Act.[638] The proposed language parallels the terminology in our proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5, which relies in large measure upon the status of existing, reasonably foreseeable, and designated uses of water. In addition, we propose to add paragraph (b)(8), which would require that the coal mine waste disposal facility not cause or contribute to an exceedance of any applicable water quality standards. Finally, we propose to add paragraph (b)(9), which would require that the disposal facility not discharge acid or toxic mine drainage.

The proposed addition of paragraphs (b)(6) through (9) is intended to improve implementation of sections 510(b)(3) and 515(b)(10) of SMCRA. Section 510(b)(3)[639] prohibits approval of a permit application unless the applicant demonstrates and the regulatory authority finds that the proposed operation ''has been designed to prevent material damage to the hydrologic balance outside the permit area.'' Section 515(b)(10)[640] requires that surface coal mining and reclamation operations be conducted so as to ''minimize disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' The proposed revisions also are consistent with our proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5, which focuses on mining-related impacts to uses of groundwater and surface water. Finally, the proposed revisions are consistent with section 702(a) of SMCRA,[641] which provides that nothing in SMCRA may be construed as superseding, amending, modifying, or repealing the Clean Water Act or state laws enacted pursuant to the Clean Water Act.

Proposed Paragraph (c): Coal Mine Waste From Outside the Permit Area

Proposed paragraph (c) is substantively identical to existing paragraph (b).

Proposed Paragraph (d): Design and Construction Requirements

Proposed paragraph (d) would include existing paragraph (c) in revised form. Proposed paragraph (d)((1)(i) would require that coal mine waste disposal facilities be constructed in accordance with current, prudent engineering practices and any criteria established by the regulatory authority. The existing regulations require that the design of the facility meet those requirements, but they do not address the construction process, which also is important in ensuring that the structure is stable and performs as intended.

Proposed paragraph (d)(1)(ii) would require that, as part of the design certification, the engineer specifically certify that any existing and planned underground mine workings in the vicinity of the disposal facility will not adversely impact the stability of the structure. The Martin County Slurry Spill incident in Martin County, Kentucky on October 11, 2000, illustrates the magnitude of environmental damage that can result when impounded coal refuse slurry breaks through into adjacent underground mine workings that open to the surface. In this case, the mine openings discharged 306 million gallons of slurry into two tributaries of the Tug Fork River (Coldwater Fork and Wolf Creek). The slurry covered nearby residents' yards to a depth of as much as 5 feet, visibly polluted more than 100 miles of waterways, including the Big Sandy and Ohio Rivers, and devastated aquatic life in 70 miles of stream. Six public water intakes were adversely affected and alternative water supplies had to be arranged for 27,000 residents. Cleanup costs were approximately $59 million.[642]

Proposed paragraph (d)(1)(ii) is intended to ensure that each coal mine waste disposal facility is designed to prevent similar events. This design requirement would benefit the public, the environment, and mine operators by reducing the probability of breakthroughs into underground mine workings and the environmental and property damage and cleanup expenses that may result from those breakthroughs.

Proposed paragraph (d)(1)(iii) would require that the coal mine waste disposal facility be constructed in accordance with the design and plans submitted under 30 CFR 780.25 and approved in the permit and that a qualified registered professional engineer experienced in the design and construction of similar earth and waste structures certify that the facility has been constructed in accordance with the approved design. Proposed paragraph (d)(1)(iii) would provide additional safeguards for protection of the environment, public health and safety, and property. Thus, it would better implement section 102(a) of SMCRA,[643] which states that one of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' To the extent that proposed paragraph (d)(1)(iii) would improve stability, it also would improve implementation of section 515(b)(11) of SMCRA,[644] which requires that all waste piles be stabilized in designated areas, and sections 515(b)(13) and 515(f) of SMCRA,[645] which include provisions intended to ensure that coal mine waste impoundments are constructed in a manner that would protect public safety and public and private property. And the proposed revisions would be consistent with section 515(b)(23) of SMCRA,[646] which requires surface coal mining and reclamation operations to ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.''

Proposed Paragraph (e): Foundation Investigations

Proposed paragraph (e) is substantively identical to existing paragraph (d), except that we propose to add language requiring that the analysis of foundation conditions for the coal mine waste disposal facility take into consideration the effect of any underground mine workings located in either the permit area or the adjacent area. The rationale for this proposed change is the same as the rationale for proposed paragraph (d), as discussed above.

Proposed Paragraph (f): Soil Handling Requirements

Proposed paragraph (f) would require that vegetation, organic matter, and soil materials be salvaged, stored, and redistributed or otherwise handled in accordance with proposed 30 CFR

[638] 33 U.S.C. 1251(a) and 1313(c), respectively.

[639] 30 U.S.C. 1260(b)(3).

[640] 30 U.S.C. 1265(b)(10).

[641] 30 U.S.C. 1292(a).

[642] See *http://www.sourcewatch.org/index.php?title=Martin_County_sludge_spill* (last accessed February 4, 2015) and *http://www.jackspadaro.com/news_articles/2003/10_12_03/herald-leader10_12_03.html* (last accessed February 4, 2015).

[643] 30 U.S.C. 1202(a).

[644] 30 U.S.C. 1265(b)(11).

[645] 30 U.S.C. 1265(b)(13) and (f).

[646] 30 U.S.C. 1265(b)(23).

816.22. While 30 CFR 816.22 would apply in the absence of this rule, the addition of this paragraph would reaffirm the applicability of that rule to coal mine waste disposal facilities.

Proposed paragraphs (g) and (h): Emergency Procedures and Underground Disposal

Proposed paragraphs (g) and (h) are substantively identical to existing paragraphs (e) and (f), respectively.

24. Section 816.83: What special performance standards apply to coal mine waste refuse piles?

Proposed 30 CFR 816.83 is substantively identical to existing 30 CFR 816.83 except as discussed below. We propose to revise paragraph (b), which includes existing paragraph (a), to specify that the refuse pile must be constructed with the diversions and underdrains included in the approved design.

In proposed paragraph (b)(3), which corresponds to part of existing paragraph (a)(2), we propose to add a requirement that diversion channels be designed using the appropriate regional NRCS synthetic storm distribution to determine the peak flow from surface runoff from a 100-year, 6-hour precipitation event. The preamble to proposed 30 CFR 780.29 explains the rationale for this proposed requirement.

We propose to remove existing paragraph (c)(1) because it duplicates the soil handling requirements of proposed 30 CFR 816.81, which 30 CFR 816.83(a) cross-references.

In proposed paragraph (d)(2), which corresponds to existing paragraph (c)(3), we propose to delete language in the existing rule that allows the creation and retention of small depressions on the completed refuse pile. Removal of this provision is justified because depressions promote infiltration and because discharges filtered through coal mine waste typically contain higher levels of total dissolved solids, metals, and other parameters of concern than discharges filtered through mine spoil. The proposed revision would improve implementation of sections 510(b)(3) and 515(b)(10) of SMCRA.[647] Section 510(b)(3)[648] prohibits approval of a permit application unless the applicant demonstrates and the regulatory authority finds that the proposed operation ''has been designed to prevent material damage to the hydrologic balance outside the permit area.'' Section 515(b)(10)[649] requires that surface coal mining and reclamation operations be conducted so as to ''minimize disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.''

In proposed paragraph (e), which corresponds to existing paragraph (d), we propose to delete the existing inspection standards and requirements and replace them with a cross-reference to the corresponding inspection and examination requirements for excess spoil fills that we propose to adopt as part of 30 CFR 816.71. Excess spoil fills and coal mine waste refuse piles are similar structures in terms of engineering needs and requirements. Therefore, they should have identical inspection and examination requirements.

25. Section 816.84: What special requirements apply to coal mine waste impounding structures?

Proposed 30 CFR 816.84 is substantively identical to existing 30 CFR 816.84 except as discussed below. Proposed paragraph (b), which is the counterpart to existing paragraph (a), would clarify that coal mine waste may not be used to construct impounding structures unless the use of coal mine waste will not result acid drainage or toxic seepage through the impounding structure. The existing rule only refers to acid seepage. Our proposed revision of the scope of this rule to include toxic seepage is appropriate because section 515(b)(10)(A) of SMCRA[650] requires avoidance of ''acid or other toxic mine drainage.'' We also propose to replace the term ''acid seepage'' in the existing rule with ''acid drainage'' because that is the term that we define in 30 CFR 701.5. However, we propose to use the term toxic seepage in recognition of the mechanism by which we anticipate that any toxic mine drainage might develop.

Proposed paragraph (e), which is the counterpart to existing paragraph (d), would specify that diversions must be both designed and constructed to meet the requirements of 30 CFR 816.43. The existing rule contains only the design requirement. The performance standards of 30 CFR 816.43 apply to all diversions subject to regulation under SMCRA and our proposed revision would reiterate that principle. We also propose to specify that the diversions must be designed using the appropriate regional NRCS synthetic storm distribution to determine the peak flow from surface runoff from a 100-year, 6-hour precipitation event. The preamble to proposed 30 CFR 780.29 explains the rationale for this proposed requirement.

Finally, we propose to move existing paragraph (e) to 30 CFR 780.25(d) because it is a permitting requirement rather than a performance standard. Our goal is to move permitting requirements now located in the performance standards of subchapter K to the permitting provisions of subchapter G whenever feasible.

26. Section 816.95: How must I protect surface areas from wind and water erosion?

We propose to revise 30 CFR 816.95(b) to replace the references to topsoil with references to soil and soil substitutes to be consistent with 30 CFR 780.12(e) and 816.22(c), which allow the use of topsoil and subsoil substitutes and supplements under certain conditions.

27. Section 816.97: How must I protect and enhance fish, wildlife, and related environmental values?

Unless otherwise noted, our proposed substantive revisions to 30 CFR 816.97, as discussed below, are intended to more fully implement section 515(b)(24) of SMCRA,[651] which provides that ''to the extent possible using the best technology currently available'' surface coal mining and reclamation operations must be conducted so as to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' A few of the proposed revisions also would provide more detail on the measures and procedures needed to ensure compliance with the Endangered Species Act. Proposed requirements for the use of native species and reforestation would more completely implement section 515(b)(19) of SMCRA,[652] which requires establishment of a ''permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession.''

Proposed Paragraph (a): General Requirements

Proposed paragraph (a) would require that the permittee, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and

[647] 30 U.S.C. 1260(b)(3) and 1265(b)(10).

[648] 30 U.S.C. 1260(b)(3).

[649] 30 U.S.C. 1265(b)(10).

[650] 30 U.S.C. 1265(b)(10)(A).

[651] 30 U.S.C. 1265(b)(24).

[652] 30 U.S.C. 1265(b)(19).

achieve enhancement of those resources where practicable, as described in detail in the fish and wildlife protection and enhancement plan approved in the permit in accordance with 30 CFR 780.16. Proposed paragraph (a) is substantively identical to both section 515(b)(24) of SMCRA [653] and to existing paragraph (a), with the exception that we propose to add a reminder that the permittee must comply with the fish and wildlife protection and enhancement plan approved in the permit.

Proposed Paragraph (b): Species Listed or Proposed for Listing as Threatened or Endangered

Existing 30 CFR 816.97(b) and (d) contain provisions that pertain to threatened and endangered species. We propose to consolidate those provisions in proposed paragraph (b). Proposed paragraph (b)(1) would set forth requirements concerning species that the U.S. Fish and Wildlife Service has listed or proposed for listing under the Endangered Species Act.

Proposed paragraphs (b)(1)(i) through (iii) are substantively identical to the requirements of existing 30 CFR 816.97(b) with respect to federally-listed species, with four exceptions. First, we propose to replace the terms ''consult'' and ''consultation'' in the existing regulations with ''contact and coordinate'' and ''in coordination with'' to clarify that, in this context, these regulations do not refer to consultation under section 7(a)(2) of the Endangered Species Act.

Second, we propose to expand the scope of paragraph (b)(1)(i) to include species proposed for listing as threatened or endangered under the Endangered Species Act, not just species actually listed under that law. We are proposing this change in response to discussions with the U.S. Fish and Wildlife Service. The proposed change is consistent with section 7(a)(4) of the Endangered Species Act, which provides that ''[e]ach Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.'' It also would assist in implementing the fish and wildlife protection provisions of sections 515(b)(24) and 516(b)(11) of SMCRA. The conferencing requirement of section 7(a)(4) of the Endangered Species Act is not the same as the consultation requirement for threatened and endangered species under section 7(a)(2) of the Endangered Species Act.

Third, in proposed paragraph (b)(1)(ii), we propose to add a sentence clarifying that the requirement that the permittee report to the regulatory authority the presence of any federally-listed threatened or endangered species within the permit area applies regardless of whether the species was listed before or after permit issuance. We also propose to expand this notification requirement to apply to both the permit area and the adjacent area, not just the permit area as under the existing rule. We are proposing this change in response to discussions with the U.S. Fish and Wildlife Service concerning compliance with the Endangered Species Act.

We are considering whether to limit the notification requirement of proposed paragraph (b)(1)(ii) to the active mining phase of the operation; *i.e.,* whether the final rule should specify that the notification requirement expires at the time of Phase II bond release because of the typical lack of activity on the site after that stage of reclamation. We invite comment on this question.

Fourth, in proposed paragraph (b)(1)(iii)(A), we propose to add a requirement that the regulatory authority issue a permit revision order under 30 CFR 774.10(b) when necessary to implement the results of the coordination process with state and federal fish and wildlife agencies following receipt of notification under proposed paragraphs (b)(1)(ii) and (iii). This requirement would apply only when revision of the operation and reclamation plan approved in the permit is necessary to ensure protection of federally-listed threatened and endangered species.

Proposed paragraph (b)(1)(iv) would expressly require compliance with any species-specific protective measures required by the regulatory authority in coordination with the U.S. Fish and Wildlife Service. While proposed paragraph (b)(1)(iv) would be a new regulation, the requirement itself is a longstanding component of the result of a formal section 7(a)(2) consultation under the Endangered Species Act with respect to the continuation and approval of surface coal mining and reclamation operations under a SMCRA regulatory program.

Proposed paragraph (b)(1)(v) is substantively identical to those elements of existing paragraph (d) that pertain to the Endangered Species Act; *i.e.,* it would provide that nothing in our regulations authorizes the taking of a threatened or endangered species in violation of the Endangered Species Act. Only the U.S. Fish and Wildlife Service may quantify allowable take of species listed as threatened or endangered.

Proposed paragraph (b)(2) would set forth requirements pertaining to species listed as threatened or endangered under state statutes similar to the Endangered Species Act. It would include reporting and related requirements analogous to those of proposed paragraphs (b)(1)(ii) and (iii).

Proposed Paragraph (c): Bald and Golden Eagles

Existing paragraphs (c) and (d) both contain provisions that pertain to bald and golden eagles. We propose to consolidate those provisions in proposed paragraph (c). Proposed paragraphs (c)(1) through (3) are substantively identical to existing paragraph (c). Proposed paragraph (c)(4) would consist of those elements of existing paragraph (d) that pertain to the Bald and Golden Eagle Protection Act; *i.e.,* it would provide that nothing in our regulations authorizes the taking of a bald or golden eagle, its nest, or its eggs in violation of the Bald and Golden Eagle Protection Act.

Proposed Paragraph (d): Miscellaneous Protective Measures for Other Species of Fish and Wildlife

We propose to redesignate existing paragraph (e), which contains miscellaneous provisions relating to protection of fish and wildlife in general, as paragraph (d). Proposed paragraph (d)(1) is substantively identical to existing paragraph (e)(1) with one exception. We propose to remove the clause allowing the regulatory authority to determine that is unnecessary to ensure that electric power transmission lines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors. We are not aware of any situations in which these precautions are not necessary or appropriate. We also propose to expand the scope of this paragraph to include all avian species with large wingspans, not just raptors, consistent with recommendations of the Avian Power Line Interaction Committee in a 2006 publication,[654] which found that non-raptor avian species with large wingspans including, but not limited to,

[653] 30 U.S.C. 1265(b)(24).

[654] Avian Power Line Interaction Committee (APLIC). 2006. *Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006.* Edison Electric Institute, APLIC, and the California Energy Commission. Washington, DC and Sacramento, CA.

ravens, magpies, storks, and cranes, are subject to electrocution by power lines.

Proposed paragraph (d)(2) would require that the permittee locate, construct, operate, and maintain haul and access roads and sedimentation control structures in a manner that avoids or minimizes impacts on important fish and wildlife species or other species protected by state or federal law. It is substantively identical to existing paragraph (e)(2), except that we propose to add the words ''construct'' and ''maintain'' to be more consistent with the language of section 515(b)(17) of SMCRA,[655] which requires that surface coal mining and reclamation operations be conducted so as to ''insure that the construction, maintenance, and postmining conditions of access roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property.'' We also propose to apply the requirements of proposed paragraph (d)(2) to sedimentation control structures to more effectively implement the fish and wildlife protection requirements of section 515(b)(24) of SMCRA.[656]

Proposed paragraphs (d)(3) and (4) are substantively identical to existing paragraphs (e)(3) and (4).

Proposed paragraph (d)(5) would require that the permittee reclaim and reforest lands that were forested at the time of application and lands that would revert to forest under conditions of natural succession in a manner that enhances recovery of the native forest ecosystem as expeditiously as practicable. This provision would assist in implementation of the fish and wildlife protection provisions of section 515(b)(24) of SMCRA [657] and the revegetation requirements of section 515(b)(19) of SMCRA.[658]

Proposed Paragraph (e): Wetlands and Habitat of Unusually High Value for Fish and Wildlife

We propose to redesignate existing paragraph (f), which pertains to wetlands, vegetation along rivers and streams and bordering ponds and lakes, and habitat of unusually high value for fish and wildlife, as paragraph (e) and revise it for clarity and to be consistent with section 515(b)(24) of SMCRA.[659] The existing rule allows the permittee to select one of four options with respect to wetlands, vegetation bordering streams and water bodies, and habitat of unusually high value for fish and wildlife: (1) Avoid disturbances to them, (2) enhance them where practical, (3) restore them, or (4) replace them. Hence, the existing rule is not fully consistent with section 515(b)(24) of SMCRA, which requires both minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible and enhancement of those resources where practicable. Proposed paragraph (e) would improve consistency with section 515(b)(24) of SMCRA by requiring the permittee to enhance those resources where practical in all cases and by adding the qualifier ''to the extent possible'' with respect to the requirement to avoid disturbances to and restore or replace those resources. In accordance with accepted scientific terminology, we also propose to use the term ''lentic'' to refer to vegetation bordering lakes and ponds. As proposed, paragraph (e) would require the permittee to avoid disturbances to, restore or replace, and, where practicable, enhance, wetlands, riparian vegetation along rivers and streams, lentic vegetation bordering ponds and lakes, and habitat of unusually high value for fish and wildlife.

Proposed Paragraph (f): Vegetation Requirements for Fish and Wildlife Habitat Postmining Land Use

We propose to redesignate existing paragraph (g) as paragraph (f) and revise it by removing the requirement that plants used to revegetate areas with a fish and wildlife habitat postmining land use be arranged to maximize edge effect. Maximizing edge effect means that plantings would be designed to include the greatest amount of boundary areas between different types of natural habitats. It promotes the greatest species diversity, but also results in habitat fragmentation, which has deleterious effects on wildlife species that require large blocks of continuous habitat. We propose to replace that requirement with a provision that would require that the permittee select and arrange plant species to maximize the benefits to fish and wildlife. This change reflects current wildlife management philosophy, which emphasizes preservation or restoration of entire natural communities, rather than just those species that would benefit from the creation of edge effect.

In addition, we propose to require the use of native species, prohibit the use of invasive plant species that are known to inhibit natural succession, and add a requirement that plant species be selected on the basis of their ability to sustain natural succession by allowing the establishment and spread of plant species across ecological gradients. These changes would improve implementation of section 515(b)(19) of SMCRA,[660] which requires establishment of a ''permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession.'' Section 515(b)(19) [661] also provides that ''introduced species may be used * * * where desirable and necessary to achieve the approved postmining land use plan.'' We cannot envision any scenario in which introduced species would be either desirable or necessary to achieve a fish and wildlife habitat postmining land use.

Proposed Paragraph (g): Vegetation Requirements for Cropland Postmining Land Use

We propose to redesignate existing paragraph (h) as paragraph (g). Both paragraphs are substantively identical, but we propose to remove the phrase ''throughout the harvested area'' from the existing rule. That phrase is both unclear and unnecessary.

Proposed Paragraph (h): Vegetation Requirements for Forestry Postmining Land Uses

Proposed paragraph (h) would provide that any lands with either a managed or unmanaged forestry postmining land use must be replanted with native tree and understory species to the extent that doing so is not inconsistent with the type of forestry to be practiced as part of the postmining land use. This new paragraph also would require that plantings of commercial species be interspersed with plantings with native trees and shrubs of high value to wildlife, regardless of the type of forestry postmining land use. Proposed paragraph (h) would improve implementation of the revegetation requirements of section 515(b)(19) of SMCRA [662] and the provisions of section 515(b)(24) of SMCRA [663] concerning protection and enhancement of fish, wildlife, and related environmental values, as previously discussed.

Proposed Paragraph (i): Vegetation Requirements for Other Postmining Land Uses

We propose to revise existing paragraph (i) to add commercial and

[655] 30 U.S.C. 1265(b)(17).
[656] 30 U.S.C. 1265(b)(24).
[657] *Id.*
[658] 30 U.S.C. 1265(b)(19).
[659] 30 U.S.C. 1265(b)(24).
[660] 30 U.S.C. 1265(b)(19).
[661] 30 U.S.C. 1265(b)(24).
[662] 30 U.S.C. 1265(b)(19).
[663] 30 U.S.C. 1265(b)(24).

intensive recreational uses to the list of postmining land uses for which the permittee must establish greenbelts to provide food and cover to wildlife. The uses that we propose to add are similar in intensity to the uses in the existing rule; therefore, the same requirements should apply. Proposed paragraph (i)(1) would require that the plants used to create the greenbelts be native and non-invasive, consistent with section 515(b)(19) of SMCRA [664] and the purpose of the greenbelts. In addition, proposed paragraph (i)(1) would create an exception to the greenbelt requirement when greenbelts would be inconsistent with the approved postmining land use for that site.

Proposed paragraph (i)(2) would add another requirement for lands with the postmining land uses listed in the introductory text of proposed paragraph (i). Specifically, proposed paragraph (i)(2)(i) would require the establishment of a 100-foot buffer [665] comprised of native species, including species adapted to and suitable for planting in riparian zones, along each bank of all perennial and intermittent streams within the portion of the permit area for which these postmining land uses are approved. The species planted must consist of native tree and understory species if the land was forested at the time of application or if it would revert to forest under conditions of natural succession. The proposed requirements would improve implementation of the revegetation requirements of section 515(b)(19) of SMCRA [666] and the provisions of section 515(b)(24) of SMCRA [667] concerning protection and enhancement of fish, wildlife, and related environmental values, as previously discussed. Proposed paragraph (i)(2)(i) would provide an exception from the riparian buffer requirement when such a buffer would be incompatible with an approved postmining land use that is implemented during the revegetation responsibility period before final bond release under proposed § 800.42(d).

Proposed Paragraph (j): Planting Arrangement Requirements

Proposed paragraph (j) would require that plantings on all reclaimed areas be designed and arranged in a manner that will optimize benefits to wildlife to the extent practicable and consistent with the approved postmining land use. The proposed requirement would improve implementation of the provisions of section 515(b)(24) of SMCRA [668] concerning protection and enhancement of fish, wildlife, and related environmental values.

28. Section 816.99: What measures must I take to prevent and remediate landslides?

We propose to revise this section to improve adherence to plain language principles and to delete the reference to erosion in existing 30 CFR 816.99(a). The proposed deletion is appropriate because retention of an undisturbed natural barrier at the elevation of the lowest coal seam to be mined would not and could not play a role in preventing erosion on the disturbed area above the barrier. The role of such a barrier is limited to stability and preventing landslides.

29. Section 816.100: What are the standards for keeping reclamation contemporaneous with mining?

We propose to revise this section to improve adherence to plain language principles and to add stream restoration to the list of reclamation activities that are subject to the contemporaneous reclamation requirement. Existing 30 CFR 816.100 states that reclamation activities include, but are not limited to, those specifically listed in the rule. Therefore, we consider our proposed addition of stream restoration to the list of activities to be a clarification of the existing regulation.

30. Why are we proposing to remove existing 30 CFR 816.101?

As adopted on December 17, 1991, 30 CFR 816.101 established time and distance requirements for rough backfilling and grading following coal removal. However, we subsequently suspended this section, effective August 31, 1992, as a result of a Joint Stipulation of Dismissal in litigation following the issuance of that rule. See 57 FR 33874, 33875 (Jul. 31, 1992) and *Nat'l Coal Ass'n et al.* v. *U.S. Dep't of the Interior, et al.,* Civ. No. 92–0408–CRR (D.D.C.). We now propose to lift the suspension and remove this section as part of our rewrite of the backfilling and grading requirements. Removal of a section that has not been in effect for almost 20 years would improve the clarity of our requirements and avoid the confusion that can result on the part of persons who are not aware of the suspension.

The contemporaneous reclamation requirements of 30 CFR 816.100, in combination with the site-specific reclamation timetable approved in the permit, should be sufficient to ensure that permittees complete rough backfilling and grading in a timely manner. The reclamation timetable requirement currently appears in existing 30 CFR 780.18(b)(3), which we propose to redesignate as 30 CFR 780.12(b). Proposed 30 CFR 780.12(b) also would require that the reclamation timetable include application for each phase of bond release under proposed 30 CFR 800.42 because reclamation cannot be considered complete until the regulatory authority releases all bond posted for the site in accordance with proposed 30 CFR 800.42(d).

31. Section 816.102: How must I backfill the mined area and configure the land surface?

We propose to revise and restructure this section to clarify exactly when and where our approximate original contour restoration requirements apply, consistent with our proposed revisions to the definition of approximate original contour in 30 CFR 701.5 and other statutory and regulatory requirements. Section 515(b)(3) of SMCRA [669] provides the primary statutory basis for both the existing rules and the changes that we are proposing. In relevant part, section 515(b)(3) requires that surface coal mining and reclamation operations ''compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this Act).'' It also provides exceptions to this requirement for mountaintop removal mining operations and thin and thick overburden situations.

Proposed Paragraph (a)

We propose to revise the introductory language of paragraph (a) to clarify that the backfilling requirement applies only to mined areas, while the grading requirement applies to the entire disturbed area. The existing rule applies the backfilling requirement to the entire disturbed area. However, those portions of the disturbed area outside the mined area do not contain a pit or similar excavation that requires backfilling. (See the preamble discussion of our proposed definition of backfill in 30 CFR 701.5.) Those areas only require grading to restore the approximate original contour in compliance with

[664] 30 U.S.C. 1265(b)(19).

[665] See the discussion of proposed 30 CFR 780.16(c) in this preamble for an explanation of how this distance must be measured.

[666] 30 U.S.C. 1265(b)(19).

[667] 30 U.S.C. 1265(b)(24).

[668] *Id.*

[669] 30 U.S.C. 1265(b)(3).

section 515(b)(3) of SMCRA.[670] We also propose to require that the backfilling and grading of the minesite adhere to the plan approved in the permit in accordance with 30 CFR 780.12(d).

Proposed paragraphs (a)(1)(i) through (ix) list exceptions from the requirement to restore the approximate original contour as the final surface configuration of the backfilled and regraded area. The exceptions in proposed paragraphs (a)(1)(i) through (v) correspond to the exceptions that appear in existing paragraph (k) and are substantively identical to those exceptions. We propose to reword the exception in proposed paragraph (a)(1)(v) to emphasize that the exception for remining operations applies only to the extent specified in 30 CFR 816.106(b); *i.e.,* it is limited to an exception from the highwall elimination requirement. This proposed revision would not change existing law, policy, or practice, but it would add clarity concerning the scope of the exception.

Proposed paragraphs (a)(1)(vi) and (vii) would clarify that excess spoil fills constructed in accordance with 30 CFR 816.71 or 816.74 and refuse piles constructed in accordance with 30 CFR 816.83 do not need to comply with approximate original contour restoration requirements. The rationale for these two exceptions appears in the preamble discussion of our proposed revisions to the definition of approximate original contour in 30 CFR 701.5.

Proposed paragraph (a)(1)(viii) would clarify that permanent impoundments that meet the requirements of proposed paragraph (a)(3)(ii) and proposed § 780.35(b)(4) are exempt from compliance with approximate original contour restoration requirements. The proposed exception is consistent with the definition of approximate original contour in section 701(2) of SMCRA,[671] which contains a clause specifying that ''water impoundments may be permitted'' if they comply with the permanent impoundment provisions of section 515(b)(8) of SMCRA.[672] The regulations implementing section 515(b)(8) of SMCRA are located at 30 CFR 816.49(b). Proposed 30 CFR 816.102(a)(3)(ii) would require compliance with 30 CFR 816.49(b). Approval of a permanent impoundment would not exempt the permittee from complying with all applicable approximate original contour restoration requirements on the remainder of the disturbed area.

Proposed paragraph (a)(1)(ix) would allow the placement of overburden that otherwise would be classified as excess spoil on the mined-out area to heights in excess of the premining elevation when necessary to avoid or minimize construction of excess spoil fills on undisturbed land, provided that the placement occurs in accordance with proposed 30 CFR 780.35(b)(3). This provision would harmonize the approximate original contour restoration requirement of section 515(b)(3) of SMCRA [673] with section 515(b)(24) of SMCRA,[674] which requires that surface coal mining and reclamation operations use the best technology currently available to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values'' to the extent possible. Streams are generally recognized as among the habitats with the highest value to fish, wildlife, and related environmental values. To minimize both the amount of land disturbed and the length of stream segments buried or otherwise adversely affected, proposed 30 CFR 780.35(b)(3) provides that premining elevations would not operate as a cap on the elevation of backfilled areas. Instead, the final elevation would be determined on the basis of the factors listed in proposed 30 CFR 780.35(b)(2)(ii) through (v), together with the requirement in 30 CFR 780.35(b)(3) that the final surface configuration be compatible with the natural drainage pattern and the surrounding terrain.

Proposed paragraph (a)(2) is substantively identical to existing paragraph (g), with the exception of a proposed requirement that backfilling and grading be conducted in a manner that minimizes the creation of uniform slopes and cut-and-fill terraces. Both uniform slopes and cut-and-fill terraces are rarely found in nature and thus normally would not be considered consistent with the concept of approximate original contour restoration. However, the definition of approximate original contour in section 701(2) of SMCRA [675] contains language allowing terracing. Therefore, the proposed rule would continue to allow the construction of cut-and-fill terraces under certain conditions for specified purposes, as in the existing rules.

Proposed paragraph (a)(3), like existing paragraph (a)(2), would require the elimination of all highwalls, spoil piles, and depressions, with certain exceptions. We propose to add impoundments to this list for clarity, although this addition would not be a substantive change.

Proposed paragraph (a)(3)(i)(A), like existing paragraph (h), would allow the construction of small depressions if they are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation. Proposed paragraph (a)(3)(i) would add two other requirements that must be met before small depressions may be created or retained. First, proposed paragraph (a)(3)(i)(B) would require that the depressions be consistent with the hydrologic reclamation plan approved in the permit in accordance with proposed 30 CFR 780.22. Second, proposed paragraph (a)(3)(i)(C) would require that the permittee demonstrate that the depressions would not result in elevated levels of parameters of concern (*e.g.,* total dissolved solids and selenium) in discharges from the backfilled and graded area. The two new requirements are intended to ensure protection of the hydrologic balance in accordance with section 515(b)(10) of SMCRA,[676] which provides that surface coal mining and reclamation operations must be conducted to ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' Proposed paragraphs (a)(3)(i)(B) and (C) also would improve implementation of section 515(b)(3) of SMCRA,[677] which requires, in pertinent part, that surface coal mining and reclamation operations shape and grade overburden or spoil ''in such a way as to prevent * * * water pollution.''

Proposed paragraph (a)(3)(ii), like existing paragraph (i), would allow the retention of permanent impoundments if they are suitable for the approved postmining land use and if they meet the requirements of 30 CFR 816.49 and 816.56. We propose to add a provision allowing the retention of permanent impoundments only if the permittee has demonstrated compliance with the future maintenance requirements of proposed 30 CFR 800.42(c)(5). The new provision would improve implementation of section 519(c)(2) of SMCRA,[678] which provides that ''[w]here a silt dam is to be retained as a permanent impoundment pursuant to section 515(b)(8) [679] [the statutory counterpart to 30 CFR 816.49(b)],''

[670] *Id.*

[671] 30 U.S.C. 1291(2).

[672] 30 U.S.C. 1265(b)(8).

[673] 30 U.S.C. 1265(b)(3).

[674] 30 U.S.C. 1265(b)(24).

[675] 30 U.S.C. 1291(2).

[676] 30 U.S.C. 1265(b)(10).

[677] 30 U.S.C. 1265(b)(3).

[678] 30 U.S.C. 1269(c)(2).

[679] 30 U.S.C. 1265(b)(8).

Phase II bond may be released ''so long as provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.'' In addition, proposed paragraph (a)(3)(ii)(D) would specify that the permittee must have obtain all necessary approvals and authorizations under section 404 of the Clean Water Act before a previously temporary impoundment may be retained as a permanent impoundment. This provision would apply only when the impoundment is located in waters of the United States. It is intended to encourage coordination and cooperation with the Clean Water Act permitting authority.

Proposed paragraph (a)(3)(iii), like existing paragraph (a)(2), would allow the permittee to retain highwalls on previously mined areas to the extent provided in § 816.106(b).

Proposed paragraph (a)(3)(iv) would allow retention of modified highwall segments to the extent necessary to replace similar natural landforms; *i.e.,* cliffs or bluffs, removed by the mining operation. The proposed rule would harmonize two provisions of section 515(b)(3) of SMCRA [680] that may pose a potential conflict in certain situations: the requirement to restore the approximate original contour and the requirement to eliminate all highwalls. The proposed rule would allow the retention of highwall segments to replace cliffs or bluffs destroyed by mining, but only if the highwall segments are modified to closely resemble the features destroyed by mining and to restore the ecological functions of those features. For example, ledges may need to be blasted into the highwall face to provide nesting habitat for raptors and other cliff-dwelling wildlife and microhabitats may need to be created at the base of the highwall remnant. The proposed rule would specify that the number, length, and height of any modified highwall segments retained may not exceed the number, length, and height of the premining features that they replace. In addition to harmonizing potentially-conflicting requirements within section 515(b)(3) of SMCRA,[681] the proposed rule would require restoration of valuable wildlife habitat, which would improve implementation of section 515(b)(24) of SMCRA.[682] Section 515(b)(24) requires that, to the extent possible, surface coal mining and reclamation operations use the best technology currently available to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable.

Under the proposed rule, the regulatory authority would have to amend its regulatory program to establish the conditions under which highwall segments may be retained and the modifications that must be made to those highwall segments to ensure that the retained segment restores the form and ecological function of similar premining landforms. We have already approved highwall retention provisions of this nature as part of the New Mexico and Utah regulatory programs.[683]

The New Mexico program provision, CSMC Rule 20–102(a)(2), allows the retention of limited stretches of highwall if similar features were part of the natural landscape of the mine area prior to mine operations. In addition, the following requirements apply:

- The highwall must have a static safety factor of 1.3.
- The highwall must not pose a hazard to persons or wildlife in the area.
- The highwall must be backfilled to cover the uppermost coal seam to a minimum depth of 4 feet.
- The retained portion of the highwall may not exceed 800 feet in length and must be a minimum of at least 3,000 feet from any other portion of any other highwall remnant approved for retention as part of the postmining land use.
- The highwall is necessary to replace cliff-type habitats that existed in the natural topography prior to mining.
- The ends of the highwall left standing must be contoured into the surrounding topography with slopes of 3:1 or less.

The Utah program provision (Utah Administrative Code R645–301–553.650) allows a permittee to seek approval to retain highwalls when the proposed highwall remnant would meet all stability requirements and the following criteria:

- The remaining highwall will not be greater in height or length than the cliffs and cliff-like escarpments that were replaced or disturbed by the mining operations.
- The remaining highwall will replace a preexisting cliff or similar natural premining feature and will resemble the structure, composition, and function of the natural cliff it replaces.
- The remaining highwall will be modified, if necessary, as determined by the regulatory authority, to restore cliff-type habitats used by the flora and fauna existing prior to mining.
- The remaining highwall will be compatible with the postmining land use and the visual attributes of the area.
- The remaining highwall will be compatible with the geomorphic processes of the area.

We invite comment on whether we should include any of these specific state program criteria in our rule for national applicability.

Proposed paragraph (a)(4) is substantively identical to existing paragraph (a)(3).

Proposed paragraph (a)(5), like existing paragraph (a)(4), would require that backfilling and grading be conducted to minimize erosion and water pollution both on and off the site. We propose to add language clarifying that the requirement to minimize water pollution includes discharges of parameters of concern for which no numerical effluent limitations or water quality standards have been established. Our proposed revision is in accordance with section 515(b)(10) of SMCRA,[684] which provides that surface coal mining and reclamation operations must be conducted to ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.''

Proposed paragraph (a)(6) is identical to existing paragraph (a)(5).

Proposed Paragraph (b)

Existing paragraph (b) requires that all spoil except excess spoil disposed of in accordance with 30 CFR 816.71 or 816.74 be returned to the mined-out area. We propose to revise this paragraph by adding an exception in proposed paragraph (b)(2) for mountaintop removal mining operations. Under section 515(c)(4)(E) of SMCRA,[685] spoil from mountaintop removal mining operations need not be returned to the mined-out area, provided any spoil not returned to the mined-out area is placed in accordance with the excess spoil disposal requirements of section 515(b)(22) of SMCRA.[686] Mountaintop removal mining operations are designed to create a level plateau or gently rolling contour where mountainous topography existed before mining, which limits the amount

[680] 30 U.S.C. 1265(b)(3).
[681] 30 U.S.C. 1265(b)(3).
[682] 30 U.S.C. 1265(b)(24).
[683] 45 FR 86459 (Dec. 31, 1980) and 58 FR 48600 (Sept. 17, 1993), respectively.
[684] 30 U.S.C. 1265(b)(10).
[685] 30 U.S.C. 1265(c)(4)(E).
[686] 30 U.S.C. 1265(b)(22).

of spoil that can be returned to the mined-out area.

Proposed paragraph (b)(3) would include the exception in existing paragraph (d) for spoil used to blend the mined-out area into the surrounding terrain, with revisions to reflect our proposed changes to 30 CFR 816.22 concerning the salvage, storage, redistribution, and use of soil materials and organic matter. We also propose to remove existing paragraph (d)(3), which requires that spoil used for blending be backfilled and graded in accordance with the requirements of 30 CFR 816.102. Existing paragraph (d)(3) is redundant because the requirements of 30 CFR 816.102 automatically apply to all backfilling and grading activities unless specifically exempted.

Proposed Paragraph (c)

Existing paragraph (c) requires the compaction of spoil and waste materials where advisable to ensure stability or to prevent the leaching of toxic materials. For clarity and consistency with the terminology used elsewhere in our regulations, we propose to replace the phrase ''the leaching of toxic materials'' with ''the formation of acid or toxic mine drainage.''

We also propose to add a requirement to avoid compacting materials placed in what will be the root zone of the species planted under the revegetation plan approved in the permit in accordance with proposed 30 CFR 780.12(g) to the extent possible. As discussed in the portion of this preamble concerning proposed 30 CFR 780.12(e) and 816.22, soil compaction is a major inhibitor of plant growth and productivity, especially for trees and shrubs. Therefore, compaction of the root zone must be minimized to achieve the revegetation requirements of section 515(b)(19) of SMCRA [687] and the postmining land use capability requirements of section 515(b)(2) of SMCRA.[688]

Proposed Paragraph (d)

Proposed paragraph (d) would include existing paragraph (f), which requires the covering or treatment of all exposed coal seams and acid-forming materials, toxic-forming materials, and combustible materials. We propose to revise the existing rule by establishing separate requirements for exposed coal seams, acid-forming and toxic-forming materials, and combustible materials to reflect the different nature of these materials and to clarify which requirements apply to which materials.

Proposed paragraph (d)(1) would require that all exposed coal seams be covered with material that is noncombustible, nonacid-forming, and nontoxic-forming to prevent coal seam fires and the development of acid or toxic mine drainage. Proposed paragraph (d)(2) would require that all other combustible materials exposed, used, or produced during mining be handled and disposed of in accordance with 30 CFR 816.89 (noncoal waste materials) in a manner that will prevent sustained combustion. Proposed paragraph (d)(3) would require that the permittee handle and place all other acid-forming or toxic-forming materials in compliance with the plan approved in the permit in accordance with proposed 30 CFR 780.12(d)(4); in compliance with 30 CFR 816.38, which governs the handling and placement of acid-forming and toxic-forming materials; in compliance with the hydrologic reclamation plan approved in the permit in accordance with proposed 30 CFR 780.22(a); and in a manner that will minimize adverse effects on plant growth and the approved postmining land use.

The proposed revisions described above would improve implementation of section 515(b)(10) of SMCRA,[689] which provides that surface coal mining and reclamation operations must be conducted to ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' They also would more fully implement those provisions of section 515(b)(3) of SMCRA [690] that discuss the handling of acid-forming and toxic materials during backfilling and grading, as well as section 515(b)(14) of SMCRA,[691] which contains requirements for the handling and disposal of acid-forming and toxic materials and materials constituting a fire hazard.

Proposed Paragraph (e)

We propose to revise this paragraph by updating the terminology to reflect our 1983 rulemaking in which we introduced the term ''coal mine waste'' to include both coal processing waste and underground development waste.[692]

Proposed Paragraph (f)

Proposed paragraph (f) is substantively identical to existing paragraph (j) except that we propose to revise this paragraph by replacing the references to ''topsoil'' with the term ''soil materials'' to be consistent with our proposed changes to 30 CFR 816.22.

32. Section 816.104: What special provisions for backfilling, grading, and surface configuration apply to sites with thin overburden?

We propose to revise this section, which implements the thin overburden exception in section 515(b)(3) of SMCRA,[693] for clarity. Our proposed revisions to existing paragraph (a) would resolve ambiguities and convert the definition to a description of the situations in which the thin overburden provisions of 30 CFR 816.104 would apply. In proposed paragraph (a)(1), we propose to replace the term ''land'' with ''mined area'' to emphasize that the determination as to whether the postmining surface configuration closely resembles the premining surface configuration must be made with respect to the mined area, not the surrounding area. We also propose to insert ''any'' before ''mining'' to clarify that, when the permit area has been previously mined, the premining surface configuration must be the surface configuration that existed before any mining, not the surface configuration of the existing previously mined area. The preamble to our proposed revisions to the definition of approximate original contour in 30 CFR 701.5 contains further discussion of these matters.

In proposed paragraph (b), we propose to retain the existing performance standards for thin overburden at 30 CFR 816.104(b)(1) and (2), with appropriate plain language and citation changes. Among other things, the existing standards require that the permittee use all spoil and waste materials available from the entire permit area to attain the lowest practicable grade that does not exceed the angle of repose. This requirement is consistent with section 515(b)(3) of SMCRA,[694] which provides—

> That in surface coal mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit

[687] 30 U.S.C. 1265(b)(19).

[688] 30 U.S.C. 1265(b)(2).

[689] 30 U.S.C. 1265(b)(10).

[690] 30 U.S.C. 1265(b)(3).

[691] 30 U.S.C. 1265(b)(14).

[692] See 48 FR 44006 (Sept. 26, 1983).

[693] 30 U.S.C. 1265(b)(3).

[694] *Id.*

area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region[.]

We propose to add a reminder that the permittee must backfill all mined areas and grade all disturbed areas in accordance with the backfilling and grading plan approved in the permit under proposed 30 CFR 780.12(d). We also propose to require that the permittee ensure that the final surface configuration blends into and complements the drainage pattern of the surrounding terrain to the extent possible. This requirement is intended to harmonize the reclaimed area with surrounding areas.

33. Section 816.105: What special provisions for backfilling, grading, and surface configuration apply to sites with thick overburden?

We propose to revise this section, which implements the thick overburden exception in section 515(b)(3) of SMCRA,[695] for clarity. Our proposed revisions to existing paragraph (a) would resolve ambiguities and convert the definition to a description of the situations in which the thick overburden provisions of 30 CFR 816.105 would apply. In proposed paragraph (a)(1), we propose to replace the term ''land'' with ''mined area'' to emphasize that the determination as to whether the postmining surface configuration closely resembles the premining surface configuration must be made with respect to the mined area, not the surrounding area. We also propose to insert ''any'' before ''mining'' to clarify that, when the permit area has been previously mined, the premining surface configuration must be the surface configuration that existed before any mining, not the surface configuration of the existing previously mined area. The preamble to our proposed revisions to the definition of approximate original contour in 30 CFR 701.5 contains further discussion of these matters.

We also propose to delete the provision in our existing rules that a thick overburden situation exists when the amount of material to be returned to the mined-out area is so large that it is not possible to achieve a surface configuration that blends into and complements the drainage pattern of the surrounding terrain. We are aware of no circumstances in which this situation would exist.

We propose to revise the performance standards for thick overburden operations in existing paragraph (b) by adding an introductory reminder that all backfilling and grading activities must comply with the backfilling and grading plan approved in the permit under proposed 30 CFR 780.12(d). We also propose to revise existing paragraph (b) to improve consistency with the underlying statutory provisions and to reflect other rule changes that we are proposing. In relevant part, section 515(b)(3) of SMCRA [696] provides—

That in surface coal mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall after restoring the approximate original contour, backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but not more than the angle of repose, and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and that such overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution and is revegetated in accordance with the requirements of the Act[.]

To implement this provision, proposed 30 CFR 816.105(b)(1) would require that the permittee backfill the mined-out area to the approximate original contour and then place the remaining spoil and waste materials on top of the backfilled area to the extent possible, as determined in accordance with the excess spoil minimization requirements of proposed 30 CFR 780.35(b). Section 515(b)(3) of SMCRA could be interpreted as requiring return of all spoil and waste materials to the mined-out area, but such a reading would not be the best interpretation of the statute. Nor is it technically possible to return all spoil from many steep-slope mining operations to the mined-out area.

Section 515(b)(22) of SMCRA [697] recognizes that mining operations may generate excess spoil. Accordingly, it establishes requirements governing placement of excess spoil outside the mined-out area. To harmonize these two statutory provisions, proposed 30 CFR 816.105(b)(1) would require adherence to the excess spoil minimization requirements in proposed 30 CFR 780.35(b) to ensure that spoil and waste materials are returned to the mined-out area to the extent possible after considering the technical, postmining land use, environmental, and other factors listed in proposed 30 CFR 780.35(b)(2)(i) through (v).

Proposed 30 CFR 816.105(b)(2) would require that the spoil and waste materials placed on top of the backfilled area be graded to the lowest practicable grade that is ecologically sound, consistent with the postmining land use, and compatible with the surrounding region. No slope may exceed the angle of repose. Proposed paragraph (b)(2) would be consistent with the language in section 515(b)(3) of SMCRA,[698] which requires that the operator ''backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but not more than the angle of repose * * * in order to achieve an ecologically sound land use compatible with the surrounding region.''

Proposed 30 CFR 816.105(b)(3), like existing 30 CFR 816.105(b)(2), would continue to require compliance with most of the backfilling, spoil and soil placement, grading, and surface configuration requirements of 30 CFR 816.102, with the notable exception of the requirement in 30 CFR 816.102(a)(1) for restoration of the approximate original contour as the final surface configuration. Among other things, proposed paragraph (b)(3) would implement or facilitate implementation of those provisions of section 515(b)(3) of SMCRA that require (1) covering of all acid-forming and other toxic materials, (2) compaction of spoil and waste materials where advisable, (3) shaping and grading of overburden and spoil ''in such a way as to prevent slides, erosion, and water pollution,'' and (4) revegetation.

Proposed 30 CFR 816.105(b)(4), like existing 30 CFR 816.105(b)(3), would continue to require that any excess spoil be placed in accordance with the excess spoil disposal requirements of 30 CFR 816.71 or 816.74. As provided in our proposed definition of excess spoil in 30 CFR 701.5, this requirement would apply to all spoil material placed above the approximate original contour within the mined-out area as part of the continued construction of an excess spoil fill with a toe located outside the mined-out area.

[695] 30 U.S.C. 1265(b)(3).

[696] 30 U.S.C. 1265(b)(3).

[697] 30 U.S.C. 1265(b)(22).

[698] 30 U.S.C. 1265(b)(3).

Proposed paragraph (b)(5) would require that the final surface configuration blend into and complement the drainage pattern of the surrounding terrain to the extent possible. This requirement is intended to harmonize the reclaimed area with surrounding areas.

34. Section 816.106: What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

We propose to modify the cross-references in existing paragraph (b) to be consistent with the other rule changes that we are proposing today. We also propose to revise the language of existing paragraph (b) to clarify that it does not grant an exception to any of the general backfilling and grading requirements of 30 CFR 816.102 except the requirement to eliminate all highwalls. All other proposed changes would improve adherence to plain language principles and are nonsubstantive.

35. Section 816.107: What special provisions for backfilling, grading, and surface configuration apply to steep slopes?

We propose to revise existing paragraph (d) of this section, which governs the disposal of woody materials on steep-slope mining sites, for consistency with proposed 30 CFR 816.22(f). The existing rule provides that woody materials may not be buried in the backfill unless the regulatory authority determines that doing so would not create stability problems. However, as discussed in the preamble to proposed 30 CFR 816.22(f), woody materials are sufficiently valuable for revegetation and fish and wildlife enhancement purposes that they should be used for those purposes rather than being buried or burned. Therefore, we propose to revise 30 CFR 816.107(d) to prohibit the burial of woody materials in the backfill and to require that the permittee instead handle those materials in accordance with proposed 30 CFR 816.22(f).

36. Section 816.111: How must I revegetate the area disturbed by mining?

We propose to revise and restructure this section for clarity and consistency with other proposed rule changes. We also propose to move existing paragraphs (b) and (c) and most of existing paragraph (d) to proposed 30 CFR 780.12(g) because they are permitting requirements that pertain to development of the revegetation plan. We propose to delete the sentence in existing paragraph (d) stating that the requirements of 30 CFR part 823 apply to prime farmland. This sentence is unnecessary because by its own terms 30 CFR part 823 applies to all prime farmland. In addition, we propose to redesignate existing 30 CFR 816.113 and 816.114 as proposed paragraphs (e) and (d), respectively, of 30 CFR 816.111.

Most of our proposed substantive revisions are intended to improve the implementation of section 515(b)(2) of SMCRA,[699] which requires that surface coal mining and reclamation operations ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood,'' and section 515(b)(19) of SMCRA,[700] which provides that surface coal mining and reclamation operations must—

> establish on the regraded areas, and on all other lands affected, a diverse, effective, and permanent vegetation cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan[.]

The proposed revisions are necessary in part because an approved higher or better postmining land use is not always implemented during the revegetation responsibility period. Requiring initial revegetation with native species would promote environmentally-sound reclamation and enhance fish and wildlife habitat without precluding implementation of the higher or better use at a later date. The increased emphasis on revegetation with native species also would prevent proliferation of instances in which backfilled and graded minesites have not been revegetated with a permanent vegetative cover of the same seasonal variety native to the area, as required by section 515(b)(19) of SMCRA.

Proposed Paragraph (a)

We propose to revise existing paragraph (a) to clarify that the revegetation requirements of 30 CFR 816.111 do not apply to rock piles and other rock or non-vegetative features created to restore or enhance wildlife habitat under the fish and wildlife protection and enhancement plan approved in the permit in accordance with 30 CFR 780.16. We also propose to clarify that the revegetation exemption also applies to any other area that contains an impervious surface, such as a building or a parking lot, approved as part of or in support of the postmining land use and constructed before expiration of the revegetation responsibility period. Finally, we propose to clarify that the revegetation exemption for water areas applies only to water areas approved as part of or in support of the postmining land use or approved as part of the fish and wildlife protection and enhancement plan in the permit.

Proposed Paragraph (b)

Proposed paragraph (b) would require that the reestablished vegetative cover comply with the revegetation plan approved in the permit in accordance with proposed 30 CFR 780.12(g). It also would require that the vegetative cover be consistent with both the approved postmining land use and establishment of the plant communities described in the permit application as required by proposed 30 CFR 779.19. In addition, proposed paragraph (b) would require that the vegetative cover be capable of stabilizing the soil surface and, in the long term, preventing erosion in excess of what would have occurred naturally had the site not been disturbed. Background erosion levels on undisturbed sites vary from region to region and site to site, depending on geology, soils, topography, and climate. Further, proposed paragraph (b) would require that the vegetative cover not inhibit the establishment of woody plants when the revegetation plan requires the use of woody plants.

Extensive herbaceous ground cover can inhibit the establishment and growth of trees and shrubs, which would provide more effective long-term surface stabilization and erosion control in areas that are naturally forested. The dense herbaceous ground covers often used in the past to control erosion on regraded sites compete with newly-planted trees and tree seedlings for soil nutrients, water, and sunlight and provide habitat and cover for rodents and other animals that damage tree seedlings and young trees. An article in a technical publication provides the following summary of the effects of ground cover on establishment of trees on mined lands:

> The negative effects of overly abundant and aggressive ground cover on the survival and growth of trees planted on reclaimed mine lands has long been known. Trees planted into introduced, aggressive forages [especially tall fescue and sericea lespedeza] often are overtopped by the grass or legume and are unable to break free (Burger and Torbert, 1992; Torbert et al., 1995). The seedlings are pinned to the ground and have

[699] 30 U.S.C. 1265(b)(2).

[700] 30 U.S.C. 1265(b)(19).

little chance for survival. If it is known that trees are to be planted, a tree-compatible ground cover should be seeded that will be less competitive with trees. Tree-compatible ground cover should be slow growing, sprawling or low growing, not allopathic, and non-competitive with trees (Burger and Torbert, 1992). Plass (1968) reported that after four growing seasons the height growth of sweetgum and sycamore planted into an established stand of tall fescue on spoil banks was significantly retarded. Andersen et al. (1989) found that survival and height growth for red oak and black walnut was significantly greater on sites where ground cover was chemically controlled.[701]

Researchers from the University of Maine determined that even a small amount (less than 20 percent) of herbaceous ground cover around tree seedlings will substantially reduce early stand growth.[702] Another study of revegetation of mined lands in Appalachia found that dense ground covers prevent the natural seeding-in of native plants, while low ground cover seeding rates allowed the invasion of light-seeded native trees such as yellow poplar, red maple, and birches.[703]

The amount of vegetative ground cover necessary to control erosion on any particular site is a function of the site topography, composition of the surface material, precipitation frequency and intensity, and the degree of soil compaction. Loosely graded or uncompacted material, particularly if placed on a relatively gentle slope, may have virtually no runoff or erosion and would require little or no herbaceous vegetative ground cover to control erosion. Conversely, highly-compacted material placed on a steep slope severely limits infiltration and increases runoff so that a dense vegetative cover may be needed to control erosion.

We invite comment on whether proposed paragraphs (b)(4) and (5) strike the proper balance between the need for erosion control and the conditions required to promote establishment of native trees and shrubs, or whether adjustments are needed.

Proposed Paragraph (c)

Proposed paragraph (c) would allow volunteer plants of species that are desirable components of the plant communities described in the permit application under proposed 30 CFR 779.19 and that are not inconsistent with the postmining land use to be considered in determining whether the revegetation requirements of 30 CFR 816.111 and 816.116 have been met. Proposed paragraph (c) would be consistent with existing practice and with the requirement to establish a vegetative cover capable of self-regeneration and plant succession in section 515(b)(19) of SMCRA.[704]

Proposed Paragraph (d)

Proposed paragraph (d), which would include existing 30 CFR 816.114, would require that all areas upon which soil materials have been redistributed be stabilized either by establishing a temporary vegetative cover consisting of noncompetitive and non-invasive species or by applying a hay mulch (native hay would be required when commercially available) that is free of weed and noxious plant seeds. These methods could be used alone or in combination. In addition, proposed paragraph (d) would allow the regulatory authority to waive this requirement if it determines that neither method is necessary to stabilize the surface and control erosion. Proposed paragraph (d) is intended to promote establishment of ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession,'' as required by section 515(b)(19) of SMCRA.[705] The preamble to proposed paragraph (b) explains the obstacle that dense herbaceous ground covers comprised of aggressive perennial species like tall fescue and sericea lespedeza present to the establishment of trees and shrubs and, hence, to achieving the type of postmining plant community that SMCRA requires.

Proposed Paragraph (e)

Proposed paragraph (e), which concerns the timing of revegetation, is substantively identical to existing 30 CFR 816.113. We propose to add a cross-reference to the revegetation plan approved in the permit in accordance with proposed 30 CFR 780.12(g).

37. Why are we proposing to remove existing 30 CFR 816.113 and 816.114?

We propose to consolidate existing 30 CFR 816.113 and 816.114 into 30 CFR 816.111 with the other general performance standards for revegetation. We propose to redesignate 30 CFR 816.113 and 816.114 as 30 CFR 816.111(e) and (d), respectively.

38. Section 816.115: How long am I responsible for revegetation after planting?

Proposed 30 CFR 816.115 is substantively identical to the provisions concerning revegetation responsibility periods in existing 30 CFR 816.116(c), with one exception.

Proposed paragraph (a)(2) would provide that the initial planting of small areas that are regraded and planted as a result of the removal of sediment control structures and associated structures and facilities (*e.g.,* diversion ditches, disposal and storage areas for accumulated sediment, sediment pond embankments, and ancillary roads used to access those structures) need not be considered an augmented seeding necessitating an extended or separate revegetation responsibility period. This proposed paragraph is not a new proposal; its adoption would merely incorporate into regulation the policy upon which we previously provided notice and opportunity for comment[706] and subsequently adopted in the context of the approval of several state regulatory program amendments.[707]

The following discussion from the preamble to our approval of the Illinois program amendment sets forth the rationale for our policy:

> Section 515(b)(20) of SMCRA provides that the revegetation responsibility period shall commence ''after the last year of augmented seeding, fertilizing, irrigation, or other work'' needed to assure revegetation success. In the absence of any indication of Congressional intent in the legislative history, OSM interprets this requirement as applying to the increment or permit area as a whole, not individually to those lands within the permit area upon which revegetation is delayed solely because of their use in support of the reclamation effort on the planted area. As implied in the preamble discussion of 30 CFR 816.46(b)(5), which prohibits the removal of ponds or other siltation structures until two years after the last augmented seeding, planting of the sites from which such structures are removed need not itself be considered an augmented seeding necessitating an extended or separate liability period (48 FR 44038–44039, September 26, 1983).
>
> The purpose of the revegetation responsibility period is to ensure that the mined area has been reclaimed to a condition capable of supporting the desired permanent vegetation. Achievement of this purpose will not be adversely affected by this

[701] King, J. and J. Skousen, ''Tree Survival on a Mountaintop Surface Mine in West Virginia,'' West Virginia University Morgantown, American Society of Mining and Reclamation, 2003 (unpaginated document).

[702] Wagner, R. G., ''Top 10 Principles for Managing Competing Vegetation to Maximize Regeneration Success and Long-Term Yields,'' University of Maine (unpaginated document).

[703] Burger, J. A. and C. E. Zipper, ''How to Restore Forests on Surface-Mined Land,'' Virginia Polytechnic Institute and State University, Powell River Project, Virginia Cooperative Extension Publication 460–123, Revised 2002 (unpaginated document).

[704] 30 U.S.C. 1265(b)(19).

[705] *Id.*

[706] See 58 FR 48333 (Sept. 15, 1993).

[707] See, *e.g.,* Colorado (61 FR 26792, 26796–26797 (May 29, 1996)), Illinois (62 FR 55765–55769 Oct. 22, 1997)), and Ohio (63 FR 51829–51833 (Sept. 29, 1998)).

interpretation of section 515(b)(20) of SMCRA since (1) the lands involved are relatively small in size and either widely dispersed or narrowly linear in distribution and (2) the delay in establishing revegetation on these sites is due not to reclamation deficiencies or the facilitation of mining, but rather to the regulatory requirement that ponds and diversions be retained and maintained to control runoff from the planted area until the revegetation is sufficiently established to render such structure unnecessary for the protection of water quality.

In addition, the areas affected likely would be no larger than those which could be reseeded (without restarting the revegetation period) in the course of performing normal husbandry practices, as that term is defined in 30 CFR 816.116(c)(4) and explained in the preamble to that rule (53 FR 34636, 34641; September 7, 1988; 52 FR 28012, 28016; July 27, 1987). Areas this small would have a negligible impact on any evaluation of the permit area as a whole.

Most importantly, this interpretation is unlikely to adversely affect the regulatory authority's ability to make a statistically valid determination as to whether a diverse, effective permanent vegetative cover has been successfully established in accordance with the appropriate revegetation success standards. From a practical standpoint, it is usually difficult to identify precisely where such areas are located in the field once revegetation is established in accordance with the approved reclamation plan.[708]

Neither the policy nor the state program amendment approvals extend to the removal of haul roads or other primary roads. Because of the difficulty in reestablishing vegetation on the surfaces of primary roads, that type of road may need to be bonded separately for purposes of the revegetation liability period, unless the road is approved for retention as part of the postmining land use.

39. Section 816.116: What are the standards for determining the success of revegetation?

We propose to reorient our regulations concerning revegetation success standards away from focusing on a single postmining land use, which may or may not be implemented, to standards pertinent to a determination of whether the site has been restored ''to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood,'' as required by section 515(b)(2) of SMCRA.[709] In effect, the standards would have to reflect the premining land use capability and productivity information provided in the permit application in accordance with proposed 30 CFR 779.22(b). This approach is also consistent with the legislative history of section 508 of SMCRA,[710] in which Congress states: ''It is important that the potential utility which the land had for a variety of uses be the benchmark rather than any single, possibly low value, use which by circumstances may have existed at the time mining began.'' [711]

We propose to require that minesites be revegetated in a manner that will restore the native plant communities described in the permit application in accordance with proposed 30 CFR 779.19, regardless of the approved postmining land use. The proposed rule contains an exception for those portions of the permit area on which the approved postmining land use is implemented before the end of the revegetation responsibility period under proposed 30 CFR 816.115, but that exception would apply only if restoration of native plant communities would be inconsistent with that use, as may be the case with agricultural, commercial, industrial, and residential postmining land uses. This approach would improve implementation of section 515(b)(19) of SMCRA,[712] which provides that surface coal mining and reclamation operations must—

establish on the regraded areas, and on all other lands affected, a diverse, effective, and permanent vegetation cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan[.]

Nothing in this provision of the Act suggests that revegetation success standards should be based solely or primarily on the postmining land use, with the exception of situations in which introduced species are desirable and necessary to achieve the postmining land use, as would be true of most cropland postmining land uses. Therefore, the approach most consistent with paragraphs (b)(2) and (b)(19) of section 515 of SMCRA [713] is the one that we are proposing; *i.e.,* success standards that are sufficiently rigorous to demonstrate that the disturbed area has been restored to a condition capable of supporting the uses that it was capable of supporting before any mining and that will ensure restoration of plant communities native to the area.

Proposed 30 CFR 816.116 would fill a gap in our existing rules by requiring the establishment of revegetation success standards for all reclaimed areas. Specifically, existing 30 CFR 816.116(b)(4) establishes revegetation success standards for lands with an approved commercial, industrial, or residential postmining land use only if that land use is to be implemented less than 2 years after completion of regrading. The existing rules are silent on revegetation success standards for lands with an approved commercial, industrial, or residential postmining land use to be implemented two or more years after completion of regrading.

Proposed Paragraph (a)

Proposed paragraph (a) is substantively identical to existing paragraph (a)(1).

Proposed Paragraph (b)

Proposed 30 CFR 816.116 would establish, or require the establishment of, revegetation success standards for all reclaimed areas. Proposed paragraph (b) would require that those standards be adequate to demonstrate restoration of premining land use capability, consistent with section 515(b)(2) of SMCRA.[714] Specifically, revegetation success standards would have to be based upon the plant community and vegetation information required under proposed 30 CFR 779.19, the soil type and productivity information required under proposed 30 CFR 779.21, and the land use capability and productivity information required under proposed 30 CFR 779.22. Revegetation success standards also must be based upon the postmining land use approved under proposed 30 CFR 780.24 if the postmining land use will be implemented before expiration of the revegetation responsibility period. Otherwise, proposed paragraph (a)(4) would require that the site be revegetated in a manner that will restore native plant communities and the revegetation success standards for the site must reflect that requirement, regardless of the postmining land use. Proposed paragraph (a)(4) would improve implementation of section 515(b)(19) of SMCRA,[715] which, with limited exceptions, requires revegetation with native species, and section 515(b)(24) of SMCRA,[716] which requires that surface coal mining and reclamation operations minimize

[708] 62 FR 55766 (Oct. 22, 1997).

[709] 30 U.S.C. 1265(b)(2).

[710] 30 U.S.C. 1258.

[711] S. Rept. 95–128, 95th Cong., 1st Sess. 76–77 (1977).

[712] 30 U.S.C. 1265(b)(19).

[713] 30 U.S.C. 1265(b)(2) and (19).

[714] 30 U.S.C. 1265(b)(2).

[715] 30 U.S.C. 1265(b)(19).

[716] 30 U.S.C. 1265(b)(24).

adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available and enhance those resources where practicable.

Together with our proposed changes to the soil salvage and redistribution requirements in proposed 30 CFR 780.12(e) and 816.22, the revegetation success standard requirements of proposed paragraph (b) would preserve the site's future land use capability in those situations in which the approved postmining land use is less intensive than other uses that the land was capable of supporting before mining. For example, if the approved postmining land use is pasture, but the land was used for cropland before mining, proposed 30 CFR 780.12(e) and 816.22 would require that the soil be reconstructed in a manner that would restore the site's capability to support cropland (not just pasture, which does not require as deep a root zone). Similarly, proposed 30 CFR 816.116(b) would require that the revegetation success standards for the site be based in part upon row crop production, not just production of pasture forage and ground cover.

Proposed Paragraph (c)

Proposed paragraph (c) would require that revegetation success standards include species diversity, areal distribution of species, ground cover (except for land actually used for cropland after the completion of regrading and redistribution of soil materials), production (for land used for cropland, pasture or grazing land either before permit issuance or after the completion of regrading and redistribution of soil materials), and stocking (for all areas revegetated with woody plants, regardless of the postmining land use). Proposed paragraph (c) is intended to provide greater specificity than the introductory language of existing paragraph (a), which requires that the success of revegetation ''be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of § 816.111.'' Proposed paragraph (c) would be consistent with section 515(b)(19) of SMCRA,[717] which requires establishment of ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.'' It also would be consistent with section 515(b)(2) of SMCRA,[718] which requires restoration of the land ''to a condition capable of supporting the uses that it was capable of supporting prior to any mining, or to higher or better uses * * *.''

Proposed Paragraph (d)

Proposed paragraph (d) is substantively identical to the second sentence of existing paragraph (a)(2), which establishes statistical confidence requirements for revegetation sampling techniques and statistical adequacy standards for determining when revegetation success standards for ground cover, production, and stocking have been met. We invite comment on whether our statistical confidence interval requirements are appropriate in all situations.

Proposed Paragraph (e)

Proposed paragraph (e) is substantively identical to existing paragraph (b)(3)(i) in that it would require that the regulatory authority specify minimum stocking and planting arrangements on the basis of local and regional conditions and after coordination with and approval by the state agencies responsible for the administration of forestry and wildlife programs. However, unlike existing paragraph (b)(3)(i), which applies only to areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, proposed paragraph (e) would apply to all areas that are revegetated with woody plants, consistent with proposed paragraph (c), as discussed in the preamble to proposed paragraph (b). We also propose to replace the term ''consultation'' with ''coordination'' to avoid any confusion with consultation requirements and procedures under section 7(a)(2) of the Endangered Species Act.

Proposed Paragraph (f)

Proposed paragraphs (f)(1) and (2) are substantively identical to existing paragraph (b)(3)(ii). However, proposed paragraph (f)(2)(iii)(A) would clarify that only those species of trees and shrubs approved in the permit as part of the revegetation plan under proposed 30 CFR 780.12(g) or volunteer trees and shrubs of species that meet the requirements of proposed 30 CFR 816.111(c) may be counted for purposes of determining whether stocking standards have been met. This proposed clarification is intended to ensure that only specimens of species consistent with section 515(b)(19) of SMCRA [719] are counted in determining revegetation success.

Existing paragraph (b)(3)(iii) requires that vegetative ground cover on areas planted with trees and shrubs not be less than that required to achieve the approved postmining land use. Proposed paragraph (f)(3) would replace that requirement with a provision that would require that vegetative ground cover on areas planted with trees and shrubs have characteristics that will allow for the natural establishment and succession of native plants, including trees and shrubs. The preamble to proposed 30 CFR 816.111(b) discusses the significance of the extent and type of ground cover to the successful establishment of trees and shrubs.

Proposed Paragraph (g)

Proposed paragraph (g) is based upon existing paragraph (b)(4), which provides that areas to be developed for commercial, industrial, or residential use less than 2 years after completion of regrading need only meet a ground cover standard; *i.e.,* the vegetative ground cover must not be less than that required to control erosion. Proposed paragraph (g) would revise this requirement to apply to all lands actually developed for commercial, industrial, or residential use during the revegetation responsibility period. This change would recognize the fact that vegetation and vegetative productivity are not major components of those land uses. However, because of the potential for abuse of this provision, the proposed rule would limit its applicability to only those lands actually developed for the specified uses, rather than all lands for which one of those uses has been approved as the postmining land use in the permit.

Proposed Paragraph (h)

Proposed paragraph (h) is substantively identical to existing paragraph (b)(5) in that it specifies that, at a minimum, the cover on revegetated previously mined areas must not be less than the ground cover existing before redisturbance and must be adequate to control erosion. We also propose to clarify that previously mined areas need only meet a ground cover standard unless the regulatory authority specifies otherwise. The added language is consistent with the intent of the existing rule.

[717] 30 U.S.C. 1265(b)(19).

[718] 30 U.S.C. 1265(b)(2).

[719] 30 U.S.C. 1265(b)(19).

Proposed Paragraph (i)

Proposed paragraph (i) would provide a reminder that, for prime farmland, the revegetation success standards in 30 CFR 823.15 apply in lieu of the provisions of proposed 30 CFR 816.116(b) through (h).

40. Section 816.133: What provisions concerning the postmining land use apply to my operation?

We propose to revise existing paragraph (a) for clarity, to include cross-references to pertinent permitting requirements, and to add the phrase ''of which there is a reasonable likelihood'' after ''higher or better uses'' to be consistent with the corresponding statutory provision in section 515(b)(2) of SMCRA.[720] Existing paragraphs (b) and (c) of this section are permitting requirements that we propose to move to the land use information requirements of 30 CFR 779.22 and the postmining land use requirements of 30 CFR 780.24. Similarly, existing paragraph (d) of this section consists of permitting requirements that we propose to consolidate with the approximate original contour variance provisions of 30 CFR 785.16.

41. Why are we proposing to remove the interpretive rule in existing 30 CFR 816.200?

This section contains only one interpretive rule, which pertains to the 1979 version of the topsoil substitute requirements in 30 CFR 816.22. However, we revised 30 CFR 816.22 on May 16, 1983 (48 FR 22100), in a manner that rendered the interpretive rule obsolete. Therefore, we intend to remove existing 30 CFR 816.200.

M. Part 817: Permanent Program Performance Standards—Underground Mining Activities.

Part 817 contains the permanent regulatory program performance standards for underground mining activities. It is the counterpart to part 816 for surface mining activities. In general, part 817 is substantively identical to part 816, except for the substitution of ''underground mining activities'' for ''surface mining activities,'' the replacement of references to surface mining regulations with references to the corresponding underground mining regulations, and changes of a similar nature. Our proposed revisions to part 817 are similarly substantively identical to the corresponding revisions that we propose in part 816. Therefore, this portion of the preamble discusses only those proposed revisions to part 817 that differ from the proposed revisions to the corresponding provisions of part 816. Otherwise, the rationale that we provide for the proposed revisions to part 816 applies with equal effect to our proposed revisions to part 817.

Section 516 of SMCRA[721] contains the performance standards for underground mining operations. Section 516(b)(10)[722] states that ''with respect to other surface impacts not specified in this subsection * * *, [underground coal mining operations must] operate in accordance with the [performance] standards established under section 515 of this title for such effects which result from surface coal mining operations.'' In other words, unless otherwise specified in section 516 or in the regulations implementing section 516, the performance standards for surface mining operations in section 515 of SMCRA[723] also apply to underground mining operations under section 516 of the Act. The following table identifies those provisions of section 515 for which section 516 contains a counterpart:

Section 515(b)	Section 516(b)
(10)	(9)
(11)	(4)
(13)	(5)
(14)	(8)
(19)	(6)
(21)	(7)
(24)	(11)

In general, the corresponding provisions of sections 515 and 516 listed in the table are similar. Therefore, when reading the preamble to part 816 for purposes of understanding a rule proposed in part 817, you may use this table to convert references to section 515 in the preamble to part 816 to references to section 516 for purposes of part 817.

1. Section 817.11: What signs and markers must I post?

The existing rules contain two requirements to mark buffer zones for perennial and intermittent streams—one in the stream buffer zone rules in sections 816.57(b) and 817.57(b) and one in the rules concerning signs and markers in sections 816.11(e) and 817.11(e). We propose to consolidate those requirements in sections 816.11(e) and 817.11(e). As revised, proposed section 817.11(e) provides that the boundaries of any buffer to be maintained between surface activities and perennial or intermittent streams in accordance with sections 784.28 and 817.57 must be clearly marked to avoid disturbance by surface operations and facilities resulting from or in connection with an underground mine.

2. Section 817.34: How must I protect the hydrologic balance?

This section is substantively identical to proposed 30 CFR 816.34 for surface mines, with one exception: The underground rules do not contain a counterpart to proposed 30 CFR 816.34(a)(9), which would require that the permittee handle earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole. Our omission of this provision from the underground mining rules reflects the construction of sections 515 and 516 of SMCRA.[724] Section 515(b)(10)(D) of SMCRA[725] requires that surface coal mining operations restore the recharge capacity of the mined area to approximate premining conditions. However, that requirement does not appear in the corresponding provision for underground coal mining operations in section 516(b)(9) of SMCRA.[726]

3. Section 817.40: What responsibility do I have to replace water supplies?

This section is substantively identical to proposed 30 CFR 816.40 for surface mines, with one exception: Proposed paragraph (a)(1) reflects the water supply replacement requirements of section 720(a)(2) of SMCRA[727] for underground mining operations rather than the water supply replacement requirements of section 717(b) of SMCRA[728] for surface mines.

4. Section 817.44: What restrictions apply to gravity discharges from underground mines?

The counterpart to this proposed rule is existing 30 CFR 817.41(i). We propose to revise this rule by adding a requirement in proposed paragraph (a)(2)(ii) that the applicant for a gravity discharge design the discharge control structure to prevent a mine pool blowout. We also propose to add paragraph (a)(3), which would require that the permittee construct and maintain the discharge control structure in accordance with the design approved by the regulatory authority and any other conditions imposed by the regulatory authority. The proposed

[720] 30 U.S.C. 1265(b)(2).

[721] 30 U.S.C. 1266.

[722] 30 U.S.C. 1266(b)(10).

[723] 30 U.S.C. 1265.

[724] 30 U.S.C. 1265 and 1266.

[725] 30 U.S.C. 1265(b)(10)(D).

[726] 30 U.S.C. 1266(b)(9).

[727] 30 U.S.C. 1309a(a)(2).

[728] 30 U.S.C. 1307(b).

revisions are intended to provide for the safety of the public, protect property from damage by mine pool blowouts, and prevent material damage to the hydrologic balance outside the permit area in accordance with section 510(b)(3) of SMCRA.[729]

5. Section 817.57: What additional performance standards apply to surface activities conducted in, through, or adjacent to a perennial or intermittent stream?

This section is substantively identical to proposed 30 CFR 816.57 for surface mining activities except that, in accordance with our interpretation of the definition of ''surface coal mining operations'' in section 701(28) of SMCRA [730] and 30 CFR 700.5, the provisions of 30 CFR 817.57 would not apply to the surface impacts, including subsidence-related impacts, resulting from underground mining activities if there are no mining activities conducted on the surface of the land on which those impacts occur. However, as provided in the proposed definition of ''material damage to the hydrologic balance outside the permit area'' in 30 CFR 701.5, underground mine operators must conduct their operations in a manner that preserves sufficient flow to maintain existing and reasonably foreseeable uses of perennial and intermittent streams on land overlying the underground workings or within the angle of draw of those workings. In addition, as provided in the same definition, underground mine operators must conduct their operations in a manner that does not preclude attainment of the designated use or uses of perennial and intermittent streams on land overlying the underground workings or within the angle of draw of those workings.

6. Section 817.71: How must I dispose of excess spoil?

We propose to remove existing 30 CFR 817.71(k), which provides that spoil resulting from face-up operations for underground coal mine development may be placed at drift entries as part of a cut-and-fill structure if that structure is less than 400 feet in length and is designed in accordance with section 817.71. We propose to remove this paragraph because spoil excavated as part of face-up operations and used to construct a mine bench is not excess spoil. Under both the existing and proposed definitions of excess spoil in 30 CFR 701.5, excess spoil consists of spoil material disposed of in a location outside the mined-out area, but it does not include spoil needed to achieve restoration of the approximate original contour. In most cases, spoil used to construct the bench for an underground mine will later be used to reclaim the face-up area when coal extraction from the underground mine is finished. That is, the bench will be regraded to cover the mine entry and eliminate any highwall once mining is completed and the bench is no longer needed for mine offices, parking lots, equipment storage, conveyor belts, and other mining-related purposes. Consequently, this paragraph of the regulations does not belong in a section devoted to disposal of excess spoil.

We are not proposing to move the requirements of 30 CFR 817.71(k) to another part of our rules because we do not find it necessary to impose the design requirements for excess spoil fills (which are permanent structures) on temporary spoil storage structures and support facilities, such as the benches to which section 817.71(k) applies. Nor do we find it necessary or appropriate to limit those benches to 400 feet in length. Bench length and configuration are more appropriately determined by operational, topographic, geologic, and other site-specific considerations. However, the regulatory authority has the right to impose design and construction requirements on a case-by-case basis when it determines that those requirements are a necessary prerequisite to making the permit application approval findings specified in 30 CFR 773.15.

7. Section 817.102: How must I backfill surface excavations and grade and configure the land surface?

This section contains several differences from proposed 30 CFR 816.102 for surface mining activities. First, in paragraph (a), we propose to clarify that the backfilling requirement applies to surface excavations created by surface operations associated with underground mines.

Second, the underground mining regulations would not include the exceptions for mountaintop removal mining and thin and thick overburden found in proposed 30 CFR 816.102(a)(1)(i), (iii), and (iv). Those provisions do not apply to underground mining operations.

Third, we propose to move existing 30 CFR 817.102(l) to paragraph (a)(1)(vii) to consolidate it with the other exceptions to the requirement to restore the approximate original contour. We also propose to replace the word ''fills'' in the existing rule with ''spoil storage areas'' to comply more accurately with the decision in *In re: Permanent Surface Mining Regulation Litigation I, Round II* (*PSMRL I, Round II)* when read as a whole.[731] The opinion directs the Secretary to provide some flexibility for underground mining operations with respect to regrading spoil from face-up areas. The court's opinion addresses the requirement to restore the approximate original contour for spoil stored until the underground mining operation is completed:

> One distinct difference between surface and underground mines concerns the length of their duration. An underground mine may remain active up to 40 years. Surface disturbances thereby become settled and revegetated. In this situation, it is duplicitous to require the removal of previously settled and revegetated land only to achieve the purpose of a second revegetation. The court therefore remands these regulations. It directs the Secretary to provide some flexibility for settled fills that have become stabilized and revegetated.[732]

The opinion does use the word ''fills'' in one instance in the last sentence of the opinion. However, we do not believe that the court intended its opinion to address excess spoil because excess spoil by definition includes only spoil not needed to restore the approximate original contour, which means that excess spoil fills already are excluded from the requirement to restore the approximate original contour. Therefore, applying this exception only to excess spoil fills would render the court's decision meaningless.

The court's decision does not discuss the requirement in section 515(b)(3) of SMCRA [733] to eliminate all highwalls. We do not interpret the court's decision as requiring an exception from that requirement. The court's objection to the 1979 rule discusses situations in which the only purpose of removing and regrading spoil in a settled and revegetated storage area would be to restore the approximate original contour to achieve a second revegetation. However, removal of the stored spoil may be necessary for purposes other than revegetation. For example, the stored spoil may be needed to eliminate the highwall at the mine face-up. Therefore, we propose to add paragraph (a)(1)(vii)(G) to specify that settled and revegetated spoil storage areas may not be retained undisturbed if the spoil in those areas is needed to eliminate the

[729] 30 U.S.C. 1260(b)(3).

[730] 30 U.S.C. 1291(28).

[731] See *In re: Permanent Surface Mining Regulation Litigation I-Round II,* No. 79–1144, 1980 U.S. Dist. LEXIS 17660 at *17–18 (D.D.C. May 16, 1980).

[732] *Id.* at *18.

[733] 30 U.S.C. 1265(b)(3).

highwall or to meet other requirements of the regulatory program.

8. Section 817.121: What measures must I take to prevent, control, or correct damage resulting from subsidence?

We propose to revise paragraph (c)(4) of this section by removing those provisions that we suspended on December 22, 1999 (64 FR 71652–71653), in response to a court order vacating those provisions.[734] Specifically, we propose to remove all of existing 30 CFR 817.121(c)(4) except paragraph (c)(4)(v). We also propose to restructure this section for clarity and ease of reference and revise it in accordance with plain-language principles to make it more user-friendly. We do not propose any substantive revisions.

9. Why are we proposing to remove the interpretive rules in existing 30 CFR 817.200?

Existing 30 CFR 817.200 contains two interpretive rules. The first one, in paragraph (c), pertains to the 1979 version of the topsoil substitute requirements in 30 CFR 817.22. However, we subsequently revised 30 CFR 817.22 in a manner that rendered the interpretive rule obsolete.[735] Therefore, we intend to remove existing 30 CFR 817.200(c).

The second interpretive rule, in paragraph (d), addresses the use of the permit revision process for postmining land use changes for underground mines. We propose to include this interpretive rule into 30 CFR 784.24 in revised form to the extent that it contains unique provisions not already present in other regulations. Specifically, proposed 30 CFR 784.24(c) would require that any proposed change to a higher or better postmining land use be processed as a significant permit revision. We will remove 30 CFR 817.200(d) if we adopt proposed 30 CFR 784.24(c).

As discussed in the preamble to proposed 30 CFR 780.24(c), we propose to apply this requirement only to changes to higher or better uses rather than to all proposed land use changes because we also propose to revise our postmining land use regulations to clarify that the standards and procedures for approving alternative postmining land uses would apply only to changes to higher or better uses.

Changes from one land use that the land was capable of supporting prior to mining to another land use that the land was capable of supporting prior to mining would no longer require approval as an alternative postmining land use. Our proposed revisions would improve consistency with section 515(b)(2) of SMCRA,[736] which requires that surface coal mining and reclamation operations ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood.'' The statutory provision distinguishes only between uses that the land was capable of supporting before mining and higher or better uses; *i.e.,* it establishes criteria for approval of higher or better uses, but no special criteria for approval of any of the uses that the land was capable of supporting before mining.

N. Part 824: Special Permanent Program Performance Standards—Mountaintop Removal Mining Operations

We propose to revise 30 CFR 824.11(a) by removing paragraphs (a)(2) through (a)(4) because they duplicate our proposed definition of mountaintop removal mining in 30 CFR 701.5. In addition, we propose to streamline the introductory language by specifying that 30 CFR 824.11 applies to all operations for which the regulatory authority has approved a permit under 30 CFR 785.14.

Proposed paragraph (b)(1) would include existing 30 CFR 824.11(a)(5), which provides that mountaintop removal mining operations must meet all applicable requirements of the regulatory program except for approximate original contour restoration requirements. We propose to revise this paragraph by adding a citation to the approximate original contour restoration requirements in proposed 30 CFR 816.102(a)(1) and by adding an exception from the thick overburden requirements of 30 CFR 816.105. The latter requirements are inconsistent with the purpose of mountaintop removal mining operations, which is to create a level plateau or gently rolling contour, because the thick overburden rules require that as much spoil be returned to the mined-out area as possible.

Under proposed paragraph (b)(2)(i), as under existing 30 CFR 824.11(a)(6), the permittee would be required to retain an outcrop barrier, consisting of the toe of the lowest coal seam and its associated overburden, of sufficient width to prevent slides and erosion, except for certain specified exceptions. We propose to revise this provision to require that the permittee construct drains through the barrier to the extent necessary to prevent saturation of the backfill. This requirement is necessary because the outcrop barrier resembles a berm but consists of consolidated natural rock and coal that is much less permeable than the fractured, unconsolidated rock of which backfill is comprised. Without drains, the barrier could serve as a dike, impounding water in the void spaces within the backfill. Allowing the foundation zone of the backfill to become saturated could result in slope instability, which would be inconsistent with section 102(a) of SMCRA,[737] which states that one of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.''

We also propose to add paragraph (b)(2)(iv) to allow the regulatory authority to approve removal of the outcrop barrier required by paragraph (b)(2)(i) if the regulatory program establishes standards for and requires construction of a barrier comprised of alternative materials that will provide equivalent stability. We have approved one such state program provision in West Virginia that has worked well, both in terms of stability and in terms of maximizing coal recovery consistent with section 515(b)(1) of SMCRA.[738]

In proposed paragraph (b)(3), which would include existing 30 CFR 824.11(a)(7), we propose to delete the phrase ''on the mined area'' from the language requiring final graded slopes to be no steeper than 20 percent. This revision would allow the plateau area to extend outside the mined area to include the decks (top surfaces) of excess spoil fills, which would be consistent with the concept of mountaintop removal mining and could facilitate the use of landforming principles if desired.

In proposed paragraph (b)(4), which would include existing 30 CFR 824.11(a)(8), we propose to delete the existing sentence that prohibits directing drainage through or over a valley or head-of-hollow fill. This proposed revision would enhance the ability of the permittee to use landforming principles and natural stream channel design techniques when it is possible to do so without adversely impacting the stability of the fill and without increasing discharges of parameters of concern. Its adoption would allow the reestablishment or replacement of impacted or buried streams and facilitate the use of drainage techniques that incorporate the

[734] *Nat'l Mining Ass'n* v. *Babbitt,* 173 F.3d 906 (D.C. Cir. 1999).

[735] See 48 FR 22100 (May 16, 1983).

[736] 30 U.S.C. 1265(b)(2).

[737] 30 U.S.C. 1202(a).

[738] 30 U.S.C. 1265(b)(1).

best technology currently available for the control of drainage. In particular, it would allow the construction of stable channels to convey discharges and runoff from the plateau areas over valley and head-of-hollow fills.

We propose to move existing 30 CFR 824.11(a)(9), which prohibits damage to natural watercourses below the lowest coal seam to be mined, to 30 CFR 785.14(b)(9) in revised form. We propose to do so because this requirement is really more of an operational design element (permitting requirement) than a performance standard, especially in view of our proposed interpretation of the meaning of the underlying statutory provision as discussed in the preamble to proposed 30 CFR 785.14(b)(9).

We propose to remove existing 30 CFR 824.11(a)(10), which requires that all waste and acid-forming and toxic-forming materials be covered with non-toxic spoil to prevent pollution and to achieve the postmining land use. As discussed above, this provision is unnecessary because it contains no requirements that are not already encompassed by proposed 30 CFR 824.11(b)(1), which is the counterpart to existing 30 CFR 824.11(a)(5).

O. Part 827: Special Permanent Program Performance Standards—Coal Preparation Plants Not Located Within the Permit Area of a Mine

We propose to revise 30 CFR 827.12 by streamlining it to list only the sections of part 816 that apply to coal preparation plants not located at a mine. Specifically, this proposed rule would specify that the construction, operation, maintenance, modification, reclamation, and removal activities at coal preparation plants must comply with the following provisions of part 816: Sections 816.11, 816.22, 816.34 through 816.57, 816.71, 816.74, 816.79, 816.81 through 816.97, 816.100, 816.102, 816.104, 816.106, 816.111 through 816.116, 816.131 through 816.133, 816.150, 816.151, and 816.181. This list of sections is substantively identical to the sections included in the existing rule, with the exception that we propose to add 30 CFR 816.57 to the list. Section 816.57 contains performance standards for mining in, through, or within 100 feet of perennial and intermittent streams.

In a previous rulemaking, we declined to include 30 CFR 816.57, which at that time was known as the stream buffer zone rule, in 30 CFR 827.12. However, we stated that we might add such a requirement ''in a separate rulemaking if experience under this rule indicates that such buffer zones are necessary to meet the Act's objectives.'' [739]

Our experience over the last three decades has led us to propose inclusion of 30 CFR 816.57. Specifically, we find that coal preparation plants can have substantial and long-lasting adverse environmental impacts on streams as a result of dust, surface runoff, and noncompliant discharges of process water. In addition, coal preparation plants normally are in existence longer than a surface mine and some underground mines, which means that any impacts would be relatively long-term. An undisturbed buffer between coal preparation plants and streams could mitigate some of those impacts.

X. What effect would this rule have in federal program states and on Indian lands?

If adopted in final form, the rule that we are proposing today would apply to all non-Indian lands in states with a federal regulatory program. States with federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. These programs are codified at 30 CFR parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. In general, there would be no need to amend the approved federal program before the rule would take effect because, with limited exceptions, each program cross-references 30 CFR parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827.

Tennessee is the only federal program state with active coal production and, thus, is the only state in which the rule would have immediate impact. Tennessee law already sharply restricts most significant mining activities in or near streams, which means that the provisions of proposed 30 CFR 780.28, 784.28, 816.57, and 817.57 pertaining to mining in, through, or near streams, are unlikely to have a significant effect on mining within that state. Section 69–3–108(f) of the Tennessee Code Annotated, as amended by the Responsible Mining Act of 2009, prohibits issuance of any permit for the removal of coal by surface mining methods or for surface access points to underground mining within 100 feet of the ordinary high-water mark of a stream. It also prohibits issuance of a permit that would allow placement of overburden or waste from a surface mine within that buffer zone. However, unlike the proposed federal rule, the state law does not apply to any type of stream crossing, to operations that improve the quality of stream segments previously disturbed by mining, or to coal mine waste from underground mines or coal preparation plants. Nor does the state law apply to coal transportation, storage, preparation and processing, loading, and shipping operations when necessary because of site-specific conditions, provided that those activities and operations do not cause the loss of stream function.

If adopted in final form, the following parts of the proposed rule that we are publishing today also would apply to Indian lands by virtue of cross-references in 30 CFR part 750:

- 30 CFR 750.12(c)(1) includes the permitting provisions of parts 773, 774, 777, 779, 780, 783, 784, and 785 by cross-reference. We are not proposing any substantive revisions to the exceptions listed in 30 CFR 750.12(c)(2).
- 30 CFR 750.17 includes the bond and insurance provisions of subchapter J (part 800) by cross-reference.
- 30 CFR 750.16 includes the performance standards of parts 816, 817, 824, and 827 by cross-reference.

The revisions to parts 700 and 701 also would apply to Indian lands by virtue of 30 CFR 700.1(a), which provides that subchapter A of 30 CFR chapter VII contains ''regulatory requirements and definitions generally applicable to the programs and persons covered by the Act.''

We invite the public to comment on whether there are unique conditions in any federal program states or on Indian lands that should be addressed in the national rule or as specific amendments to individual federal programs or to the Indian lands rules.

XI. How would this rule affect state regulatory programs?

Adoption of this proposed rule as a final rule would not have any immediate effect on approved state regulatory programs. States would need to propose and adopt counterpart revisions to their regulations and other state program provisions and submit them for review by OSMRE and the public as a program amendment under 30 CFR 732.17. Under 30 CFR 732.17(g)(9), no change to state law or regulations shall take effect for purposes of a state program until that change is approved by OSMRE as a program amendment.

If we adopt a final rule based on this proposed rule, we will evaluate each state regulatory program approved under 30 CFR part 732 and section 503

[739] 48 FR 20399 (May 5, 1983).

of the Act[740] to determine whether any changes in the state program are necessary to maintain consistency with federal requirements. If we determine that a state program provision needs to be amended as a result of revisions to the corresponding federal rule, we will notify the state in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act[741] and 30 CFR 730.11(a) provide that SMCRA and federal regulations adopted under SMCRA do not supersede any state law or regulation unless that law or regulation is inconsistent with the Act or the federal regulations adopted under the Act. Section 505(b) of the Act[742] and 30 CFR 730.11(b) provide that we may not construe existing state laws and regulations, or state laws and regulations adopted in the future, as inconsistent with SMCRA or the federal regulations if these state laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the federal regulations.

Under 30 CFR 732.15(a), each state regulatory program must provide for the state to carry out the provisions and meet the purposes of the Act and its implementing regulations. In addition, that rule requires that state laws and regulations be in accordance with the provisions of the Act and consistent with the federal regulations. As defined in 30 CFR 730.5, ''consistent with'' and ''in accordance with'' mean that the state laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the state laws and regulations are no less effective than the federal regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a state program amendment if, as a result of changes in SMCRA or the federal regulations, the approved state regulatory program no longer meets the requirements of SMCRA or the federal regulations.

XII. How do I submit comments on the proposed rule?

General Guidance

We will review and consider all comments submitted to *www.regulations.gov* or to the offices listed under **ADDRESSES** by the close of the comment period (see **DATES**). We cannot ensure that comments received after the close of the comment period will be included in the docket for this rulemaking or considered in the development of a final rule.

Please include the Docket ID ''OSM–2010–0018'' at the beginning of all comments on the proposed rule. The most helpful comments and the ones most likely to influence the final rule are those that include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent federal laws or regulations, technical literature, other relevant publications, or personal experience. Your comments should refer to a specific portion of the proposed rule or preamble, be confined to issues pertinent to the proposed rule, explain the reason for any recommended change or objection, and include supporting data when appropriate.

If you wish to comment on the information collection aspects of this proposed rule, please follow the instructions under the heading ''Paperwork Reduction Act'' in Part XIII of this preamble (''Procedural Matters and Required Determinations'').

Please include the Docket ID ''OSM–2010–0021'' at the beginning of all comments on the draft environmental impact statement.

Please include the Docket ID ''OSM–2015–0002'' at the beginning of all comments on the draft regulatory impact analysis.

You may review the proposed rule, the draft environmental impact statement, and the draft regulatory impact analysis online at the Web sites listed in **ADDRESSES** or in person at the headquarters office location listed in **ADDRESSES** and at the following OSMRE regional, field, and area office locations:

Appalachian Regional Office, Three Parkway Center, Pittsburgh, Pennsylvania 15220, Phone: (412) 937–2828

Mid-Continent Regional Office, William L. Beatty Federal Building, 501 Belle Street, Room 216, Alton, Illinois 62002, Phone: (618) 463–6460

Western Regional Office, 1999 Broadway, Suite 3320, Denver, Colorado 80201, Phone: (303) 844–1401

Charleston Field Office, 1027 Virginia Street, East Charleston, West Virginia 25301, Phone: (304) 347–7158

Knoxville Field Office, 710 Locust Street, 2nd floor, Knoxville, Tennessee 37902, Phone: (865) 545–4103

Lexington Field Office, 2675 Regency Road, Lexington, Kentucky 40503, Phone: (859) 260–3900

Beckley Area Office, 313 Harper Park Drive, Beckley, West Virginia 25801, Phone: (304) 255–5265

Harrisburg Area Office, 215 Limekiln Road, New Cumberland, Pennsylvania 17070, Phone: (717) 730–6985

Albuquerque Area Office, 100 Sun Avenue NE, Pan American Building, Suite 330, Albuquerque, New Mexico 87109, Phone: (505) 761–8989

Casper Area Office, Dick Cheney Federal Building, 150 East B Street, Casper, Wyoming 82601, Phone: (307) 261–6550

Birmingham Field Office, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209, Phone: (205) 290–7282

Tulsa Field Office, 1645 South 101st East Avenue, Suite 145, Tulsa, Oklahoma 74128, Phone: (918) 581–6430

Public Availability of Comments

Before including your address, phone number, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Public Hearings

We will hold a public hearing on the proposed rule and the draft environmental impact statement in the following cities: Charleston, West Virginia; Denver, Colorado; Lexington, Kentucky; Pittsburgh, Pennsylvania; and St. Louis, Missouri. OSMRE representatives will provide information on the proposed rule at each hearing. A court reporter will be available at each hearing to record your comments if you wish to provide input in this fashion. The docket for this rulemaking will include a written summary of each hearing and the transcript provided by the court reporter.

We will announce arrangements, specific locations, dates, and times for each hearing in a **Federal Register** notice published at least 7 days before each hearing. If you are a disabled individual who needs reasonable accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** after we publish notice of the specific hearing locations and dates.

XIII. Procedural Matters and Required Determinations

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory

[740] 30 U.S.C. 1253.

[741] 30 U.S.C. 1255(a).

[742] 30 U.S.C. 1255(b).

Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is significant because it may have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health, or safety, or State, local or tribal governments or communities.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

We have prepared a draft regulatory impact analysis (RIA) and submitted it to the Office of Management and Budget. We invite comments on that analysis, which you can view online at *www.osmre.gov* and *www.regulations.gov* or in person at the headquarters office location listed in **ADDRESSES** and at the OSMRE regional, field, and area office locations listed in Part XII of this preamble.

Based upon the draft RIA, we do not project that the proposed rule would prohibit mining of any particular coal reserves in excess of baseline conditions. Therefore, our estimates do not include the direct and indirect costs associated with stranded coal reserves. We invite comment on the occurrence of stranded coal reserves as a consequence of the proposed rule and any attendant costs that should be included in the RIA.

We also invite comment on the cost assumptions by model mine and alternative in Exhibit 4–3 in the draft RIA, including the assumed costs for habitat restoration.

Social Cost of Carbon (SCC)

The Interagency Working Group on the Social Cost of Carbon issued guidelines in 2010, and an update in 2013, to help agencies assess the climate change-related benefits of reducing carbon emissions and integrate these estimates into their assessments of regulatory impacts in cost-benefit analyses.[743] The Interagency Working Group guidance provides an SCC dollar value based on the average of three specific models. The SCC related to a specific proposed action is calculated by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years.

This analysis does not monetize the methane emissions and increased carbon sequestration effects of the action alternatives in the draft EIS for multiple reasons. Most fundamentally, data limitations prevent a quantitative analysis of the net effect of each alternative on carbon emissions from coal mining. Available evidence suggests that the alternatives would have varying offsetting effects on greenhouse gas emissions. For instance, some alternatives would result in changes that would increase emissions, such as an increase in the amount of time hauling vehicles are operated. Conversely, some of the same alternatives would increase the number of acres of forest reestablished or undisturbed annually, which would increase the carbon storage potential when compared to the No Action Alternative.

Predicting the direction and magnitude of impacts on overall U.S. greenhouse gas emissions is highly complex. The impact depends on factors such as the change in coal prices, the technological flexibility that power producers have to switch to substitute fuels, the price trends for those substitutes, the emissions profile for those substitutes, changes in coal export markets, and a variety of other considerations.

This analysis anticipates that the net effect on climate resiliency is positive at the national level under each action alternative (excluding Alternative 9), *i.e.,* that each alternative would result in less carbon in the atmosphere because of increased carbon sequestration and reduced methane emissions. However, data gaps prevent quantifying, and therefore monetizing, the magnitude of this benefit.

[743] Technical Support Document—Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, Interagency Working Group on Social Cost of Carbon, United States Government, May 2013. Accessed June 2015 from *https://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.*

B. Regulatory Flexibility Act (RFA).

When a federal agency proposes regulations, the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires the agency to prepare and make available for public comment an analysis that describes the effect of the rule on small businesses, small organizations, and small government jurisdictions.[744] For this rulemaking, the analysis takes the form of an Initial Regulatory Flexibility Analysis (IRFA), which appears in Appendix A of the draft regulatory impact analysis.

Estimate of the Number of Small Entities to Which the Rule Would Apply

The goal of this analysis is to identify the number of small entities with mining permits that fall within each coal region. However, due to the complexity in corporate structures in the coal mining industry, it is difficult to calculate the exact number of small entities (defined by the RFA as having 500 or fewer employees) that could be affected by this proposed rule. The coal mining industry is continually changing and it is common for large mining operators to merge with smaller operators, creating complicated business relationships between parent corporations and subsidiaries.

When determining how to estimate the number of small coal mining companies that could be affected by the proposed rule, we used a conservative approach to avoid underestimating the number of small entities. Specifically, we adhered to the method that the Mine Safety and Health Administration (MSHA) uses to calculate compliance costs to small business. MSHA examines the impact of a proposed rule on a mine with 500 or fewer employees, which is the Small Business Administration (SBA) threshold, and gives careful consideration to small mines with fewer than 20 employees. MSHA's rationale for applying these two thresholds is as follows:

> MSHA has also examined the impact of the proposed rule on mines with fewer than 20 employees, which MSHA and the mining community have traditionally referred to as ''small mines.'' These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. Therefore, their costs of complying with MSHA's rules and the impact of the Agency's rules on them would also tend to be different. This analysis complies with the requirements of the RFA for an analysis of the impact on ''small

[744] 5 U.S.C. 601 *et seq.*

entities'' while continuing MSHA's traditional definition of ''small mines.'' [745]

To estimate the number of small entities potentially affected by this rule, we used MSHA data from 2013 on mines, mine controllers, employees, and production to identify mines likely operated by small businesses. We assumed that each mine controller listed in that database represented a separate entity. We eliminated controllers with more than 500 employees. We also excluded all inactive mines, all operating companies reporting no employees, and all entities reporting less than 2,000 tons annual production because these mines are not representative of a typical small entity in the industry.

We sorted small entities into those with identified controllers having 500 or fewer employees (the SBA threshold), and, as a subset, those controllers having fewer than 20 employees (the MSHA threshold). We determined that there were 284 small entities under the SBA threshold and 134 small entities under MSHA's small mine definition, with 91 percent of the SBA small entities and 96 percent of the MSHA small mines located in the Appalachian Basin.

We estimate that compliance costs for SBA small entities would range between zero and 3.6 percent of gross annual revenues, depending on the mining region. In Appalachia, we estimate compliance costs would average 4.7 percent of gross annual revenues for surface mines and 2.5 percent of gross annual revenues for underground mines.

We estimate that compliance costs for MSHA small mines would range between 0 and 16 percent of gross annual revenues, depending on the mining region. In Appalachia, we estimate compliance costs would average 7.1 percent of gross annual revenues for surface mines and 4.3 percent of gross annual revenues for underground mines.

Description of Measures to Minimize Economic Impacts on Small Entities

Section 507(c) of SMCRA [746] establishes the small operator assistance program (SOAP). To the extent that funds are appropriated for that program, this provision of SMCRA authorizes us to provide small operators with training and financial assistance in preparing certain elements of permit applications. An operator is eligible to receive training and assistance if his or her probable total annual production at all locations will not exceed 300,000 tons.

Under section 507(c)(1) of SMCRA [747] and 30 CFR 795.9, the following permit application activities are eligible for financial assistance under SOAP:

- Preparation of the determination of the probable hydrologic consequences of mining, including collection and analysis of baseline data and any engineering analyses and designs needed for the determination.
- Collection and analysis of geological data.
- Development of cross-sections, maps, and plans.
- Collection of information on archaeological and historical resources and preparation of any related plans.
- Development of preblast surveys.
- Collection of site-specific information on fish and wildlife resources and preparation of fish and wildlife protection and enhancement plans.

These activities include many of the new permit application requirements in the proposed rule; *e.g.,* the expanded baseline data requirements concerning hydrology, geology, and the biological condition of streams and the expanded requirements for site-specific fish and wildlife protection and enhancement plans. In addition, section 507(c)(2) of SMCRA [748] provides that, as part of SOAP, we must either provide training or assume the cost of training eligible small operators on the preparation of permit applications and compliance with the regulatory program. Although SOAP funding is available for activities associated with new permit application requirements and training, SMCRA does not authorize SOAP funding for compliance costs associated with the expanded requirements for monitoring groundwater, surface water, and the biological condition of streams.

If this proposed rule is adopted as a final rule, we intend to interpret section 507(c)(1) of SMCRA [749] in a manner that will maximize SOAP funding eligibility for the cost of compliance with the new permit application requirements. We invite comment on whether 30 CFR 795.9 could or should be revised to include more of the new permit application requirements in this proposed rule.

SOAP funding is subject to annual appropriation from the federal expense portion of the Abandoned Mine Reclamation Fund established under section 401(a) of SMCRA.[750] Section 401(c)(9) of SMCRA [751] caps SOAP funding at $10 million per year. If this proposed rule is adopted, we intend to request $10 million in appropriations to provide financial assistance to small operators in developing permit applications. We also intend to provide training to assist small operators in meeting the additional requirements of the proposed rule. Thus, SOAP assistance should substantially reduce compliance costs for small operators by offsetting the cost of most of the new permit application requirements.

C. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). As discussed in the draft regulatory impact analysis, the proposed rule would not—

a. Have an annual effect on the economy of $100 million or more.

b. Cause a major increase in costs or prices for consumers; individual industries; federal, state, or local government agencies; or geographic regions.

c. Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates

This proposed rule would not impose an unfunded mandate on state, local, or tribal governments or the private sector of $100 million or more per year. As discussed in the draft regulatory impact analysis, the total aggregate annual compliance and related costs associated with this proposed rule would not exceed $60 million. In addition, the proposed rule would not have a significant or unique effect on state, tribal, or local governments or the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1534, is not required.

E. Executive Order 12630—Takings

Under the criteria in Executive Order 12630, we have made a preliminary determination that this proposed rule does not have specific, identifiable takings implications. First, based upon the draft regulatory impact analysis, we

[745] U.S. Department of Labor, Mine Safety and Health Administration Office of Standards, Regulations, and Variances. Preliminary Regulatory Economic Analysis for Lowering Miners' Exposure to Respirable Coal Mine Dust Including Continuous Personal Dust Monitors Proposed Rule. Washington, RIN 1219–AB64, September 2010. Page 159.

[746] 30 U.S.C. 1257(c).

[747] 30 U.S.C. 1257(c)(1).

[748] 30 U.S.C. 1257(c)(2).

[749] 30 U.S.C. 1257(c)(1).

[750] 30 U.S.C. 1231(a).

[751] 30 U.S.C. 1231(c)(9).

do not project that the proposed rule would prohibit mining of any particular coal reserves in excess of baseline conditions. Second, the question of whether the proposed rule might effect a compensable taking of a particular property interest necessarily involves ad hoc factual inquiries, including the economic impact of the proposed rule on a particular claimant; the extent to which the proposed rule might interfere with a claimant's reasonable, investment-backed expectations; and the character of the government action, none of which is possible for a national rule of this scope, which does not specifically bar the mining of any particular coal reserves. However, based upon the draft regulatory impact analysis, we have no basis to believe that implementation of the proposed rule would be likely to result in compensable takings of any specific property interests.

F. Executive Order 13132—Federalism

This proposed rule would not alter or affect the relationship between states and the federal government. Therefore, the proposed rule does not have significant federalism implications. Consequently, there is no need to prepare a federalism assessment.

G. Executive Order 12988—Civil Justice Reform

The Office of the Solicitor for the Department of the Interior has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

H. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

We have evaluated the potential effects of this proposed rule on federally-recognized Indian tribes and have determined that its provisions would not have substantial direct effects on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes. On May 12, 2010, the Director of OSMRE met with the Chairmen of the Hopi and Crow Tribes and the President of the Navajo Nation to initiate consultation on the stream protection rulemaking and development of the draft EIS. The tribes in attendance requested that they be kept informed of the rulemaking process and EIS development. The Director of OSMRE again met with tribal leaders in Washington, DC on December 1, 2011. At that time, OSMRE provided additional information on the elements under consideration for the alternatives in the draft EIS and discussed the expected impacts to the SMCRA regulatory program for Indian lands. OSMRE intends to consult with tribal leaders again after the proposed rule has been published.

I. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not considered a significant energy action under Executive Order 13211. As discussed below and in the draft regulatory impact analysis, the revisions contained in this proposed rule would not have a significant effect on the supply, distribution, or use of energy.

The Office of Management and Budget has identified nine outcomes that may constitute ''a significant adverse effect.'' The three outcomes that are relevant to this proposed rule are: (1) A reduction in coal production in excess of five million tons per year, (2) a reduction in electricity production in excess of one billion kilowatt-hours per year or in excess of 500 megawatts (MW) of installed capacity,[752] and (3) an increase in the cost of energy production in excess of one percent. As explained below, the proposed rule would not meet any of these criteria.

The draft regulatory impact analysis estimates the impact of the proposed rule on coal production over a 21-year period, 2020 through 2040. On average, the rule would reduce coal production by 1.9 million short tons per year, with the greatest impact occurring in 2022, when the reduction would be 4.6 million short tons.

Because coal makes up a significant part of the domestic energy mix, an increase in the price of coal likely would result in an increase in domestic electricity prices, which in turn would reduce market demand for electricity. The draft regulatory impact analysis predicts that the proposed rule would increase electricity costs by 0.1 percent per year on average, which would result in an average decrease in electricity demand and production of 0.2 billion kilowatt-hours per year.

Compliance costs associated with the proposed rule would be less than one percent of total coal production costs in every year within the study period (2020–2040). On average, compliance costs would comprise 0.1 percent of total coal production costs over that period.

J. Paperwork Reduction Act

Under 5 CFR 1320, the rules implementing the information collection aspects of the Paperwork Reduction Act, a federal agency must estimate the burden imposed on the public by any proposed collection of information. This burden consists of ''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.''

We estimated the aggregate burden (in hours) for information collection under the proposed rule by calculating the number of hours that industry and state and local governments would need to comply with each element of the proposed rule.

In addition, we estimated the total annual non-hour cost burden to respondents. These non-wage costs include items such as equipment required for monitoring, sampling, drilling and testing, operation and maintenance, and purchase of services.

We calculated the total estimated burden for two respondent groups, mine operators and state regulatory authorities, on an annual basis averaged over a 3-year period.

Summary of Burden (Costs) Calculated for Major Elements of Stream Protection Rule

This proposed rule contains collections of information that we are submitting 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.* These collections are contained in 30 CFR parts 774, 779, 783, 780, 784, 785, 800, 816, and 817. We also estimated programmatic changes where burden is being moved between parts.

Title: 30 CFR part 774—Revision; Renewal; Transfer, Assignment, or Sale of Permit Rights; Post-Permit Issuance Requirements.

OMB Control Number: 1029–xxx1.

Summary: Sections 506, 507, 509, 510, and 511 of SMCRA provide that persons seeking permit revisions, permit renewals; or the transfer, assignment, or sale of their permit rights for coal mining activities submit relevant information to the regulatory authority to allow the regulatory authority to determine whether the applicant meets the requirements for the action requested.

[752] Installed capacity is the ''total manufacturer-rated capacity for equipment such as turbines, generators, condensers, transformers, and other system components'' and represents the maximum flow of energy from the plant or the maximum output of the plant.

Title: 30 CFR parts 779 and 783—Surface and Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions.

OMB Control Number: 1029–xxx2.

Summary: Applications for surface and underground coal mining permits are required to provide adequate descriptions of the environmental resources that may be affected by proposed surface mining activities. Without this information, OSMRE and state regulatory authorities could not approve permit applications for surface coal mines and related facilities.

Title: 30 CFR part 780—Surface Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans.

OMB Control Number: 1029–xxx3.

Summary: Sections 507 and 508 of the Act contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. Without this information, OSMRE and state regulatory authorities could not approve permit applications for surface coal mines and related facilities.

Title: 30 CFR part 784—Underground Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans.

OMB Control Number: 1029–xxx4.

Summary: Sections 507(b), 508(a), and 516(b) and (d) of SMCRA require applicants for permits for underground coal mines to prepare and submit operation and reclamation plans for coal mining activities as part of the application. Regulatory authorities use this information to determine whether the plans will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSMRE and state regulatory authorities could not approve permit applications for underground coal mines and related facilities.

Title: 30 CFR part 785—Requirements for Permits for Special Categories of Mining.

OMB Control Number: 1029–xxx5.

Summary: Sections 507, 508, 510, 515, 701, and 711 of SMCRA require applicants for special categories of mining activities to provide descriptions, maps, plans and data relating to the proposed activity. Without this information, OSMRE and state regulatory authorities could not approve permit applications for special categories of mining activities.

Title: 30 CFR part 800—Bond, Financial Assurance, and Insurance Requirements for Surface Coal Mining and Reclamation Operations Under Regulatory Programs.

OMB Control Number: 1029–xxx6.

Summary: OSMRE and state regulatory authorities use the information collected under 30 CFR part 800 to ensure that persons conducting or planning to conduct surface coal mining and reclamation operations post and maintain a performance bond or financial assurance in a form and amount adequate to guarantee fulfillment of all reclamation obligations.

Title: 30 CFR parts 816 and 817—Permanent Program Performance Standards—Surface and Underground Mining Activities.

OMB Control Number: 1029–xxx7.

Summary: Sections 515 and 516 of SMCRA provide that permittees conducting coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to assist in evaluating compliance with this requirement.

The table below summarizes estimated information collection burdens associated with this proposed rule, should it become final. We calculated the total estimated burden for two respondent groups, mine operators and state regulatory authorities, on an annual basis averaged over a 3-year period. The table does not include operational or other costs that do not involve a collection of information.

30 CFR Part	Type of respondent	Estimated annual responses	Estimated burden hour changes due to SPR	Total estimated burden hours	Estimated operator non-wage cost changes due to SPR	Total estimated burden non-wage costs
774	Operators	3,510	6,000	167,362	$0	$902,920
	SRA	3,343	6,226	87,043	N/A	N/A
779 and 783	Operators	1,561	8,442	208,282	$113,730	$113,730
	SRA	1,540	1,100	10,010	N/A	N/A
780	Operators	2,475	7,680	43,018	$2,853,500	$3,956,125
	SRA	2,418	5,776	20,281	N/A	N/A
784	Operators	767	2,630	11,440	$963,900	$1,170,765
	SRA	748	1,540	5,262	N/A	N/A
785	Operators	189	400	12,500	$0	$0
	SRA	189	80	6,180	N/A	N/A
800	Operators	4,048	17,200	49,034	$6,000	$383,379
	SRA	7,425	400	42,992	N/A	$130,423
816 and 817	Operators	403,665	46,427	1,807,617	$8,369,340	$15,995,424
	SRA	1,220	26	46,746	N/A	$58,350
Subtotals	Operators	416,215	88,779	2,299,253	$12,306,470	$22,522,343
	SRA	16,883	15,148	218,514	N/A	$188,773
Grand Totals		433,098	103,927	2,517,767	$12,306,470	$22,711,116

We invite comments on:

(a) Whether the proposed collection of information is necessary for SMCRA regulatory authorities to implement their responsibilities, including whether the information will have practical utility.

(b) The accuracy of our estimate of the burden of the proposed collections of information.

(c) Ways to enhance the quality, utility, and clarity of the information to be collected.

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, we must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the forms and regulations requesting the information have currently valid OMB control numbers. These control numbers appear in §§ 774.9, 779.10, 780.10, 783.10, 784.10, 785.10, 800.10, 816.10, and 817.10. To obtain a copy of our information collection requests contact John A. Trelease at (202) 208–2783 or by email at *jtrelease@osmre.gov*. You may also review the information collection requests at *http://www.reginfo.gov/public/do/PRAMain*. Follow the Web site to the Department of the Interior's collections currently under review by OMB to locate the seven collections being revised for this proposed rulemaking.

By law, OMB must respond to us within 60 days of publication of this proposed rule, but it may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection requirements by August 26, 2015 to the Department of the Interior Desk Officer at OMB–OIRA, via email at *OIRA_Submission@omb.eop.gov*, or via facsimile at (202) 395–5806. Also, send a copy of your comments to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203 SIB, Washington, DC 20240, or electronically at *jtrelease@osmre.gov*. You may still send other comments on the proposed rulemaking to us by September 25, 2015.

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.

In accordance with 44 U.S.C. 3507(d), we have submitted the information collection and recordkeeping requirements of 30 CFR parts 774, 779, 780, 783, 784, 785, 800, 816, and 817 to OMB for review and approval.

K. National Environmental Policy Act

We have prepared a draft EIS for the proposed rule in accordance with the National Environmental Policy Act. The draft EIS is on file in the administrative record for this proposed rule at the location specified under **ADDRESSES**. You also may review the draft EIS at *www.osmre.gov* and *www.regulations.gov*. The Docket ID Number is OSM–2010–0021. We will complete a final environmental impact statement with responses to all substantive comments received on the draft statement before we publish a final rule.

L. Data Quality Act

In developing this proposed rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

M. 1 CFR Part 51—Incorporation by reference

Proposed 30 CFR 780.25(a)(2)(i)(B), 784.25(a)(2)(i)(B), 816.49(a)(1), and 817.49(a)(1) would incorporate by reference the Natural Resources Conservation Service publication ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005) (''TR–60''). The proposed incorporation by reference would replace the incorporation by reference of the now-obsolete October 1985 edition of TR–60 in the existing rules. While the incorporation by reference would extend to the entire document, our regulations use only two elements of the publication: the hazard classification system for dams and the freeboard hydrograph criteria for impoundments in the table entitled ''Minimum Emergency Spillway Hydrologic Criteria.''

Under 1 CFR 51.5(a), we must make the materials that we propose to incorporate by reference reasonably available to interested parties. The July 2005 edition of TR–60 is available for review and download free of charge from the Web site of the Natural Resources Conservation Service at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm*. The publication also is available for review in person at the OSMRE headquarters office location listed in **ADDRESSES** and at the OSMRE regional, field, and area office locations listed in Part XII of this preamble.

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 774

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 777

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 779

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 780

Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 783

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 800

Insurance, Reporting and recordkeeping requirements, Surety bonds, Surface mining, Underground mining.

30 CFR Part 816

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 824

Environmental protection, Surface mining.

30 CFR Part 827

Environmental protection, Surface mining, Underground mining.

Dated: July 7, 2015.

Janice M. Schneider,

Assistant Secretary—Land and Minerals Management.

For the reasons set forth in the preamble, the Department proposes to amend 30 CFR parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827 as set forth below.

PART 700—GENERAL

■ 1. The authority citation for part 700 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. In § 700.11, revise paragraph (d) to read as follows:

§ 700.11 What coal exploration and coal mining operations are subject to our rules?

* * * * *

(d) *Termination and reassertion of jurisdiction*—(1) *Termination of jurisdiction for initial regulatory program sites.* A regulatory authority may terminate its jurisdiction under the initial regulatory program over a completed surface coal mining and reclamation operation, or portion thereof, when the regulatory authority determines in writing that all requirements imposed under subchapter B of this chapter have been successfully completed.

(2) *Termination of jurisdiction for permanent regulatory program sites.* A regulatory authority may terminate its jurisdiction under the permanent regulatory program over a completed surface coal mining and reclamation operation, or portion thereof, when—

(i) The regulatory authority determines in writing that all requirements imposed under the applicable regulatory program have been successfully completed; or

(ii)(A) Where a performance bond or financial assurance was required, the regulatory authority has made a final decision in accordance with part 800 of this chapter to release the performance bond or financial assurance fully.

(B) When a financial assurance has been posted under § 800.18 of this chapter and all other performance bonds posted for the site under part 800 of this chapter have been released, the regulatory authority may terminate jurisdiction over all portions of the site and all aspects of the operation except for treatment-related facilities and obligations covered by the financial assurance.

(3) *Reassertion of jurisdiction.* Following a termination under paragraph (d)(1) or (2) of this section, the regulatory authority must reassert jurisdiction under the regulatory program over a site or operation if it is demonstrated that the written determination or bond release referred to in paragraph (d)(1) or (2) of this section was based upon fraud, collusion, or the intentional or unintentional misrepresentation of a material fact, which includes the discovery of a discharge requiring treatment of mining-related parameters of concern, as that term is defined in § 701.5 of this chapter, after termination of jurisdiction.

(4) *Exception for certain underground mining requirements.* The provisions of paragraphs (d)(1) and (2) of this section do not apply to the domestic water supply replacement requirements of § 817.40 of this chapter or to the structural damage repair or compensation requirements of § 817.121(c)(2) of this chapter.

PART 701—PERMANENT REGULATORY PROGRAM

■ 3. The authority citation for part 701 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 4. Amend § 701.5 as follows:

■ a. Revise the definitions for ''Acid drainage'', ''Adjacent area'', and ''Approximate original contour'';

■ b. Add in alphabetical order definitions for ''Backfill'', ''Bankfull'', and ''Biological condition'';

■ c. Revise the definition for ''Cumulative impact area'';

■ d. Add in alphabetical order a definition for ''Ecological function'';

■ e. Revise the definitions for ''Ephemeral stream'' and ''Excess spoil'';

■ f. Add in alphabetical order a definition for ''Fill'';

■ g. Remove the definition for ''Fugitive dust'' and ''Ground water'';

■ h. Add in alphabetical order a definition for ''Groundwater'';

■ i. Remove the definition for ''Highwall remnant'';

■ j. Revise the definitions for ''Hydrologic balance'', ''Intermittent stream'', the introductory text and paragraph (a) of the definition for ''Land use'', and the definition for ''Material damage'';

■ k. Add in alphabetical order a definition for ''Material damage to the hydrologic balance outside the permit area'';

■ l. Revise the definitions for ''Mountaintop removal mining'' and ''Occupied residential dwelling and structures related thereto'';

■ m. Add in alphabetical order a definition for ''Parameters of concern'';

■ n. Revise the definitions for ''Perennial stream'' and ''Reclamation'';

■ o. Add in alphabetical order a definition for ''Reclamation plan'';

■ p. Revise the definitions for ''Renewable resource lands'', ''Replacement of water supply'', and ''Temporary diversion''; and

■ q. Add in alphabetical order a definition for ''Waters of the United States''.

The revisions and additions read as follows:

§ 701.5 Definitions

Acid drainage or *acid mine drainage* means water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity that is discharged from an active, inactive, or abandoned surface coal mining and reclamation operation or from an area affected by surface coal mining and reclamation operations.

* * * * *

Adjacent area means—

(a) *Basic definition for all operations and all resources.* The area outside the proposed or actual permit area within which there is a reasonable possibility of adverse impacts from surface coal mining operations or underground mining activities, as determined by the regulatory authority. The area covered by this term will vary with the context in which a regulation uses this term; *i.e.,* the nature of the resource or resources addressed by a regulation in which the term ''adjacent area'' appears will determine the size and other dimensions of the adjacent area for purposes of that regulation.

(b) *Underground mines.* For underground mines, the adjacent area includes, at a minimum, the area overlying the underground workings plus the area within a reasonable angle of draw from the perimeter of the underground workings.

(c) *Underground mine pools.* For all operations, the adjacent area also includes the area that might be affected physically or hydrologically by the dewatering of existing mine pools as part of surface or underground mining operations, plus the area that might be affected physically or hydrologically by mine pools that develop after cessation of mining activities.

* * * * *

Approximate original contour means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area closely resembles the general surface configuration of the land within the permit area prior to any mining activities or related disturbances and blends into and complements the

drainage pattern of the surrounding terrain. All highwalls and spoil piles must be eliminated to meet the terms of the definition, but that requirement does not prohibit the approval of terracing under § 816.102 or § 817.102 of this chapter, the retention of access roads in accordance with § 816.150 or § 817.151 of this chapter, or the approval of permanent water impoundments that comply with §§ 816.49, 816.56, and 780.24(b) or §§ 817.49, 817.56, and 784.24(b) of this chapter. For purposes of this definition, the term ''mined area'' does not include excess spoil fills and coal refuse piles.

* * * * *

Backfill, when used as a noun, means the spoil and waste materials used to fill the void resulting from an excavation created for the purpose of extracting coal from the earth. When used as a verb, the term refers to the process of filling that void. The term also includes all spoil and waste materials used to restore the approximate original contour.

Bankfull means the water level, or stage, at which a stream, river, or lake is at the top of its banks and any further rise would result in water moving into the flood plain.

* * * * *

Biological condition is a measure of the ecological health of a stream or segment of a stream as determined by the type, diversity, distribution, abundance, and physiological state of aquatic organisms and communities found in the stream or stream segment.

* * * * *

Cumulative impact area means an area that includes the—

(a) Actual or proposed permit area.

(b) HUC–12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset) watershed or watersheds in which the actual or proposed permit area is located.

(c) Any other area within which impacts resulting from an actual or proposed surface or underground coal mining operation may interact with the impacts of all existing and anticipated surface and underground coal mining on surface-water and groundwater systems, including the impacts that existing and anticipated mining will have during mining and reclamation and after final bond release. At a minimum, existing and anticipated mining must include:

(1) The proposed operation;

(2) All existing surface and underground coal mining operations;

(3) Any proposed surface or underground coal mining operation for which a permit application has been submitted to the regulatory authority;

(4) Any proposed surface or underground coal mining operation for which a request for an authorization, certification, or permit has been submitted under the Clean Water Act;

(5) All existing and proposed coal mining operations that are required to meet diligent development requirements for leased federal coal and for which a resource recovery and protection plan has been either approved or submitted to and reviewed by the authorized officer of the Bureau of Land Management under 43 CFR 3482.1(b); and

(6) For underground mines, all areas of contiguous coal reserves adjacent to an existing or proposed underground mine that are owned or controlled by the applicant.

* * * * *

Ecological function of a stream means the role that the stream plays in dissipating energy and transporting water, sediment, organic matter, and nutrients downstream. It also includes the ability of the stream ecosystem to retain and transform inorganic materials needed for biological processes into organic forms (forms containing carbon) and to oxidize those organic molecules back into elemental forms through respiration and decomposition. Finally, the term includes the role that the stream plays in the life cycles of plants, insects, amphibians (especially salamanders), reptiles, fish, birds, and mammals that either reside in the stream or depend upon it for habitat, reproduction, food, water, or protection from predators. The biological condition of a stream is one measure of its ecological function.

* * * * *

Ephemeral stream means a stream or part of a stream that has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral streambeds are located above the water table year-round. Groundwater is not a source of water for streamflow. Runoff from rainfall is the primary source of water for streamflow.

* * * * *

Excess spoil means spoil material disposed of in a location other than the mined-out area within the permit area and all spoil material placed above the approximate original contour within the mined-out area as part of the continued construction of an excess spoil fill with a toe located outside the mined-out area. This term does not include any spoil required and used to restore the approximate original contour of the mined-out area. Except as provided in the first sentence of this definition, this term does not include spoil material placed within the mined-out area in accordance with the thick overburden provisions of § 816.105(b)(1) of this chapter. Nor does it include spoil material used to blend the mined-out area with the surrounding terrain in non-steep slope areas in accordance with § 816.102(b)(3) or § 817.102(b)(3) of this chapter.

* * * * *

Fill means a permanent, non-impounding structure constructed under §§ 816.71 through 816.83 or §§ 817.71 through 817.83 of this chapter for the purpose of disposing of excess spoil or coal mine waste generated by surface coal mining operations or underground mining activities.

* * * * *

Groundwater means subsurface water located in those portions of soils and geologic formations that are fully saturated with water; *i.e.,* those zones where all the pore spaces and rock fractures are completely filled with water. This term includes subsurface water in both regional and perched aquifers, but it does not include water in soil horizons that are temporarily saturated by precipitation events.

* * * * *

Hydrologic balance means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in storage of groundwater and surface water, as well as interactions that result in changes in the chemical composition or physical characteristics of groundwater and surface water, which may in turn affect the biological condition of streams and other water bodies.

* * * * *

Intermittent stream means a stream or part of a stream that has flowing water during certain times of the year when groundwater provides water for streamflow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for streamflow.

* * * * *

Land use means specific uses or management-related activities, rather than the vegetation or cover of the land. The term includes support facilities that are an integral part of the use. Land uses may be identified in combination when joint or seasonal uses occur. For purposes of this chapter, the following land use categories apply:

(a) *Cropland.* Land used for the production of crops for harvest, either alone or in rotation with grasses and legumes. Crops include row crops, small grains, hay, commercial nursery plantings, vegetables, fruits, nuts, crops, and other plants typically cultivated for commercial purposes in fields, orchards, vineyards, and similar settings.

* * * * *

Material damage, in the context of §§ 784.30 and 817.121 of this chapter, means:

(a) Any functional impairment of surface lands, features, structures or facilities;

(b) Any physical change that has a significant adverse impact on the affected land's capability to support any current or reasonably foreseeable uses or causes significant loss in production or income; or

(c) Any significant change in the condition, appearance or utility of any structure or facility from its pre-subsidence condition.

Material damage to the hydrologic balance outside the permit area means any adverse impact from surface coal mining and reclamation operations or from underground mining activities, including any adverse impacts from subsidence that may occur as a result of underground mining activities, on the quality or quantity of surface water or groundwater, or on the biological condition of a perennial or intermittent stream, that would—

(a) Preclude any designated use under sections 101(a) or 303(c) of the Clean Water Act or any existing or reasonably foreseeable use of surface water or groundwater outside the permit area; or

(b) Impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

* * * * *

Mountaintop removal mining means surface mining activities in which the mining operation extracts an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill, except for outcrop barriers retained under § 824.11(b)(2) of this chapter, by removing substantially all overburden above the coal seam and using that overburden to create a level plateau or a gently rolling contour, with no highwalls remaining, that is capable of supporting one or more of the postmining land uses identified in § 785.14 of this chapter.

* * * * *

Occupied residential dwelling and structures related thereto means, for purposes of §§ 784.30 and 817.121 of this chapter, any building or other structure that, at the time the subsidence occurs, is used either temporarily, occasionally, seasonally, or permanently for human habitation. This term also includes any building, structure, or facility installed on, above, or below the land surface if that building, structure, or facility is adjunct to or used in connection with an occupied residential dwelling. Examples of such structures include, but are not limited to, garages; storage sheds and barns; greenhouses and related buildings; utilities and cables; fences and other enclosures; retaining walls; paved or improved patios, walks and driveways; septic sewage treatment facilities; and lot drainage and lawn and garden irrigation systems. This term does not include any structure used only for commercial agricultural, industrial, retail or other commercial purposes.

* * * * *

Parameters of concern means those chemical or physical characteristics and properties of surface water or groundwater that could be altered by surface or underground mining activities, including discharges associated with those activities, in a manner that would adversely impact surface-water or groundwater quality or the biological condition of a stream.

Perennial stream means a stream or part of a stream that has flowing water year-round during a typical year. The water table is located above the streambed for most of the year. Groundwater is the primary source of water for streamflow. Runoff from rainfall is a supplemental source of water for streamflow.

* * * * *

Reclamation means those actions taken to restore mined land and associated disturbed areas to a condition in which the site is capable of supporting the uses it was capable of supporting prior to any mining or any higher or better uses approved by the regulatory authority. The site also must meet all other requirements of the permit and regulatory program that pertain to restoration of the site. For sites with discharges that require treatment, this term also includes those actions taken to eliminate, remediate, or treat those discharges, including both discharges from the mined area and all other discharges that are hydrologically connected to either the mined area or the operation, regardless of whether those discharges are located within the disturbed area.

Reclamation plan means the plan for reclamation of surface coal mining operations under parts 780, 784, and 785 of this chapter.

* * * * *

Renewable resource lands means aquifers, aquifer recharge areas, recharge areas for other subsurface and surface water, areas for agricultural or silvicultural production of food and fiber, and grazing lands.

Replacement of water supply means, with respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

* * * * *

Temporary diversion means a channel constructed to convey streamflow or overland flow away from the site of actual or proposed coal exploration or surface coal mining and reclamation operations or to convey those flows to a siltation structure or other treatment facility. The term includes only those channels not approved by the regulatory authority to remain after reclamation as part of the approved postmining land use.

* * * * *

Waters of the United States has the same meaning as the definition of that term in 40 CFR 230.3(s).

* * * * *

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

■ 5. The authority citation for part 773 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.,* 54 U.S.C. 300101 *et seq.,* 16 U.S.C. 661 *et seq.,* 16 U.S.C. 703 *et seq.,* 16 U.S.C. 668a *et seq.,* 16 U.S.C. 469 *et seq.,* and 16 U.S.C. 1531 *et seq.*

■ 6. Revise § 773.5 to read as follows:

§ 773.5 How must the regulatory authority coordinate the permitting process with requirements under other laws?

(a) To avoid duplication, each regulatory program must provide for the coordination of review of permit applications and issuance of permits for surface coal mining operations with the federal and state agencies responsible for permitting and related actions under the following laws and their implementing regulations:

(1) The Clean Water Act (33 U.S.C. 1251 *et seq.*).

(2) The Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(3) The Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).

(4) The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703 *et seq.*).

(5) The Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d).

(b) In addition to the requirements of paragraph (a) of this section, each federal regulatory program must provide for coordination of the review of permit applications and issuance of permits for surface coal mining operations with applicable requirements of the following laws and their implementing regulations:

(1) The National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*).

(2) The Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 *et seq.*).

(3) The Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa *et seq.*), where federal or Indian lands covered by that Act are involved.

(4) The National Environmental Policy Act of 1969 (42 U.S.C. 4371 *et seq.*).

■ 7. Revise § 773.7 to read as follows:

§ 773.7 How and when will the regulatory authority review and make a decision on an application for a permit, permit revision, or permit renewal?

(a) *General.* The regulatory authority will review an application for a permit, permit revision, or permit renewal; and issue a written decision granting, requiring modification of, or denying the application. Before making this decision, the regulatory authority must consider any written comments and objections submitted, as well as the records of any informal conference or hearing held on the application.

(b) *When will the regulatory authority make a decision on a permit application*? (1) If an informal conference is held under § 773.6(c) of this part, the regulatory authority will issue a decision on the application within 60 days of the close of the conference.

(2) If no informal conference is held under § 773.6(c) of this part, the regulatory authority must issue a decision on the application within a reasonable time established in the regulatory program. In determining what constitutes a reasonable time or times, the regulatory authority must consider the following five factors:

(i) The time needed for proper site investigations.

(ii) The complexity of the permit application.

(iii) Whether there are any written objections on file.

(iv) Whether the application previously has been approved or disapproved, in whole or in part.

(v) The time required for coordination of permitting activities with other agencies under § 773.5 of this part.

(c) *Who has the burden of proof*? You, the applicant for a permit, revision of a permit, or the transfer, assignment, or sale of permit rights, have the burden of establishing that your application is in compliance with all requirements of the regulatory program.

■ 8. Revise § 773.15 to read as follows:

§ 773.15 What findings must the regulatory authority make before approving a permit application?

The regulatory authority may not approve any application for a permit or a significant revision of a permit that you, the applicant, submit unless the application affirmatively demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, that—

(a) The application is accurate and complete and you have complied with all applicable requirements of the Act and the regulatory program.

(b) You have demonstrated that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan contained in the permit application.

(c) The proposed permit area is not within an area—

(1) Under study or administrative proceedings under a petition filed pursuant to part 764 or part 769 of this chapter to have an area designated as unsuitable for surface coal mining operations, unless you demonstrate that you made substantial legal and financial commitments before January 4, 1977, in relation to the operation covered by the permit application;

(2) Designated under parts 762 and 764 or 769 of this chapter as unsuitable for the type of surface coal mining operations that you propose to conduct; or

(3) Subject to the prohibitions of § 761.11 of this chapter, unless one or more of the exceptions provided under that section apply.

(d) For mining operations where the private mineral estate to be mined has been severed from the private surface estate, you have submitted to the regulatory authority the documentation required under § 778.15(b) of this chapter.

(e) The regulatory authority has—

(1) Made an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area;

(2) Determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area; and

(3) Inserted into the permit criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis, expressed in numerical terms for each parameter of concern, as required by § 780.21(b) or § 784.21(b) of this chapter.

(f) You have demonstrated that any existing structure will comply with § 701.11(d) of this chapter and the applicable performance standards of subchapter B or K of this chapter.

(g) You have paid all reclamation fees from previous and existing operations as required by subchapter R of this chapter.

(h) You have satisfied the applicable requirements of part 785 of this chapter.

(i) If applicable, you have satisfied the requirements for approval of a long-term, intensive agricultural postmining land use.

(j) The operation is not likely to jeopardize the continued existence of species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or result in destruction or adverse modification of designated critical habitat under that law.

(k) The regulatory authority has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources or a documented decision that the regulatory authority has determined that no additional protection measures are necessary.

(l) For a proposed remining operation where you intend to reclaim in accordance with the requirements of § 816.106 or § 817.106 of this chapter, the site of the operation is a previously mined area, as that term is defined in § 701.5 of this chapter.

(m) You are eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

(n) You have demonstrated that—

(1) The operation has been designed to prevent the formation of discharges with levels of parameters of concern that would require long-term treatment after mining has been completed.

(2) There is no credible evidence that the design of the proposed operation will not work as intended to prevent the formation of discharges with levels of parameters of concern that would require long-term treatment after mining has been completed.

(o) To the extent possible using the best technology currently available, the proposed operation has been designed to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, as identified in § 779.20 or § 783.20 of this chapter, and to achieve enhancement of those resources where practicable, as required under § 780.16 or § 784.16 of this chapter.

■ 9. Revise § 773.17 to read as follows:

§ 773.17 What conditions must the regulatory authority place on each permit issued?

The regulatory authority must include the following conditions in each permit issued:

(a) You, the permittee, may conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to part 800 of this chapter.

(b) You must conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit.

(c) You must comply with the terms and conditions of the permit, all applicable requirements of the Act, and the requirements of the regulatory program.

(d) Without advance notice, delay, or a search warrant, upon presentation of appropriate credentials, you must allow authorized representatives of the Secretary and the regulatory authority to—

(1) Have the right of entry provided for in §§ 842.13 and 840.12 of this chapter; and

(2) Be accompanied by private persons for the purpose of conducting an inspection in accordance with parts 840 and 842 of this chapter, when the inspection is in response to an alleged violation reported to the regulatory authority by the private person.

(e) You must take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition or the permit, including, but not limited to—

(1) Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance.

(2) Immediate implementation of measures necessary to comply.

(3) Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(4) Notifying the regulatory authority and other appropriate state and federal regulatory agencies.

(f) As applicable, you must comply with § 701.11(d) and subchapter B or K of this chapter for compliance, modification, or abandonment of existing structures.

(g) You or the operator must pay all reclamation fees required by subchapter R of this chapter for coal produced under the permit for sale, transfer or use, in the manner required by that subchapter.

(h) You must obtain all necessary authorizations, certifications, and permits in accordance with requirements under the Clean Water Act, 33 U.S.C. 1251 *et seq.,* before conducting any activities that require authorization or certification under those provisions of the Clean Water Act.

PART 774—REVISION; RENEWAL; TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS; POST–PERMIT ISSUANCE REQUIREMENTS

■ 10. The authority citation for part 774 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 11. Revise the part heading for part 774 to read as set forth above.

■ 12. Revise § 774.9 to read as follows:

§ 774.9 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029-xxxx. The regulatory authority uses this information to determine if you, the applicant, meet the requirements for permit revision; permit renewal; or the transfer, assignment, or sale of permit rights. The regulatory authority also uses this information to update the Applicant/Violator System. You must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 13. Revise § 774.10 to read as follows:

§ 774.10 When must the regulatory authority review a permit after issuance?

(a) The regulatory authority must review each permit issued and outstanding under an approved regulatory program during the term of the permit.

(1) This review must occur not later than the middle of each permit term except that permits with a term longer than 5 years must be reviewed no less frequently than the permit midterm or every 5 years, whichever is more frequent.

(2) Permits granted in accordance with § 785.14 of this chapter (mountaintop removal mining) and permits containing a variance from approximate original contour restoration requirements in accordance with § 785.16 of this chapter must be reviewed no later than 3 years from the date of issuance of the permit, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the permit. This review may be combined with the first review conducted under paragraph (a)(1) of this section if the permit term does not exceed 5 years.

(3) Permits containing an experimental practice approved in accordance with § 785.13 of this chapter must be reviewed as set forth in the permit or at least every 2½ years from the date of issuance as required by the regulatory authority, in accordance with § 785.13(g) of this chapter.

(4) Permits granted in accordance with § 785.18 of this chapter (variance for delay in contemporaneous reclamation requirement in combined surface and underground mining operations) must be reviewed no later than 3 years from the date of issuance of the permit. This review may be combined with the first review conducted under paragraph (a)(1) of this section if the permit term does not exceed 5 years.

(b) After a review required by paragraph (a) of this section, or at any time, the regulatory authority may, by order, require reasonable revision of a permit in accordance with § 774.13 to ensure compliance with the Act and the regulatory program.

(c) Any order of the regulatory authority requiring revision of a permit must be based upon written findings and is subject to the provisions for administrative and judicial review in part 775 of this chapter. Copies of the order must be sent to the permittee.

(d) Permits may be suspended or revoked in accordance with subchapter L of this chapter.

■ 14. Revise § 774.15 to read as follows:

§ 774.15 How may I renew a permit?

(a) *Right of renewal.* A valid permit, issued pursuant to an approved regulatory program, carries with it the right of successive renewal, within the approved boundaries of the existing permit, upon expiration of the term of the permit.

(b) *Application requirements and procedures.* (1) You, the permittee, must file an application for renewal of a permit with the regulatory authority at least 120 days before expiration of the existing permit term.

(2) You must file the application for renewal in the form required by the regulatory authority. At a minimum, your application must include the following information—

(i) Your name and address

(ii) The term of the renewal requested.

(iii) The permit number or other identifier.

(iv) Evidence that a liability insurance policy for the operation will continue in full force and effect during the proposed renewal term or that you will have adequate self-insurance under § 800.60 of this chapter for the proposed term of renewal.

(v) Evidence that the performance bond for the permit will continue in full force and effect for the proposed term of renewal.

(vi) A copy of the newspaper notice and proof of publication, as required by § 778.21 of this chapter.

(vii) An analysis of the monitoring results under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter and an evaluation of the accuracy and adequacy of the determination of the probable hydrologic consequences of mining prepared under § 780.20 or § 784.20 of this chapter.

(viii) An update of the determination of the probable hydrologic consequences of mining prepared under § 780.20 or § 784.20 of this chapter, if needed, or documentation that the findings in the existing determination are still valid.

(ix) Additional revised or updated information required by the regulatory authority.

(3) Applications for renewal are subject to the public notification and public participation requirements in §§ 773.6 and 773.19(b) of this chapter.

(4) If an application for renewal includes any proposed revisions to the permit, those revisions must be identified and processed in accordance with § 774.13 of this part.

(c) *Approval process*—(1) *Criteria for approval.* The regulatory authority must approve a complete and accurate application for permit renewal, unless it finds, in writing that—

(i) The terms and conditions of the existing permit are not being satisfactorily met.

(ii) The present surface coal mining and reclamation operations are not in compliance with the environmental protection standards of the Act and the regulatory program. The permit eligibility standards in §§ 773.12 through 773.14 of this chapter apply to this determination.

(iii) The requested renewal substantially jeopardizes your continuing ability to comply with the Act and the regulatory program on existing permit areas.

(iv) You have not provided evidence of having continuing liability insurance or self-insurance coverage as required under § 800.60 of this chapter.

(v) You have not provided evidence that any performance bond required to be in effect for the operation will continue in full force and effect for the proposed term of renewal.

(vi) You have not posted any additional bond required by the regulatory authority under part 800 of this chapter.

(vii) You have not provided any additional revised or updated information required by the regulatory authority.

(viii) The finding that the regulatory authority made under § 773.15(e) of this chapter that the operation is designed to prevent material damage to the hydrologic balance outside the permit area is no longer accurate, as demonstrated by analysis of the monitoring results under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter or the updated determination of the probable hydrologic consequences of mining prepared under paragraph (b)(2)(viii) of this section.

(2) *Burden of proof.* In the determination of whether to approve or deny an application for renewal of a permit, the burden of proof is on the opponents of renewal.

(3) *Alluvial valley floor variance.* Areas previously identified in the reclamation plan for the original permit as exempt from the standards in paragraphs (A) and (B) of section 510(b)(5) of the Act and the requirements of paragraphs (c) through (e) of § 785.19 of this chapter will retain their exempt status for the term of the renewal.

(d) *Renewal term.* The term for any permit renewal must not exceed the original permit term under § 773.19(c) of this chapter.

(e) *Notice of decision.* The regulatory authority must send copies of its decision to the applicant, to each person who filed comments or objections on the renewal, to each party to any informal conference held on the permit renewal, and to OSMRE if OSMRE is not the regulatory authority.

(f) *Administrative and judicial review.* Any person having an interest which is or may be adversely affected by the decision of the regulatory authority has the right to administrative and judicial review under part 775 of this chapter.

PART 777—GENERAL CONTENT REQUIREMENTS FOR PERMIT APPLICATIONS

■ 15. Revise the authority citation for part 777 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 16. Revise § 777.1 to read as follows:

§ 777.1 What does this part cover?

This part provides minimum requirements concerning data collection and analysis and the format and general content of permit applications under a regulatory program.

■ 17. Revise § 777.11 to read as follows:

§ 777.11 What are the format and content requirements for permit applications?

(a) An application must—

(1) Contain current information, as required by this subchapter.

(2) Be clear and concise.

(3) Be filed in an electronic format prescribed by the regulatory authority, unless the regulatory authority grants an exception to this requirement for good cause.

(b) If used in the application, referenced materials must either be provided to the regulatory authority by the applicant or be readily available to the regulatory authority. If provided, relevant portions of referenced published materials must be presented briefly and concisely in the application by photocopying or abstracting and with explicit citations.

(c) Applications for permits; revisions; renewals; or transfers, sales or assignments of permit rights must be verified under oath, by a responsible official of the applicant, that the information contained in the application is true and correct to the best of the official's information and belief.

■ 18. Revise § 777.13 to read as follows:

§ 777.13 What requirements apply to the collection, analysis, and reporting of technical data and to the use of models?

(a) *Technical data and analyses.* (1) All technical data submitted in the

application must be accompanied by metadata, including, but not limited to, the names of persons or organizations that collected and analyzed the data, the dates that the data were collected and analyzed, descriptions of the methodology used to collect and analyze the data, the quality assurance and quality control procedures used by the laboratory and the results of those procedures, and the field sampling sheets for water samples collected from wells. For electronic data, metadata must include identification of any data transformations.

(2) Technical analyses must be planned by or under the direction of a professional qualified in the subject to be analyzed.

(b) *Sampling and analyses of groundwater and surface water.* All sampling and analyses of groundwater and surface water performed to meet the requirements of this subchapter must be conducted according to the methodology in 40 CFR parts 136 and 434.

(c) *Geological sampling and analysis.* All geological sampling and analyses performed to meet the requirements of this subchapter must be conducted using a scientifically-valid methodology.

(d) *Use of models.* (1) Unless the regulatory authority specifies otherwise, you may use modeling techniques, interpolation, or statistical techniques to prepare the permit application.

(2) All models must be calibrated using actual site-specific data and validated for the region and ecosystem in which they will be used.

(3) The regulatory authority may either disallow the use of models or require that you submit additional actual, site-specific data.

■ 19. Revise § 777.14 to read as follows:

§ 777.14 What general requirements apply to maps and plans?

(a)(1) Maps submitted with applications must be presented in a consolidated format, to the extent possible, and must include all the types of information that are set forth on topographic maps of the U.S. Geological Survey of the 1:24,000 scale series.

(2) Maps of the proposed permit area must be at a scale of 1:6,000 or larger.

(3) Maps of the adjacent area must clearly show the lands and waters within that area and must be at a scale determined by the regulatory authority, but in no event smaller than 1:24,000.

(b) All maps and plans submitted with the application must distinguish among each of the phases during which surface coal mining operations were or will be conducted at any place within the life of operations. At a minimum, distinctions must be clearly shown among those portions of the life of operations in which surface coal mining operations occurred—

(1) Prior to August 3, 1977;

(2) After August 3, 1977, and prior to either—

(i) May 3, 1978; or

(ii) In the case of an applicant or operator which obtained a small operator's exemption in accordance with § 710.12 of this chapter, January 1, 1979;

(3) After May 3, 1978 (or January 1, 1979, for persons who received a small operator's exemption) and prior to the approval of the applicable regulatory program;

(4) After the estimated date of issuance of a permit by the regulatory authority under the approved regulatory program.

■ 20. Revise § 777.15 to read as follows:

§ 777.15 What information must my application include to be administratively complete?

An administratively complete application for a permit to conduct surface coal mining operations and must include at a minimum—

(a) For surface mining activities, the information required under parts 778, 779, and 780 of this chapter, and, as applicable to the operation, part 785 of this chapter.

(b) For underground mining activities, the information required under parts 778, 783, and 784 of this chapter, and, as applicable to the operation, part 785 of this chapter.

■ 21. Lift the suspension of § 779.21 and revise part 779 to read as follows:

PART 779—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES AND CONDITIONS

Sec.

779.1 Scope: What does this part do?
779.2 What is the objective of this part?
779.4 What responsibilities do I and government agencies have under this part?
779.10 Information collection.
779.11 [Reserved]
779.12 [Reserved]
779.17 What information on cultural, historic, and archeological resources must I include in my permit application?
779.18 What information on climate must I include in my permit application?
779.19 What information on vegetation must I include in my permit application?
779.20 What information on fish and wildlife resources must I include in my permit application?
779.21 What information on soils must I include in my permit application?
779.22 What information on land use and productivity must I include in my permit application?
779.24 What maps, plans, and cross-sections must I submit with my permit application?
779.25 [Reserved]

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 779.1 Scope: What does this part do?

This part establishes the minimum requirements for the descriptions of environmental resources and conditions that you must include in an application for a permit to conduct surface mining activities.

§ 779.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with a complete and accurate description of the environmental resources that may be impacted or affected by proposed surface mining activities and the environmental conditions that exist within the proposed permit and adjacent areas.

§ 779.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide all information required by this part in your application, except when this part specifically exempts you from doing so.

(b) State and federal government agencies are responsible for providing information for permit applications to the extent that this part specifically requires that they do so.

§ 779.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–xxxx. The information is being collected to meet the requirements of sections 507 and 508 of SMCRA, which require that each permit application include a description of the premining environmental resources within and around the proposed permit area. The regulatory authority uses this information as a baseline for evaluating the impacts of mining. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 779.11 [Reserved]

§ 779.12 [Reserved]

§ 779.17 What information on cultural, historic, and archeological resources must I include in my permit application?

(a) Your permit application must describe the nature of cultural, historic, and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description must be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(b) The regulatory authority may require you, the applicant, to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, by—

(1) Collecting additional information;

(2) Conducting field investigations, or

(3) Completing other appropriate analyses.

§ 779.18 What information on climate must I include in my permit application?

The regulatory authority may require that your permit application contain a statement of the climatic factors that are representative of the proposed permit area, including:

(a) The average seasonal precipitation.

(b) The average direction and velocity of prevailing winds.

(c) Seasonal temperature ranges.

(d) Additional data that the regulatory authority deems necessary to ensure compliance with the requirements of this subchapter.

§ 779.19 What information on vegetation must I include in my permit application?

(a) You must identify, describe, and map—

(1) Existing vegetation types and plant communities on the proposed permit and adjacent areas and within any proposed reference areas. The description and map must be adequate to evaluate whether the vegetation provides important habitat for fish and wildlife and whether the site contains native plant communities of local or regional significance.

(2) The plant communities that would exist on the proposed permit area under conditions of natural succession.

(b) When preparing the materials required by paragraph (a) of this section, you must adhere to the National Vegetation Classification Standard.

(c) With the approval of the regulatory authority, you may use other generally-accepted vegetation classification systems in lieu of the system specified in paragraph (b) of this section.

(d) Your application must include a discussion of the potential for reestablishing the plant communities identified in paragraph (a) of this section after the completion of mining.

§ 779.20 What information on fish and wildlife resources must I include in my permit application?

(a) *General requirements.* Your permit application must include information on fish and wildlife resources for the proposed permit and adjacent areas. The adjacent area must include all lands and waters likely to be affected by the proposed operation.

(b) *Scope and level of detail.* The regulatory authority will determine the scope and level of detail for this information in coordination with state and federal agencies with responsibilities for fish and wildlife. The scope and level of detail must be sufficient to design the protection and enhancement plan required under § 780.16 of this chapter.

(c) *Site-specific resource information requirements.* Your application must include site-specific resource information if the proposed permit area or the adjacent area contains or is likely to contain one or more of the following—

(1) Fish and wildlife or plants listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or critical habitat designated under that law. When these circumstances exist, the site-specific resource information must include a description of the effects of future state or private activities that are reasonably certain to occur within the proposed permit and adjacent areas.

(2) Species or habitat protected by state endangered species statutes and regulations.

(3) Habitat of unusually high value for fish and wildlife such as wetlands, riparian areas, cliffs supporting raptors, significant migration corridors, specialized reproduction or wintering areas, areas offering special shelter or protection, and areas that support populations of endemic species that are vulnerable because of restricted ranges, limited mobility, limited reproductive capacity, or specialized habitat requirements.

(4) Other species or habitat identified through interagency coordination as requiring special protection under state or federal law, including species identified as sensitive by a state or federal agency.

(5) Perennial or intermittent streams.

(6) Native plant communities of local or regional ecological significance.

(d) *Fish and Wildlife Service review.* (1)(i) The regulatory authority must provide the resource information obtained under paragraph (c) of this section to the applicable regional or field office of the U.S. Fish and Wildlife Service whenever that information includes species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide this information to the Service no later than the time that it provides written notice of the permit application to the Service under § 773.6(a)(3)(ii) of this chapter.

(ii) When the resource information obtained under paragraph (c) of this section does not include threatened or endangered species, designated critical habitat, or species proposed for listing as threatened or endangered, the regulatory authority must provide this information to the applicable regional or field office of the U.S. Fish and Wildlife Service only if the Service requests an opportunity to review and comment on that information. The regulatory authority must provide the requested information to the Service within 10 days of receipt of the request from the Service.

(2)(i) The regulatory authority must document its disposition of all comments from the Service that pertain to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law.

(ii) If the regulatory authority does not agree with a Service recommendation that pertains to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law, the regulatory authority must explain the rationale for that decision in the disposition document prepared under paragraph (d)(2)(i) of this section. The regulatory authority must provide a copy of that document to the pertinent Service field office and OSMRE field office and must refrain from approving the permit application.

(iii) If the Service field office does not concur with the regulatory authority's decision under paragraph (d)(2)(ii) of this section and the regulatory authority and the Service field office are unable to reach agreement at that level, either the Service or the regulatory authority

may request that the issue be elevated through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.

(iv) The regulatory authority may not approve the permit application until all issues are resolved in accordance with paragraph (d)(2)(iii) of this section and the regulatory authority receives written documentation from the Service that all issues have been resolved.

(e) *Designation of areas in which adverse impacts are prohibited.* In coordination with state and federal fish and wildlife agencies and agencies responsible for implementation of the Clean Water Act, the regulatory authority may use the information provided under this section and information gathered from other agencies to determine whether, based on scientific principles and analyses, any stream segments, wildlife habitats, or watersheds in the proposed permit or adjacent areas are of such exceptional environmental value that any adverse mining-related impacts must be prohibited.

§ 779.21 What information on soils must I include in my permit application?

Your permit application must include—

(a) The results of a reconnaissance inspection to determine whether the proposed permit area may contain prime farmland, as required by § 785.17(b)(1) of this chapter.

(b)(1) A map showing the soil mapping units located within the proposed permit area, if the National Cooperative Soil Survey has completed and published a soil survey of the area.

(2) The applicable soil survey information that the Natural Resources Conservation Service maintains for the soil mapping units identified in paragraph (b)(1) of this section. You may provide this information either in paper form or via a link to the appropriate element of the Natural Resources Conservation Service's soil survey Web site.

(c) A description of soil depths within the proposed permit area.

(d) Detailed information on soil quality, if you seek approval for the use of soil substitutes or supplements under § 780.12(e) of this chapter.

(e) The soil survey information required by § 785.17(b)(3) of this chapter if the reconnaissance inspection conducted under paragraph (a) of this section indicates that prime farmland may be present.

(f) Any other information that the regulatory authority finds necessary to determine land use capability and to prepare the reclamation plan.

§ 779.22 What information on land use and productivity must I include in my permit application?

Your permit application must contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including—

(a)(1) A map and narrative identifying and describing the land use or uses in existence at the time of the filing of the application.

(2) A description of the historical uses of the land.

(3) For any previously mined area within the proposed permit area, a description of the land uses in existence before any mining, to the extent that such information is available.

(b) A narrative analysis of—

(1) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the proposed permit area; and

(2) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products obtained under high levels of management, as determined by—

(i) Actual yield data; or

(ii) Yield estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities, or appropriate state natural resources or agricultural agencies.

(3) The productivity of the proposed permit area before mining for fish and wildlife.

(c) Any additional information that the regulatory authority deems necessary to determine the condition, capability, and productivity of the land within the proposed permit area.

§ 779.24 What maps, plans, and cross-sections must I submit with my permit application?

(a) In addition to the maps, plans, and information required by other sections of this part, your permit application must include maps and, when appropriate, plans and cross-sections showing—

(1) All boundaries of lands and names of present owners of record of those lands, both surface and subsurface included in or contiguous to the proposed permit area.

(2) The boundaries of land within the proposed permit area upon which you have the legal right to enter and begin underground mining activities.

(3) The boundaries of all areas that you anticipate affecting over the estimated total life of the surface mining activities, with a description of the size, sequence, and timing of the mining of subareas for which you anticipate seeking additional permits or expansion of an existing permit in the future.

(4) The location and current use of all buildings on the proposed permit area or within 1,000 feet of the proposed permit area.

(5) The location of surface and subsurface manmade features within, passing through, or passing over the proposed permit area, including, but not limited to, highways, electric transmission lines, pipelines, constructed drainageways, irrigation ditches, and agricultural drainage tile fields.

(6) The location and boundaries of any proposed reference areas for determining the success of revegetation.

(7) The location and ownership of existing wells, springs, and other groundwater resources within the proposed permit and adjacent areas. You may provide ownership information in a table cross-referenced to a map if approved by the regulatory authority.

(8) The location and depth, if available, of each water well within the proposed permit and adjacent areas. You may provide information concerning depth in a table cross-referenced to a map if approved by the regulatory authority.

(9) The name, location, ownership, and description of all surface-water bodies and features, such as perennial, intermittent, and ephemeral streams; ponds, lakes, and other impoundments; wetlands; and natural drainageways, within the proposed permit and adjacent areas. To the extent appropriate, you may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(10) The locations of water supply intakes for current users of surface water flowing into, from, and within a hydrologic area defined by the regulatory authority.

(11) The location of any public water supplies and the extent of any associated wellhead protection zones located within one-half mile, measured horizontally, of the proposed permit area.

(12) The location of all existing or proposed discharges to any surface-water body within the proposed permit and adjacent areas.

(13) The location of any discharge into or from an active, inactive, or abandoned surface or underground mine, including, but not limited to, a mine-water treatment or pumping facility, that is hydrologically connected to the proposed permit area or that is

located within one-half mile, measured horizontally, of the proposed permit area.

(14) Each public road located in or within 100 feet of the proposed permit area.

(15) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

(16) Each cemetery that is located in or within 100 feet of the proposed permit area.

(17) Any land within the proposed permit area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act.

(18) The elevations, locations, and geographic coordinates of test borings and core samplings. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(19) The location and extent of subsurface water, if encountered, within the proposed permit and adjacent areas. This information must include, but is not limited to, the estimated elevation of the water table, the areal and vertical distribution of aquifers, and portrayal of seasonal variations in hydraulic head in different aquifers. You must display this information on appropriately scaled cross-sections.

(20) The elevations, locations, and geographic coordinates of monitoring stations used to gather data on water quality and quantity, fish and wildlife, and other biological surveys in preparation of the application. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(21) The nature, depth, thickness, and commonly used names of the coal seams to be mined and of any coal or rider seams above the seam to be mined.

(22) Any coal crop lines within the permit and adjacent areas and the strike and dip of the coal to be mined.

(23) The location and extent of known workings of active, inactive, or abandoned underground mines within or underlying the proposed permit and adjacent areas.

(24) Any underground mine openings to the surface within the proposed permit and adjacent areas.

(25) The location and extent of existing or previously surface-mined areas within the proposed permit area.

(26) The location and dimensions of existing areas of spoil, coal mine waste, noncoal mine waste disposal sites, dams, embankments, other impoundments, and water treatment facilities within the proposed permit area.

(27) The location and depth (if available) of all conventional gas and oil wells within the proposed permit and adjacent areas, as well as any directional or horizontal drilling for hydrocarbon extraction operations, including those using hydraulic fracturing methods, within or underlying those areas. You may provide information concerning depth in a table cross-referenced to a map if approved by the regulatory authority.

(28) Other relevant information required by the regulatory authority.

(b) Maps, plans, and cross-sections required by paragraph (a) of this section must be—

(1) Prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or in any state that authorizes land surveyors to prepare and certify such maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(2) Updated when required by the regulatory authority.

(c) The regulatory authority may require that you submit the materials required by this section in a digital format that includes all necessary metadata.

§ 779.25 [Reserved]

■ 22. Revise part 780 to read as follows:

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR OPERATION AND RECLAMATION PLANS

Sec.

780.1 Scope: What does this part do?
780.2 What is the objective of this part?
780.4 What responsibilities do I and government agencies have under this part?
780.10 Information collection.
780.11 What must I include in the general description of my proposed operations?
780.12 What must the reclamation plan include?
780.13 What additional maps and plans must I include in the reclamation plan?
780.14 What requirements apply to the use of existing structures?
780.15 What plans for the use of explosives must I include in my application?
780.16 What must I include in the fish and wildlife protection and enhancement plan?
780.18 [Reserved]
780.19 What baseline information on hydrology, geology, and aquatic biology must I provide?
780.20 How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?
780.21 What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?
780.22 What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?
780.23 What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?
780.24 What requirements apply to the postmining land use?
780.25 What information must I provide for siltation structures, impoundments, and refuse piles?
780.27 What special requirements apply to surface mining near underground mining?
780.28 What additional requirements apply to activities in, through, or adjacent to streams?
780.29 What information must I include in the surface-water runoff control plan?
780.31 What information must I provide concerning the protection of publicly owned parks and historic places?
780.33 What information must I provide concerning the relocation or use of public roads?
780.35 What information must I provide concerning the minimization and disposal of excess spoil?
780.37 What information must I provide concerning access and haul roads?
780.38 What information must I provide concerning support facilities?

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 780.1 Scope: What does this part do?

This part establishes the minimum requirements for the operation and reclamation plan portions of applications for a permit to conduct surface mining activities, except to the extent that part 785 of this subchapter establishes different requirements.

§ 780.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with comprehensive and reliable information on how you propose to conduct surface mining activities and reclaim the disturbed area in compliance with the Act, this chapter, and the regulatory program.

§ 780.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide to the regulatory authority all information required by this part, except where specifically exempted in this part.

(b) State and federal governmental agencies must provide information needed for permit applications to the extent that this part specifically requires that they do so.

§ 780.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–xxxx. Sections 507 and 508 of SMCRA contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 780.11 What must I include in the description of my proposed operations?

Your application must contain a description of the mining operations that you propose to conduct during the life of the mine within the proposed permit area, including, at a minimum, the following:

(a) A narrative description of the—

(1) Type and method of coal mining procedures and proposed engineering techniques.

(2) Anticipated annual and total number of tons of coal to be produced.

(3) Major equipment to be used for all aspects of the proposed operations.

(b) A narrative explaining the construction, modification, use, maintenance, and removal (unless you can satisfactorily explain why retention is necessary or appropriate for the postmining land use specified in the application under § 780.24 of this part) of the following facilities:

(1) Dams, embankments, and other impoundments.

(2) Overburden and soil handling and storage areas and structures.

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures.

(4) Spoil, coal processing waste, and noncoal mine waste removal, handling, storage, transportation, and disposal areas and structures.

(5) Mine facilities.

(6) Water pollution control facilities.

§ 780.12 What must the reclamation plan include?

(a) *General requirements.* Your application must contain a plan for the reclamation of the lands to be disturbed within the proposed permit area. The plan must show how you will comply with the operation and reclamation requirements of the applicable regulatory program. At a minimum, the plan must include all information required under this part and part 785 of this chapter.

(b) *Reclamation timetable.* The reclamation plan must contain a detailed timetable for the completion of each major step in the reclamation process including, but not limited to—

(1) Backfilling.

(2) Grading.

(3) Restoration of the form of all perennial and intermittent stream segments through which you mine, either in their original location or as permanent stream-channel diversions.

(4) Soil redistribution.

(5) Planting.

(6) Demonstration of revegetation success.

(7) Restoration of the ecological function of all reconstructed perennial and intermittent stream segments, either in their original location or as permanent stream-channel diversions.

(8) Application for each phase of bond release under § 800.42 of this chapter.

(c) *Reclamation cost estimate.* The reclamation plan must contain a detailed estimate of the cost of reclamation, including both direct and indirect costs, of those elements of the proposed operations that are required to be covered by a performance bond under part 800 of this chapter, with supporting calculations for the estimates. You must use current standardized construction cost estimation methods and equipment cost guides to prepare this estimate.

(d) *Backfilling and grading plan.* (1) The reclamation plan must contain a plan for backfilling the mined area, compacting the backfill, and grading the disturbed area, with contour maps, models, or cross-sections that show in detail the anticipated final surface configuration of the proposed permit area, including drainage patterns, in accordance with §§ 816.102 through 816.107 of this chapter, using the best technology currently available. You must limit compaction to the minimum necessary to achieve stability requirements unless additional compaction is necessary to reduce infiltration to minimize leaching and discharges of parameters of concern.

(2) The backfilling and grading plan must describe in detail how you will conduct backfilling and related reclamation activities, including how you will handle acid-forming and toxic-forming materials, if present, to prevent the formation of acid or toxic drainage from acid-forming and toxic-forming materials within the overburden. You must explain how the method that you select will protect groundwater and surface water in accordance with § 816.38 of this chapter.

(e) *Soil handling plan*—(1) *General requirements.* (i) The reclamation plan must include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with § 816.22 of this chapter. It also must include a plan and schedule for removal, storage, and redistribution or other use of organic matter in accordance with § 816.22(f) of this chapter.

(ii) The plan submitted under paragraph (e)(1)(i) of this section must require that the B horizon, C horizon, and other underlying strata, or portions thereof, be removed and segregated, stockpiled, and redistributed to achieve the optimal rooting depths required to restore premining land use capability or to comply with the revegetation requirements of §§ 816.111 and 816.116 of this chapter.

(iii) The plan submitted under paragraph (e)(1)(i) of this section must explain how you will handle and store soil materials to avoid contamination by acid-forming or toxic-forming materials and to minimize deterioration of desirable soil characteristics.

(2) *Substitutes and supplements.* (i) This paragraph (e)(2) applies to you if you propose to use appropriate overburden materials as a supplement to or substitute for the existing topsoil or subsoil on the proposed permit area.

(ii) You must demonstrate, and the regulatory authority must find in writing, that—

(A)(*1*) The quality of the existing topsoil and subsoil is inferior to that of the best overburden materials available within the proposed permit area; or

(*2*) The quantity of the existing topsoil and subsoil is insufficient to provide the optimal rooting depth or to meet other growth requirements of the native species to be planted. In this case, the plan must require that all available existing topsoil and favorable subsoil, regardless of the amount, be removed, stored, and redistributed as part of the final growing medium.

(B) The use of the overburden materials that you have selected, in combination with or in place of the topsoil or subsoil, will result in a soil medium that is more suitable than the

existing topsoil and subsoil to sustain vegetation consistent with the postmining land use and the revegetation plan under paragraph (g) of this section and that will provide a rooting depth that is superior to the existing topsoil and subsoil.

(C) The overburden materials that you select for use as a soil substitute or supplement are the best materials available in the proposed permit area to support the native vegetation to be established or the crops to be planted.

(iii) The regulatory authority will specify the—

(A) Suitability criteria for substitutes and supplements.

(B) Chemical and physical analyses, field trials, or greenhouse tests that you must conduct to make the demonstration required by paragraph (e)(2)(ii) of this section.

(C) Sampling objectives and techniques and the analytical techniques that you must use for purposes of paragraph (e)(2)(iii)(B) of this section.

(iv) At a minimum, the demonstrations required by paragraph (e)(2)(ii) of this section must include—

(A) The physical and chemical soil characteristics and root zones needed to support the type of vegetation to be established on the reclaimed area.

(B) A comparison and analysis of the thickness, total depth, texture, percent coarse fragments, pH, thermal toxicity, and areal extent of the different kinds of soil horizons and overburden materials available within the proposed permit area, based upon a statistically valid sampling procedure.

(v) You must include a plan for testing and evaluating overburden materials during both removal and redistribution to ensure that only materials approved for use as soil substitutes or supplements are removed and redistributed.

(f) *Surface stabilization plan.* The reclamation plan must contain a plan for stabilizing road surfaces, redistributed soil materials, and other exposed surface areas to effectively control erosion and air pollution attendant to erosion in accordance with §§ 816.95, 816.150, and 816.151 of this chapter.

(g) *Revegetation plan.* (1) The reclamation plan must contain a plan for revegetation consistent with §§ 816.111 through 816.116 of this chapter, including, but not limited to, descriptions of—

(i) The schedule for revegetation of the area to be disturbed.

(ii) The site preparation techniques that you plan to use, including the measures that you will take to avoid or, when avoidance is not possible, to minimize and alleviate compaction of the root zone during backfilling, grading, soil redistribution, and planting.

(iii) What soil tests you will perform, together with a statement as to whether you will apply lime, fertilizer, or other amendments in response to those tests before planting or seeding.

(iv) The species that you will plant to achieve temporary erosion control or a description of other soil stabilization measures that you will implement in lieu of planting a temporary cover.

(v) The species that you will plant and the seeding and stocking rates and planting arrangements that you will use to achieve or complement the postmining land use and to enhance fish and wildlife habitat.

(vi) The planting and seeding techniques that you will use.

(vii) Whether you will apply mulch and, if so, the type of mulch and the method of application.

(viii) Whether you plan to conduct irrigation or apply fertilizer after the first growing season and, if so, to what extent and for what length of time.

(ix) Any normal husbandry practices that you plan to use in accordance with § 816.115(b) of this chapter.

(x) The standards and evaluation techniques that you propose to use to determine the success of revegetation in accordance with § 816.116 of this chapter.

(xi) The measures that you will take to avoid the establishment of invasive species on reclaimed areas or to control those species if they do become established.

(2) Except as provided in paragraphs (g)(4) and (5) of this section, the species and planting rates and arrangements selected as part of the revegetation plan must be designed to create a diverse, effective, permanent vegetative cover that is consistent with the native vegetative communities described in your permit application, as required by § 779.19 of this chapter, and that will meet the other requirements of paragraphs (a) and (b) of § 816.116 of this chapter.

(3) The species selected as part of the revegetation plan must—

(i) Be native to the area. The regulatory authority may approve the use of introduced species as part of the permanent vegetative cover for the site only if those species are both non-invasive and necessary to achieve the postmining land use.

(ii) Be capable of stabilizing the soil surface from erosion to the extent that control of erosion with herbaceous ground cover is consistent with establishment of a permanent vegetative cover that resembles native plant communities in the area.

(iii) Be compatible with the approved postmining land use.

(iv) Have the same seasonal characteristics of growth as the vegetative communities described in your permit application, as required by § 779.19 of this chapter.

(v) Be capable of self-regeneration and natural succession.

(vi) Be compatible with the plant and animal species of the area.

(vii) Meet the requirements of applicable state and federal seed, poisonous and noxious plant, and introduced species laws and regulations.

(4) The regulatory authority may grant an exception to the requirements of paragraphs (g)(3)(i), (iv), and (v) of this section when necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, and the species selected to achieve this purpose are consistent with measures to establish permanent vegetation.

(5) The regulatory authority may grant an exception to the requirements of paragraphs (g)(2), (g)(3)(i), (g)(3)(iv), and (g)(3)(v) of this section for those areas with a long-term, intensive, agricultural postmining land use.

(6) A professional forester or ecologist must develop and certify all revegetation plans that include the establishment of trees and shrubs. These plans must include site-specific planting prescriptions for canopy trees, understory trees and shrubs, and herbaceous ground cover compatible with establishment of those trees and shrubs. Each plan must use native species exclusively unless those species are inconsistent with the approved postmining land use and that land use is implemented before the entire bond amount for the area has been fully released under § 800.42(d) of this chapter.

(h) *Stream restoration plan.* If you propose to mine through a perennial or intermittent stream, the reclamation plan must explain in detail how and when you will restore both the form and the ecological function of the stream segment, either in its original location or as a permanent stream-channel diversion, in accordance with §§ 780.28 and 816.57 of this chapter.

(i) *Coal resource conservation plan.* The reclamation plan must describe the measures that you will employ to maximize the use and conservation of the coal resource while using the best technology currently available to maintain environmental integrity, as required by § 816.59 of this chapter.

(j) *Plan for disposal of noncoal waste materials.* The reclamation plan must describe—

(1) The type and quantity of noncoal waste materials that you anticipate disposing of within the proposed permit area.

(2) How you intend to dispose of noncoal waste materials in accordance with § 816.89 of this chapter.

(3) The locations of any proposed noncoal waste material disposal sites within the proposed permit area.

(4) The contingency plans that you have developed to preclude sustained combustion of combustible noncoal materials.

(k) *Management of mine openings, boreholes, and wells.* The reclamation plan must contain a description, including appropriate cross-sections and maps, of the measures that you will use to seal or manage mine openings, and to plug, case or manage exploration holes, boreholes, wells and other openings within the proposed permit area, in accordance with § 816.13 of this chapter.

(l) *Compliance with Clean Air Act and Clean Water Act.* The reclamation plan must describe the steps that you have taken or will take to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

(m) *Consistency with land use plans and surface owner plans.* The reclamation plan must describe how the proposed operation is consistent with—

(1) All applicable state and local land use plans and programs.

(2) The plans of the surface landowner, to the extent that those plans are practicable and consistent with this chapter and with other applicable laws and regulations.

§ 780.13 What additional maps and plans must I include in the reclamation plan?

(a) In addition to the maps and plans required under § 779.24 and other provisions of this subchapter, your application must include maps, plans, and cross-sections of the proposed permit area showing—

(1) The lands that you propose to affect throughout the life of the operation, including the sequence and timing of surface mining activities and the sequence and timing of backfilling, grading, and other reclamation activities to be conducted on areas where the operation will disturb the land surface.

(2) Each area of land for which a performance bond or other equivalent guarantee will be posted under part 800 of this chapter.

(3) Any change that the proposed operations will cause in a facility or feature identified under § 779.24 of this chapter.

(4) All buildings, utility corridors, and facilities to be used or constructed within the proposed permit area, with identification of those facilities that you propose to retain as part of the postmining land use.

(5) Each coal storage, cleaning, processing, and loading area and facility.

(6) Each temporary storage area for soil, spoil, coal mine waste, and noncoal mine waste.

(7) Each water diversion, collection, conveyance, treatment, storage and discharge facility to be used, including the location of each point at which water will be discharged from the proposed permit area to a surface-water body and the name of that water body.

(8) Each disposal facility for coal mine waste and noncoal mine waste materials.

(9) Each feature and facility to be constructed to protect or enhance fish, wildlife, and related environmental values.

(10) Each explosive storage and handling facility.

(11) Location of each siltation structure, sedimentation pond, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 780.25 of this part, and the location of each excess spoil fill for which plans are required under § 780.35 of this part.

(12) Each segment of a perennial or intermittent stream that you propose to mine through, bury, or divert.

(13) Each location in which you propose to restore a segment of a perennial or intermittent stream or construct a temporary or permanent stream-channel diversion.

(14) Each segment of a perennial or intermittent stream that you propose to enhance under the plan submitted in accordance with § 780.16 of this part.

(15) Location and geographic coordinates of each monitoring point for groundwater and surface water, and each point at which you propose to monitor the biological condition of perennial and intermittent streams.

(b) Except as provided in §§ 780.25(a)(2), 780.25(a)(3), 780.35, 816.74(c), and 816.81(c) of this chapter, maps, plans, and cross-sections required under paragraphs (a)(5), (6), (7), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(c) The regulatory authority may require that you submit the materials required by this section in a digital format.

§ 780.14 What requirements apply to the use of existing structures?

(a) Each application must contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description must include—

(1) The location of the structure.

(2) Plans of the structure and a description of its current condition.

(3) The approximate starting and ending dates of construction of the existing structure.

(4) A showing, including relevant monitoring data or other evidence, of whether the structure meets the performance standards of subchapter K (Permanent Program Standards) of this chapter or, if the structure does not meet the performance standards of subchapter K of this chapter, a showing of whether the structure meets the performance standards of subchapter B (Initial Program Standards) of this chapter.

(b) Each application must contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan must include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of subchapter K of this chapter.

(2) A construction schedule that includes dates for beginning and completing interim steps and final reconstruction.

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of subchapter K of this chapter are met.

(4) A demonstration that there is no significant risk of harm to the environment or to public health or safety during modification or reconstruction of the structure.

§ 780.15 What plans for the use of explosives must I include in my application?

(a) *Blasting plan.* Each application must contain a blasting plan for the proposed permit area, explaining how

the applicant will comply with the requirements of §§ 816.61 through 816.68 of this chapter. This plan must include, at a minimum, information setting forth the limitations the operator will meet with regard to ground vibration and airblast, the bases for those limitations, and the methods to be applied in controlling the adverse effects of blasting operations.

(b) *Monitoring system.* Each application must contain a description of any system to be used to monitor compliance with the standards of § 816.67 including the type, capability, and sensitivity of any blast-monitoring equipment and proposed procedures and locations of monitoring.

(c) *Blasting near underground mines.* Blasting operations within 500 feet of active underground mines require approval of the state and federal regulatory authorities concerned with the health and safety of underground miners.

§ 780.16 What must I include in the fish and wildlife protection and enhancement plan?

(a) *General requirements.* Your application must include a fish and wildlife protection and enhancement plan that—

(1) Is consistent with the requirements of § 816.97 of this chapter.

(2) Is specific to the resources identified under § 779.20 of this chapter.

(3) Complies with the requirements of paragraphs (b) through (e) of this section.

(b) *Protection of threatened and endangered species.* You must describe how you will comply with the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* including any species-specific protection and enhancement plans developed in accordance with that law.

(c) *Protection of other species.* You must describe how, to the extent possible using the best technology currently available, you will minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. At a minimum, you must explain how you will—

(1) Time operations to avoid or minimize disruption of critical life cycle events for fish and wildlife, including migration, nesting, breeding, calving, and spawning.

(2) Retain forest cover and other native vegetation as long as possible and time the removal of that vegetation to minimize adverse impacts on aquatic and terrestrial species.

(3) To the extent possible, maintain an intact forested buffer at least 100 feet wide between surface disturbances and perennial and intermittent streams that are located in forested areas. The buffer width must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(4) Locate and design sedimentation ponds, utilities, support facilities, roads, rail spurs, and other transportation facilities to avoid or minimize adverse impacts on fish, wildlife, and related environmental values.

(5) Periodically evaluate the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas and use that information to modify operations or take other action to avoid or minimize adverse impacts on those values.

(6) Select non-invasive native species for revegetation that either promote or do not inhibit the long-term development of wildlife habitat.

(7) Avoid mining through perennial or intermittent streams or disturbing riparian habitat adjacent to those streams. When avoidance is not possible, minimize—

(i) The time during which mining and reclamation operations disrupt those streams or associated riparian habitat;

(ii) The length of the stream segments mined through; and

(iii) The amount of riparian habitat disturbed by the operation.

(8) Implement other appropriate conservation practices such as, but not limited to, those identified in the technical guides published by the Natural Resources Conservation Service.

(d) *Enhancement measures*—(1) *General requirements.* You must describe how you will use the best technology currently available to enhance fish, wildlife, and related environmental values both within and outside the area to be disturbed by mining activities, where practicable. Your permit application must either identify and describe the enhancement measures that you will implement, where practicable, or explain why implementation of those measures is not practicable. Potential enhancement measures include, but are not limited to—

(i) Using the backfilling and grading process to create postmining surface features and configurations, such as functional wetlands, of high value to fish and wildlife.

(ii) Designing and constructing permanent impoundments in a manner that will maximize their value to fish and wildlife.

(iii) Creating rock piles and other permanent landscape features of value to raptors and other wildlife for nesting and shelter, to the extent that those features are consistent with premining features, the surrounding topography, and the approved postmining land use.

(iv) Reestablishing native forests or other native plant communities, both within and outside the permit area. This may include restoring the native plant communities that existed before any mining, establishing native plant communities consistent with the native plant communities that are a part of the natural succession process, or establishing native plant communities that will support wildlife species of local, state, or national concern, including, but not limited to, species listed or proposed for listing as threatened or endangered on a state or national level.

(v) Establishing a vegetative corridor at least 100 feet wide along the banks of streams that lacked a buffer of this nature before mining. The corridor width should be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel. Species selected for planting within the corridor must be comprised of species native to the area, including native plants adapted to and suitable for planting in riparian zones within the corridor. Whenever possible, you should establish this corridor along both banks of the stream.

(vi) Implementing conservation practices identified in publications, such as the technical guides published by the Natural Resources Conservation Service.

(vii) Permanently fencing livestock away from streams.

(viii) Installing perches and nest boxes.

(ix) Establishing conservation easements or deed restrictions, with an emphasis on preserving riparian vegetation and forested corridors along perennial and intermittent streams.

(x) Providing funding to cover long-term operation and maintenance costs that watershed organizations incur in treating long-term postmining discharges from previous mining operations.

(xi) Reclaiming previously mined areas located outside the area that you propose to disturb.

(xii) Implementing measures to reduce or eliminate existing sources of surface-water or groundwater pollution.

(2) *Additional enhancement requirements for operations with anticipated long-term adverse impacts.* (i) Your permit application must identify and describe the enhancement measures under paragraph (d)(1) of this

section that you will implement if your surface mining activities would result in the long-term loss of native forest, other native plant communities, or a segment of a perennial or intermittent stream.

(ii) The scope of the enhancement measures that you propose under paragraph (d)(2)(i) of this section must be commensurate with the magnitude of the long-term adverse impacts of the proposed operation. Whenever possible, the measures must be permanent.

(iii)(A) Enhancement measures proposed under paragraph (d)(2) of this section must be implemented within the watershed in which the proposed operation is located, unless opportunities for enhancement are not available within that watershed. In that case, you must propose to implement enhancement measures in the closest adjacent watershed in which enhancement opportunities exist, as approved by the regulatory authority.

(B) Each regulatory program must prescribe the size of the watershed for purposes of paragraph (d)(2)(iii)(A) of this section, using a generally-accepted watershed classification system.

(iv) The permit approved by the regulatory authority must include a condition requiring completion of the enhancement measures proposed under paragraph (d)(2) of this section.

(3) *Inclusion within permit area.* If the enhancement measures to be implemented under paragraphs (d)(1) and (2) of this section would involve more than a de minimis disturbance of the surface of land outside the area to be mined, you must include the land to be disturbed by those measures within the proposed permit area.

(e) *Fish and Wildlife Service review.* (1)(i) The regulatory authority must provide the protection and enhancement plan developed under this section to the applicable regional or field office of the U.S. Fish and Wildlife Service whenever the resource information submitted under § 779.20 of this chapter includes species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide the protection and enhancement plan to the Service no later than the time that it provides written notice of the permit application to the Service under § 773.6(a)(3)(ii) of this chapter.

(ii) When the resource information obtained under § 779.20 of this chapter does not include threatened or endangered species, designated critical habitat, or species proposed for listing as threatened or endangered, the regulatory authority must provide the protection and enhancement plan to the applicable regional or field office of the U.S. Fish and Wildlife Service only if the Service requests an opportunity to review and comment on that plan. The regulatory authority must provide the requested plan to the Service within 10 days of receipt of the request from the Service.

(2)(i) The regulatory authority must document its disposition of all comments from the Service that pertain to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law.

(ii) If the regulatory authority does not agree with a species-specific protection measure or any other recommendation from the Service that pertains to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law, the regulatory authority must explain the rationale for that decision in the disposition document prepared under paragraph (e)(2)(i) of this section. The regulatory authority must provide a copy of that document to the pertinent Service field office and OSMRE field office and must refrain from approving the permit application.

(iii) If the Service field office does not concur with the regulatory authority's decision under paragraph (e)(2)(ii) of this section and the regulatory authority and the Service field office are unable to reach agreement at that level, either the regulatory authority or the Service may elevate the issue through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.

(iv) The regulatory authority may not approve the permit application until all issues are resolved in accordance with paragraph (e)(2)(iii) of this section and the regulatory authority receives written documentation from the Service that all issues have been resolved.

§ 780.18 [Reserved]

§ 780.19 What baseline information on hydrology, geology, and aquatic biology must I provide?

(a) *General requirements.* Your permit application must include information on the hydrology, geology, and aquatic biology of the proposed permit and adjacent areas in sufficient detail to assist in—

(1) Determining the probable hydrologic consequences of the operation upon the quality and quantity of surface water and groundwater in the proposed permit and adjacent areas, as required under § 780.20 of this part.

(2) Determining the nature and extent of both the hydrologic reclamation plan required under § 780.22 of this part and the monitoring plans required under § 780.23 of this part.

(3) Determining whether reclamation as required by this chapter can be accomplished.

(4) Preparing the cumulative hydrologic impact assessment under § 780.21 of this part, including an evaluation of whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(b) *Groundwater information*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variations in the quality, quantity, and usage of groundwater, including all surface discharges, within the proposed permit and adjacent areas.

(2) *Underground mine pools.* If an underground mine pool is present within the proposed permit or adjacent areas, you must prepare an assessment of the characteristics of the mine pool, including seasonal changes in quality, quantity, and flow patterns, unless you demonstrate, and the regulatory authority finds, that the mine pool is not hydrologically connected to the proposed permit area. The determination of the probable hydrologic consequences of mining required under § 780.20 of this part also must include a discussion of the effect of the proposed mining operation on any underground mine pools within the proposed permit and adjacent areas.

(3) *Monitoring wells.* The regulatory authority must require the installation of properly-screened monitoring wells when necessary to document seasonal variations in the quality, quantity, and usage of groundwater.

(4) *Groundwater quality descriptions.* At a minimum, groundwater quality descriptions must include baseline information on—

(i) Major anions, including, at a minimum, bicarbonate, sulfate, and chloride.

(ii) Major cations, including, at a minimum, calcium, magnesium, sodium, and potassium.

(iii) The cation-anion balance of the parameters sampled in paragraphs (b)(4)(i) and (ii) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(iv) Ammonia.

(v) Arsenic.

(vi) Cadmium.

(vii) Copper.
(viii) Hot acidity.
(ix) Nitrogen.
(x) pH.
(xi) Selenium.
(xii) Specific conductance corrected to 25 °C.
(xiii) Total alkalinity.
(xiv) Total dissolved solids.
(xv) Total iron.
(xvi) Total manganese.
(xvii) Zinc.

(5) *Groundwater quantity descriptions.* At a minimum, groundwater quantity descriptions must include seasonal variations in approximate rates of groundwater discharge or usage and the depth to the water table in—

(i) Each coal seam to be mined.

(ii) Each water-bearing stratum above each coal seam to be mined.

(iii) Each potentially impacted stratum below the lowest coal seam to be mined.

(6) *Sampling requirements.* (i) You must establish monitoring wells or equivalent monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine groundwater quality, quantity, and movement in each aquifer above or immediately below the lowest coal seam to be mined. At a minimum, for each aquifer, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area; and

(B) Within the proposed permit area.

(ii) To document seasonal variations in groundwater quality, you must collect samples from the locations identified in paragraph (b)(6)(i) of this section at equally spaced monthly intervals for a minimum of 12 consecutive months. You must analyze those samples for the parameters listed in paragraph (b)(4) of this section at the same frequency.

(iii) To document seasonal variations in groundwater quantity, you must take the measurements listed in paragraph (b)(5) of this section at each location identified in paragraph (b)(6)(i) of this section at equally spaced monthly intervals for a minimum of 12 consecutive months.

(iv) The regulatory authority must extend the minimum data collection period specified in paragraphs (b)(6)(ii) and (iii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought (-3.0 or lower on the Palmer Drought Severity Index) or abnormally high precipitation (3.0 or higher on the Palmer Drought Severity Index) during the initial baseline data collection period. Baseline data collection must continue until the dataset includes 12 consecutive months without severe drought or abnormally high precipitation.

(c) *Surface-water information*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variation in surface-water quality, quantity, and usage within the proposed permit and adjacent areas.

(2) *Surface-water quality descriptions.* At a minimum, surface-water quality descriptions must include baseline information on—

(i) Major anions, including, at a minimum, bicarbonate, sulfate, and chloride.

(ii) Major cations, including, at a minimum, calcium, magnesium, sodium, and potassium.

(iii) The cation-anion balance of the parameters sampled in paragraphs (c)(2)(i) and (ii) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(iv) Ammonia.
(v) Arsenic.
(vi) Cadmium.
(vii) Copper.
(viii) Hot acidity.
(ix) Nitrogen.
(x) pH.
(xi) Selenium.
(xii) Specific conductance corrected to 25 °C.
(xiii) Total alkalinity.
(xiv) Total dissolved solids.
(xv) Total iron.
(xvi) Total manganese.
(xvii) Total suspended solids.
(xviii) Zinc.
(xix) Any other parameter for which effluent limitations guidelines have been established under 40 CFR part 434.

(3) *Surface-water quantity descriptions.* (i) At a minimum, surface-water quantity descriptions for perennial, intermittent, and ephemeral streams and other discharges within the proposed permit and adjacent areas must include—

(A) Baseline information on peak-flow magnitude and frequency.

(B) Usage data for existing uses and anticipated usage for all reasonably foreseeable uses of each stream.

(C) Seasonal flow variations.

(ii) All flow measurements under paragraph (c)(3)(i) of this section must be made using generally-accepted professional techniques approved by the regulatory authority. All techniques must be repeatable and must produce consistent results on successive measurements. Visual observations are not acceptable.

(4) *Sampling requirements.* (i) You must establish monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine the quality and quantity of water in streams within those areas. At a minimum, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas; and

(B) In a representative number of ephemeral streams within the proposed permit area.

(ii) To document seasonal variations in surface-water quality, you must collect samples from the locations identified in paragraph (c)(4)(i) of this section at equally spaced monthly intervals for a minimum of 12 consecutive months. You must analyze those samples for the parameters listed in paragraph (c)(2) of this section at the same frequency.

(iii) To document seasonal variations in surface-water quantity, you must take the measurements listed in paragraph (c)(3) of this section at each location identified in paragraph (c)(4)(i) of this section at equally spaced monthly intervals for a minimum of 12 consecutive months.

(iv) The regulatory authority must extend the minimum data collection period specified in paragraphs (c)(4)(ii) and (iii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought (-3.0 or lower on the Palmer Drought Severity Index) or abnormally high precipitation (3.0 or higher on the Palmer Drought Severity Index) during the initial baseline data collection period. Baseline data collection must continue until the dataset includes 12 consecutive months without severe drought or abnormally high precipitation.

(5) *Precipitation measurements.* You must provide records of precipitation amounts for the proposed permit area, using on-site, self-recording devices. Precipitation records must be adequate to generate and calibrate a hydrologic model of the site. The regulatory authority will determine whether you must create such a model.

(6) *Stream assessments.* You must map and separately identify all perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas and include an assessment of those streams. At a minimum, the assessment must include—

(i) The baseline stream pattern, profile, and dimensions, with measurements of channel slope, sinuosity, water depth, alluvial groundwater depth, depth to bedrock, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate at a scale and frequency adequate to characterize all stream segments.

(ii) A description of riparian zone vegetation, including—

(A) Any hydrophytic vegetation within and adjacent to the stream channel.

(B) The percentage of the riparian zone that is forested.

(C) The percentage of channel canopy coverage.

(iii) The biological condition of each stream segment, to the extent required by paragraph (e) of this section.

(iv) The location of the channel head on terminal reaches of each stream segment.

(v) The location of transition points from ephemeral to intermittent and from intermittent to perennial, when applicable.

(vi) Identification of all stream segments within the proposed permit and adjacent areas that appear on the list of impaired surface waters prepared under section 303(d) of the Clean Water Act. You must identify the stressors and associated total maximum daily loads for those stream segments, if applicable.

(d) *Additional information for discharges from previous coal mining operations.* If the proposed permit and adjacent areas contain any discharges from previous surface or underground coal mining operations, you must sample those discharges during low-flow conditions of the receiving stream on a one-time basis and analyze the samples for the parameters listed in paragraph (c)(2) of this section and for both total and dissolved fractions of the following parameters—

(1) Aluminum.
(2) Arsenic.
(3) Barium.
(4) Beryllium.
(5) Cadmium.
(6) Copper.
(7) Lead.
(8) Mercury.
(9) Nickel.
(10) Selenium.
(11) Silver.
(12) Thallium.
(13) Zinc.

(e) *Biological condition information.* (1) Except as provided in paragraph (h) of this section, your permit application must include an assessment of the biological condition of—

(i) Each perennial and intermittent stream within the proposed permit area.

(ii) Each perennial and intermittent stream within the adjacent area that would receive discharges from the proposed operation.

(iii) A representative sample of ephemeral streams within both the proposed permit area and the adjacent area that would receive discharges from the proposed operation.

(2) In conducting this assessment, you must use a multimetric bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory required under section 305(b) of the Clean Water Act, or other scientifically-valid multimetric bioassessment protocol used by agencies responsible for implementing the Clean Water Act, modified as necessary to meet the following requirements. At a minimum, the protocol must—

(i) Be based upon the measurement of an appropriate array of aquatic organisms, including identification of benthic macroinvertebrates to the genus level.

(ii) Result in the calculation of index values for both habitat and macroinvertebrates.

(iii) Provide a correlation of index values to the capability of the stream to support designated uses under section 101(a) or 303(c) of the Clean Water Act, as well as any other existing or reasonably foreseeable uses.

(f) *Geologic information.* (1) Your application must include a description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined that may be adversely impacted by mining. The description must include—

(i) The areal and structural geology of the proposed permit and adjacent areas.

(ii) Other parameters that may influence the required reclamation.

(iii) An explanation of how the areal and structural geology and other parameters affect the occurrence, availability, movement, quantity, and quality of potentially impacted surface water and groundwater.

(2) The description required by paragraph (f)(1) of this section must be based on all of the following—

(i) The cross-sections, maps, and plans required by § 779.24 of this chapter.

(ii) The information obtained under paragraphs (f)(3) and (f)(4) of this section.

(iii) Geologic literature and practices.

(3) For any portion of the proposed permit area in which the strata down to the coal seam or seams to be mined will be removed or are already exposed, you must collect and analyze samples collected from test borings; drill cores; or fresh, unweathered, uncontaminated samples from rock outcrops, down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest seam to be mined that may be adversely impacted by mining. Your application must include the following data and analyses:

(i) Logs showing the lithologic characteristics, including physical properties and thickness of each stratum, and the location of any groundwater encountered.

(ii) Chemical analyses identifying those strata that may contain acid-forming materials, toxic-forming materials, or alkalinity-producing materials and the extent to which each stratum contains those materials.

(iii) Chemical analyses of the coal seam for acid-forming or toxic-forming materials, including, but not limited to, total sulfur and pyritic sulfur.

(4) You must provide any additional geologic information and analyses that the regulatory authority determines to be necessary to protect the hydrologic balance or to meet the performance standards of this chapter.

(5) You may request the regulatory authority to waive the requirements of paragraph (f)(3) of this section, in whole or in part. The regulatory authority may grant the waiver request only after finding in writing that the collection and analysis of such data is unnecessary because other representative information is available to the regulatory authority in a satisfactory form.

(g) *Cumulative impact area information.* (1) The regulatory authority will obtain the hydrologic, geologic, and biological information necessary to assess the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining on surface-water and groundwater systems in the cumulative impact area, as required by § 780.21 of this part, from the appropriate federal or state agencies, to the extent that the information is available from those agencies.

(2) If the information identified in paragraph (g)(1) of this section is not available from other federal or state agencies, you must gather and submit this information to the regulatory authority as part of the permit application before the regulatory authority may approve your application. As an alternative to collecting new information, you may submit data and analyses from nearby mining operations if the site of those operations is

representative of the proposed operations in terms of topography, hydrology, geology, geochemistry, and method of mining.

(3) The regulatory authority may not approve the permit application until the necessary hydrologic, geologic, and biological information for the cumulative impact area is available, either from other agencies or from you, the applicant.

(h) *Exception for operations that avoid streams.* Upon your request, the regulatory authority may waive the biological condition information requirements of paragraph (e) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(1) Mine through or bury a perennial or intermittent stream;

(2) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(3) Modify the base flow of any perennial or intermittent stream.

(i) *Coordination with Clean Water Act agencies.* The regulatory authority will consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act and make best efforts to minimize differences in baseline data collection points and parameters and to share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

(j) *Corroboration of baseline data.* The regulatory authority must either corroborate a sample of the baseline information in your application or arrange for a third party to conduct the corroboration at your expense. Corroboration may include, but is not limited to, simultaneous sample collection and analysis, use of field measurements, or comparison of application data with application or monitoring data from adjacent operations.

(k) *Permit nullification for inaccurate information.* If the regulatory authority issues a permit on the basis of what it later determines to be substantially inaccurate baseline information, the permit will be void from the date of issuance and have no legal effect. You must cease mining-related activities and immediately begin to reclaim the disturbed area upon notification by the regulatory authority that the permit is void under this paragraph.

§ 780.20 How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

(a) *Content of PHC determination.* Your permit application must contain a determination of the probable hydrologic consequences of the proposed operation upon the quality and quantity of surface water and groundwater and upon the biological condition of perennial, intermittent, and ephemeral streams under seasonal flow conditions for the proposed permit and adjacent areas. You must base the PHC determination on an analysis of the baseline hydrologic, geologic, biological, and other information required under § 780.19 of this part. It must include findings on:

(1) Whether the operation may cause material damage to the hydrologic balance outside the permit area.

(2) Whether acid-forming or toxic-forming materials are present that could result in the contamination of surface water or groundwater.

(3) Whether the proposed operation may result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas that is used for a domestic, agricultural, industrial, or other legitimate purpose.

(4) Whether the proposed operation will intercept aquifers in overburden strata or aquifers in underground mine voids (mine pools) or create aquifers in spoil placed in the backfilled area and, if so, what impacts the operation would have on those aquifers, both during mining and after reclamation, and the effect of those impacts on the hydrologic balance.

(5) What impact the proposed operation will have on:

(i) Sediment yield and transport from the area to be disturbed.

(ii) Water quality within the proposed permit and adjacent areas, including, at a minimum—

(A) Major anions including, at a minimum, bicarbonate, sulfate, and chloride.

(B) Major cations, including, at a minimum, calcium, magnesium, sodium, and potassium.

(C) Hot acidity.

(D) pH.

(E) Selenium.

(F) Specific conductance corrected to 25 °C.

(G) Total alkalinity.

(H) Total dissolved solids.

(I) Total iron.

(J) Total manganese.

(K) Total suspended solids.

(L) Other water quality parameters of local importance, as determined by a review of the baseline information required under § 780.19 of this part.

(iii) Flooding and precipitation runoff patterns and characteristics.

(iv) Peak-flow magnitude and frequency for perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.

(v) Seasonal variations in streamflow.

(vi) The availability of groundwater and surface water, including the impact of any diversion of surface or subsurface flows to underground mine workings or any changes in watershed size as a result of the postmining surface configuration.

(vii) The biological condition of perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.

(viii) Other characteristics as required by the regulatory authority.

(b) *Supplemental information.* (1) The regulatory authority must require that you, the applicant, submit supplemental information if the PHC determination required by paragraph (a) of this section indicates that one of the following conditions exists:

(i) The proposed operation may result in adverse impacts to the hydrologic balance either within or outside the proposed permit area.

(ii) The proposed operation may result in adverse impacts to the biological condition of a perennial or intermittent stream within the proposed permit or adjacent areas.

(iii) Acid-forming or toxic-forming material is present that may result in the contamination of either groundwater or surface water used as a water supply.

(2) The supplemental information required under paragraph (b)(1) of this section must be adequate to fully evaluate the probable hydrologic consequences of the proposed operation and to plan remedial and reclamation activities. It may include, but is not limited to, additional drilling, geochemical analyses of overburden materials, aquifer tests, hydrogeologic analyses of the water-bearing strata, analyses of flood flows, or analyses of other characteristics of water quality or quantity, including the stability of underground mine pools that might be affected by the proposed operation.

(c) *Subsequent reviews of PHC determinations.* (1) The regulatory authority must review each application for a permit revision to determine whether a new or updated PHC determination is needed.

(2) The regulatory authority must require that you prepare a new or updated PHC determination if the review under paragraph (c)(1) of this section finds that one is needed.

§ 780.21 What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?

(a) *General requirements.* (1) The regulatory authority must prepare a written assessment of the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining upon surface-water and groundwater systems in the cumulative impact area. This assessment, which is known as the CHIA, must be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(2) In preparing the CHIA, the regulatory authority will consider relevant information on file for other mining operations located within the cumulative impact area or in similar watersheds.

(3) As provided in § 780.19(g) of this part, the regulatory authority may not approve your permit application until it receives the hydrologic, geologic, and biological information needed to prepare the CHIA, either from other federal and state agencies or from you.

(b) *Contents.* At a minimum, the CHIA must include—

(1) A map of the cumulative impact area. At a minimum, the map must identify and display—

(i) Any difference in the boundaries of the cumulative impact area for groundwater and surface water.

(ii) The locations of all previous, current, and anticipated surface and underground mining.

(iii) The locations of all baseline data collection sites within the proposed permit and adjacent areas under § 780.19 of this part.

(iv) Designated uses of surface water under section 101(a) or 303(c) of the Clean Water Act.

(2) A description of all previous, existing, and anticipated surface and underground coal mining within the cumulative impact area, including, at a minimum, the coal seam or seams mined, the extent of mining, and the reclamation status of each operation.

(3) A description of baseline hydrologic information for the proposed permit and adjacent areas under § 780.19 of this part, including—

(i) The quality and quantity of surface water and groundwater and seasonal variations therein.

(ii) Quantitative information about existing usage of surface water and groundwater, as well as information defining the quality of water required for each existing and reasonably foreseeable use of groundwater and surface water and each designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(iii) A description and map of the local and regional groundwater systems.

(iv) The biological condition of perennial, intermittent, and ephemeral streams.

(4) A discussion of any potential concerns identified in the PHC determination required under § 780.20 of this part and how those concerns have been or will be resolved.

(5) A qualitative and quantitative assessment of how all anticipated surface and underground mining may impact the quality of surface water and groundwater in the cumulative impact area, expressed in terms of each baseline parameter identified under § 780.19 of this part.

(6) Criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis. These criteria must—

(i) Be expressed in numerical terms for each parameter of concern.

(ii) Take into consideration the biological requirements of any species listed as threatened or endangered under the Endangered Species Act when those species or designated critical habitat are present within the cumulative impact area.

(iii) Identify the portion of the cumulative impact area to which the criteria apply and locations at which impacts will be monitored. The regulatory authority may establish different criteria for subareas within the cumulative impact area when appropriate.

(iv) Be incorporated into the permit.

(7) An assessment of how all anticipated surface and underground mining may affect groundwater movement and availability within the cumulative impact area.

(8) An evaluation, with references to supporting data and analyses, of whether the CHIA will support a finding that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. To support this finding, the CHIA must include the following determinations, with appropriate documentation:

(i) During all phases of mining and reclamation and at all times of the year, variations in streamflow and groundwater availability resulting from the operation, as well as variations in the amount and concentration of parameters of concern in discharges from the operation to groundwater and surface water, will not—

(A) Result in conversion of a perennial or intermittent stream to an ephemeral stream or conversion of a perennial stream to an intermittent stream. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream may be acceptable, provided the conversion would not disrupt or preclude any existing, reasonably foreseeable, or designated use of the stream under section 101(a) or 303(c) of the Clean Water Act and would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act.

(B) Result in an exceedance of applicable water quality standards in any stream located outside the permit area.

(C) Disrupt or preclude any existing or reasonably foreseeable use of surface water outside the permit area or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act outside the permit area, except as provided in §§ 780.22(b) and 816.40 of this chapter.

(D) Disrupt or preclude any existing or reasonably foreseeable use of groundwater outside the permit area, except as provided in §§ 780.22(b) and 816.40 of this chapter.

(ii) The operation has been designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in damage from flooding, when compared with premining conditions.

(iii) Perennial and intermittent streams located outside the permit area but within the cumulative impact area will continue to have sufficient base flow and recharge capacity to maintain their premining flow regime; *i.e.,* perennial stream segments will retain perennial flows and intermittent stream segments will retain intermittent flows both during and after mining and reclamation. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream may be acceptable, provided the conversion would not disrupt or preclude any existing, reasonably foreseeable, or designated use of the stream under section 101(a) or 303(c) of the Clean Water Act and would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act.

(iv) The operation has been designed to protect the quantity and quality of water in any aquifer that significantly ensures the prevailing hydrologic balance.

(c) *Subsequent reviews.* (1) The regulatory authority must review each application for a significant permit revision to determine whether a new or updated CHIA is needed. The regulatory authority must document the review, including the analysis and conclusions, together with the rationale for the conclusions, in writing.

(2)(i) The regulatory authority must reevaluate the CHIA during the permit renewal process to determine whether the CHIA remains accurate and whether the material damage criteria in the CHIA and the permit are adequate to ensure that material damage to the hydrologic balance outside the permit area will not occur. This evaluation must include a review of all water monitoring data from both this operation and all other coal mining operations within the cumulative impact area.

(ii) If the permit has a term longer than 5 years, the regulatory authority must conduct the review required by paragraph (c)(2)(i) of this section at intervals not to exceed 5 years.

(3) The regulatory authority must prepare a new or updated CHIA if the review conducted under paragraph (c)(1) or (2) of this section finds that one is needed.

§ 780.22 What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?

(a) *Hydrologic reclamation plan.* Your permit application must include a plan, with maps and descriptions, that demonstrates how the proposed operation will comply with the applicable provisions of subchapter K of this chapter that relate to protection of the hydrologic balance. The plan must—

(1) Be specific to local hydrologic conditions.

(2) Include preventive or remedial measures for any potential adverse hydrologic consequences identified in the PHC determination prepared under § 780.20 of this part. These measures must describe the steps that you will take during mining and reclamation through final bond release under § 800.42(d) of this chapter to—

(i) Minimize disturbances to the hydrologic balance within the proposed permit and adjacent areas.

(ii) Prevent material damage to the hydrologic balance outside the proposed permit area.

(iii) Meet applicable water quality laws and regulations.

(iv) Protect the rights of existing water users in accordance with paragraph (b) of this section and § 816.40 of this chapter.

(v) Avoid acid or toxic discharges to surface water and avoid or, if avoidance is not possible, minimize degradation of groundwater.

(vi) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or to runoff outside the proposed permit area.

(vii) Provide water-treatment facilities when needed.

(viii) Control surface-water runoff in accordance with § 780.29 of this part.

(ix) Restore the approximate premining recharge capacity.

(3) Address the impacts of any transfers of water among active and abandoned mines within the proposed permit and adjacent areas.

(4) Describe the steps that you will take during mining and reclamation through final bond release under § 800.42(d) of this chapter to protect and enhance aquatic life and related environmental values to the extent possible using the best technology currently available.

(b) *Alternative water source information.* (1) If the PHC determination prepared under § 780.20 of this part indicates that the proposed mining operation may result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas that is used for a domestic, agricultural, industrial, or other legitimate purpose, your application must demonstrate that alternative water sources are both available and feasible to develop. The alternative water sources must be of suitable quality and sufficient in quantity to support existing premining uses and approved postmining land uses.

(2) If you cannot identify an alternative water source that is both suitable and available, you must modify your application to prevent the proposed operation from contaminating, interrupting, or diminishing any water supply protected under § 816.40 of this chapter.

(3)(i) When a suitable alternative water source is available, your operation plan must require that the alternative water supply be developed and installed on a permanent basis before your operation may adversely affect an existing water supply protected under § 816.40 of this chapter.

(ii) Paragraph (b)(3)(i) of this section will not apply immediately if you demonstrate, and the regulatory authority finds, that the proposed operation also would adversely affect the replacement supply. In that case, your plan must require provision of a temporary replacement water supply until it is safe to install the permanent replacement water supply required under paragraph (b)(3)(i) of this section.

(4) Your application must describe how you will provide both temporary and permanent replacements for any unexpected losses of water supplies protected under § 816.40 of this chapter.

§ 780.23 What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

(a) *Groundwater monitoring plan*—(1) *General requirements.* Your permit application must include a groundwater monitoring plan adequate to evaluate the impacts of the mining operation on groundwater in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the parameters to be monitored.

(ii) Specify the sampling frequency for each parameter.

(iii) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) For each aquifer above or immediately below the lowest coal seam to be mined, monitoring wells or equivalent monitoring points located upgradient and downgradient of the proposed operation.

(B) Monitoring wells placed in backfilled portions of the permit area after backfilling and grading of all or a portion of the permit area is completed, unless you demonstrate, and the regulatory authority finds in writing, that wells in the backfilled area are not necessary to determine or predict the future impact of the mining operation on groundwater quality.

(C) Monitoring wells in any existing underground mine workings that would have a direct hydrological connection to the proposed operation.

(iv) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(v) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters that could be affected by the proposed operation if those parameters relate to the—

(A) Findings and predictions in the PHC determination prepared under § 780.20 of this part.

(B) Biological condition of perennial and intermittent streams and other surface-water bodies that receive discharges from groundwater within the proposed permit and adjacent areas.

(C) Suitability of the groundwater for existing and reasonably foreseeable uses.

(D) Suitability of the groundwater to support the premining and postmining land uses.

(ii) *Minimum requirements.* At a minimum, the plan must require that the following parameters be measured at each location every three months, with data submitted to the regulatory authority at the same frequency:

(A) Major anions, including, at a minimum, bicarbonate, chloride, and sulfate.

(B) Major cations, including, at a minimum, calcium, magnesium, potassium, and sodium.

(C) The cation-anion balance of the parameters sampled in paragraphs (a)(2)(ii)(A) and (B) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(D) Ammonia.

(E) Arsenic.

(F) Cadmium.

(G) Copper.

(H) Hot acidity.

(I) Nitrogen.

(J) pH.

(K) Selenium.

(L) Specific conductance corrected to 25 °C.

(M) Total alkalinity.

(N) Total dissolved solids.

(O) Total iron.

(P) Total manganese.

(Q) Zinc.

(R) Water levels, discharge rates, or yield rates.

(S) Any parameter listed in § 780.19(d) of this part, if detected by the sampling conducted under that paragraph.

(T) Any other parameters of local significance, as determined by the regulatory authority, based upon the information and analyses required under §§ 780.19 through 780.21 of this part.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of the application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 780.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes. At a minimum, the plan must require monitoring of all parameters for which the regulatory authority has established material damage criteria pursuant to the cumulative hydrologic impact assessment.

(4) *Exception.* If you can demonstrate, on the basis of the PHC determination prepared under § 780.20 of this part or other available information that a particular water-bearing stratum in the proposed permit and adjacent areas has no existing or foreseeable use for agricultural or other human purposes or for fish and wildlife purposes and does not serve as an aquifer that significantly ensures the hydrologic balance within the cumulative impact area, the regulatory authority may waive monitoring of that stratum.

(b) *Surface-water monitoring plan*—(1) *General requirements.* Your permit application must include a surface-water monitoring plan adequate to evaluate the impacts of the mining operation on surface water in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the surface-water quantity and quality parameters to be monitored.

(ii) Require on-site measurement of precipitation amounts at specified locations within the permit area, using self-recording devices. Measurement of precipitation amounts must continue through Phase II bond release under § 800.42(c) of this chapter or for any longer period specified by the regulatory authority.

(iii) Specify the sampling frequency for each parameter to be monitored.

(iv) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) Monitoring of point-source discharges from the proposed operation; and

(B) Monitoring locations upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas.

(v) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biological condition of perennial and intermittent streams and other surface-water bodies within the proposed permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(vi) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters that could be affected by the proposed operation if those parameters relate to the—

(A) Applicable effluent limitation guidelines under 40 CFR part 434.

(B) Findings and predictions in the PHC determination prepared under § 780.20 of this part.

(C) Surface-water runoff control plan prepared under § 780.29 of this part.

(D) Biological condition of perennial or intermittent streams or other surface-water bodies within the proposed permit and adjacent areas.

(E) Suitability of the surface water for existing and reasonably foreseeable uses, as well as designated uses under section 101(a) or 303(c) of the Clean Water Act.

(F) Suitability of the surface water to support the premining and postmining land uses.

(ii) *Minimum requirements for monitoring locations other than point-source discharges.* For all monitoring locations other than point-source discharges, the plan must require that the following parameters be measured at each location at least every 3 months, with data submitted to the regulatory authority at the same frequency:

(A) Flow rates: The plan must require use of generally-accepted professional flow measurement techniques. Visual observations are not acceptable.

(B) Major anions, including, at a minimum, bicarbonate, chloride, and sulfate.

(C) Major cations, including, at a minimum, calcium, magnesium, potassium, and sodium.

(D) The cation-anion balance of the parameters sampled in paragraphs (b)(2)(ii)(B) and (C) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(E) Ammonia.

(F) Arsenic.

(G) Cadmium.

(H) Copper.

(I) Hot acidity.

(J) Nitrogen.

(K) pH.

(L) Selenium.

(M) Specific conductance corrected to 25 °C.

(N) Total alkalinity.

(O) Total dissolved solids.

(P) Total iron.

(Q) Total manganese.

(R) Total suspended solids.

(S) Zinc.

(T) Any parameter listed in § 780.19(d) of this part, if detected by the sampling conducted under that paragraph.

(U) Any other parameters of local significance, as determined by the regulatory authority, based upon the information and analyses required under §§ 780.19 through 780.21 of this part.

(iii) *Minimum requirements for point-source discharges.* For point-source discharges, the plan must—

(A) Provide for monitoring in accordance with 40 CFR parts 122, 123, and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(B) Require measurement of flow rates, using generally-accepted professional flow measurement techniques.

(iv) *Requirements related to the Clean Water Act.* You must revise the plan to incorporate any site-specific monitoring requirements imposed by the National Pollutant Discharge Elimination System permitting authority or the agency responsible for administration of section 404 of the Clean Water Act.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of your application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 780.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes. At a minimum, the plan must require monitoring of all parameters for which the regulatory authority has established material damage criteria pursuant to the cumulative hydrologic impact assessment.

(c) *Biological condition monitoring plan*—(1) *General requirements.* Except as provided in paragraph (d) of this section, your permit application must include a plan for monitoring the biological condition of perennial and intermittent streams within the proposed permit and adjacent areas. The plan must be adequate to evaluate the impacts of the mining operation on the biological condition of those streams and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area.

(2) *Monitoring techniques.* The plan must—

(i) Require use of a multimetric bioassessment protocol that meets the requirements of § 780.19(e)(2) of this part.

(ii) Identify monitoring locations in each perennial and intermittent stream within the proposed permit and adjacent areas.

(iii) Establish a sampling frequency that must be no less than annual, but not so frequent as to unnecessarily deplete the populations of the species being monitored.

(iv) Require submission of monitoring data to the regulatory authority on an annual basis.

(3) *Regulatory authority review and action.* (i) Upon completing review of your application, the regulatory authority may require that you revise the plan to adjust monitoring locations, the frequency of monitoring, and the species to be monitored.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 780.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(d) *Exceptions*—(1) *Lands eligible for remining.* (i) If the proposed permit area includes only lands eligible for remining, you may request that the regulatory authority modify the groundwater and surface water monitoring plan requirements of paragraphs (a) and (b) of this section and modify or waive the biological condition monitoring plan requirements of paragraph (c) of this section.

(ii) The regulatory authority may approve your request if it determines that a less extensive monitoring plan will be adequate to monitor the impacts of the proposed operation on groundwater and surface water, based upon an evaluation of the quality of groundwater and surface water and the biological condition of the receiving stream at the time of application.

(2) *Operations that avoid streams.* (i) Upon your request, the regulatory authority may waive the biological condition monitoring plan requirements of paragraph (c) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(A) Mine through or bury any perennial or intermittent stream;

(B) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(C) Modify the base flow of any perennial or intermittent stream.

(ii) If you meet all the criteria of paragraph (d)(2)(i) of this section with the exception of paragraph (d)(2)(i)(B) of this section, you may request, and the regulatory authority may approve, limiting the biological condition monitoring plan requirements of paragraph (c) of this section to only the stream that will receive the point-source discharge.

(e) *Coordination with Clean Water Act agencies.* The regulatory authority will consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act and make best efforts to minimize differences in monitoring locations and reporting requirements and to share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

§ 780.24 What requirements apply to the postmining land use?

(a) *What postmining land use information must my application contain*? (1) You must describe and map the proposed use or uses of the land within the proposed permit area following reclamation, based on the categories of land uses listed in the definition of land use in § 701.5 of this chapter.

(2) You must discuss the utility and capability of the reclaimed land to

support a variety of other uses, including the uses that the land was capable of supporting before any mining, as identified under § 779.22 of this chapter, regardless of the proposed postmining land use.

(3) You must explain how the proposed postmining land use is consistent with existing state and local land use policies and plans.

(4) You must include a copy of the comments concerning the proposed postmining use that you receive from the—

(i) Legal or equitable owner of record of the surface of the proposed permit area; and

(ii) State and local government agencies that would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

(5) You must explain how the proposed postmining land use will be achieved and identify any support activities or facilities needed to achieve that use.

(6) If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses rather than to a condition capable of supporting the uses that the land could support before any mining, you must—

(i) Provide the demonstration required under paragraph (b)(1) of this section.

(ii) Disclose any monetary compensation, item of value, or other consideration that you or your agent provided or expect to provide to the landowner in exchange for the landowner's agreement to a postmining land use that differs from the premining use.

(b) *What requirements apply to the approval of alternative postmining land uses*?—(1) *Application requirements.* If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses, rather than to a condition capable of supporting the use or uses that the land could support before any mining, you must demonstrate that the proposed higher or better use or uses meet the following criteria:

(i) There is a reasonable likelihood that the proposed use or uses will be achieved after mining and reclamation, as documented by, for example, real estate and construction contracts, plans for installation of any necessary infrastructure, procurement of any necessary zoning approvals, landowner commitments, economic forecasts, and studies by land use planning agencies.

(ii) The proposed use or uses do not present any actual or probable hazard to public health or safety or any threat of water diminution or pollution.

(iii) The proposed use or uses will not—

(A) Be impractical or unreasonable.

(B) Be inconsistent with applicable land use policies or plans.

(C) Involve unreasonable delay in implementation.

(D) Cause or contribute to a violation of federal, state, or local law.

(E) Result in changes in the size or frequency of peak flows from the reclaimed area that would cause an increase in damage from flooding when compared with the conditions that would exist if the land were restored to a condition capable of supporting the uses that it was capable of supporting before any mining.

(F) Cause the total volume of flow from the reclaimed area, during every season of the year, to vary in a way that would preclude any existing or reasonably foreseeable use of surface water or groundwater or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(G) Cause a change in the temperature or chemical composition of the water that would preclude any existing or reasonably foreseeable use of surface water or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(2) *Regulatory authority decision requirements.* The regulatory authority may approve your request if it—

(i) Consults with the landowner or the land management agency having jurisdiction over the lands to which the use would apply; and

(ii) Finds in writing that you have made the demonstration required under paragraph (b)(1) of this section.

(c) *What requirements apply to permit revision applications that propose to change the postmining land use*? (1) You may propose to change the postmining land use for all or a portion of the permit area at any time through the permit revision process under § 774.13 of this chapter.

(2) If you propose a higher or better postmining land use, the requirements of paragraphs (b)(1) and (2) of this section will apply and the application must be considered a significant permit revision for purposes of § 774.13(b)(2) of this chapter.

(d) *What restrictions apply to the retention of mining-related structures*? (1) If you propose to retain mining-related structures other than roads and impoundments for potential future use as part of the postmining land use, you must demonstrate, and the regulatory authority must find in writing, that the size and characteristics of the structures are consistent with and proportional to the needs of the postmining land use.

(2) The amount of bond required for the permit under part 800 of this chapter must include the cost of removing the structure and reclaiming the land upon which it was located to a condition capable of supporting the premining uses. The bond must include the cost of restoring the site to its approximate original contour in accordance with § 816.102 of this chapter and establishing native vegetation in accordance with § 816.111 of this chapter.

(3) The reclamation plan submitted under § 780.12 of this part must specify that if a structure is not in use as part of the approved postmining land use by the end of the revegetation responsibility period specified in § 816.115 of this chapter, you must remove the structure and reclaim the land upon which it was located by restoring the approximate original contour in accordance with § 816.102 of this chapter and establishing native vegetation in accordance with § 816.111 of this chapter.

(e) *What special provisions apply to previously mined areas*? If land that was previously mined cannot be reclaimed to the land use that existed before any mining because of the previously mined condition, you may propose, and the regulatory authority may approve, any appropriate postmining land use for that land that is both achievable and compatible with land uses in the surrounding area, provided that you comply with paragraphs (a) and (b)(1)(iv) of this section.

§ 780.25 What information must I provide for siltation structures, impoundments, and refuse piles?

(a) *General requirements.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) *Requirements for general plan for all structures.* Each general plan must—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(ii) Contain a description, map, and cross-sections of the structure and its location.

(iii) Contain the hydrologic and geologic information required to assess the hydrologic impact of the structure.

(iv) Contain a report describing the results of a geotechnical investigation of the potential effect on the structure if subsurface strata subside as a result of past, current, or future underground mining operations beneath or within the proposed permit and adjacent areas. When necessary, the investigation report also must identify design and construction measures that would prevent adverse subsidence-related impacts on the structure.

(v) Contain an analysis of the potential for each impoundment to drain into subjacent underground mine workings, together with an analysis of the impacts of such drainage.

(vi)(A) Contain a certification statement that includes a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority.

(B) The regulatory authority must approve, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) *Detailed design plan requirements for high hazard dams, significant hazard dams, and impounding structures that meet MSHA criteria*—(i) *Applicability.* The requirements of paragraph (a)(2)(ii) of this section apply to all impounding structures that meet—

(A) The MSHA criteria in § 77.216(a) of this title; or

(B) The criteria for Significant Hazard Class or High Hazard Class dams in ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service. Technical Release No. 60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* You may inspect and obtain a copy of this document, which is on file at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240. For information on the availability of this document at OSMRE, call 202–208–2823. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(ii) *Detailed design plan requirements.* Each detailed design plan for a structure that meets the applicability provisions of paragraph (a)(2)(i) of this section must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture.

(B) Incorporate any design and construction measures identified in the geotechnical investigation report prepared under paragraph (a)(1)(iv) of this section as necessary to protect against potential adverse impacts from subsidence resulting from underground mine workings underlying or adjacent to the structure.

(C) Describe the operation and maintenance requirements for each structure.

(D) Describe the timetable and plans to remove each structure, if appropriate.

(3) *Detailed design plan requirements for other structures.* Each detailed design plan for structures not included in paragraph (a)(2) of this section must—

(i) Be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor, except that all coal mine waste structures to which §§ 816.81 through 816.84 of this chapter apply must be certified by a qualified, registered, professional engineer.

(ii) Reflect any design and construction requirements for the structure, including any required geotechnical information.

(iii) Describe the operation and maintenance requirements for each structure.

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(b) *Siltation structures.* Siltation structures must be designed in compliance with the requirements of § 816.46 of this chapter.

(c) *Permanent and temporary impoundments.* (1) Permanent and temporary impoundments must be designed to comply with the requirements of § 816.49 of this chapter.

(2) Each plan for an impoundment meeting the criteria in § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title. You must submit the plan required to be submitted to the District Manager of MSHA under § 77.216 of this title to the regulatory authority as part of the permit application to the extent that the plan, or a portion thereof, is available at the time of submittal of the permit application.

(3) For impoundments not included in paragraph (a)(2) of this section, the regulatory authority may establish, through the regulatory program approval process, engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in § 816.49(a)(4)(ii) of this chapter.

(4) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR–60 or meets the criteria of § 77.216(a) of this chapter, each plan must include stability analyses of the structure. The stability analyses must address static, seismic, and post-earthquake (liquefaction) conditions. They must include, but are not limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

(d) *Coal mine waste impoundments, refuse piles, and impounding structures constructed of coal mine waste.* If you, the permit applicant, propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable design requirements in paragraphs (d)(1) and (2) of this section.

(1) *Design requirements for refuse piles.* You must design refuse piles to comply with the requirements of §§ 780.28, 816.81, and 816.83 of this chapter.

(2) *Design requirements for impounding structures that will impound coal mine waste or that will be constructed of coal mine waste.* (i) You must design impounding structures constructed of or intended to impound coal mine waste to comply with the coal mine waste disposal requirements of §§ 780.28, 816.81, and 816.84 of this chapter and with the impoundment requirements of paragraphs (a) and (c) of § 816.49 of this chapter.

(ii) The plan for each impounding structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title.

(iii) Each plan for an impounding structure that will impound coal mine waste or that will be constructed of coal mine waste must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the impounding structure.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impounding structure on each plan.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impounding structure, impoundment, or impounded material.

(iv) The design must ensure that at least 90 percent of the water stored in the impoundment during the design precipitation event will be removed within a 10-day period.

§ 780.27 What special requirements apply to surface mining near underground mining?

Your application must describe the measures that you will use to comply with § 816.79 of this chapter if you intend to conduct surface mining activities within 500 feet of an underground mine.

§ 780.28 What additional requirements apply to proposed activities in, through, or adjacent to streams?

(a) *Clean Water Act requirements.* You may conduct surface mining activities in waters of the United States only if you first obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *When must I comply with this section*?—(1) *General applicability.* You, the permit applicant, must provide the information and demonstrations required by this section whenever you propose to conduct surface mining activities—

(i) In or through a perennial, intermittent, or ephemeral stream; or

(ii) On the surface of lands within 100 feet of a perennial, intermittent, or ephemeral stream. You must measure this distance horizontally on a line perpendicular to the stream beginning at the bankfull elevation of the stream or, if there are no discernible streambanks, the centerline of the active channel of the stream.

(2) *Activities in or near perennial and intermittent streams.* Except as provided in paragraph (d) of this section, if you propose to conduct an activity identified in paragraph (b)(1) of this section, and if the affected stream is a perennial or intermittent stream, you must demonstrate that the proposed activity would not—

(i) Preclude any premining use or any designated use under section 101(a) or 303(c) of the Clean Water Act of the affected stream segment following the completion of mining and reclamation.

(ii) Result in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral.

(iii) Cause or contribute to a violation of applicable water quality standards.

(iv) Cause material damage to the hydrologic balance outside the permit area.

(3) *Postmining riparian corridor requirements for perennial, intermittent, and ephemeral streams.* (i) If you propose to conduct an activity identified in paragraph (b)(1) of this section, you must propose to establish a riparian corridor at least 100 feet wide on each side of the stream as part of the reclamation process following the completion of mining activities within that corridor. The corridor width must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(ii) You must use native species, including species adapted to and suitable for planting in riparian zones within that corridor, to revegetate disturbed areas within the corridor required under paragraph (b)(3)(i) of this section. For areas that are forested at the time of application or that would revert to forest under conditions of natural succession, you must use native trees and shrubs to meet this requirement.

(iii) Paragraph (b)(3)(i) of this section does not apply to—

(A) Prime farmland historically used for cropland;

(B) Situations in which revegetation would be incompatible with an approved postmining land use that is implemented during the revegetation responsibility period before final bond release under § 800.42(d) of this chapter; or

(C) Streams buried beneath an excess spoil fill or a coal mine waste disposal facility under paragraph (d) of this section.

(c) *What additional requirements apply to an application that proposes to mine through or divert a perennial, intermittent, or ephemeral stream*?—(1) *Postmining drainage pattern.* The postmining drainage pattern of perennial, intermittent, and ephemeral stream channels that you propose to restore after the completion of mining must be similar to the premining drainage pattern, unless the regulatory authority approves a different pattern to—

(i) Ensure stability;

(ii) Prevent or minimize downcutting of reconstructed stream channels; or

(iii) Promote enhancement of fish and wildlife habitat.

(2) *Mining through or diverting a perennial or intermittent stream.* If you propose to mine through or divert a perennial or intermittent stream, you must—

(i) Comply with the requirements of paragraphs (a) through (c)(1) of this section.

(ii) Demonstrate that there is no reasonable alternative that would avoid mining through or diverting the stream.

(iii) Design the operation to minimize the extent to which the stream will be mined through or diverted.

(iv) Demonstrate that you can restore the form and ecological function of the affected stream segment, as required by § 816.57(b) of this chapter, using the techniques in the proposed reclamation plan.

(A) Those techniques must include the selective placement of low-permeability materials in the backfill or fill and associated stream channels to create the aquitards necessary to support streamflow when the goal is to reestablish a perennial or intermittent stream, unless you can demonstrate an alternative method of restoring perennial or intermittent streamflow.

(B) You must include a separate bond calculation for the cost of restoring the ecological function of the affected stream segment. You must post a surety bond, a collateral bond, or a combination of surety and collateral bonds to cover that cost before the regulatory authority may issue the permit.

(v) Comply with the following stream-channel restoration and stream-channel diversion design requirements:

(A) Designs for permanent stream-channel diversions, temporary stream-

channel diversions that will remain in use for 2 or more years, and stream channels to be restored after the completion of mining must adhere to design techniques that will restore or approximate the premining characteristics of the original stream channel to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement. The premining characteristics of the original stream channel include, but are not limited to, the baseline stream pattern, profile, dimensions, substrate, habitat, and natural vegetation growing in the riparian zone. For temporary stream-channel diversions that will remain in use for 2 or more years, the vegetation proposed for planting in the riparian zone need not include species that would not reach maturity until after the diversion is removed.

(B) The designed hydraulic capacity of all temporary and permanent stream-channel diversions must be at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream of the diversion, but no greater than the hydraulic capacity of the unmodified stream channel immediately downstream from the diversion.

(C) All temporary and permanent stream-channel diversions must be designed so that the combination of channel, bank, and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(vi) Submit a certification from a qualified registered professional engineer that the designs for all stream-channel diversions and all stream channels to be restored after the completion of mining meet the design requirements of this section and any additional design criteria established by the regulatory authority. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel; it need not include restoration of ecological function.

(d) *What requirements apply to an application to construct an excess spoil fill or a coal mine waste disposal facility in a perennial or intermittent stream*?—(1) *Applicability.* If you propose to construct an excess spoil fill under § 780.35 of this part or a coal mine waste disposal facility under § 780.25(d) of this part, you must comply with the requirements of paragraph (d)(2) of this section in place of the requirements of paragraph (b)(2) of this section whenever the fill or disposal facility would encroach upon any part of a perennial or intermittent stream.

(2) *Application requirements.* If you propose to construct an excess spoil fill or coal mine waste disposal facility of the nature described in paragraph (d)(1) of this section, your application must demonstrate that—

(i) The operation has been designed to minimize the amount of excess spoil or coal mine waste generated.

(ii) After evaluating all potential upland locations in the vicinity of the proposed operation, there is no practicable alternative that would avoid placement of excess spoil or coal mine waste in a perennial or intermittent stream.

(iii) To the extent possible using the best technology currently available, the proposed excess spoil fill or coal mine waste disposal facility has been designed to minimize—

(A) Placement of excess spoil or coal mine waste in a perennial or intermittent stream.

(B) Adverse impacts on fish, wildlife, and related environmental values.

(iv) The fish and wildlife enhancement plan submitted under § 780.16 of this part includes measures that would fully and permanently offset any long-term adverse impacts that the fill, refuse pile, or coal mine waste impoundment would have on fish, wildlife, and related environmental values within the footprint of the fill, refuse pile, or impoundment.

(v) The excess spoil fill or coal mine waste disposal facility has been designed in a manner that will not cause or contribute to a violation of water quality standards or result in the formation of toxic mine drainage.

(vi) The revegetation plan submitted under § 780.12(g) of this part requires reforestation of the completed excess spoil fill if the land is forested at the time of application or if it would revert to forest under conditions of natural succession.

(e) *What are the regulatory authority's responsibilities*?—(1) *Standards for restoration of the ecological function of a stream.* (i) The regulatory authority must establish objective standards for determining when the ecological function of a restored or permanently-diverted perennial or intermittent stream has been restored.

(ii) In establishing standards under paragraph (e)(1)(i) of this section, the regulatory authority must coordinate with the Clean Water Act permitting authority to ensure compliance with all Clean Water Act requirements.

(iii) The standards established under paragraph (e)(1)(i) of this section must comply with § 816.57(b)(2) of this chapter.

(2) *Finding.* The regulatory authority may not approve an application that includes any activity identified under paragraph (b)(1) of this section unless it first makes a specific written finding that you have fully satisfied all applicable requirements of this section. The finding must be accompanied by a detailed explanation of the rationale for the finding.

§ 780.29 What information must I include in the surface-water runoff control plan?

Your application must contain a surface-water runoff control plan that includes the following—

(a)(1) An explanation of how you will handle surface-water runoff in a manner that will prevent peak discharges from the proposed permit area, both during and after mining and reclamation, from exceeding the premining peak discharge from the same area for the same-size precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to estimate peak discharges.

(2) The explanation in paragraph (a)(1) of this section must consider the findings in the determination of the probable hydrologic consequences of mining prepared under § 780.20 of this part.

(b) A surface-water runoff monitoring and inspection program that will provide sufficient precipitation and stormwater discharge data for the proposed permit area to evaluate the effectiveness of the surface-water runoff control practices under paragraph (a) of this section. The surface-water runoff monitoring and inspection program must specify criteria for monitoring, inspection, and reporting consistent with § 816.34(d) of this chapter. The program must contain a monitoring-point density that adequately represents the drainage pattern across the entire proposed permit area, with a minimum of one monitoring point per watershed discharge point.

(c) Descriptions, including maps and cross-sections, of runoff-control structures, including an explanation of how diversions and other channels to collect and convey surface-water runoff will be constructed in compliance with § 816.43 of this chapter.

§ 780.31 What information must I provide concerning the protection of publicly owned parks and historic places?

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be

adversely affected by the proposed operation, you must describe the measures to be used—

(1) To prevent adverse impacts, or

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

§ 780.33 What information must I provide concerning the relocation or use of public roads?

Your application must describe, with appropriate maps and cross-sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under § 761.14 of this chapter, you seek to have the regulatory authority approve—

(a) Conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 780.35 What information must I provide concerning the minimization and disposal of excess spoil?

(a) *Applicability.* This section applies to you, the permit applicant, if you propose to generate excess spoil as part of your operation.

(b) *Demonstration of minimization of excess spoil.* (1) You must submit a demonstration, with supporting calculations and other documentation, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate.

(2) The demonstration under paragraph (b)(1) of this section must explain, in quantitative terms, how the maximum amount of overburden will be returned to the mined-out area after considering—

(i) Applicable regulations concerning backfilling, compaction, grading, and restoration of the approximate original contour.

(ii) Safety and stability needs and requirements.

(iii) The need for drainage structures, access roads, and berms. You may construct drainage structures, access roads, and berms on the perimeter of the backfilled area, but you must limit the total width of those structures to 20 feet unless you demonstrate an absolutely essential need for a greater width.

(iv) Needs and requirements associated with revegetation and the proposed postmining land use.

(v) Any other relevant regulatory requirements, including those pertaining to protection of water quality and fish, wildlife, and related environmental values.

(3) When necessary to avoid or minimize construction of excess spoil fills on undisturbed land, paragraph (b)(2)(i) of this section does not prohibit the placement of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation, provided that the final surface configuration is compatible with the surrounding terrain and generally resembles landforms found in the surrounding area.

(4) You may not create a final-cut impoundment under § 816.49(b) of this chapter or place coal combustion residues or noncoal materials in the mine excavation if doing so would result in the creation of excess spoil.

(c) *Fill capacity demonstration.* You must submit a demonstration, with supporting calculations and other documentation, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as calculated under paragraph (b) of this section.

(d) *Requirements related to perennial and intermittent streams.* You must comply with the requirements of § 780.28 of this part concerning activities in or near perennial or intermittent streams if you propose to construct an excess spoil fill in or within 100 feet of a perennial or intermittent stream. The 100-foot distance must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(e) *Location and profile.* (1) You must submit maps and cross-section drawings or models showing the location and profile of all proposed excess spoil fills.

(2) You must locate fills on the most moderately sloping and naturally stable areas available. The regulatory authority will determine which areas are available, based upon the requirements of the Act and this chapter.

(3) Whenever possible, you must place fills on or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(f) *Design plans.* You must submit detailed design plans, including appropriate maps and cross-section drawings, for each proposed fill, prepared in accordance with the requirements of this section and §§ 816.71 through 816.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(g) *Geotechnical investigation.* You must submit the results of a geotechnical investigation, with supporting calculations and analyses, of the site of each proposed fill, with the exception of those sites at which excess spoil will be placed only on a preexisting bench under § 816.74 of this chapter. The information submitted must include—

(1) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site.

(2) A description of the character of the bedrock and any adverse geologic conditions in the area of the proposed fill.

(3) The geographic coordinates and a narrative description of all springs, seepage, mine discharges, and groundwater flow observed or anticipated during wet periods in the area of the proposed fill.

(4) An analysis of the potential effects of any underground mine workings within the proposed permit and adjacent areas, including the effects of any subsidence that may occur as a result of previous, existing, and future underground mining operations.

(5) A technical description of the rock materials to be used in the construction of fills underlain by a rock drainage blanket.

(6) Stability analyses that address static, seismic, and post-earthquake (liquefaction) conditions. The analyses must include, but are not limited to, strength parameters, pore pressures and long-term seepage conditions. The analyses must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the specific design specifications and methods.

(h) *Operation and reclamation plans.* You must submit plans for the construction, operation, maintenance,

and reclamation of all excess spoil fills in accordance with the requirements of §§ 816.71 through 816.74 of this chapter.

(i) *Additional requirements for bench cuts or rock-toe buttresses.* If bench cuts or rock-toe buttresses are required under § 816.71(b)(2) of this chapter, you must provide the—

(1) Number, location, and depth of borings or test pits, which must be determined according to the size of the fill and subsurface conditions.

(2) Engineering specifications used to design the bench cuts or rock-toe buttresses. Those specifications must be based upon the stability analyses required under paragraph (g)(6) of this section.

(j) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of each proposed fill and appurtenant structures meets the requirements of this section.

§ 780.37 What information must I provide concerning access and haul roads?

(a) *Design and other application requirements.* (1) You, the applicant, must submit a map showing the location of all roads that you intend to construct or use within the proposed permit area, together with plans and drawings for each road to be constructed, used, or maintained within the proposed permit area.

(2) You must include appropriate cross-sections, design drawings, and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, drainage structures, and fords and low-water crossings of perennial and intermittent streams.

(3) You must demonstrate how all proposed roads will comply with the applicable requirements of §§ 780.28, 816.150, and 816.151 of this chapter.

(4) You must identify—

(i) Each road that you propose to locate in or within 100 feet, measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel, of a perennial or intermittent stream.

(ii) Each proposed ford of a perennial or intermittent stream that you plan to use as a temporary route during road construction.

(iii) Any plans to alter or relocate a natural stream channel.

(iv) Each proposed low-water crossing of a perennial or intermittent stream channel.

(5) You must explain why the roads and stream crossings identified in paragraph (a)(4) of this section are necessary and how they comply with the applicable requirements of § 780.28 of this part and section 515(b)(18) of the Act.

(6) You must describe the plans to remove and reclaim each road that would not be retained as part of the postmining land use, and provide a schedule for removal and reclamation.

(b) *Primary road certification.* The plans and drawings for each primary road must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the design of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads, as meeting the requirements of this chapter; current, prudent engineering practices; and any design criteria established by the regulatory authority.

(c) *Standard design plans.* The regulatory authority may establish engineering design standards for primary roads through the regulatory program approval process, in lieu of engineering tests, to establish compliance with the minimum static safety factor of 1.3 for all embankments specified in § 816.151(b) of this chapter.

§ 780.38 What information must I provide concerning support facilities?

You must submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings must include a map, appropriate cross-sections, design drawings, and specifications sufficient to demonstrate compliance with § 816.181 of this chapter for each facility.

■ 23. Lift the suspensions of §§ 783.21, 783.25(a)(3), 783.25(a)(8), and 783.25(a)(9) and revise part 783 to read as follows:

PART 783—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES AND CONDITIONS

Sec.

783.1 Scope: What does this part do?
783.2 What is the objective of this part?
783.4 What responsibilities do I and government agencies have under this part?
783.10 Information collection.
783.11 [Reserved]
783.12 [Reserved]
783.17 What information on cultural, historic, and archeological resources must I include in my permit application?
783.18 What information on climate must I include in my permit application?
783.19 What information on vegetation must I include in my permit application?
783.20 What information on fish and wildlife resources must I include in my permit application?
783.21 What information on soils must I include in my permit application?
783.22 What information on land use and productivity must I include in my permit application?
783.24 What maps, plans, and cross-sections must I submit with my permit application?
783.25 [Reserved]

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 783.1 Scope: What does this part do?

This part establishes the minimum requirements for the descriptions of environmental resources and conditions that you must include in an application for a permit to conduct underground mining activities.

§ 783.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with a complete and accurate description of the environmental resources that may be impacted or affected by proposed underground mining activities and the environmental conditions that exist within the proposed permit and adjacent areas.

§ 783.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide all information required by this part in your application, except when this part specifically exempts you from doing so.

(b) State and federal government agencies are responsible for providing information for permit applications to the extent that this part specifically requires that they do so.

§ 783.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029-xxxx. The information is being collected to meet the requirements of sections 507 and 508 of SMCRA, which require that each permit application include a description of the premining environmental resources within and around the proposed permit area. The regulatory authority uses this information as a baseline for evaluating the impacts of mining. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of

information unless it displays a currently valid OMB control number.

§ 783.11 [Reserved]

§ 783.12 [Reserved]

§ 783.17 What information on cultural, historic, and archeological resources must I include in my permit application?

(a) Your permit application must describe the nature of cultural, historic, and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description must be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(b) The regulatory authority may require you, the applicant, to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through—

(1) Collection of additional information,

(2) Conducting field investigations, or

(3) Other appropriate analyses.

§ 783.18 What information on climate must I include in my permit application?

The regulatory authority may require that your permit application contain a statement of the climatic factors that are representative of the proposed permit area, including—

(a) The average seasonal precipitation.

(b) The average direction and velocity of prevailing winds.

(c) Seasonal temperature ranges.

(d) Additional data that the regulatory authority deems necessary to ensure compliance with the requirements of this subchapter.

§ 783.19 What information on vegetation must I include in my permit application?

(a) You must identify, describe, and map—

(1) Existing vegetation types and plant communities on the proposed permit and adjacent areas and within any proposed reference areas. The description and map must be adequate to evaluate whether the vegetation provides important habitat for fish and wildlife and whether the site contains native plant communities of local or regional significance.

(2) The plant communities that would exist on the proposed permit area under conditions of natural succession.

(b) When preparing the materials required by paragraph (a) of this section, you must adhere to the National Vegetation Classification Standard.

(c) With the approval of the regulatory authority, you may use other generally-accepted vegetation classification systems in lieu of the system specified in paragraph (b) of this section.

(d) Your application must include a discussion of the potential for reestablishing the plant communities identified in paragraph (a) of this section after the completion of mining.

§ 783.20 What information on fish and wildlife resources must I include in my permit application?

(a) *General requirements.* Your permit application must include information on fish and wildlife resources for the proposed permit and adjacent areas. The adjacent area must include all lands and waters likely to be affected by the proposed operation.

(b) *Scope and level of detail.* The regulatory authority will determine the scope and level of detail for this information in coordination with state and federal agencies with responsibilities for fish and wildlife. The scope and level of detail must be sufficient to design the protection and enhancement plan required under § 784.16 of this chapter.

(c) *Site-specific resource information requirements.* Your application must include site-specific resource information if the proposed permit area or the adjacent area contains or is likely to contain one or more of the following—

(1) Fish and wildlife or plants listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or critical habitat designated under that law. When these circumstances exist, the site-specific resource information must include a description of the effects of future state or private activities that are reasonably certain to occur within the proposed permit and adjacent areas.

(2) Species or habitat protected by state endangered species statutes and regulations.

(3) Habitat of unusually high value for fish and wildlife such as wetlands, riparian areas, cliffs supporting raptors, significant migration corridors, specialized reproduction or wintering areas, areas offering special shelter or protection, and areas that support populations of endemic species that are vulnerable because of restricted ranges, limited mobility, limited reproductive capacity, or specialized habitat requirements.

(4) Other species or habitat identified through interagency coordination as requiring special protection under state or federal law, including species identified as sensitive by a state or federal agency.

(5) Perennial or intermittent streams.

(6) Native plant communities of local or regional ecological significance.

(d) *Fish and Wildlife Service review.* (1)(i) The regulatory authority must provide the resource information obtained under paragraph (c) of this section to the applicable regional or field office of the U.S. Fish and Wildlife Service whenever that information includes species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide this information to the Service no later than the time that it provides written notice of the permit application to the Service under § 773.6(a)(3)(ii) of this chapter.

(ii) When the resource information obtained under paragraph (c) of this section does not include threatened or endangered species, designated critical habitat, or species proposed for listing as threatened or endangered, the regulatory authority must provide this information to the applicable regional or field office of the U.S. Fish and Wildlife Service only if the Service requests an opportunity to review and comment on that information. The regulatory authority must provide the requested information to the Service within 10 days of receipt of the request from the Service.

(2)(i) The regulatory authority must document its disposition of all comments from the Service that pertain to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law.

(ii) If the regulatory authority does not agree with a Service recommendation that pertains to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law, the regulatory authority must explain the rationale for that decision in the disposition document prepared under paragraph (d)(2)(i) of this section. The regulatory authority must provide a copy of that document to the pertinent Service field office and OSMRE field office and must refrain from approving the permit application.

(iii) If the Service field office does not concur with the regulatory authority's decision under paragraph (d)(2)(ii) of this section and the regulatory authority and the Service field office are unable

to reach agreement at that level, either the Service or the regulatory authority may request that the issue be elevated through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.

(iv) The regulatory authority may not approve the permit application until all issues are resolved in accordance with paragraph (d)(2)(iii) of this section and the regulatory authority receives written documentation from the Service that all issues have been resolved.

(e) *Designation of areas in which adverse impacts are prohibited.* In coordination with state and federal fish and wildlife agencies and agencies responsible for implementation of the Clean Water Act, the regulatory authority may use the information provided under this section and information gathered from other agencies to determine whether, based on scientific principles and analyses, any stream segments, wildlife habitats, or watersheds in the proposed permit or adjacent areas are of such exceptional environmental value that any adverse mining-related impacts must be prohibited.

§ 783.21 What information on soils must I include in my permit application?

Your permit application must include—

(a) The results of a reconnaissance inspection to determine whether the proposed permit area may contain prime farmland, as required by § 785.17(b)(1) of this chapter.

(b)(1) A map showing the soil mapping units located within the proposed permit area, if the National Cooperative Soil Survey has completed and published a soil survey of the area.

(2) The applicable soil survey information that the Natural Resources Conservation Service maintains for the soil mapping units identified in paragraph (b)(1) of this section. You may provide this information either in paper form or via a link to the appropriate element of the Natural Resources Conservation Service's soil survey Web site.

(c) A description of soil depths within the proposed permit area.

(d) Detailed information on soil quality, if you seek approval for the use of soil substitutes or supplements under § 784.12(e) of this chapter.

(e) The soil survey information required by § 785.17(b)(3) of this chapter if the reconnaissance inspection conducted under paragraph (a) of this section indicates that prime farmland may be present.

(f) Any other information that the regulatory authority finds necessary to determine land capability and to prepare the reclamation plan.

§ 783.22 What information on land use and productivity must I include in my permit application?

Your permit application must contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including—

(a)(1) A map and narrative identifying and describing the land use or uses in existence at the time of the filing of the application.

(2) A description of the historical uses of the land.

(3) For any previously mined area within the proposed permit area, a description of the land uses in existence before any mining, to the extent that such information is available.

(b) A narrative analysis of—

(1) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the proposed permit area; and

(2) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products obtained under high levels of management, as determined by—

(i) Actual yield data; or

(ii) Yield estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities, or appropriate state natural resources or agricultural agencies.

(3) The productivity of the proposed permit area before mining for fish and wildlife.

(c) Any additional information that the regulatory authority deems necessary to determine the condition, capability, and productivity of the land within the proposed permit area.

§ 783.24 What maps, plans, and cross-sections must I submit with my permit application?

(a) In addition to the maps, plans, and information required by other sections of this part, your permit application must include maps and, when appropriate, plans and cross-sections showing—

(1) All boundaries of lands and names of present owners of record of those lands, both surface and subsurface included in or contiguous to the proposed permit area.

(2) The boundaries of land within the proposed permit area upon which you have the legal right to enter and begin underground mining activities.

(3) The boundaries of all areas that you anticipate affecting over the estimated total life of the underground mining activities, with a description of the size, sequence, and timing of the mining of subareas for which you anticipate seeking additional permits or expansion of an existing permit in the future.

(4) The location and current use of all buildings within the proposed permit area or within 1,000 feet of the proposed permit area.

(5) The location of surface and subsurface manmade features within, passing through, or passing over the proposed permit and adjacent areas, including, but not limited to, highways, major electric transmission lines, pipelines, constructed drainageways, irrigation ditches, and agricultural drainage tile fields.

(6) The location and boundaries of any proposed reference areas for determining the success of revegetation.

(7) The location and ownership of existing wells, springs, and other groundwater resources within the proposed permit and adjacent areas. You may provide ownership information in a table cross-referenced to a map if approved by the regulatory authority.

(8) The location and depth (if available) of each water well within the proposed permit and adjacent areas. You may provide information concerning depth in a table cross-referenced to a map if approved by the regulatory authority.

(9) The name, location, ownership, and description of all surface-water bodies and features, such as perennial, intermittent, and ephemeral streams; ponds, lakes, and other impoundments; wetlands; and natural drainageways, within the proposed permit and adjacent areas. To the extent appropriate, you may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(10) The locations of water supply intakes for current users of surface water flowing into, from, and within a hydrologic area defined by the regulatory authority.

(11) The location of any public water supplies and the extent of any associated wellhead protection zones located within one-half mile, measured horizontally, of the proposed permit area or the area overlying the proposed underground workings.

(12) The location of all existing and proposed discharges to any surface-water body within the proposed permit and adjacent areas.

(13) The location of any discharge into or from an active, inactive, or abandoned surface or underground

mine, including, but not limited to, a mine-water treatment or pumping facility, that is hydrologically connected to the area of the proposed operation or that is located within one-half mile, measured horizontally, of either the proposed permit area or the area overlying the proposed underground workings.

(14) Each public road located in or within 100 feet of the proposed permit area.

(15) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

(16) Each cemetery that is located in or within 100 feet of the proposed permit area.

(17) Any land within the proposed permit area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act.

(18) The elevations, locations, and geographic coordinates of test borings and core samplings. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(19) The location and extent of subsurface water, if encountered, within the proposed permit or adjacent areas. This information must include, but is not limited to, the estimated elevation of the water table, the areal and vertical distribution of aquifers, and portrayal of seasonal variations in hydraulic head in different aquifers. You must display this information on appropriately scaled cross-sections.

(20) The elevations, locations, and geographic coordinates of monitoring stations used to gather data on water quality and quantity, fish and wildlife, and other biological surveys in preparation of the application. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(21) The nature, depth, thickness, and commonly used names of the coal seams to be mined.

(22) Any coal crop lines within the permit and adjacent areas and the strike and dip of the coal to be mined.

(23) The location and extent of known workings of active, inactive, or abandoned underground mines located either within the proposed permit area or within a 2,000-foot radius of the proposed underground workings in any direction.

(24) Any underground mine openings to the surface within the proposed permit and adjacent areas.

(25) The location and extent of existing or previously surface-mined areas within the proposed permit area.

(26) The location and dimensions of existing areas of spoil, coal mine waste, noncoal mine waste disposal sites, dams, embankments, other impoundments, and water treatment facilities within the proposed permit area.

(27) The location and depth (if available) of all conventional gas and oil wells within the proposed permit and adjacent areas, as well as the extent of any directional or horizontal drilling for hydrocarbon extraction operations, including those using hydraulic fracturing methods, within or underlying those areas. You may provide information concerning depth in a table cross-referenced to a map if approved by the regulatory authority.

(28) Other relevant information required by the regulatory authority.

(b) Maps, plans, and cross-sections required by paragraph (a) of this section must be—

(1) Prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or in any state that authorizes land surveyors to prepare and certify such maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(2) Updated when required by the regulatory authority.

(c) The regulatory authority may require that you submit the materials required by this section in a digital format that includes all necessary metadata.

§ 783.25 [Reserved]

■ 24. Revise part 784 to read as follows:

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR OPERATION AND RECLAMATION PLANS

Sec.

784.1 Scope: What does this part do?
784.2 What is the objective of this part?
784.4 What responsibilities do I and government agencies have under this part?
784.10 Information collection.
784.11 What must I include in the general description of my proposed operations?
784.12 What must the reclamation plan include?
784.13 What additional maps and plans must I include in the reclamation plan?
784.14 What requirements apply to the use of existing structures?
784.15 [Reserved]
784.16 What must I include in the fish and wildlife protection and enhancement plan?
784.17 [Reserved]
784.18 [Reserved]
784.19 What baseline information on hydrology, geology, and aquatic biology must I provide?
784.20 How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?
784.21 What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?
784.22 What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?
784.23 What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?
784.24 What requirements apply to the postmining land use?
784.25 What information must I provide for siltation structures, impoundments, and refuse piles?
784.26 What information must I provide if I plan to return coal processing waste to abandoned underground workings?
784.28 What additional requirements apply to proposed surface activities in, through, or adjacent to streams?
784.29 What information must I include in the surface-water runoff control plan?
784.30 When must I prepare a subsidence control plan and what information must that plan include?
784.31 What information must I provide concerning the protection of publicly owned parks and historic places?
84.33 What information must I provide concerning the relocation or use of public roads?
784.35 What information must I provide concerning the minimization and disposal of excess spoil?
784.37 What information must I provide concerning access and haul roads?
784.38 What information must I provide concerning support facilities?
784.200 [Reserved]

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 784.1 Scope: What does this part do?

This part establishes the minimum requirements for the operation and reclamation plan portions of applications for a permit to conduct underground mining activities, except to the extent that part 785 of this subchapter establishes different requirements.

§ 784.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with comprehensive and reliable information

on how you propose to conduct underground mining activities and reclaim the disturbed area in compliance with the Act, this chapter, and the regulatory program.

§ 784.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide to the regulatory authority all information required by this part, except where specifically exempted in this part.

(b) State and federal governmental agencies must provide information needed for permit applications to the extent that this part specifically requires that they do so.

§ 784.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–xxxx. Collection of this information is required under section 516(d) of SMCRA, which in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 784.11 What must I include in the general description of my proposed operations?

Your application must contain a description of the mining operations that you propose to conduct during the life of the mine, including, at a minimum, the following—

(a) A narrative description of the—

(1) Type and method of coal mining procedures and proposed engineering techniques.

(2) Anticipated annual and total number of tons of coal to be produced.

(3) Major equipment to be used for all aspects of the proposed operations.

(b) A narrative explaining the construction, modification, use, maintenance, and removal (unless you can satisfactorily explain why retention is necessary or appropriate for the postmining land use specified in the application under § 784.24 of this part) of the following facilities:

(1) Dams, embankments, and other impoundments.

(2) Overburden and soil handling and storage areas and structures.

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures.

(4) Spoil, coal processing waste, underground development waste, and noncoal mine waste removal, handling, storage, transportation, and disposal areas and structures.

(5) Mine facilities, including ventilation boreholes, fans, and access roads.

(6) Water pollution control facilities.

§ 784.12 What must the reclamation plan include?

(a) *General requirements.* Your application must contain a plan for the reclamation of the lands to be disturbed within the proposed permit area. The plan must show how you will comply with the reclamation requirements of the applicable regulatory program. At a minimum, the plan must include all information required under this part and part 785 of this chapter.

(b) *Reclamation timetable.* The reclamation plan must contain a detailed timetable for the completion of each major step in the reclamation process including, but not limited to—

(1) Backfilling.

(2) Grading.

(3) Restoration of the form of all perennial and intermittent stream segments through which you mine, either in their original location or as permanent stream-channel diversions.

(4) Soil redistribution.

(5) Planting.

(6) Demonstration of revegetation success.

(7) Restoration of the ecological function of all reconstructed perennial and intermittent stream segments, either in their original location or as permanent stream-channel diversions.

(8) Application for each phase of bond release under § 800.42 of this chapter.

(c) *Reclamation cost estimate.* The reclamation plan must contain a detailed estimate of the cost of reclamation, including both direct and indirect costs, of those elements of the proposed operations that are required to be covered by a performance bond under part 800 of this chapter, with supporting calculations for the estimates. You must use current standardized construction cost estimation methods and equipment cost guides to prepare this estimate.

(d) *Backfilling and grading plan.* (1) The reclamation plan must contain a plan for backfilling surface excavations, compacting the backfill, and grading the disturbed area, with contour maps, models, or cross-sections that show the anticipated final surface configuration of the proposed permit area, including drainage patterns, in accordance with §§ 817.102 through 817.107 of this chapter, using the best technology currently available. You must limit compaction to the minimum necessary to achieve stability requirements unless additional compaction is necessary to reduce infiltration to minimize leaching and discharges of parameters of concern.

(2) The backfilling and grading plan must describe in detail how you will conduct backfilling and related reclamation activities, including how you will handle acid-forming and toxic-forming materials, if present, to prevent the formation of acid or toxic drainage from acid-forming and toxic-forming materials within the overburden. You must explain how the method that you select will protect groundwater and surface water in accordance with § 817.38 of this chapter.

(e) *Soil handling plan*—(1) *General requirements.* (i) The reclamation plan must include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with § 817.22 of this chapter. It also must include a plan and schedule for removal, storage, and redistribution or other use of organic matter in accordance with § 817.22(f) of this chapter.

(ii) The plan submitted under paragraph (e)(1)(i) of this section must require that the B horizon, C horizon, and other underlying strata, or portions thereof, be removed and segregated, stockpiled, and redistributed to achieve the optimal rooting depths required to restore premining land use capability or to comply with the revegetation requirements of §§ 817.111 and 817.116 of this chapter.

(iii) The plan submitted under paragraph (e)(1)(i) of this section must explain how you will handle and store soil materials to avoid contamination by acid-forming or toxic-forming materials and to minimize deterioration of desirable soil characteristics.

(2) *Substitutes and supplements.* (i) Paragraph (e)(2) of this section applies to you if you propose to use appropriate overburden materials as a supplement to or substitute for the existing topsoil or subsoil on the proposed permit area.

(ii) You must demonstrate, and the regulatory authority must find in writing, that—

(A)(*1*) The quality of the existing topsoil and subsoil is inferior to that of the best overburden materials available within the proposed permit area; or

(*2*) The quantity of the existing topsoil and subsoil on the proposed permit area is insufficient to provide the optimal rooting depth or to meet other growth requirements of the native species to be planted. In this case, the plan must require that all available existing topsoil and favorable subsoil, regardless of the amount, be removed, stored, and redistributed as part of the final growing medium.

(B) The use of the overburden materials that you have selected, in combination with or in place of the topsoil or subsoil, will result in a soil medium that is more suitable than the existing topsoil and subsoil to sustain vegetation consistent with the postmining land use and the revegetation plan under paragraph (g) of this section and that will provide a rooting depth that is superior to the existing topsoil and subsoil.

(C) The overburden materials that you select for use as a soil substitute or supplement are the best materials available in the proposed permit area to support the native vegetation to be established or the crops to be planted.

(iii) The regulatory authority will specify the—

(A) Suitability criteria for substitutes and supplements.

(B) Chemical and physical analyses, field trials, or greenhouse tests that you must conduct to make the demonstration required by paragraph (e)(2)(ii) of this section.

(C) Sampling objectives and techniques and the analytical techniques that you must use for purposes of paragraph (e)(2)(iii)(B) of this section.

(iv) At a minimum, the demonstrations required by paragraph (e)(2)(ii) of this section must include—

(A) The physical and chemical soil characteristics and root zones needed to support the type of vegetation to be established on the reclaimed area.

(B) A comparison and analysis of the thickness, total depth, texture, percent coarse fragments, pH, thermal toxicity, and areal extent of the different kinds of soil horizons and overburden materials available within the proposed permit area, based upon a statistically valid sampling procedure.

(v) You must include a plan for testing and evaluating overburden materials during both removal and redistribution to ensure that only materials approved for use as soil substitutes or supplements are removed and redistributed.

(f) *Surface stabilization plan.* The reclamation plan must contain a plan for stabilizing road surfaces, redistributed soil materials, and other exposed surface areas to effectively control erosion and air pollution attendant to erosion in accordance with §§ 817.95, 817.150, and 817.151 of this chapter.

(g) *Revegetation plan.* (1) The reclamation plan must contain a plan for revegetation consistent with §§ 817.111 through 817.116 of this chapter, including, but not limited to, descriptions of—

(i) The schedule for revegetation of the area to be disturbed.

(ii) The site preparation techniques that you plan to use, including the measures that you will take to avoid or, when avoidance is not possible, to minimize and alleviate compaction of the root zone during backfilling, grading, soil redistribution, and planting.

(iii) What soil tests you will perform, together with a statement as to whether you will apply lime, fertilizer, or other amendments in response to those tests before planting or seeding.

(iv) The species that you will plant to achieve temporary erosion control or a description of other soil stabilization measures that you will implement in lieu of planting a temporary cover.

(v) The species that you will plant and the seeding and stocking rates and planting arrangements that you will use to achieve or complement the postmining land use and to enhance fish and wildlife habitat.

(vi) The planting and seeding techniques that you will use.

(vii) Whether you will apply mulch and, if so, the type of mulch and the method of application.

(viii) Whether you plan to conduct irrigation or apply fertilizer after the first growing season and, if so, to what extent and for what length of time.

(ix) Any normal husbandry practices that you plan to use in accordance with § 817.115(b) of this chapter.

(x) The standards and evaluation techniques that you propose to use to determine the success of revegetation in accordance with § 817.116 of this chapter.

(xi) The measures that you will take to avoid the establishment of invasive species on reclaimed areas or to control those species if they do become established.

(2) Except as provided in paragraphs (g)(4) and (5) of this section, the species and planting rates and arrangements selected as part of the revegetation plan must be designed to create a diverse, effective, permanent vegetative cover that is consistent with the native vegetative communities described in the permit application, as required by § 783.19 of this chapter, and that will meet the other requirements of paragraphs (a) and (b) of § 817.116 of this chapter.

(3) The species selected as part of the revegetation plan must—

(i) Be native to the area. The regulatory authority may approve the use of introduced species as part of the permanent vegetative cover for the site only if those species are both non-invasive and necessary to achieve the postmining land use.

(ii) Be capable of stabilizing the soil surface from erosion to the extent that control of erosion with herbaceous ground cover is consistent with establishment of a permanent vegetative cover that resembles native plant communities in the area.

(iii) Be compatible with the approved postmining land use.

(iv) Have the same seasonal characteristics of growth as the vegetative communities described in the permit application, as required by § 783.19 of this chapter.

(v) Be capable of self-regeneration and natural succession.

(vi) Be compatible with the plant and animal species of the area.

(vii) Meet the requirements of applicable state and federal seed, poisonous and noxious plant, and introduced species laws and regulations.

(4) The regulatory authority may grant an exception to the requirements of paragraphs (g)(3)(i), (iv), and (v) of this section when necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, and the species selected to achieve this purpose are consistent with measures to establish permanent vegetation.

(5) The regulatory authority may grant an exception to the requirements of paragraphs (g)(2), (g)(3)(i), (g)(3)(iv), and (g)(3)(v) of this section for those areas with a long-term, intensive, agricultural postmining land use.

(6) A professional forester or ecologist must develop and certify all revegetation plans that include the establishment of trees and shrubs. These plans must include site-specific planting prescriptions for canopy trees, understory trees and shrubs, and herbaceous ground cover compatible with establishment of those trees and shrubs. Each plan must use native species exclusively unless those species are inconsistent with the approved postmining land use and that land use is implemented before the entire bond amount for the area has been fully released under § 800.42(d) of this chapter.

(h) *Stream restoration plan.* If you propose to mine through a perennial or

intermittent stream, the reclamation plan must explain in detail how and when you will restore both the form and the ecological function of the stream segment, either in its original location or as a permanent stream-channel diversion, in accordance with §§ 784.28 and 817.57 of this chapter.

(i) *Coal resource conservation plan.* The reclamation plan must describe the measures that you will employ to maximize the use and conservation of the coal resource while using the best technology currently available to maintain environmental integrity, as required by § 817.59 of this chapter.

(j) *Plan for disposal of noncoal waste materials.* The reclamation plan must describe—

(1) The type and quantity of noncoal waste materials that you anticipate disposing of within the proposed permit area.

(2) How you intend to dispose of noncoal waste materials in accordance with § 817.89 of this chapter.

(3) The locations of any proposed noncoal waste material disposal sites within the proposed permit area.

(4) The contingency plans that you have developed to preclude sustained combustion of combustible noncoal materials.

(k) *Management of mine openings, boreholes, and wells.* The reclamation plan must contain a description, including appropriate cross-sections and maps, of the measures that you will use to seal or manage mine openings, and to plug, case or manage exploration holes, boreholes, wells and other openings within the proposed permit area, in accordance with § 817.13 of this chapter.

(l) *Compliance with Clean Air Act and Clean Water Act.* The reclamation plan must describe the steps that you have taken or will take to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

(m) *Consistency with land use plans and surface owner plans.* The reclamation plan must describe how the proposed operation is consistent with—

(1) All applicable state and local land use plans and programs.

(2) The plans of the surface landowner, to the extent that those plans are practicable and consistent with this chapter and with other applicable laws and regulations.

§ 784.13 What additional maps and plans must I include in the reclamation plan?

(a) In addition to the maps and plans required under § 783.24 and other provisions of this subchapter, your application must include maps, plans, and cross-sections of the proposed permit area showing—

(1) The lands that you propose to affect throughout the life of the operation, including the sequence and timing of underground mining activities and the sequence and timing of backfilling, grading, and other reclamation activities to be conducted on areas where the operation will disturb the land surface.

(2) Each area of land for which a performance bond or other equivalent guarantee will be posted under part 800 of this chapter.

(3) Any change that the proposed operations will cause in a facility or feature identified under § 783.24 of this chapter.

(4) All buildings, utility corridors, and facilities to be used or constructed within the proposed permit area, with identification of those facilities that you propose to retain as part of the postmining land use.

(5) Each coal storage, cleaning, processing, and loading area and facility.

(6) Each temporary storage area for soil, spoil, coal mine waste, and noncoal mine waste.

(7) Each water diversion, collection, conveyance, treatment, storage and discharge facility to be used, including the location of each point at which water will be discharged from the proposed permit area to a surface-water body and the name of that water body.

(8) Each disposal facility for coal mine waste and noncoal mine waste materials.

(9) Each feature and facility to be constructed to protect or enhance fish, wildlife, and related environmental values.

(10) Each explosive storage and handling facility.

(11) Location of each siltation structure, sedimentation pond, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 784.25 of this part, and the location of each excess spoil fill for which plans are required under § 784.35 of this part.

(12) Each segment of a perennial or intermittent stream that you propose to mine through, bury, or divert.

(13) Each location in which you propose to restore a segment of a perennial or intermittent stream or construct a temporary or permanent stream-channel diversion.

(14) Each segment of a perennial or intermittent stream that you propose to enhance under the plan submitted in accordance with § 784.16 of this part.

(15) Location and geographic coordinates of each monitoring point for groundwater, surface water, and subsidence, and each point at which you propose to monitor the biological condition of perennial and intermittent streams.

(b) Except as provided in §§ 784.25(a)(2), 784.25(a)(3), 784.35, 817.74(c), and 817.81(c) of this chapter, maps, plans, and cross-sections required under paragraphs (a)(5), (6), (7), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify such maps, plans, and cross-sections, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture.

(c) The regulatory authority may require that you submit the materials required by this section in a digital format.

§ 784.14 What requirements apply to the use of existing structures?

(a) Each application must contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description must include—

(1) The location of the structure.

(2) Plans of the structure and a description of its current condition.

(3) The approximate starting and ending dates of construction of the existing structure.

(4) A showing, including relevant monitoring data or other evidence, of whether the structure meets the performance standards of subchapter K (Permanent Program Standards) of this chapter or, if the structure does not meet the performance standards of subchapter K of this chapter, a showing of whether the structure meets the performance standards of subchapter B (Initial Program Standards) of this chapter.

(b) Each application must contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan must include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of subchapter K of this chapter.

(2) A construction schedule that includes dates for beginning and

completing interim steps and final reconstruction.

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of subchapter K of this chapter are met.

(4) A demonstration that there is no significant risk of harm to the environment or to public health or safety during modification or reconstruction of the structure.

§ 784.15 [Reserved]

§ 784.16 What must I include in the fish and wildlife protection and enhancement plan?

(a) *General requirements.* Your application must include a fish and wildlife protection and enhancement plan that—

(1) Is consistent with the requirements of § 817.97 of this chapter.

(2) Is specific to the resources identified under § 783.20 of this chapter.

(3) Complies with the requirements of paragraphs (b) through (e) of this section.

(b) *Protection of threatened and endangered species.* You must describe how you will comply with the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* including any species-specific protection and enhancement plans developed in accordance with that law.

(c) *Protection of other species.* You must describe how, to the extent possible using the best technology currently available, you will minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. At a minimum, you must explain how you will—

(1) Time operations to avoid or minimize disruption of critical life cycle events for fish and wildlife, including migration, nesting, breeding, calving, and spawning.

(2) Retain forest cover and other native vegetation as long as possible and time the removal of that vegetation to minimize adverse impacts on aquatic and terrestrial species.

(3) To the extent possible, maintain an intact forested buffer at least 100 feet wide between surface disturbances and perennial and intermittent streams that are located in forested areas. The buffer width must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(4) Locate and design sedimentation ponds, utilities, support facilities, roads, rail spurs, and other transportation facilities to avoid or minimize adverse impacts on fish, wildlife, and related environmental values.

(5) Periodically evaluate the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas and use that information to modify operations or take other action to avoid or minimize adverse impacts on those values.

(6) Select non-invasive native species for revegetation that either promote or do not inhibit the long-term development of wildlife habitat.

(7) Avoid mining through perennial or intermittent streams or disturbing riparian habitat adjacent to those streams. When avoidance is not possible, minimize—

(i) The time during which mining and reclamation operations disrupt those streams or associated riparian habitat;

(ii) The length of the stream segments mined through; and

(iii) The amount of riparian habitat disturbed by the operation.

(8) Implement other appropriate conservation practices such as, but not limited to, those identified in the technical guides published by the Natural Resources Conservation Service.

(d) *Enhancement measures*—(1) *General requirements.* You must describe how you will use the best technology currently available to enhance fish, wildlife, and related environmental values both within and outside the area to be disturbed by mining activities, where practicable. Your permit application must either identify and describe the enhancement measures that you will implement, where practicable, or explain why implementation of those measures is not practicable. Potential enhancement measures include, but are not limited to—

(i) Using the backfilling and grading process to create postmining surface features and configurations, such as functional wetlands, of high value to fish and wildlife.

(ii) Designing and constructing permanent impoundments in a manner that will maximize their value to fish and wildlife.

(iii) Creating rock piles and other permanent landscape features of value to raptors and other wildlife for nesting and shelter, to the extent that those features are consistent with premining features, the surrounding topography, and the approved postmining land use.

(iv) Reestablishing native forests or other native plant communities, both within and outside the permit area. This may include restoring the native plant communities that existed before any mining, establishing native plant communities consistent with the native plant communities that are a part of the natural succession process, or establishing native plant communities that will support wildlife species of local, state, or national concern, including, but not limited to, species listed or proposed for listing as threatened or endangered on a state or national level.

(v) Establishing a vegetative corridor at least 100 feet wide along the banks of streams that lacked a buffer of this nature before mining. The corridor width should be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel. Species selected for planting within the corridor must be native to the area, including native plants adapted to and suitable for planting in riparian zones within the corridor. Whenever possible, you should establish this corridor along both banks of the stream.

(vi) Implementing conservation practices identified in publications, such as the technical guides published by the Natural Resources Conservation Service.

(vii) Permanently fencing livestock away from streams.

(viii) Installing perches and nest boxes.

(ix) Establishing conservation easements or deed restrictions, with an emphasis on preserving riparian vegetation and forested corridors along perennial and intermittent streams.

(x) Providing funding to cover long-term operation and maintenance costs that watershed organizations incur in treating long-term postmining discharges from previous mining operations.

(xi) Reclaiming previously mined areas located outside the area that you propose to disturb.

(xii) Implementing measures to reduce or eliminate existing sources of surface-water or groundwater pollution.

(2) *Additional enhancement requirements for operations with anticipated long-term adverse impacts.* (i) Your permit application must identify and describe the enhancement measures under paragraph (d)(1) of this section that you will implement if your mining activities would result in the long-term loss of native forest, other native plant communities, or a segment of a perennial or intermittent stream.

(ii) The scope of the enhancement measures that you propose under paragraph (d)(2)(i) of this section must be commensurate with the magnitude of the long-term adverse impacts of the proposed operation. Whenever possible, the measures must be permanent.

(iii)(A) Enhancement measures proposed under paragraph (d)(2) of this section must be implemented within the watershed in which the proposed operation is located, unless opportunities for enhancement are not available within that watershed. In that case, you must propose to implement enhancement measures in the closest adjacent watershed in which enhancement opportunities exist, as approved by the regulatory authority.

(B) Each regulatory program must prescribe the size of the watershed for purposes of paragraph (d)(2)(iii)(A) of this section, using a generally-accepted watershed classification system.

(iv) The permit approved by the regulatory authority must include a condition requiring completion of the enhancement measures proposed under paragraph (d)(2) of this section.

(3) *Inclusion within permit area.* If the enhancement measures to be implemented under paragraphs (d)(1) and (2) of this section would involve more than a de minimis disturbance of the surface of land outside the area to be mined, you must include the land to be disturbed by those measures within the proposed permit area.

(e) *Fish and Wildlife Service review.* (1)(i) The regulatory authority must provide the protection and enhancement plan developed under this section to the applicable regional or field office of the U.S. Fish and Wildlife Service whenever the resource information submitted under § 783.20 of this chapter includes species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide the protection and enhancement plan to the Service no later than the time that it provides written notice of the permit application to the Service under § 773.6(a)(3)(ii) of this chapter.

(ii) When the resource information obtained under § 783.20 of this chapter does not include threatened or endangered species, designated critical habitat, or species proposed for listing as threatened or endangered, the regulatory authority must provide the protection and enhancement plan to the applicable regional or field office of the U.S. Fish and Wildlife Service only if the Service requests an opportunity to review and comment on that plan. The regulatory authority must provide the requested plan to the Service within 10 days of receipt of the request from the Service.

(2)(i) The regulatory authority must document its disposition of all comments from the Service that pertain to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law.

(ii) If the regulatory authority does not agree with a species-specific protection measure or any other recommendation from the Service that pertains to fish and wildlife or plants listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or to critical habitat designated under that law, the regulatory authority must explain the rationale for that decision in the disposition document prepared under paragraph (e)(2)(i) of this section. The regulatory authority must provide a copy of that document to the pertinent Service field office and OSMRE field office and must refrain from approving the permit application.

(iii) If the Service field office does not concur with the regulatory authority's decision under paragraph (e)(2)(ii) of this section and the regulatory authority and the Service field office are unable to reach agreement at that level, either the regulatory authority or the Service may elevate the issue through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.

(iv) The regulatory authority may not approve the permit application until all issues are resolved in accordance with paragraph (e)(2)(iii) of this section and the regulatory authority receives written documentation from the Service that all issues have been resolved.

§ 784.17 [Reserved]

§ 784.18 [Reserved]

§ 784.19 What baseline information on hydrology, geology, and aquatic biology must I provide?

(a) *General requirements.* Your permit application must include information on the hydrology, geology, and aquatic biology of the proposed permit and adjacent areas in sufficient detail to assist in—

(1) Determining the probable hydrologic consequences of the proposed operation upon the quality and quantity of surface water and groundwater in the proposed permit and adjacent areas, as required under § 784.20 of this part.

(2) Determining the nature and extent of both the hydrologic reclamation plan required under § 784.22 of this part and the monitoring plans required under § 784.23 of this part.

(3) Determining whether reclamation as required by this chapter can be accomplished.

(4) Preparing the cumulative hydrologic impact assessment under § 784.21 of this part, including an evaluation of whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(5) Preparing the subsidence control plan under § 784.30 of this part.

(b) *Groundwater information*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variations in the quality, quantity, and usage of groundwater, including all surface discharges, within the proposed permit and adjacent areas.

(2) *Underground mine pools.* If an underground mine pool is present within the proposed permit or adjacent areas, you must prepare an assessment of the characteristics of the mine pool, including seasonal changes in quality, quantity, and flow patterns, unless you demonstrate, and the regulatory authority finds, that the mine pool would not be hydrologically connected to the proposed operation. The determination of the probable hydrologic consequences of mining required under § 784.20 of this part also must include a discussion of the effect of the proposed mining operation on any underground mine pools within the proposed permit and adjacent areas.

(3) *Monitoring wells.* The regulatory authority must require the installation of properly-screened monitoring wells when necessary to document seasonal variations in the quality, quantity, and usage of groundwater.

(4) *Groundwater quality descriptions.* At a minimum, groundwater quality descriptions must include baseline information on—

(i) Major anions, including, at a minimum, bicarbonate, sulfate, and chloride.

(ii) Major cations, including, at a minimum, calcium, magnesium, sodium, and potassium.

(iii) The cation-anion balance of the parameters sampled in paragraphs (b)(4)(i) and (ii) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(iv) Ammonia.

(v) Arsenic.

(vi) Cadmium.

(vii) Copper.

(viii) Hot acidity.

(ix) Nitrogen.

(x) pH.

(xi) Selenium.

(xii) Specific conductance corrected to 25 °C.

(xiii) Total alkalinity.
(xiv) Total dissolved solids.
(xv) Total iron.
(xvi) Total manganese.
(xvii) Zinc.

(5) *Groundwater quantity descriptions.* At a minimum, groundwater quantity descriptions must include seasonal variations in approximate rates of groundwater discharge or usage and the depth to the water table in—

(i) Each coal seam to be mined.

(ii) Each water-bearing stratum above each coal seam to be mined.

(iii) Each potentially impacted stratum below the lowest coal seam to be mined.

(6) *Sampling requirements.* (i) You must establish monitoring wells or equivalent monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine groundwater quality, quantity, and movement in each aquifer above or immediately below the lowest coal seam to be mined. At a minimum, for each aquifer, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area;

(B) Upgradient and downgradient of the area overlying the proposed underground mine workings; and

(C) In a representative number of ephemeral streams within the proposed permit and adjacent areas.

(ii) To document seasonal variations in groundwater quality, you must collect samples from the locations identified in paragraph (b)(6)(i) of this section at equally spaced monthly intervals for a minimum of 12 consecutive months. You must analyze those samples for the parameters listed in paragraph (b)(4) of this section at the same frequency.

(iii) To document seasonal variations in groundwater quantity, you must take the measurements listed in paragraph (b)(5) of this section at each location identified in paragraph (b)(6)(i) of this section at equally spaced monthly intervals for a minimum of 12 consecutive months.

(iv) The regulatory authority must extend the minimum data collection period specified in paragraphs (b)(6)(ii) and (iii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought (− 3.0 or lower on the Palmer Drought Severity Index) or abnormally high precipitation (3.0 or higher on the Palmer Drought Severity Index) during the initial baseline data collection period. Baseline data collection must continue until the dataset includes 12 consecutive months without severe drought or abnormally high precipitation.

(c) *Surface-water information*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variation in surface-water quality, quantity, and usage within the proposed permit and adjacent areas.

(2) *Surface-water quality descriptions.* At a minimum, surface-water quality descriptions must include baseline information on—

(i) Major anions, including, at a minimum, bicarbonate, sulfate, and chloride.

(ii) Major cations, including, at a minimum, calcium, magnesium, sodium, and potassium.

(iii) The cation-anion balance of the parameters sampled in paragraphs (c)(2)(i) and (ii) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(iv) Ammonia.
(v) Arsenic.
(vi) Cadmium.
(vii) Copper.
(viii) Hot acidity.
(ix) Nitrogen.
(x) pH.
(xi) Selenium.
(xii) Specific conductance corrected to 25 °C.
(xiii) Total alkalinity.
(xiv) Total dissolved solids.
(xv) Total iron.
(xvi) Total manganese.
(xvii) Total suspended solids.
(xviii) Zinc.

(3) *Surface-water quantity descriptions.* (i) At a minimum, surface-water quantity descriptions for perennial, intermittent, and ephemeral streams and other discharges within the proposed permit and adjacent areas must include—

(A) Baseline information on peak flow magnitude and frequency.

(B) Usage data for existing uses and anticipated usage for all reasonably foreseeable uses of each stream.

(C) Seasonal flow variations.

(D) Seepage-run sampling determinations, if you propose to deploy a longwall panel beneath a perennial or intermittent stream or employ other types of full-extraction mining methods beneath a perennial or intermittent stream.

(ii) All flow measurements under paragraph (c)(3)(i) of this section must be made using generally-accepted professional techniques approved by the regulatory authority. All techniques must be repeatable and must produce consistent results on successive measurements. Visual observations are not acceptable.

(4) *Sampling requirements.* (i) You must establish monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine the quality and quantity of water in streams within those areas. At a minimum, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas;

(B) Upgradient and downgradient of the area overlying the proposed underground mine workings in all potentially affected perennial and intermittent streams; and

(C) In a representative number of ephemeral streams within the proposed permit and adjacent areas.

(ii) To document seasonal variations in surface-water quality, you must collect samples from the locations identified in paragraph (c)(4)(i) of this section at equally-spaced monthly intervals for a minimum of 12 consecutive months. You must analyze those samples for the parameters listed in paragraph (c)(2) of this section at the same frequency.

(iii) To document seasonal variations in surface-water quantity, you must take the measurements listed in paragraph (c)(3) of this section at each location identified in paragraph (c)(4)(i) of this section at equally-spaced monthly intervals for a minimum of 12 consecutive months.

(iv) The regulatory authority must extend the minimum data collection period specified in paragraphs (c)(4)(ii) and (iii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought (− 3.0 or lower on the Palmer Drought Severity Index) or abnormally high precipitation (3.0 or higher on the Palmer Drought Severity Index) during the initial baseline data collection period. Baseline data collection must continue until the dataset includes 12 consecutive months without severe drought or abnormally high precipitation.

(5) *Precipitation measurements.* You must provide records of precipitation amounts for the proposed permit area, using on-site, self-recording devices. Precipitation records must be adequate to generate and calibrate a hydrologic model of the site. The regulatory authority will determine whether you must create such a model.

(6) *Stream assessments.* You must map and separately identify all perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas and include an assessment of those streams. At a minimum, the assessment must include—

(i) The baseline stream pattern, profile, and dimensions, with measurements of channel slope, sinuosity, water depth, alluvial groundwater depth, depth to bedrock, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate at a scale and frequency adequate to characterize all stream segments.

(ii) A description of riparian zone vegetation, including—

(A) Any hydrophytic vegetation within and adjacent to the stream channel.

(B) The percentage of the riparian zone that is forested.

(C) The percentage of channel canopy coverage.

(iii) The biological condition of each stream segment, to the extent required by paragraph (e) of this section.

(iv) The location of the channel head on terminal reaches of each stream segment.

(v) The location of transition points from ephemeral to intermittent and from intermittent to perennial, when applicable.

(vi) Identification of all stream segments within the proposed permit and adjacent areas that appear on the list of impaired surface waters prepared under section 303(d) of the Clean Water Act. You must identify the stressors and associated total maximum daily loads for those stream segments, if applicable.

(d) *Additional information for discharges from previous coal mining operations.* If the proposed permit and adjacent areas contain any discharges from previous surface or underground coal mining operations, you must sample those discharges during low-flow conditions of the receiving stream on a one-time basis and analyze the samples for the parameters listed in paragraph (c)(2) of this section and for both total and dissolved fractions of the following parameters—

(1) Aluminum.
(2) Arsenic.
(3) Barium.
(4) Beryllium.
(5) Cadmium.
(6) Copper.
(7) Lead.
(8) Mercury.
(9) Nickel.
(10) Selenium.
(11) Silver.
(12) Thallium.
(13) Zinc.

(e) *Biological condition information.* (1) Except as provided in paragraph (h) of this section, your permit application must include an assessment of the biological condition of—

(i) Each perennial and intermittent stream within the proposed permit area.

(ii) Each perennial and intermittent stream within the adjacent area that would receive discharges from the proposed operation.

(iii) A representative sample of ephemeral streams within both the proposed permit area and the adjacent area that would receive discharges from the proposed operation.

(iv) Each perennial and intermittent stream within the adjacent area that might possibly be impacted by subsidence resulting from the proposed underground mining activities.

(2) In conducting this assessment, you must use a multimetric bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory required under section 305(b) of the Clean Water Act, or other scientifically-valid multimetric bioassessment protocols used by agencies responsible for implementing the Clean Water Act, modified as necessary to meet the following requirements. At a minimum, the protocol must—

(i) Be based upon the measurement of an appropriate array of aquatic organisms, including identification of benthic macroinvertebrates to the genus level.

(ii) Result in the calculation of index values for both habitat and macroinvertebrates.

(iii) Provide a correlation of index values to the capability of the stream to support designated uses under section 101(a) or 303(c) of the Clean Water Act, as well as any other existing or reasonably foreseeable uses.

(f) *Geologic information.* (1) Your application must include a description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined that may be adversely impacted by mining. The description must include—

(i) The areal and structural geology of the proposed permit and adjacent areas.

(ii) Other parameters that influence the required reclamation.

(iii) An explanation of how the areal and structural geology may affect the occurrence, availability, movement, quantity, and quality of potentially impacted surface water and groundwater.

(iv) The composition of the base of each perennial and intermittent stream within the proposed permit and adjacent areas, together with a prediction of how that base would respond to subsidence of strata overlying the proposed underground mine workings and how subsidence would impact streamflow.

(2) The description required by paragraph (f)(1) of this section must be based on all of the following—

(i) The cross-sections, maps, and plans required by § 783.24 of this chapter.

(ii) The information obtained under paragraphs (f)(3) through (f)(5) of this section.

(iii) Geologic literature and practices.

(3) For any portion of the proposed permit area in which the strata down to the coal seam to be mined will be removed or are already exposed, you must collect and analyze samples from test borings; drill cores; or fresh, unweathered, uncontaminated samples from rock outcrops, down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest seam to be mined that may be adversely impacted by mining. Your application must include the following data and analyses:

(i) Logs showing the lithologic characteristics, including physical properties and thickness, of each stratum, and the location of any groundwater encountered.

(ii) Chemical analyses identifying those strata that may contain acid-forming materials, toxic-forming materials, or alkalinity-producing materials and the extent to which each stratum contains those materials.

(iii) Chemical analyses of the coal seam for acid-forming or toxic-forming materials, including, but not limited to, total sulfur and pyritic sulfur.

(4) For lands within the permit and adjacent areas where the strata above the coal seam to be mined will not be removed, you must collect and analyze samples from test borings or drill cores. Your application must include the following data and analyses:

(i) Logs showing the lithologic characteristics, including physical properties and thickness, of each stratum that may be impacted, and the location of any groundwater encountered.

(ii) Chemical analyses of those strata immediately above and below the coal seam to be mined to identify whether and to what extent each stratum contains acid-forming materials, toxic-

forming materials, or alkalinity-producing materials.

(iii) Chemical analyses of the coal seam for acid-forming or toxic-forming materials, including, but not limited to, total sulfur and pyritic sulfur.

(iv) For standard room-and-pillar mining operations, the thickness and engineering properties of clays or soft rock such as clay shale, if any, in the strata immediately above and below each coal seam to be mined.

(5) You must provide any additional geologic information and analyses that the regulatory authority determines to be necessary to protect the hydrologic balance, to minimize or prevent subsidence, or to meet the performance standards of this chapter.

(6) You may request the regulatory authority to waive the requirements of paragraphs (f)(3) and (4) of this section, in whole or in part. The regulatory authority may grant the waiver request only after finding in writing that the collection and analysis of that data is unnecessary because other representative information is available to the regulatory authority in a satisfactory form.

(g) *Cumulative impact area information.* (1) The regulatory authority will obtain the hydrologic, geologic, and biological information necessary to assess the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining on surface-water and groundwater systems in the cumulative impact area, as required by § 784.21 of this part, from the appropriate federal or state agencies, to the extent that the information is available from those agencies.

(2) If the information identified in paragraph (g)(1) of this section is not available from other federal or state agencies, you must gather and submit this information to the regulatory authority as part of the permit application before the regulatory authority may approve your application. As an alternative to collecting new information, you may submit data and analyses from nearby mining operations if the site of those operations is representative of the proposed operations in terms of topography, hydrology, geology, geochemistry, and method of mining.

(3) The regulatory authority may not approve the permit application until the necessary hydrologic, geologic, and biological information for the cumulative impact area is available, either from other agencies or from you, the applicant.

(h) *Exception for operations that avoid streams.* Upon your request, the regulatory authority may waive the biological condition information requirements of paragraph (e) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(1) Mine through or bury a perennial or intermittent stream;

(2) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(3) Modify the base flow of any perennial or intermittent stream or cause the stream to pool, either as a result of subsidence or as a result of any other mining-related activity.

(i) *Coordination with Clean Water Act agencies.* The regulatory authority will consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act and make best efforts to minimize differences in baseline data collection points and parameters and to share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

(j) *Corroboration of baseline data.* The regulatory authority must either corroborate a sample of the baseline information in your application or arrange for a third party to conduct the corroboration at your expense. Corroboration may include, but is not limited to, simultaneous sample collection and analysis, use of field measurements, or comparison of application data with application or monitoring data from adjacent operations.

(k) *Permit nullification for inaccurate information.* If the regulatory authority issues a permit on the basis of what it later determines to be substantially inaccurate baseline information, the permit will be void from the date of issuance and have no legal effect. You must cease mining-related activities and immediately begin to reclaim the disturbed area upon notification by the regulatory authority that the permit is void under this paragraph.

§ 784.20 How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

(a) *Content of PHC determination.* Your permit application must contain a determination of the probable hydrologic consequences of the proposed operation upon the quality and quantity of surface water and groundwater and upon the biological condition of perennial, intermittent, and ephemeral streams under seasonal flow conditions for the proposed permit and adjacent areas. You must base the PHC determination on an analysis of the baseline hydrologic, geologic, biological, and other information required under § 784.19 of this part. It must include findings on:

(1) Whether the operation may cause material damage to the hydrologic balance outside the permit area.

(2) Whether acid-forming or toxic-forming materials are present that could result in the contamination of surface water or groundwater.

(3) Whether underground mining activities conducted after October 24, 1992, may result in contamination, diminution or interruption of a well or spring within the permit or adjacent areas that was in existence when the permit application was submitted and that is used for domestic, drinking, or residential purposes.

(4) Whether the proposed operation will intercept aquifers in overburden strata or aquifers in underground mine voids (mine pools) or create aquifers in spoil placed in the backfilled area and, if so, what impacts the operation would have on those aquifers, both during mining and after reclamation, and the effect of those impacts on the hydrologic balance.

(5) What impact the proposed operation will have on:

(i) Sediment yield and transport from the area to be disturbed.

(ii) Water quality within the proposed permit and adjacent areas, including, at a minimum—

(A) Major anions including, at a minimum, bicarbonate, sulfate, and chloride.

(B) Major cations, including, at a minimum, calcium, magnesium, sodium, and potassium.

(C) Hot acidity.

(D) pH.

(E) Selenium.

(F) Specific conductance corrected to 25 °C.

(G) Total alkalinity.

(H) Total dissolved solids.

(I) Total iron.

(J) Total manganese.

(K) Total suspended solids.

(L) Other water quality parameters of local importance, as determined by a review of the baseline information required under § 784.19 of this part.

(iii) Flooding and precipitation runoff patterns and characteristics.

(iv) Peak-flow magnitude and frequency for perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.

(v) Seasonal variations in streamflow.

(vi) The availability of groundwater and surface water, including the impact of any diversion of surface or subsurface

flows to underground mine workings or any changes in watershed size as a result of the postmining surface configuration.

(vii) The biological condition of perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.

(viii) Other characteristics as required by the regulatory authority.

(6) What impact subsidence resulting from the proposed underground mining activities may have on perennial and intermittent streams.

(7) Whether the underground mine workings will flood after mine closure and, if so, a statement and explanation of—

(i) The highest potentiometric surface of the mine pool after closure.

(ii) Whether, where, and when the mine pool is likely to result in a surface discharge, either via gravity or as a result of hydrostatic pressure.

(iii) The predicted quality of any discharge from the mine pool.

(iv) The predicted impact of the mine pool on the hydrologic balance of the proposed permit and adjacent areas after the mine pool reaches equilibrium.

(v) The potential for a mine pool blowout or other hydrologic disturbances.

(vi) The potential for the mine pool to destabilize surface features.

(vii) The potential impact of roof collapses on mine pool behavior and equilibrium.

(b) *Supplemental information.* (1) The regulatory authority must require that you, the applicant, submit supplemental information if the PHC determination required by paragraph (a) of this section indicates that one of the following conditions exists:

(i) The proposed operation may result in adverse impacts to the hydrologic balance either within or outside the proposed permit area.

(ii) The proposed operation may result in adverse impacts to the biological condition of a perennial or intermittent stream within the proposed permit or adjacent areas.

(iii) Acid-forming or toxic-forming material is present that may result in the contamination of either groundwater or surface water used as a water supply.

(2) The supplemental information required under paragraph (b)(1) of this section must be adequate to fully evaluate the probable hydrologic consequences of the proposed operation and to plan remedial and reclamation activities. It may include, but is not limited to, additional drilling, geochemical analyses of overburden materials, aquifer tests, hydrogeologic analyses of the water-bearing strata, analyses of flood flows, or analyses of other characteristics of water quality or quantity, including the stability of underground mine pools that might be affected by the proposed operation and the stability of any mine pool created by the proposed operation.

(c) *Subsequent reviews of PHC determinations.* (1) The regulatory authority must review each application for a permit revision to determine whether a new or updated PHC determination is needed.

(2) The regulatory authority must require that you prepare a new or updated PHC determination if the review under paragraph (c)(1) of this section finds that one is needed.

§ 784.21 What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?

(a) *General requirements.* (1) The regulatory authority must prepare a written assessment of the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining upon surface-water and groundwater systems in the cumulative impact area. This assessment, which is known as the CHIA, must be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(2) In preparing the CHIA, the regulatory authority will consider relevant information on file for other mining operations located within the cumulative impact area or in similar watersheds.

(3) As provided in § 784.19(g) of this part, the regulatory authority may not approve your permit application until it receives the hydrologic, geologic, and biological information needed to prepare the CHIA, either from other federal and state agencies or from you.

(b) *Contents.* At a minimum, the CHIA must include—

(1) A map of the cumulative impact area. At a minimum, the map must identify and display—

(i) Any difference in the boundaries of the cumulative impact area for groundwater and surface water.

(ii) The locations of all previous, current, and anticipated surface and underground mining.

(iii) The locations of all baseline data collection sites within the proposed permit and adjacent areas under § 784.19 of this part.

(iv) Designated uses of surface water under section 101(a) or 303(c) of the Clean Water Act.

(2) A description of all previous, existing, and anticipated surface and underground coal mining within the cumulative impact area, including, at a minimum, the coal seam or seams mined, the extent of mining, and the reclamation status of each operation.

(3) A description of baseline hydrologic information for the proposed permit and adjacent areas under § 784.19 of this part, including—

(i) The quality and quantity of surface water and groundwater and seasonal variations therein.

(ii) Quantitative information about existing usage of surface water and groundwater, as well as information defining the quality of water required for each existing and reasonably foreseeable use of groundwater and surface water and each designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(iii) A description and map of the local and regional groundwater systems.

(iv) The biological condition of perennial, intermittent, and ephemeral streams.

(4) A discussion of any potential concerns identified in the PHC determination required under § 784.20 of this part and how those concerns have been or will be resolved.

(5) A quantitative assessment of how all anticipated surface and underground mining may impact the quality of surface water and groundwater in the cumulative impact area, expressed in terms of each baseline parameter identified under § 784.19 of this part.

(6) Criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis. These criteria must—

(i) Be expressed in numerical terms for each parameter of concern.

(ii) Take into consideration the biological requirements of any species listed as threatened or endangered under the Endangered Species Act when those species or designated critical habitat are present within the cumulative impact area.

(iii) Identify the portion of the cumulative impact area to which the criteria apply and the locations at which impacts will be monitored. The regulatory authority may establish different criteria for subareas within the cumulative impact area when appropriate.

(iv) Be incorporated into the permit.

(7) An assessment of how all anticipated surface and underground mining may affect groundwater movement and availability within the cumulative impact area.

(8) An evaluation, with references to supporting data and analyses, of whether the CHIA will support a finding that the proposed operation has been

designed to prevent material damage to the hydrologic balance outside the permit area. To support this finding, the CHIA must include the following determinations, with appropriate documentation—

(i) During all phases of mining and reclamation and at all times of the year, variations in streamflow and groundwater availability resulting from the operation, as well as variations in the amount and concentration of parameters of concern in discharges from the operation to groundwater and surface water, will not—

(A) Result in conversion of a perennial or intermittent stream to an ephemeral stream or conversion of a perennial stream to an intermittent stream. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream may be acceptable, provided the conversion would not disrupt or preclude any existing, reasonably foreseeable, or designated use of the stream under section 101(a) or 303(c) of the Clean Water Act and would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act.

(B) Result in an exceedance of applicable water quality standards in any stream located outside the permit area.

(C) Disrupt or preclude any existing or reasonably foreseeable use of surface water outside the permit area or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act outside the permit area, except as provided in §§ 784.22(b) and 817.40 of this chapter.

(D) Disrupt or preclude any existing or reasonably foreseeable use of groundwater outside the permit area, except as provided in §§ 784.22(b) and 817.40 of this chapter.

(ii) The operation has been designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in damage from flooding, when compared with premining conditions.

(iii) Perennial and intermittent streams located outside the permit area but within the cumulative impact area will continue to have sufficient base flow and recharge capacity to maintain their premining flow regime; *i.e.,* perennial stream segments will retain perennial flows and intermittent stream segments will retain intermittent flows both during and after mining and reclamation. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream may be acceptable, provided the conversion does not disrupt or preclude any existing, reasonably foreseeable, or designated use of the stream under section 101(a) or 303(c) of the Clean Water Act and would not adversely impact threatened or endangered species or designated critical habitat in violation of the Endangered Species Act.

(iv) The operation has been designed to protect the quantity and quality of water in any aquifer that significantly ensures the prevailing hydrologic balance.

(c) *Subsequent reviews.* (1) The regulatory authority must review each application for a significant permit revision to determine whether a new or updated CHIA is needed. The regulatory authority must document the review, including the analysis and conclusions, together with the rationale for the conclusions, in writing.

(2)(i) The regulatory authority must reevaluate the CHIA during the permit renewal process to determine whether the CHIA remains accurate and whether the material damage criteria in the CHIA and the permit are adequate to ensure that material damage to the hydrologic balance outside the permit area will not occur. This evaluation must include a review of all water monitoring data from both this operation and all other coal mining operations within the cumulative impact area.

(ii) If the permit has a term longer than 5 years, the regulatory authority must conduct the review required by paragraph (c)(2)(i) of this section at intervals not to exceed 5 years.

(3) The regulatory authority must prepare a new or updated CHIA if the review conducted under paragraph (c)(1) or (2) of this section finds that one is needed.

§ 784.22 What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?

(a) *Hydrologic reclamation plan.* Your permit application must include a plan, with maps and descriptions, that demonstrates how the proposed operation will comply with the applicable provisions of this subchapter and subchapter K of this chapter that relate to protection of the hydrologic balance. The plan must—

(1) Be specific to local hydrologic conditions.

(2) Include preventive or remedial measures for any potential adverse hydrologic consequences identified in the PHC determination prepared under § 784.20 of this part. These measures must describe the steps that you will take during mining and reclamation through final bond release under § 800.42(d) of this chapter to—

(i) Minimize disturbances to the hydrologic balance within the proposed permit and adjacent areas.

(ii) Prevent material damage to the hydrologic balance outside the proposed permit area.

(iii) Meet applicable water quality laws and regulations.

(iv) Protect existing water users in accordance with paragraph (b) of this section and § 817.40 of this chapter.

(v) Avoid acid or toxic discharges to surface water and avoid or, if avoidance is not possible, minimize degradation of groundwater.

(vi) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or to runoff outside the proposed permit area.

(vii) Provide water-treatment facilities when needed.

(viii) Control surface-water runoff in accordance with § 784.29 of this part.

(3) Address the impacts of any transfers of water among active and abandoned mines within the proposed permit and adjacent areas.

(4) Describe the steps that you will take during mining and reclamation through final bond release under § 800.42(d) of this chapter to protect and enhance aquatic life and related environmental values to the extent possible using the best technology currently available.

(b) *Alternative water source information.* (1) If the PHC determination prepared under § 784.20 of this part indicates that underground mining activities conducted after October 24, 1992, may result in contamination, diminution, or interruption of a well or spring that is in existence at the time the permit application is submitted and that is used for domestic, drinking, or residential purposes, your application must demonstrate that alternative water sources are both available and feasible to develop. The alternative water sources must be of suitable quality and sufficient in quantity to support existing premining uses and approved postmining land uses.

(2) If you cannot identify an alternative water source that is both suitable and available, you must modify your application to prevent the proposed operation from contaminating, interrupting, or diminishing any water supply protected under § 817.40 of this chapter.

(3)(i) When a suitable alternative water source is available, your operation plan must require that the alternative water supply be developed and installed on a permanent basis before your operation may adversely affect an existing water supply protected under § 817.40 of this chapter.

(ii) Paragraph (b)(3)(i) of this section will not apply immediately if you demonstrate, and the regulatory authority finds, that the proposed operation also would adversely affect the replacement supply. In that case, your plan must require provision of a temporary replacement water supply until it is safe to install the permanent replacement water supply required under paragraph (b)(3)(i) of this section.

(4) Your application must describe how you will provide both temporary and permanent replacements for any unexpected losses of water supplies protected under § 817.40 of this chapter.

§ 784.23 What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

(a) *Groundwater monitoring plan*—(1) *General requirements.* Your permit application must include a groundwater monitoring plan adequate to evaluate the impacts of the mining operation on groundwater in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the parameters to be monitored.

(ii) Specify the sampling frequency for each parameter.

(iii) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) For each aquifer above or immediately below the coal seam to be mined, monitoring sites located upgradient and downgradient of the proposed operation at a distance sufficiently close to the underground mine workings to detect changes as the mining operation progresses. The plan must include a schedule and map for moving these sites as the underground workings advance.

(B) Monitoring wells in any existing underground mine workings that would have a direct hydrological connection to the proposed operation.

(C) At least one monitoring well to be located in the mine pool after mine closure.

(iv) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(v) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters that could be affected by the proposed operation if those parameters relate to the—

(A) Findings and predictions in the PHC determination prepared under § 784.20 of this part.

(B) Biological condition of perennial and intermittent streams and other surface-water bodies that receive discharges from groundwater within the proposed permit and adjacent areas.

(C) Suitability of the groundwater for existing and reasonably foreseeable uses.

(D) Suitability of the groundwater to support the premining and postmining land uses.

(ii) Minimum requirements. At a minimum, the plan must require that the following parameters be measured at each location every three months, with data submitted to the regulatory authority at the same frequency:

(A) Major anions, including, at a minimum, bicarbonate, chloride, and sulfate.

(B) Major cations, including, at a minimum, calcium, magnesium, potassium, and sodium.

(C) The cation-anion balance of the parameters sampled in paragraphs (a)(2)(ii)(A) and (B) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(D) Ammonia.

(E) Arsenic.

(F) Cadmium.

(G) Copper.

(H) Hot acidity.

(I) Nitrogen.

(J) pH.

(K) Selenium.

(L) Specific conductance corrected to 25 °C.

(M) Total alkalinity.

(N) Total dissolved solids.

(O) Total iron.

(P) Total manganese.

(Q) Zinc.

(R) Water levels, discharge rates, or yield rates.

(S) Any parameter listed in § 784.19(d) of this part, if detected by the sampling conducted under that paragraph.

(T) Any other parameters of local significance, as determined by the regulatory authority, based upon the information and analyses required under §§ 784.19 through 784.21 of this part.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of the application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 784.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes. At a minimum, the plan must require monitoring of all parameters for which the regulatory authority has established material damage criteria pursuant to the cumulative hydrologic impact assessment.

(4) *Exception.* If you can demonstrate, on the basis of the PHC determination prepared under § 784.20 of this part or other available information that a particular water-bearing stratum in the proposed permit and adjacent areas has no existing or foreseeable use for agricultural or other human purposes or for fish and wildlife purposes and does not serve as an aquifer that significantly ensures the hydrologic balance within the cumulative impact area, the regulatory authority may waive monitoring of that stratum.

(b) *Surface-water monitoring plan*—(1) *General requirements.* Your permit application must include a surface-water monitoring plan adequate to evaluate the impacts of the mining operation on surface water in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic

balance outside the permit area. The plan must—

(i) Identify the surface-water quantity and quality parameters to be monitored.

(ii) Require on-site measurement of precipitation amounts at specified locations within the permit area, using self-recording devices. Measurement of precipitation amounts must continue through Phase II bond release under § 800.42(c) of this chapter or for any longer period specified by the regulatory authority.

(iii) Specify the sampling frequency for each parameter to be monitored.

(iv) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) Monitoring of point-source discharges from the proposed operation.

(B) Monitoring locations upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas.

(C) Monitoring locations upgradient and downgradient of the proposed operation at a distance sufficiently close to the underground mine workings to detect changes as the mining operation progresses. The plan must include a schedule and map for moving these sites as the underground workings advance.

(v) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biological condition of perennial and intermittent streams and other surface-water bodies within the proposed permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(vi) Describe how water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters could be affected by the proposed operation if those parameters that relate to the—

(A) Applicable effluent limitation guidelines under 40 CFR part 434.

(B) Findings and predictions in the PHC determination prepared under § 784.20 of this part.

(C) Surface-water runoff control plan prepared under § 784.29 of this part.

(D) Biological condition of perennial or intermittent streams or other surface-water bodies within the proposed permit and adjacent areas.

(E) Suitability of the surface water for existing and reasonably foreseeable uses, as well as designated uses under section 101(a) or 303(c) of the Clean Water Act.

(F) Suitability of the surface water to support the premining and postmining land uses.

(ii) *Minimum requirements for monitoring locations other than point-source discharges.* For all monitoring locations other than point-source discharges, the plan must require that the following parameters be measured at each location at least every 3 months, with data submitted to the regulatory authority at the same frequency:

(A) Flow rates: The plan must require use of generally-accepted professional flow measurement techniques. Visual observations are not acceptable.

(B) Major anions, including, at a minimum, bicarbonate, chloride, and sulfate.

(C) Major cations, including, at a minimum, calcium, magnesium, potassium, and sodium.

(D) The cation-anion balance of the parameters sampled in paragraphs (b)(2)(ii)(B) and (C) of this section, plus any cation or anion that constitutes a significant percentage of the total ionic charge balance.

(E) Ammonia.

(F) Arsenic.

(G) Cadmium.

(H) Copper.

(I) Hot acidity.

(J) Nitrogen.

(K) pH.

(L) Selenium.

(M) Specific conductance corrected to 25 °C.

(N) Total alkalinity.

(O) Total dissolved solids.

(P) Total iron.

(Q) Total manganese.

(R) Total suspended solids.

(S) Zinc.

(T) Any parameter listed in § 784.19(d) of this part, if detected by the sampling conducted under that paragraph.

(U) Any other parameters of local significance, as determined by the regulatory authority, based upon the information and analyses required under §§ 784.19 through 784.21 of this part.

(iii) *Minimum requirements for point-source discharges.* For point-source discharges, the plan must—

(A) Provide for monitoring in accordance with 40 CFR parts 122, 123, and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(B) Require measurement of flow rates, using generally-accepted professional flow measurement techniques.

(iv) *Requirements related to the Clean Water Act.* You must revise the plan to incorporate any site-specific monitoring requirements imposed by the National Pollutant Discharge Elimination System permitting authority or the agency responsible for administration of section 404 of the Clean Water Act.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of your application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 784.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes. At a minimum, the plan must require monitoring of all parameters for which the regulatory authority has established material damage criteria pursuant to the cumulative hydrologic impact assessment.

(c) *Biological condition monitoring plan*—(1) *General requirements.* Except as provided in paragraph (d) of this section, your permit application must include a plan for monitoring the biological condition of perennial and intermittent streams within the proposed permit and adjacent areas. The plan must be adequate to evaluate the impacts of the mining operation on the biological condition of those streams and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area.

(2) *Monitoring techniques.* The plan must—

(i) Require use of a multimetric bioassessment protocol that meets the requirements of § 784.19(e)(2) of this part.

(ii) Identify monitoring locations in each perennial and intermittent stream

within the proposed permit and adjacent areas.

(iii) Establish a sampling frequency that must be no less than annual, but not so frequent as to unnecessarily deplete the populations of the species being monitored.

(iv) Require submission of monitoring data to the regulatory authority on an annual basis.

(3) *Regulatory authority review and action.* (i) Upon completing review of your application, the regulatory authority may require that you revise the plan to adjust monitoring locations, the frequency of monitoring, and the species to be monitored.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 784.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(d) *Exception for operations that avoid streams.* (1) Upon your request, the regulatory authority may waive the biological condition monitoring plan requirements of paragraph (c) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(i) Mine through or bury any perennial or intermittent stream;

(ii) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(iii) Modify the base flow of any perennial or intermittent stream or cause the stream to pool, either as a result of subsidence or as a result of any other mining-related activity.

(2) If you meet all the criteria of paragraph (d)(1) of this section with the exception of paragraph (d)(1)(ii) of this section, you may request, and the regulatory authority may approve, limiting the biological condition monitoring requirements of paragraph (c) of this section to only the stream that will receive the point-source discharge.

(e) *Coordination with Clean Water Act agencies.* The regulatory authority will consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act and make best efforts to minimize differences in monitoring locations and reporting requirements and to share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

§ 784.24 What requirements apply to the postmining land use?

(a) *What postmining land use information must my application contain*? (1) You must describe and map the proposed use or uses of the land within the proposed permit area following reclamation, based on the categories of land uses listed in the definition of land use in § 701.5 of this chapter.

(2) You must discuss the utility and capability of the reclaimed land to support a variety of other uses, including the uses that the land was capable of supporting before any mining, as identified under § 783.22 of this chapter, regardless of the proposed postmining land use.

(3) You must explain how the proposed postmining land use is consistent with existing state and local land use policies and plans.

(4) You must include a copy of the comments concerning the proposed postmining use that you receive from the—

(i) Legal or equitable owner of record of the surface of the proposed permit area; and

(ii) State and local government agencies that would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

(5) You must explain how the proposed postmining land use will be achieved and identify any support activities or facilities needed to achieve that use.

(6) If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses rather than to a condition capable of supporting the uses that the land could support before any mining, you must—

(i) Provide the demonstration required under paragraph (b)(1) of this section.

(ii) Disclose any monetary compensation, item of value, or other consideration that you or your agent provided or expect to provide to the landowner in exchange for the landowner's agreement to a postmining land use that differs from the premining use.

(b) *What requirements apply to the approval of alternative postmining land uses*?—(1) *Application requirements.* If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses, rather than to a condition capable of supporting the use or uses that the land could support before any mining, you must demonstrate that the proposed higher or better use or uses meet the following criteria:

(i) There is a reasonable likelihood that the proposed use or uses will be achieved after mining and reclamation, as documented by, for example, real estate and construction contracts, plans for installation of any necessary infrastructure, procurement of any necessary zoning approvals, landowner commitments, economic forecasts, and studies by land use planning agencies.

(ii) The proposed use or uses do not present any actual or probable hazard to public health or safety or any threat of water diminution or pollution.

(iii) The proposed use or uses will not—

(A) Be impractical or unreasonable.

(B) Be inconsistent with applicable land use policies or plans.

(C) Involve unreasonable delay in implementation.

(D) Cause or contribute to a violation of federal, state, or local law.

(E) Result in changes in the size or frequency of peak flows from the reclaimed area that would cause an increase in damage from flooding when compared with the conditions that would exist if the land were restored to a condition capable of supporting the uses that it was capable of supporting before any mining.

(F) Cause the total volume of flow from the reclaimed area, during every season of the year, to vary in a way that would preclude any existing or reasonably foreseeable use of surface water or groundwater or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(G) Cause a change in the temperature or chemical composition of the water that would preclude any existing or reasonably foreseeable use of surface water or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(2) *Regulatory authority decision requirements.* The regulatory authority may approve your request if it—

(i) Consults with the landowner or the land management agency having jurisdiction over the lands to which the use would apply; and

(ii) Finds in writing that you have made the demonstration required under paragraph (b)(1) of this section.

(c) *What requirements apply to permit revision applications that propose to change the postmining land use*? (1) You may propose to change the postmining land use for all or a portion of the permit area at any time through the permit revision process under § 774.13 of this chapter.

(2) If you propose a higher or better postmining land use, the requirements of paragraphs (b)(1) and (2) of this section will apply and the application must be considered a significant permit revision for purposes of § 774.13(b)(2) of this chapter.

(d) *What restrictions apply to the retention of mining-related structures*? (1) If you propose to retain mining-related structures other than roads and impoundments for potential future use as part of the postmining land use, you must demonstrate, and the regulatory authority must find in writing, that the size and characteristics of the structures are consistent with and proportional to the needs of the postmining land use.

(2) The amount of bond required for the permit under part 800 of this chapter must include the cost of removing the structure and reclaiming the land upon which it was located to a condition capable of supporting the premining uses. The bond must include the cost of restoring the site to its approximate original contour in accordance with § 817.102 of this chapter and establishing native vegetation in accordance with § 817.111 of this chapter.

(3) The reclamation plan submitted under § 784.12 of this part must specify that if a structure is not in use as part of the approved postmining land use by the end of the revegetation responsibility period specified in § 817.115 of this chapter, you must remove the structure and reclaim the land upon which it was located by restoring the approximate original contour in accordance with § 817.102 of this chapter and establishing native vegetation in accordance with § 817.111 of this chapter.

(e) *What special provisions apply to previously mined areas*? If land that was previously mined cannot be reclaimed to the land use that existed before any mining because of the previously mined condition, you may propose, and the regulatory authority may approve, any appropriate postmining land use for that land that is both achievable and compatible with land uses in the surrounding area, provided that you comply with paragraphs (a) and (b)(1)(iv) of this section.

§ 784.25 What information must I provide for siltation structures, impoundments, and refuse piles?

(a) *General requirements.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) *Requirements for general plan for all structures.* Each general plan must—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(ii) Contain a description, map, and cross-sections of the structure and its location.

(iii) Contain the hydrologic and geologic information required to assess the hydrologic impact of the structure.

(iv) Contain a report describing the results of a geotechnical investigation of the potential effect on the structure if subsurface strata subside as a result of past, current, or future underground mining operations beneath or within the proposed permit and adjacent areas. When necessary, the investigation report also must identify design and construction measures that would prevent adverse subsidence-related impacts on the structure.

(v) Contain an analysis of the potential for each impoundment to drain into subjacent underground mine workings, together with an analysis of the impacts of such drainage.

(vi)(A) Contain a certification statement that includes a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority.

(B) The regulatory authority must approve, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) *Detailed design plan requirements for high hazard dams, significant hazard dams, and impounding structures that meet MSHA criteria*—(i) *Applicability.* The requirements of paragraph (a)(2)(ii) of this section apply to all impounding structures that meet—

(A) The MSHA criteria in § 77.216(a) of this title; or

(B) The criteria for Significant Hazard Class or High Hazard Class dams in ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service. Technical Release No. 60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* You may inspect and obtain a copy of this document, which is on file at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240. For information on the availability of this document at OSMRE, call 202–208–2823. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(ii) *Detailed design plan requirements.* Each detailed design plan for a structure that meets the applicability provisions of paragraph (a)(2)(i) of this section must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture.

(B) Incorporate any design and construction measures identified in the geotechnical investigation report prepared under paragraph (a)(1)(iv) of this section as necessary to protect against potential adverse impacts from subsidence resulting from underground mine workings underlying or adjacent to the structure.

(C) Describe the operation and maintenance requirements for each structure.

(D) Describe the timetable and plans to remove each structure, if appropriate.

(3) *Detailed design plan requirements for other structures.* Each detailed design plan for structures not included in paragraph (a)(2) of this section must—

(i) Be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor, except that all coal mine waste structures to which §§ 817.81 through 817.84 of this chapter apply must be certified by a qualified, registered, professional engineer.

(ii) Reflect any design and construction requirements for the structure, including any required geotechnical information.

(iii) Describe the operation and maintenance requirements for each structure.

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(b) *Siltation structures.* Siltation structures must be designed in compliance with the requirements of § 817.46 of this chapter.

(c) *Permanent and temporary impoundments.* (1) Permanent and temporary impoundments must be

designed to comply with the requirements of § 817.49 of this chapter.

(2) Each plan for an impoundment meeting the criteria in § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title. You must submit the plan required to be submitted to the District Manager of MSHA under § 77.216 of this title to the regulatory authority as part of the permit application to the extent that the plan, or a portion thereof, is available at the time of submittal of the permit application.

(3) For impoundments not included in paragraph (a)(2) of this section, the regulatory authority may establish, through the regulatory program approval process, engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in § 817.49(a)(4)(ii) of this chapter.

(4) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR–60 or meets the criteria of § 77.216(a) of this chapter, each plan must include stability analyses of the structure. The stability analyses must address static, seismic, and post-earthquake (liquefaction) conditions. They must include, but are not limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

(d) *Coal mine waste impoundments, refuse piles, and impounding structures constructed of coal mine waste.* If you, the permit applicant, propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable requirements in paragraphs (d)(1) and (2) of this section.

(1) *Design requirements for refuse piles.* You must design refuse piles to comply with the requirements of §§ 784.28, 817.81, and 817.83 of this chapter.

(2) *Design requirements for impounding structures that will impound coal mine waste or that will be constructed of coal mine waste.* (i) You must design impounding structures constructed of or intended to impound coal mine waste to comply with the coal mine waste disposal requirements of §§ 784.28, 817.81, and 817.84 of this chapter and with the impoundment requirements of paragraphs (a) and (c) of § 817.49 of this chapter.

(ii) The plan for each impounding structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title.

(iii) Each plan for an impounding structure that will impound coal mine waste or that will be constructed of coal mine waste must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the impounding structure.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impounding structure on each plan.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impounding structure, impoundment, or impounded material.

(iv) The design must ensure that at least 90 percent of the water stored in the impoundment during the design precipitation event will be removed within a 10-day period.

§ 784.26 What information must I provide if I plan to return coal processing waste to abandoned underground workings?

(a) Each plan must describe the design, operation and maintenance of any proposed coal processing waste disposal facility, including flow diagrams and any other necessary drawings and maps, for the approval of the regulatory authority and the Mine Safety and Health Administration under § 817.81(f) of this chapter.

(b) Each plan must describe the—

(1) Source and quality of coal processing waste to be stowed in the abandoned underground workings.

(2) All chemicals used to process the coal, the quantity of those chemicals remaining in the coal processing waste, and the likely impact of those chemicals on groundwater and any persons, aquatic life, or wildlife using that groundwater.

(3) Area of the abandoned underground workings in which the waste is to be placed.

(4) Percent of the abandoned underground mine void to be filled.

(5) Method of constructing underground retaining walls.

(6) Influence of the backstowing operation on active underground mine operations.

(7) Surface area to be supported by the backstowed waste.

(8) Anticipated occurrence of surface effects following backstowing.

(c) The plan must describe the—

(1) Source of the hydraulic transport mediums.

(2) Method of dewatering the coal processing waste after placement.

(3) Extent to which water will be retained underground.

(4) Method of treatment of water if released to surface streams.

(5) Plans for monitoring for chemicals contained in the coal processing waste.

(6) Effect on the hydrologic regime and biological communities.

(7) Measures to be taken to comply with the underground mine discharge requirements of § 817.41 of this chapter, when applicable.

(d) The plan must describe the objective of each permanent monitoring well to be located in the area in which coal processing waste is placed, the stratum underlying the mined coal, and the gradient from the area in which the waste is placed. The monitoring plan must comply with § 784.23 of this part.

(e) Paragraphs (a) through (d) of this section also apply to pneumatic backstowing operations, except for those operations that the regulatory authority exempts from compliance with the hydrologic monitoring requirements after finding in writing that you have demonstrated that the proposed pneumatic backstowing operation will not adversely impact surface water, groundwater, or water supplies.

§ 784.28 What additional requirements apply to proposed surface activities in, through, or adjacent to streams?

(a) *Clean Water Act requirements.* You may conduct surface mining activities in waters of the United States only if you first obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *When must I comply with this section*?—(1) *General applicability.* You, the permit applicant, must provide the information and demonstrations required by this section whenever you

propose to conduct underground mining activities—

(i) In or through a perennial, intermittent, or ephemeral stream; or

(ii) On the surface of lands within 100 feet of a perennial, intermittent, or ephemeral stream. You must measure this distance horizontally on a line perpendicular to the stream beginning at the bankfull elevation of the stream or, if there are no discernible streambanks, the centerline of the active channel of the stream.

(2) *Activities in or near perennial and intermittent streams.* Except as provided in paragraph (d) of this section, if you propose to conduct an activity identified in paragraph (b)(1) of this section, and if the affected stream is a perennial or intermittent stream, you must demonstrate that the proposed activity would not—

(i) Preclude any premining use or any designated use under section 101(a) or 303(c) of the Clean Water Act of the affected stream segment following the completion of mining and reclamation.

(ii) Result in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral.

(iii) Cause or contribute to a violation of applicable water quality standards.

(iv) Cause material damage to the hydrologic balance outside the permit area.

(3) *Postmining riparian corridor requirements for perennial, intermittent, and ephemeral streams.* (i) If you propose to conduct an activity identified in paragraph (b)(1) of this section, you must propose to establish a riparian corridor at least 100 feet wide on each side of the stream as part of the reclamation process following the completion of mining activities within that corridor. The corridor width must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(ii) You must use native species, including species adapted to and suitable for planting in riparian zones within that corridor, to revegetate disturbed areas within the corridor required under paragraph (b)(3)(i) of this section. For areas that are forested at the time of application or that would revert to forest under conditions of natural succession, you must use native trees and shrubs to meet this requirement.

(iii) Paragraph (b)(3)(i) of this section does not apply to—

(A) Prime farmland historically used for cropland;

(B) Situations in which revegetation would be incompatible with an approved postmining land use that is implemented during the revegetation responsibility period before final bond release under § 800.42(d) of this chapter; or

(C) Streams buried beneath an excess spoil fill or a coal mine waste disposal facility under paragraph (d) of this section.

(c) *What additional requirements apply to an application that proposes to mine through or divert a perennial, intermittent, or ephemeral stream*?—(1) *Postmining drainage pattern.* The postmining drainage pattern of perennial, intermittent, and ephemeral stream channels that you propose to restore after the completion of mining must be similar to the premining drainage pattern, unless the regulatory authority approves a different pattern to—

(i) Ensure stability;

(ii) Prevent or minimize downcutting of reconstructed stream channels; or

(iii) Promote enhancement of fish and wildlife habitat.

(2) *Mining through or diverting a perennial or intermittent stream.* If you propose to mine through or divert a perennial or intermittent stream, you must—

(i) Comply with the requirements of paragraphs (a) through (c)(1) of this section.

(ii) Demonstrate that there is no reasonable alternative that would avoid mining through or diverting the stream.

(iii) Design the operation to minimize the extent to which the stream will be mined through or diverted.

(iv) Demonstrate that you can restore the form and ecological function of the affected stream segment, as required by § 817.57(b) of this chapter, using the techniques in the proposed reclamation plan.

(A) Those techniques must include the selective placement of low-permeability materials in the backfill or fill and associated stream channels to create the aquitards necessary to support streamflow when the goal is to reestablish a perennial or intermittent stream, unless you can demonstrate an alternative method of restoring perennial or intermittent streamflow.

(B) You must include a separate bond calculation for the cost of restoring the ecological function of the affected stream segment. You must post a surety bond, a collateral bond, or a combination of surety and collateral bonds to cover that cost before the regulatory authority may issue the permit.

(v) Comply with the following stream-channel restoration and stream-channel diversion design requirements:

(A) Designs for permanent stream-channel diversions, temporary stream-channel diversions that will remain in use for 2 or more years, and stream channels to be restored after the completion of mining must adhere to design techniques that will restore or approximate the premining characteristics of the original stream channel to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement. The premining characteristics of the original stream channel include, but are not limited to, the baseline stream pattern, profile, dimensions, substrate, habitat, and natural vegetation growing in the riparian zone. For temporary stream-channel diversions that will remain in use for 2 or more years, the vegetation proposed for planting in the riparian zone need not include species that would not reach maturity until after the diversion is removed.

(B) The designed hydraulic capacity of all temporary and permanent stream-channel diversions must be at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream of the diversion, but no greater than the hydraulic capacity of the unmodified stream channel immediately downstream from the diversion.

(C) All temporary and permanent stream-channel diversions must be designed so that the combination of channel, bank, and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(vi) Submit a certification from a qualified registered professional engineer that the designs for all stream-channel diversions and all stream channels to be restored after the completion of mining meet the design requirements of this section and any additional design criteria established by the regulatory authority. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel; it need not include restoration of ecological function.

(d) *What requirements apply to an application to construct an excess spoil fill or coal mine waste disposal facility in a perennial or intermittent stream*?—(1) *Applicability.* (i) If you propose to construct an excess spoil fill under § 784.35 of this part or a coal mine waste disposal facility under § 784.25(d) of this part, you must comply with the

requirements of paragraph (d)(2) of this section in place of the requirements of paragraph (b)(2) of this section whenever the fill or disposal facility would encroach upon any part of a perennial or intermittent stream.

(2) *Application requirements.* If you propose to construct an excess spoil fill or coal mine waste disposal facility of the nature described in paragraph (d)(1) of this section, your application must demonstrate that—

(i) The operation has been designed to minimize the amount of excess spoil or coal mine waste generated.

(ii) After evaluating all potential upland locations in the vicinity of the proposed operation, there is no practicable alternative that would avoid placement of excess spoil or coal mine waste in a perennial or intermittent stream.

(iii) To the extent possible using the best technology currently available, the proposed excess spoil fill or coal mine waste disposal facility has been designed to minimize—

(A) Placement of excess spoil or coal mine waste to be placed in a perennial or intermittent stream.

(B) Adverse impacts on fish, wildlife, and related environmental values.

(iv) The fish and wildlife enhancement plan submitted under § 784.16 of this part includes measures that would fully and permanently offset any long-term adverse impacts that the fill, refuse pile, or coal mine waste impoundment would have on fish, wildlife, and related environmental values within the footprint of the fill, refuse pile, or impoundment.

(v) The excess spoil fill or coal mine waste disposal facility has been designed in a manner that will not cause or contribute to a violation of water quality standards or result in the formation of toxic mine drainage.

(vi) The revegetation plan submitted under § 784.12(g) of this part requires reforestation of the completed excess spoil fill if the land is forested at the time of application or if it would revert to forest under conditions of natural succession.

(e) *What are the regulatory authority's responsibilities*?—(1) *Standards for restoration of the ecological function of a stream.* (i) The regulatory authority must establish objective standards for determining when the ecological function of a restored or permanently-diverted perennial or intermittent stream has been restored.

(ii) In establishing standards under paragraph (e)(1)(i) of this section, the regulatory authority must coordinate with the Clean Water Act permitting authority to ensure compliance with all Clean Water Act requirements.

(iii) The standards established under paragraph (e)(1)(i) of this section must comply with § 817.57(b)(2) of this chapter.

(2) *Finding.* The regulatory authority may not approve an application that includes any activity identified under paragraph (b)(1) of this section unless it first makes a specific written finding that you have fully satisfied all applicable requirements of this section. The finding must be accompanied by a detailed explanation of the rationale for the finding.

§ 784.29 What information must I include in the surface-water runoff control plan?

Your application must contain a surface-water runoff control plan that includes the following—

(a)(1) An explanation of how you will handle surface-water runoff in a manner that will prevent peak discharges from the proposed permit area, both during and after mining and reclamation, from exceeding the premining peak discharge from the same area for the same-size precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to estimate peak discharges.

(2) The explanation in paragraph (a)(1) of this section must consider the findings in the determination of the probable hydrologic consequences of mining prepared under § 784.20 of this part.

(b) A surface-water runoff monitoring and inspection program that will provide sufficient precipitation and stormwater discharge data for the proposed permit area to evaluate the effectiveness of the surface-water runoff control practices under paragraph (a) of this section. The surface-water runoff monitoring and inspection program must specify criteria for monitoring, inspection, and reporting consistent with § 817.34(d) of this chapter. The program must contain a monitoring-point density that adequately represents the drainage pattern across the entire proposed permit area, with a minimum of one monitoring point per watershed discharge point.

(c) Descriptions, including maps and cross-sections, of runoff control structures, including an explanation of how diversions and other channels to collect and convey surface-water runoff will be constructed in compliance with § 817.43 of this chapter.

§ 784.30 When must I prepare a subsidence control plan and what information must that plan include?

(a) *Pre-subsidence survey.* Each application must include:

(1) A map of the permit and adjacent areas at a scale of 1:12,000, or larger if determined necessary by the regulatory authority, showing the location and type of structures and renewable resource lands that subsidence may materially damage or for which the value or reasonably foreseeable use may be diminished by subsidence, and showing the location and type of drinking, domestic, and residential water supplies that could be contaminated, diminished, or interrupted by subsidence.

(2) A narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

(3) A survey of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. You, the applicant, must pay for any technical assessment or engineering evaluation used to determine the premining quantity and quality of drinking, domestic, or residential water supplies. You must provide copies of the survey and any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

(b) *Subsidence control plan.* If the survey conducted under paragraph (a) of this section shows that no structures, or drinking, domestic, or residential water supplies, or renewable resource lands exist, or that no material damage or diminution in value or reasonably foreseeable use of such structures or lands, and no contamination, diminution, or interruption of such water supplies would occur as a result of mine subsidence, and if the regulatory authority agrees with this conclusion, no further information need be provided under this section. If the survey shows that structures, renewable resource lands, or water supplies exist and that subsidence could cause material damage or diminution in value or reasonably foreseeable use, or contamination, diminution, or interruption of protected water supplies, or if the regulatory authority determines that damage, diminution in value or foreseeable use, or contamination, diminution, or interruption could occur, the application must include a subsidence control plan that contains the following information:

(1) A description of the method of coal removal, such as longwall mining, room-and-pillar removal or hydraulic mining, including the size, sequence

and timing of the development of underground workings.

(2) A map of the underground workings that describes the location and extent of the areas in which planned-subsidence mining methods will be used and that identifies all areas where the measures described in paragraphs (b)(4), (b)(5), and (b)(7) of this section will be taken to prevent or minimize subsidence and subsidence-related damage; and, when applicable, to correct subsidence-related material damage.

(3) A description of the physical conditions, such as depth of cover, seam thickness and lithology of overlying strata, that affect the likelihood or extent of subsidence and subsidence-related damage.

(4) A description of the monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce or correct material damage in accordance with § 817.121(c) of this chapter.

(5) Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence and subsidence-related damage, such as, but not limited to:

(i) Backstowing of voids;

(ii) Leaving support pillars of coal;

(iii) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place; and

(iv) Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface.

(6) A description of the anticipated effects of planned subsidence, if any.

(7) For those areas where planned subsidence is projected to be used, a description of methods to be employed to minimize damage from planned subsidence to non-commercial buildings and occupied residential dwellings and structures related thereto; or the written consent of the owner of the structure or facility that minimization measures not be taken; or, unless the anticipated damage would constitute a threat to health or safety, a demonstration that the costs of minimizing damage exceed the anticipated costs of repair.

(8) A description of the measures to be taken in accordance with §§ 817.40 and 817.121(c) of this chapter to replace adversely affected protected water supplies or to mitigate or remedy any subsidence-related material damage to the land and protected structures.

(9) Other information specified by the regulatory authority as necessary to demonstrate that the operation will be conducted in accordance with § 817.121 of this chapter.

§ 784.31 What information must I provide concerning the protection of publicly owned parks and historic places?

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, you must describe the measures to be used—

(1) To prevent adverse impacts, or

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

§ 784.33 What information must I provide concerning the relocation or use of public roads?

Your application must describe, with appropriate maps and cross-sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under § 761.14 of this chapter, you seek to have the regulatory authority approve—

(a) Conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 784.35 What information must I provide concerning the minimization and disposal of excess spoil?

(a) *Applicability.* This section applies to you, the permit applicant, if you propose to generate excess spoil as part of your operation.

(b) *Demonstration of minimization of excess spoil.* (1) You must submit a demonstration, with supporting calculations and other documentation, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate.

(2) The demonstration under paragraph (b)(1) of this section must explain, in quantitative terms, how the maximum amount of overburden will be returned to the mined-out area after considering—

(i) Applicable regulations concerning backfilling, compaction, grading, and restoration of the approximate original contour.

(ii) Safety and stability needs and requirements.

(iii) The need for drainage structures, access roads, and berms. You may construct drainage structures, access roads, and berms on the perimeter of the backfilled area, but you must limit the total width of those structures to 20 feet unless you demonstrate an absolutely essential need for a greater width.

(iv) Needs and requirements associated with revegetation and the proposed postmining land use.

(v) Any other relevant regulatory requirements, including those pertaining to water quality and protection of fish, wildlife, and related environmental values.

(3) When necessary to avoid or minimize construction of excess spoil fills on undisturbed land, paragraph (b)(2)(i) of this section does not prohibit the placement of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation, provided that the final surface configuration is compatible with the surrounding terrain and generally resembles landforms found in the surrounding area.

(4) You may not create a final-cut impoundment under § 817.49(b) of this chapter or place coal combustion residues or noncoal materials in the surface excavation if doing so would result in the creation of excess spoil.

(c) *Fill capacity demonstration.* You must submit a demonstration, with supporting calculations and other documentation, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as calculated under paragraph (b) of this section.

(d) *Requirements related to perennial and intermittent streams.* You must comply with the requirements of § 784.28 of this part concerning activities in or near perennial or intermittent streams if you propose to construct an excess spoil fill in or within 100 feet of a perennial or intermittent stream. The 100-foot distance must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(e) *Location and profile.* (1) You must submit maps and cross-section drawings or models showing the location and profile of all proposed excess spoil fills.

(2) You must locate fills on the most moderately sloping and naturally stable areas available. The regulatory authority will determine which areas are available, based upon the alternatives analysis under § 784.28 of this part and other requirements of the Act and this chapter.

(3) Whenever possible and consistent with the alternatives analysis and alternative selection requirements of § 784.28 of this part, you must place fills on or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(f) *Design plans.* You must submit detailed design plans, including appropriate maps and cross-section drawings, for each proposed fill, prepared in accordance with the requirements of this section and §§ 817.71 through 817.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(g) *Geotechnical investigation.* You must submit the results of a geotechnical investigation, with supporting calculations and analyses, of the site of each proposed fill, with the exception of those sites at which excess spoil will be placed only on a preexisting bench under § 817.74 of this chapter. The information submitted must include—

(1) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site.

(2) A description of the character of the bedrock and any adverse geologic conditions in the area of the proposed fill.

(3) The geographic coordinates and a narrative description of all springs, seepage, mine discharges, and groundwater flow observed or anticipated during wet periods in the area of the proposed fill.

(4) An analysis of the potential effects of any underground mine workings within the proposed permit and adjacent areas, including the effects of any subsidence that may occur as a result of previous, existing, and future underground mining operations.

(5) A technical description of the rock materials to be used in the construction of fills underlain by a rock drainage blanket.

(6) Stability analyses that address static, seismic, and post-earthquake (liquefaction) conditions. The analyses must include, but are not limited to, strength parameters, pore pressures, and long-term seepage conditions. The analyses must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(h) *Operation and reclamation plans.* You must submit plans for the construction, operation, maintenance, and reclamation of all excess spoil fills in accordance with the requirements of §§ 817.71 through 817.74 of this chapter.

(i) *Additional requirements for bench cuts or rock-toe buttresses.* If bench cuts or rock-toe buttresses are required under § 817.71(b)(2) of this chapter, you must provide the—

(1) Number, location, and depth of borings or test pits, which must be determined according to the size of the fill and subsurface conditions.

(2) Engineering specifications used to design the bench cuts or rock-toe buttresses. Those specifications must be based upon the stability analyses required under paragraph (g)(6) of this section.

(j) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of each proposed fill and appurtenant structures meets the requirements of this section.

§ 784.37 What information must I provide concerning access and haul roads?

(a) *Design and other application requirements.* (1) You, the applicant, must submit a map showing the location of all roads that you intend to construct or use within the proposed permit area, together with plans and drawings for each road to be constructed, used, or maintained within the proposed permit area.

(2) You must include appropriate cross-sections, design drawings, and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, drainage structures, and fords and low-water crossings of perennial and intermittent streams.

(3) You must demonstrate how all proposed roads will comply with the applicable requirements of §§ 784.28, 817.150, and 817.151 of this chapter.

(4) You must identify—

(i) Each road that you propose to locate in or within 100 feet, measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel, of a perennial or intermittent stream.

(ii) Each proposed ford of a perennial or intermittent stream that you plan to use as a temporary route during road construction.

(iii) Any plans to alter or relocate a natural stream channel.

(iv) Each proposed low-water crossing of a perennial or intermittent stream channel.

(5) You must explain why the roads and stream crossings identified in paragraph (a)(4) of this section are necessary and how they comply with the applicable requirements of § 784.28 of this part and section 515(b)(18) of the Act.

(6) You must describe the plans to remove and reclaim each road that would not be retained as part of the postmining land use, and provide a schedule for removal and reclamation.

(b) *Primary road certification.* The plans and drawings for each primary road must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the design of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads, as meeting the requirements of this chapter; current, prudent engineering practices; and any design criteria established by the regulatory authority.

(c) *Standard design plans.* The regulatory authority may establish engineering design standards for primary roads through the regulatory program approval process, in lieu of engineering tests, to establish compliance with the minimum static safety factor of 1.3 for all embankments specified in § 817.151(b) of this chapter.

§ 784.38 What information must I provide concerning support facilities?

You must submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings must include a map, appropriate cross-sections, design drawings, and specifications sufficient to demonstrate compliance with § 817.181 of this chapter for each facility.

§ 784.200 [Reserved]

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

■ 25. The authority citation for part 785 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 26. Revise § 785.10 to read as follows:

§ 785.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of part 785 and assigned it control number 1029-xxxx. Collection of this information is required by sections 510, 515, 701 and 711 of SMCRA, which requires applicants for special types of mining activities to provide pertinent descriptions, maps, plans, and data. The regulatory authority will use this information to determine whether you, the applicant, can meet the applicable performance standards for the special type of mining activity. You must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 27. Revise § 785.14 to read as follows:

§ 785.14 What special provisions apply to mountaintop removal mining operations?

(a) *Applicability.* This section applies to you if you conduct or intend to conduct mountaintop removal mining, as that term is defined in § 701.5 of this chapter.

(b) *Application and approval requirements.* The regulatory authority may issue a permit for mountaintop removal mining operations, without regard to the approximate original contour restoration requirements of §§ 816.102 and 816.105 of this chapter, if it first finds, in writing, on the basis of a complete application, that the following requirements are met:

(1) The proposed postmining land use of the lands to be disturbed is an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use.

(2) After consultation with the appropriate land-use planning agencies, if any, the regulatory authority deems that the proposed postmining land use constitutes an equal or better economic or public use of the land compared with the premining use.

(3) You have demonstrated compliance with the requirements for alternative postmining land uses in § 780.24(b) of this chapter.

(4) You have presented specific plans for the proposed postmining land use and appropriate assurances that the use will be—

(i) Compatible with adjacent land uses.

(ii) Obtainable according to data regarding expected need and market.

(iii) Assured of investment in necessary public facilities.

(iv) Supported by commitments from public agencies where appropriate.

(v) Practicable with respect to private financial capability for completion of the proposed use.

(vi) Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use.

(5) The proposed operation has been designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(6) The proposed use is consistent with adjacent land uses and with existing state and local land use plans and programs.

(7) The regulatory authority has provided, in writing, an opportunity of not more than 60 days to review and comment on the proposed use to—

(i) The governing body of the unit of general-purpose government in whose jurisdiction the land is located; and

(ii) Any state or federal agency that the regulatory authority, in its discretion, determines to have an interest in the proposed use.

(8) You have demonstrated that the proposed operation has been designed to comply with the requirements of part 824 of this chapter.

(9) You have demonstrated that the operation will not damage natural watercourses within the proposed permit and adjacent areas. You may meet this requirement by demonstrating that the proposed operation will comply with all of the following requirements:

(i) The proposed operation will not increase the amount or concentration of parameters of concern in discharges to groundwater and surface water from the proposed permit area, when compared to the discharges that would occur if the operation were designed to adhere to approximate original contour restoration requirements.

(ii) The proposed operation will not result in changes in the size or frequency of peak flows from the proposed permit area that would cause an increase in damage from flooding, when compared to the impacts that would occur if the operation were designed to adhere to approximate original contour restoration requirements.

(iii) The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that would adversely affect any existing or reasonably foreseeable use of surface water or groundwater or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(10) The revegetation plan proposed under § 780.12(g) of this chapter requires that those portions of the proposed permit area that are forested at the time of application or that would revert to forest under conditions of natural succession be revegetated using native tree and understory species to the extent that this requirement is not inconsistent with attainment of the proposed postmining land use.

(11) The bond posted for the permit under part 800 of this chapter includes an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented before expiration of the revegetation responsibility period under § 816.115 of this chapter.

(12) The proposed operation complies with all other requirements of the regulatory program.

(c) *Permit marking.* The regulatory authority must clearly mark the permit as including mountaintop removal mining operations. The permit must specifically identify the acreage and location of the lands on which mountaintop removal mining operations will occur within the permit area.

(d) *Subsequent permit reviews.* (1) The regulatory authority must review each permit issued under this section in accordance with § 774.10(a)(2) of this chapter.

(2) The regulatory authority may modify the terms and conditions of a permit for mountaintop removal mining at any time if it determines that more stringent measures are necessary to insure that the operation is conducted in compliance with the requirements of the regulatory program.

■ 28. Revise § 785.16 to read as follows:

§ 785.16 What special provisions apply to proposed variances from approximate original contour restoration requirements for steep-slope mining?

(a) *Application and approval requirements.* The regulatory authority may issue a permit for non-mountaintop removal steep-slope surface coal mining operations that includes a variance from the approximate original contour restoration requirements in §§ 816.102 and 816.105 of this chapter, as referenced in § 816.107 of this chapter, or § 817.102 of this chapter, as referenced in § 817.107 of this chapter, for all or a portion of the permit area. The permit may contain this variance only if the regulatory authority finds, in

writing, that you, the applicant, have demonstrated compliance with the following requirements on the basis of a complete application:

(1) After reclamation, the lands within the proposed permit area to which the variance would apply will be suitable for an industrial, commercial, residential, or public (including recreational facilities) postmining land use.

(2) The alternative postmining land use requirements of § 780.24(b) or § 784.24(b) of this chapter have been met.

(3) After consultation with the appropriate land use planning agencies, if any, the proposed use is shown to constitute an equal or better economic or public use.

(4) Federal, state, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use.

(5) A qualified registered professional engineer has certified that the operation has been designed in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(6) The highwall will be completely backfilled with spoil material in a manner that results in a static factor of safety of at least 1.3, using standard geotechnical analysis methods.

(7) Only the amount of spoil that is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of this chapter will be placed off the mine bench. All spoil not retained on the bench will be placed in accordance with §§ 816.71 and 816.74 or §§ 817.71 and 817.74 of this chapter.

(8) The variance will not result in the construction of a fill in a perennial or intermittent stream.

(9) The proposed operation will improve the condition of the watershed of lands within the proposed permit and adjacent areas when compared either with the condition of the watershed before the proposed operation or with the condition that would exist if the site were mined and restored to the approximate original contour. The condition of the watershed will be deemed improved only if you demonstrate that the following criteria will be met, relative to one of the situations described in the preceding sentence:

(i) The amount or concentration of total suspended solids or other parameters of concern in discharges to groundwater or surface water from the proposed permit area will be reduced.

(ii) Flood hazards within the watershed containing the proposed permit area will be diminished by reduction of the size or frequency of peak-flow discharges from precipitation events or thaws.

(iii) The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that would adversely affect any existing or reasonably foreseeable use of surface water or groundwater or any designated use of surface water under section 101(a) or 303(c) of the Clean Water Act.

(iv) The proposed operation will result in a lesser adverse impact on the aquatic ecology of the cumulative impact area than would occur if the area to be mined was restored to its approximate original contour.

(v) The impact on perennial and intermittent streams within the proposed permit and adjacent areas will be less than the impact that would occur if the area to be mined was restored to its approximate original contour. The fish and wildlife enhancement measures proposed and approved under § 780.16 or § 784.16 of this chapter may be considered in making this determination.

(vi) The appropriate state environmental agency has approved the plan.

(10)(i) The owner of the surface of the lands within the proposed permit area has knowingly requested, in writing, as part of the application, that a variance be granted.

(ii) The request must be made separately from any surface owner consent given for the operations under § 778.15 of this chapter and it must show an understanding that the variance could not be granted without the surface owner's request.

(iii) The surface owner has not and will not receive any monetary compensation, item of value, or other consideration in exchange for requesting the variance.

(11) The proposed deviations from the premining surface configuration are necessary and appropriate to achieve the approved postmining land use.

(12) The revegetation plan proposed under §§ 780.12(g) or 784.12(g) of this chapter requires the use of native tree and understory species to revegetate all portions of the permit area that are forested at the time of application or that would revert to forest under conditions of natural succession. This requirement does not apply to—

(i) Permanent impoundments, roads, and other impervious surfaces to be retained following the completion of mining and reclamation.

(ii) Those portions of the permit area covered by the variance, but only to the extent that compliance with this requirement would be inconsistent with attainment of the postmining land use.

(13) The bond posted for the permit under part 800 of this chapter includes an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented before expiration of the revegetation responsibility period under § 816.115 or § 817.115 of this chapter.

(b) *Regulatory authority responsibilities.* (1) The regulatory authority must specifically mark any permit that contains an approved variance from approximate original contour restoration requirements.

(2) The regulatory authority must review each permit incorporating a variance under this section in accordance with § 774.10(a)(2) of this chapter.

(3) The regulatory authority may modify the terms and conditions of a permit incorporating a variance under this section at any time if it determines that more stringent measures are necessary to ensure that the operations are conducted in compliance with the requirements of the regulatory program.

(4) The regulatory authority may grant variances in accordance with this section only if it has promulgated specific rules to govern the granting of variances in accordance with the provisions of this section and any necessary, more stringent requirements.

(5) Before approving a variance in accordance with this section, the regulatory authority must find and document in writing that the requirements of paragraph (a)(10) of this section have been met.

■ 29. Revise § 785.25 to read as follows:

§ 785.25 What special provisions apply to proposed operations on lands eligible for remining?

(a) This section applies to you if you intend to apply for a permit to conduct surface coal mining operations on lands eligible for remining, as that term is defined in § 701.5 of this chapter.

(b)(1) Your application must comply with all applicable requirements of this subchapter.

(2) In addition, to be eligible under the provisions of § 773.13 of this chapter concerning unanticipated events or conditions at remining sites, the application must—

(i) To the extent possible, if not otherwise addressed in the permit

application, identify potential environmental and safety problems that could reasonably be anticipated to occur as a result of prior mining activities within the proposed permit area. This identification must be based on a due diligence investigation that includes visual observations, a record review of past mining operations at or near the site, environmental sampling, and any other relevant available information, including data from prior mining activities and remining operations on similar sites.

(ii) With regard to potential environmental and safety problems referred to in paragraph (b)(1)(i) of this section, describe the measures that will be taken to ensure that the applicable reclamation requirements of the regulatory program can and will be met.

SUBCHAPTER J—PERFORMANCE BOND, FINANCIAL ASSURANCE, AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS

■ 30. Under the authority of 30 U.S.C. 1211(c)(2) and 1251(b), revise the heading for subchapter J to read as set forth above.

■ 31. Revise part 800 to read as follows:

PART 800—PERFORMANCE BOND, FINANCIAL ASSURANCE, AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS

Sec.

800.1 Scope and purpose.
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800.50 When and how will a bond be forfeited?
800.60 What liability insurance must I carry?
800.70 What special bonding provisions apply to anthracite operations in Pennsylvania?

Authority: 30 U.S.C. 1201 *et seq.*

§ 800.1 Scope and purpose.

This part sets forth the minimum requirements for filing and maintaining bonds, financial assurances, and liability insurance policies for surface coal mining and reclamation operations under regulatory programs in accordance with the Act.

§ 800.4 Regulatory authority responsibilities.

(a) The regulatory authority must prescribe and furnish forms for filing performance bonds and financial assurances.

(b) The regulatory authority must prescribe by regulation terms and conditions for performance bonds, financial assurances, and liability insurance policies.

(c) The regulatory authority must determine the amount of the bond for each area to be bonded, in accordance with § 800.14 of this part. The regulatory authority also must adjust the bond amount as acreage in the permit area is revised or when other relevant conditions change, in accordance with § 800.15 of this part. In addition, the regulatory authority must determine the amount of financial assurance required under § 800.18 of this part and adjust it as provided in that section.

(d) The regulatory authority may accept a self-bond if the permittee meets the requirements of § 800.23 of this part and any additional requirements in the regulatory program.

(e) The regulatory authority must release liability under a bond or financial assurance instrument in accordance with §§ 800.40 through 800.44 of this part.

(f) If the conditions specified in § 800.50 of this part occur, the regulatory authority must take appropriate action to cause all or part of a bond or financial assurance to be forfeited in accordance with procedures of that section.

(g) The regulatory authority must require in the permit that adequate bond and financial assurance coverage be in effect at all times. Except as provided in § 800.30(b), operating without adequate bond or financial assurance is a violation of a condition of these rules and the permit.

§ 800.5 Definitions.

Collateral bond means an indemnity agreement in a sum certain executed by the permittee as principal which is supported by the deposit with the regulatory authority of one or more of the following:

(1) A cash account, which shall be the deposit of cash in one or more federally-insured or equivalently protected accounts, payable only to the regulatory authority upon demand, or the deposit of cash directly with the regulatory authority.

(2) Negotiable bonds of the United States, a state, or a municipality, endorsed to the order of, and placed in the possession of, the regulatory authority.

(3) Negotiable certificates of deposit, made payable or assigned to the regulatory authority and placed in its possession or held by a federally-insured bank.

(4) An irrevocable letter of credit of any bank organized or authorized to transact business in the United States, payable only to the regulatory authority upon presentation.

(5) A perfected, first-lien security interest in real property in favor of the regulatory authority.

(6) Other securities with a rating of ''A'' or higher from either Moody's Investors Service or Standard and Poor's or an equivalent rating issued by any other nationally recognized statistical rating organization registered with the Securities and Exchange Commission, endorsed to the order of, and placed in the possession of, the regulatory authority.

Financial assurance means a trust fund, an annuity, or a combination thereof.

Self-bond means an indemnity agreement in a sum certain executed by the applicant or by the applicant and any corporate guarantor and made payable to the regulatory authority, with or without separate surety.

Surety bond means an indemnity agreement in a sum certain payable to the regulatory authority, executed by the permittee as principal and which is supported by the performance guarantee of a corporation licensed to do business as a surety in the state where the operation is located.

§ 800.9 What requirements apply to alternative bonding systems?

(a) OSMRE may approve an alternative bonding system as part of a state or federal regulatory program if the system will achieve the following objectives and purposes of the bonding program:

(1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time, except as provided in paragraphs (c) and (d) of this section.

(2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

(b) The alternative bonding system will apply in lieu of the requirements of §§ 800.12 through 800.23 of this part, with appropriate conforming modifications to the bond release provisions of §§ 800.40 through 800.44 of this part and the bond forfeiture provisions of § 800.50 of this part, to the extent specified in the regulatory program and the terms of approval under part 732 of this chapter.

(c) An alternative bonding system may be structured to include only certain phases of mining and reclamation under § 800.42 of this part, provided that the other phases of mining and reclamation are covered by one of the forms of bond listed in § 800.12 of this part.

(d) The following obligations of the permittee are not eligible for coverage by an alternative bonding system:

(1) Restoration of the ecological function of a stream under §§ 780.28 and 816.57 or §§ 784.28 and 817.57 of this chapter.

(2)(i) Treatment of long-term discharges that come into existence after the effective date of paragraph (d) of this section, unless, upon discovery of the discharge, the permittee contributes an amount sufficient to cover all costs that the regulatory authority estimates that the alternative bonding system will incur to treat the discharge for as long as the discharge requires active or passive treatment to meet Clean Water Act standards or the water quality requirements of this chapter. The alternative bonding system must place that amount in a separate account available only for treatment of the discharge for which the contribution is made. Otherwise, consistent with § 800.18 of this part, the permittee must post a financial assurance, a collateral bond, or a combination thereof to cover this obligation.

(ii) Long-term discharges that came into existence before the effective date of paragraph (d) of this section will continue to be covered by any applicable state alternative bonding system unless the regulatory authority amends its program to specifically establish an earlier effective date. The permittee of a site with a discharge subject to paragraph (d)(2)(ii) of this section must contribute to the alternative bonding system an amount sufficient to cover all costs that the alternative bonding system will incur to treat the discharge in perpetuity.

§ 800.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–xxxx. The regulatory authority uses information collected under this part to ensure that bond, insurance, and financial assurance instruments are valid and meet all requirements of section 509 of SMCRA, which requires that persons planning to conduct surface coal mining operations first post a performance bond to guarantee fulfillment of all reclamation obligations under the approved permit. The regulatory authority also uses information collected under this part to ensure compliance with the bond release requirements and procedures of section 519 of SMCRA, the liability insurance requirements of section 507(f) of SMCRA, and bond forfeiture requirements and procedures. Persons planning to conduct surface coal mining operations must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 800.11 When and how must I file a bond?

(a) After approving a permit application submitted under subchapter G of this chapter, the regulatory authority may not issue the permit until you, the permit applicant, file one of the following:

(1) A performance bond or bonds for the entire permit area;

(2) A cumulative bond schedule and the performance bond required for full reclamation of the initial area to be disturbed; or

(3) An incremental bond schedule and the performance bond required for the first increment in the schedule.

(b) The bond or bonds that you file under paragraph (a) of this section must be—

(1) In an amount determined under § 800.14 of this part.

(2) On a form prescribed and furnished by the regulatory authority.

(3) Made payable to the regulatory authority.

(4) Conditioned upon the faithful performance of all the requirements of the regulatory program and the permit, including the reclamation plan.

(c) If the bond or bonds filed under paragraph (a) of this section cover only an identified increment of land within the permit area upon which you will initiate and conduct surface coal mining operations during the initial term of the permit, you must—

(1) Identify the initial and successive areas or increments for bonding on the permit application map submitted under part 780 or part 784 of this chapter and specify the bond amount to be provided for each area or increment.

(2) Ensure that independent increments are of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary pursuant to § 800.50 of this part.

(3) File additional bond or bonds with the regulatory authority to cover each succeeding increment before you initiate and conduct surface coal mining operations on that increment.

(d) You may not disturb any surface area or extend any vertical underground mine shaft or other vertical underground mine opening for which a performance bond is required before the regulatory authority accepts the performance bond required for that area or extension.

§ 800.12 What form of bond is acceptable?

(a) The regulatory authority must prescribe the form of the performance bond.

(b) Except as provided in paragraphs (c) through (e) of this section, the regulatory authority may allow the permittee to post any of the following forms of bond:

(1) A surety bond;

(2) A collateral bond;

(3) A self-bond; or

(4) A combination of any of these forms of performance bond.

(c) An alternative bonding system approved under § 800.9 of this part may allow the permittee to post either more or fewer forms of bond than those listed in paragraph (b) of this section.

(d) The regulatory authority may accept only a financial assurance or a collateral bond to guarantee treatment of a long-term discharge under § 800.18 of this part.

(e) The regulatory authority may accept only a surety bond, a collateral bond, or a combination thereof to

guarantee restoration of the ecological function of a stream under §§ 780.28(c), 784.28(c), 816.57(b), and 817.57(b) of this chapter.

§ 800.13 What is the liability period for a bond?

(a)(1) Liability under the performance bond will be for the duration of the surface coal mining and reclamation operation and for a period coincident with the period of extended responsibility for successful revegetation under § 816.115 or § 817.115 of this chapter or until achievement of the reclamation requirements of the regulatory program and the permit, whichever is later.

(2) With the approval of regulatory authority, a bond may be posted and approved to guarantee specific phases of reclamation within the permit area, provided that the sum of phase bonds posted equals or exceeds the total amount required under §§ 800.14 and 800.15 of this part. The scope of work to be guaranteed and the liability assumed under each phase bond must be specified in detail.

(b) Isolated and clearly defined portions of the permit area requiring extended liability may be separated from the original area and bonded separately with the approval of the regulatory authority.

(1) These areas must be limited in extent and not constitute a scattered, intermittent, or checkerboard pattern of failure.

(2) With the approval of the regulatory authority, the permittee may apply the provisions of paragraph (b) of this section to the amount of bond posted to guarantee restoration of a stream's ecological function under §§ 780.28 and 816.57 or §§ 784.28 and 817.57 of this chapter.

(3) The regulatory authority must include any necessary access roads or routes in the area under extended liability.

(c) If the regulatory authority approves a long-term, intensive agricultural postmining land use, the revegetation responsibility period specified under § 816.115 or § 817.115 of this chapter will start on the date of initial planting for the long-term agricultural use.

(d)(1) The bond liability of the permittee includes only those actions that the permittee is required to perform under the permit and regulatory program to complete the reclamation plan for the area covered by the bond.

(2) The bond does not cover implementation of an alternative postmining land use approved under § 780.24(b) or § 784.24(b) of this chapter, but which is beyond the control of the permittee. Except as provided in § 785.16(a)(13) of this chapter, the permittee is responsible only for restoring the site to conditions capable of supporting the approved postmining land use.

(3) Bond liability for prime farmland includes meeting the productivity requirement specified in § 800.42(c) of this part.

(4) Bond liability for treatment or abatement of long-term discharges is specified in § 800.18 of this part.

§ 800.14 How will the regulatory authority determine the amount of bond required?

(a) The regulatory authority must determine the amount of the bond required for each area to be bonded, based upon, but not limited to—

(1) The requirements of the permit, including the reclamation plan.

(2) The probable difficulty of reclamation, giving consideration to the topography, geology, hydrology, and revegetation potential of the permit area and the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(3) The estimated reclamation costs submitted by the permit applicant.

(b)(1) The amount of the bond must be sufficient to assure the completion of the reclamation plan if the work has to be performed by a third party under contract with the regulatory authority in the event of forfeiture.

(2) The calculations used to determine the amount of bond required under paragraph (b)(1) of this section must specifically identify the amount of bond needed to guarantee restoration of a stream's ecological function under §§ 780.28 and 816.57 or §§ 784.28 and 817.57 of this chapter. The permittee may elect to either post a separate bond for this amount or incorporate that amount into the bond posted for the entire permit or increment.

(c) When the permit includes a variance from approximate original contour restoration requirements under § 785.16 of this chapter, the amount of the bond must be sufficient to restore the disturbed area to the approximate original contour if the approved postmining land use is not implemented by the end of the applicable revegetation responsibility period under § 816.115 or § 817.115 of this chapter.

(d) The amount of financial assurance required for treatment of long-term discharges must be determined in accordance with § 800.18 of this part.

(e) The total bond initially posted for the entire area under one permit may not be less than $10,000.

(f) The permittee's financial responsibility under § 817.121(c) of this chapter for repairing or compensating for material damage resulting from subsidence may be satisfied by the liability insurance policy required under § 800.60 of this part.

§ 800.15 When must the regulatory authority adjust the bond amount and when may I request adjustment of the bond amount?

(a) The regulatory authority must adjust the amount of the bond required and, if needed, the terms of the acceptance when—

(1) The area requiring bond coverage increases or decreases.

(2) The unit cost or scope of future reclamation changes as a result of technological advances, revisions to the operation or reclamation plans in the permit, or external factors.

(i) The regulatory authority may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement.

(ii) The permittee may request at any time that the regulatory authority reduce the amount of the performance bond based upon submission of evidence that the permittee's method of operation or other circumstances will reduce the estimated unit costs for the regulatory authority to reclaim the bonded area.

(iii) The regulatory authority may not use the provisions of this section to reduce the amount of the performance bond to reflect changes in the cost of reclamation resulting from completion of activities required under the reclamation plan. Bond reduction for completed reclamation activities must comply with the bond release requirements and procedures of §§ 800.40 through 800.44 of this part.

(b) The regulatory authority must—

(1) Notify the permittee, the surety, and any person with a property interest in collateral who has requested notification under § 800.21(f) of this part of any proposed adjustment to the bond amount; and

(2) Provide the permittee an opportunity for an informal conference on the adjustment.

(c) Bond reductions under paragraph (a) of this section are not subject to the bond release requirements and procedures of §§ 800.40 through 800.44 of this part.

(d) In the event that an approved permit is revised in accordance with subchapter G of this chapter, the regulatory authority must review the bond amount for adequacy and, if necessary, require adjustment of the bond amount to conform to the permit as revised. This provision may not be used to reduce bond amounts under the circumstances described in paragraph (a)(2)(iii) of this section.

(e) The regulatory authority must require that appropriate bond or financial assurance be posted in accordance with § 800.18 of this part whenever a discharge that will require long-term treatment is identified.

(f) The regulatory authority may not reduce the bond amount when the permittee does not restore the approximate original contour as required or when the reclamation plan was improperly modified to reflect the level of reclamation completed rather than the level of reclamation required under the regulatory program.

§ 800.16 What are the general terms and conditions of the bond?

(a) The performance bond must be in an amount determined by the regulatory authority as provided in § 800.14 of this part.

(b) The performance bond must be payable to the regulatory authority.

(c) The performance bond must be conditioned upon faithful performance of all the requirements of the regulatory program and the approved permit, including completion of the reclamation plan.

(d) The duration of the bond must be for the time provided in § 800.13 of this part.

(e) The bond must provide a mechanism for a bank, surety, or other responsible financial entity to give prompt notice to the regulatory authority and the permittee of any action filed alleging the insolvency or bankruptcy of the surety, the bank, or other responsible financial entity, or alleging any violations that would result in suspension or revocation of the firm's charter or license to do business.

§ 800.17 [Reserved]

§ 800.18 What special provisions apply to financial guarantees for treatment of long-term discharges?

(a) *Applicability.* (1) This section applies whenever surface coal mining operations, underground mining activities, or other activities or facilities regulated under this title result in a discharge to surface water or groundwater that—

(i) Requires treatment; and

(ii) Continues or may reasonably be expected to continue after the completion of mining, backfilling, grading, and the establishment of revegetation.

(2) This section also applies whenever information available to the regulatory authority documents that a discharge of the nature described in paragraph (a)(1) of this section will develop in the future, provided that the quantity and quality of the future discharge can be determined with reasonable probability.

(b) *Type of financial instruments allowed.* (1) Except as provided in § 800.9(d)(2) of this part, the permittee must post either a financial assurance instrument or a collateral bond to guarantee treatment or abatement of postmining discharges.

(2) If the permittee elects to post a collateral bond under paragraph (b)(1) of this section, the amount of the bond must include the cost of treating the discharge during the time required to collect and liquidate the bond and convert the proceeds to a financial instrument that will generate funds in an amount sufficient to cover future treatment costs and associated administrative expenses.

(3) Operations with discharges in states with an approved alternative bonding system must comply with the requirements of § 800.9(d)(2) of this part.

(c) *Discharge treatment standards for cost calculation purposes.* Calculation of the amount of financial assurance or collateral bond required under this section must include the cost of treating the discharge to meet any applicable numerical standards or limits that are in effect at the time that the regulatory authority issues an order requiring posting of a financial assurance or bond, provided that the numerical standards or limits are established in—

(1) The permit issued under subchapter G of this chapter;

(2) A permit or authorization issued under the Clean Water Act; or

(3) Regulations implementing the Clean Water Act.

(d) *Requirements for financial assurances.* (1) The trust fund or annuity must be established in a manner that guarantees that sufficient moneys will be available when needed to pay for—

(i) Treatment of discharges in perpetuity, unless the permittee demonstrates, and the regulatory authority finds, based upon available evidence, that treatment will be needed for a lesser time, either because the discharge will attenuate or because its quality will improve. The regulatory authority may accept arrangements that allow the permittee to build the amount of the trust fund or annuity over time, provided—

(A) The permittee continues to treat the discharge during that time; and

(B) The regulatory authority retains all performance bonds posted for the permit until the trust fund or annuity reaches a self-sustaining level as determined by the regulatory authority.

(ii) Maintenance, renovation, and replacement of treatment and support facilities as needed.

(iii) Final reclamation of the sites upon which treatment facilities are located and areas used in support of those facilities.

(iv) Administrative costs borne by the regulatory authority or trustee to implement paragraphs (d)(1)(i) through (iii) of this section.

(2) The regulatory authority must specify the investment objectives of the trust fund or annuity.

(3) In structuring the trust fund or annuity, the regulatory authority and the permittee must base calculations on a conservative anticipated rate of return on the proposed investments that is consistent with long-term historical rates of return for similar investments.

(4) The trust fund or annuity must be in a form approved by the regulatory authority and contain all terms and conditions required by the regulatory authority.

(5) The trust fund or annuity must irrevocably establish the regulatory authority as the beneficiary of the trust fund or of the proceeds from the annuity for the purpose of treating mine drainage or other mining-related discharges to protect the environment and users of surface water.

(6) The trust fund or annuity must provide that disbursement of money from the trust fund or annuity may be made only upon written authorization of the regulatory authority or according to a schedule established in the agreement accompanying the trust fund or annuity.

(7) A financial institution or company serving as a trustee or issuing an annuity must be one of the following:

(i) A national bank chartered by the Office of the Comptroller of the Currency.

(ii) An operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency.

(iii) A bank or trust company chartered by the state in which the operation is located.

(iv) An insurance company licensed or authorized to do business in the state in which the operation is located or designated by the pertinent regulatory body of that state as an eligible surplus lines insurer.

(v) Any other financial institution or company with trust powers and with offices located in the state in which the operation is located, provided that the institution's or company's activities are examined or regulated by a state or federal agency.

(e) *Termination of a financial assurance instrument.* Termination of a

trust fund or annuity may occur only upon the demise of the trustee or the company issuing the annuity or as specified by the regulatory authority upon a determination that one of the following situations exists—

(1) No further treatment or other reclamation measures are necessary, in which case paragraph (h) of this section will apply.

(2) A satisfactory replacement bond or financial assurance has been posted in accordance with paragraph (g) of this section.

(3) The terms of the trust fund or annuity establish conditions for termination and those conditions have been met.

(4) The trustee's administration of the trust fund or annuity is unsatisfactory to the regulatory authority, in which case the permittee or the regulatory authority must procure a new trustee.

(f) *Regulatory authority review and adjustment of amount of financial assurance.* (1) The regulatory authority must establish a schedule for reviewing the performance of the trustee, the adequacy of the trust fund or annuity, and the accuracy of the assumptions upon which the trust fund or annuity is based. This review must occur on at least an annual basis.

(2) The regulatory authority must require that the permittee provide additional resources to the trust fund or annuity whenever the review conducted under paragraph (f)(1) of this section or any other information available to the regulatory authority at any time demonstrates that the financial assurance is no longer adequate to meet the purpose for which it was established.

(g) *Replacement of financial assurance.* With the approval of the regulatory authority, a financial assurance may be replaced in accordance with the provisions of § 800.30(a) of this part.

(h) *Release of liability.* Release of reclamation liabilities and obligations under financial assurances is subject to the applicable bond release provisions of §§ 800.40 through 800.44 of this part.

(i) *Effect of financial assurance on release of bond.* The permittee may apply for, and the regulatory authority may approve, release of any bonds posted for the permit or permit increment for which the regulatory authority has approved a financial assurance under this section, provided that the permittee and the regulatory authority comply with the bond release requirements and procedures in §§ 800.40 through 800.44 of this part. This provision applies only if the following conditions exist—

(1) The financial assurance is both in place and fully funded.

(2) The permit or permit increment fully meets all applicable reclamation requirements, with the exception of the discharge and the presence of associated treatment and support facilities.

(3) The financial assurance will serve as the bond for reclamation of the portion of the permit area required for postmining water treatment facilities and access to those facilities.

§ 800.20 What additional requirements apply to surety bonds?

(a) A surety bond must be executed by the permittee and a corporate surety licensed to do business in the state where the operation is located.

(b) Surety bonds must be noncancellable during their terms, except that surety bond coverage for undisturbed lands may be cancelled with the prior consent of the regulatory authority. The regulatory authority will advise the surety, within 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an undisturbed area.

§ 800.21 What additional requirements apply to collateral bonds?

(a) Collateral bonds, except for letters of credit, cash accounts, and real property, are subject to the following conditions:

(1) The regulatory authority must keep custody of collateral deposited by the applicant or permittee until authorized for release or replacement as provided in this part.

(2) The regulatory authority must value collateral at its current market value, not at face value.

(3) The regulatory authority must require that certificates of deposit be made payable to or assigned to the regulatory authority, both in writing and upon the records of the bank or other financial institution issuing the certificates. If assigned, the regulatory authority must require the bank or other financial institution issuing the certificate to waive all rights of setoff or liens against the certificate.

(4) The regulatory authority may not accept an individual certificate of deposit in an amount in excess of the maximum amount insured by the Federal Deposit Insurance Corporation.

(b) Letters of credit are subject to the following conditions:

(1) The letter may be issued only by a bank organized or authorized to do business in the United States;

(2) Letters of credit must be irrevocable during their terms. The regulatory authority must forfeit and collect on a letter of credit used as security in areas requiring continuous bond coverage if the permittee has not replaced the letter with another letter of credit or other suitable form of bond at least 30 days before the letter's expiration date.

(3) The letter of credit must be payable to the regulatory authority upon demand, in part or in full, upon receipt from the regulatory authority of a notice of forfeiture issued in accordance with § 800.50 of this part.

(c) Real property posted as a collateral bond must meet the following conditions:

(1) The applicant or permittee must grant the regulatory authority a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture under § 800.50 of this part.

(2) In order for the regulatory authority to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant or permittee must submit a schedule of the real property to be mortgaged or pledged to secure the obligations under the indemnity agreement. The list must include—

(i) A description of the property;

(ii) The fair market value as determined by an independent appraisal conducted by a certified appraiser; and

(iii) Proof of possession and title to the real property.

(3) The property may include land that is part of the permit area. However, land pledged as collateral for a bond under this section may not be disturbed under any permit while it is serving as security under this section.

(d) Cash accounts are subject to the following conditions:

(1) The regulatory authority may authorize the permittee to supplement the bond through the establishment of a cash account in one or more federally-insured or equivalently protected accounts made payable upon demand to, or deposited directly with, the regulatory authority. The total bond, including the cash account, may not be less than the amount determined under § 800.14 of this part, as modified by any adjustments under § 800.15 of this part, less any amounts released under §§ 800.40 through 800.44 of this part.

(2) Any interest paid on a cash account will be retained in the account and applied to the bond value of the account unless the regulatory authority has approved the payment of interest to the permittee.

(3) Certificates of deposit may be substituted for a cash account with the approval of the regulatory authority.

(4) The regulatory authority may not accept an individual cash account in an amount in excess of the maximum amount insured by the Federal Deposit Insurance Corporation.

(e)(1) The estimated bond value of all collateral posted as assurance under this section is subject to a margin, which is the ratio of bond value to market value, as determined by the regulatory authority. The margin must reflect legal and liquidation fees, as well as value depreciation, marketability, and fluctuations that might affect the net cash available to the regulatory authority to complete reclamation.

(2)(i) The regulatory authority may evaluate the bond value of collateral at any time.

(ii) The regulatory authority must evaluate the bond value of collateral as part of the permit renewal process.

(iii) The regulatory authority must increase or decrease the performance bond amount required if an evaluation conducted under paragraph (e)(2)(i) or (ii) of this section determines that the bond value of collateral has increased or decreased.

(iv) In no case may the bond value of collateral exceed the market value of the collateral.

(f) Persons who have an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, must request such notification in writing to the regulatory authority at the time that the collateral is offered.

§ 800.23 What additional requirements apply to self-bonds?

(a) *Definitions.* For the purposes of this section only:

Current assets means cash or other assets or resources that are reasonably expected to be converted to cash or sold or consumed within one year or within the normal operating cycle of the business.

Current liabilities means obligations that are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business.

Fixed assets means plants and equipment, but does not include land or coal in place.

Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

Net worth means total assets minus total liabilities and is equivalent to owners' equity.

Parent corporation means a corporation which owns or controls the applicant.

Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The regulatory authority may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the state where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than 5 years. Continuous operation means that business was conducted over the 5 years immediately preceding the date of application.

(i) The regulatory authority may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the date of application.

(ii) When calculating the period of continuous operation, the regulatory authority may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations.

(3) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:

(i) The applicant has a current rating for its most recent bond issuance of ''A'' or higher as issued by either Moody's Investors Service or Standard and Poor's or an equivalent rating from any other nationally recognized statistical rating organization registered with the Securities and Exchange Commission.

(ii) The applicant has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(iii) The applicant's fixed assets in the United States total at least $20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits—

(i) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(ii) Unaudited financial statements for completed quarters in the current fiscal year; and

(iii) Additional unaudited information as requested by the regulatory authority.

(c)(1) The regulatory authority may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of paragraphs (b)(1) through (4) of this section as if it were the applicant. This written guarantee will be referred to as a ''corporate guarantee.'' The terms of the corporate guarantee must provide for the following:

(i) If the applicant fails to complete the reclamation plan, the guarantor must do so or the guarantor will be liable under the indemnity agreement to provide funds to the regulatory authority sufficient to complete the reclamation plan, but not to exceed the bond amount.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the regulatory authority at least 90 days in advance of the cancellation date, and the regulatory authority accepts the cancellation.

(iii) The cancellation may be accepted by the regulatory authority if the applicant obtains suitable replacement bond before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(2) The regulatory authority may accept a written guarantee for an applicant's self-bond from any corporate guarantor, whenever the applicant meets the conditions of paragraphs (b)(1), (2), and (4) of this section, and the guarantor meets the conditions of paragraphs (b)(1) through (4) of this section. This written guarantee will be referred to as a ''non-parent corporate guarantee.'' The terms of this guarantee must provide for compliance with the conditions of paragraphs (c)(1)(i) through (iii) of this section. The regulatory authority may require the applicant to submit any information specified in paragraph (b)(3) of this section in order to determine the financial capabilities of the applicant.

(d)(1) For the regulatory authority to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations may not exceed 25 percent of the applicant's tangible net worth in the United States.

(2) For the regulatory authority to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation

operations may not exceed 25 percent of the guarantor's tangible net worth in the United States.

(3) For the regulatory authority to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds may not exceed 25 percent of the guarantor's tangible net worth in the United States.

(e) If the regulatory authority accepts an applicant's self-bond, the applicant must submit an indemnity agreement subject to the following requirements:

(1) The indemnity agreement must be executed by all persons and parties who are to be bound by it, including the parent corporation guarantor. It must bind each party jointly and severally.

(2) Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond, must submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of the authorization must be provided to the regulatory authority along with an affidavit certifying that the agreement is valid under all applicable federal and state laws. In addition, the guarantor must provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.

(3) If the applicant is a partnership, joint venture or syndicate, the agreement must bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant.

(4) Pursuant to § 800.50, the applicant and the parent or non-parent corporate guarantor will be required to complete the approved reclamation plan for the lands in default or to pay to the regulatory authority an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement, when under forfeiture, will operate as a judgment against those parties liable under the indemnity agreement.

(f) A regulatory authority may require self-bonded applicants and parent and non-parent corporate guarantors to submit an update of the information required under paragraphs (b)(3) and (4) of this section within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant or the parent or non-parent corporate guarantor change so that the criteria of paragraphs (b)(3) and (d) of this section are not satisfied, the permittee must notify the regulatory authority immediately and post an alternate form of bond in the same amount as the self-bond within 90 days. Should the permittee fail to post an adequate substitute bond, the provisions of § 800.30(b) of this part will apply.

§ 800.30 When may I replace a bond or financial assurance instrument and when must I do so?

(a) *Replacement upon request of permittee.* (1) The regulatory authority may allow you, the permittee, to replace existing bonds and financial assurance instruments with other bonds and financial assurance instruments that provide equivalent coverage.

(2) If the proposed replacement bond under paragraph (a) of this section is a surety bond, the regulatory authority may decline to accept the replacement bond if, in the judgment of the regulatory authority, the new surety does not have adequate reinsurance or other resources sufficient to cover the default of one or more mining companies for which the surety has provided bond coverage.

(3) The regulatory authority may not release any existing performance bond or financial assurance instrument until you have submitted, and the regulatory authority has approved, an acceptable replacement.

(b) *Replacement by order of the regulatory authority.* (1) Upon the incapacity of a bank, surety, or other responsible financial entity by reason of bankruptcy, insolvency, or suspension or revocation of a charter or license, you will be deemed to be without bond coverage and you must promptly notify the regulatory authority.

(2) Upon receipt of notification under § 800.16(e) of this part or from you under paragraph (b)(1) of this section, the regulatory authority must issue an order requiring that you submit replacement bond or financial assurance coverage within a reasonable time, not to exceed 90 days.

(3) If you do not post adequate bond or financial assurance by the end of the time allowed, the regulatory authority must issue a notice of violation requiring that you post adequate bond or financial assurance coverage. If you are actively conducting surface coal mining operations, the notice of violation also must require that you cease coal extraction and reclaim the site in accordance with the provisions of § 816.132 or § 817.132 of this chapter.

§ 800.40 How do I apply for release of all or part of a bond?

(a) *When may I file an application for bond release?* You, the permittee, may file an application with the regulatory authority for the release of all or part of a performance bond only at times or during seasons authorized by the regulatory authority. The times or seasons appropriate for the evaluation of certain types of reclamation will be established in either the regulatory program or your permit.

(b) *What must I include in my application for bond release?* You must include—

(1) The application form and information required by the regulatory authority.

(2) A certified copy of an advertisement that you have placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. You must submit the copy within 30 days after you file the application under paragraph (b)(1) of this section. The advertisement must contain—

(i) Your name.

(ii) The permit number and approval date.

(iii) The number of acres and the precise location of the land for which you are requesting bond release.

(iv) The type and amount of the bond filed and the portion for which you seek release.

(v) The type and dates of reclamation work performed.

(vi) A description of the results that you have achieved under the approved reclamation plan, including an analysis of the results of the monitoring conducted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter.

(vii) The name and address of the regulatory authority to which written comments, objections, or requests for public hearings and informal conferences on the bond release application may be submitted pursuant to § 800.44 of this section.

(3) Copies of letters that you have sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality of the surface coal mining and reclamation operation, notifying them of your intention to seek release of the bond.

(4) A notarized statement certifying that all applicable reclamation activities have been accomplished in accordance with the requirements of the regulatory program and the approved reclamation plan. You must submit a separate certification for each application and each phase of bond release.

§ 800.41 How will the regulatory authority process my application for bond release?

(a)(1) Upon receipt of a complete application for bond release, the regulatory authority will, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection of the site and an evaluation of the reclamation work performed and the reclamation work remaining.

(2) A complete application is one that includes all items required under § 800.40 of this part.

(3) The evaluation will consider, among other factors, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution.

(b)(1) The regulatory authority will notify the surface owner, agent, or lessee before conducting the inspection and will offer that person an opportunity to participate with the regulatory authority in making the inspection.

(2) The regulatory authority may arrange with you to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

§ 800.42 What are the criteria for bond release?

(a) *General requirements.* (1) Except as provided in paragraphs (a)(2) through (5) of this section, the regulatory authority may release all or part of the bond for the permit area or an increment thereof if the regulatory authority is satisfied that you have accomplished the required reclamation for the permit area or increment in accordance with paragraphs (b) through (d) of this section.

(2) The regulatory authority may not release any bond under this section if, after an evaluation of the monitoring data submitted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter, it determines that adverse trends exist that may result in material damage to the hydrologic balance outside the permit area.

(3) If a discharge requiring long-term treatment exists either on the permit area or at a point that is hydrologically connected to the permit area, you must post a separate bond or financial assurance under § 800.18 of this part before any portion of the existing bond for the permit area may be released.

(4) If the permit area or increment includes a variance from restoration of the approximate original contour under § 785.16 of this chapter, the portion of the bond described in § 785.16(a)(13) of this chapter may not be released in whole or in part until the approved postmining land use is implemented or until the site is restored to the approximate original contour and revegetated in accordance with §§ 816.111 and 816.116 or §§ 817.111 and 817.116 of this chapter.

(5) The bond amount described in § 780.24(d)(2) or § 784.24(d)(2) of this chapter may not be released either until the structure is in use as part of the postmining land use or until the structure is removed and the site upon which it was located is reclaimed in accordance with part 816 or part 817 of this chapter.

(6) The regulatory authority must consider the results of the evaluation conducted under § 800.41(a)(3) of this part when determining the amount of bond to release.

(b) *Phase I reclamation.* (1) The regulatory authority may release a maximum of 60 percent of the bond for a bonded area after you complete Phase I reclamation for that area in accordance with the approved reclamation plan. Phase I reclamation consists of backfilling, grading, and drainage control. It includes restoration of the form of perennial and intermittent stream segments under § 816.57 or § 817.57 of this chapter. Soil replacement is optional for this phase.

(2) The amount of bond that the regulatory authority retains after Phase I release must be adequate to ensure that the regulatory authority will have sufficient funds for a third party to complete the remaining portion of the reclamation plan, including restoration of the ecological function of perennial and intermittent streams under § 816.57 or § 817.57 of this chapter and completion of any fish and wildlife enhancement measures required in the permit in accordance with § 780.16 or § 784.16 of this chapter, in the event of forfeiture.

(c) *Phase II reclamation.* (1) The regulatory authority may release an additional amount of bond after you complete Phase II reclamation, which consists of soil replacement (if not accomplished as part of Phase I reclamation) and successfully establishing revegetation on the area in accordance with the approved reclamation plan. The regulatory authority must establish standards defining successful establishment of vegetation for purposes of this paragraph.

(2) The amount of bond that the regulatory authority retains after Phase II release must be sufficient to cover the cost of having a third party reestablish revegetation for the revegetation responsibility period under § 816.115 or § 817.115 of this chapter. In addition, it must be adequate to ensure that the regulatory authority will have sufficient funds for a third party to complete the remaining portion of the reclamation plan, including restoration of the ecological function of perennial and intermittent streams under § 816.57 or § 817.57 of this chapter and completion of any fish and wildlife enhancement measures required in the permit in accordance with § 780.16 or § 784.16 of this chapter, in the event of forfeiture.

(3) The regulatory authority may not release any part of the bond under paragraph (c)(1) of this section if the lands to which the release would apply are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by subchapter K of this chapter.

(4) The regulatory authority may not release any part of the bond under paragraph (c)(1) of this section until soil productivity for any prime farmland on the area to which the release would apply has returned to levels of yield equivalent to those of nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed under part 823 of this chapter.

(5) When the regulatory authority has approved retention of a silt dam as a permanent impoundment under § 816.49(b) or § 817.49(b) of this chapter, the regulatory authority may approve Phase II bond release for the area of the impoundment if the requirements of § 816.56 or § 817.56 of this chapter have been met and provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

(d) *Phase III reclamation.* (1) The regulatory authority must release the remaining portion of the bond upon the completion of Phase III reclamation, which consists of successful completion of all surface coal mining and reclamation activities and expiration of the revegetation responsibility period under § 816.115 or § 817.115 of this chapter.

(2) The regulatory authority may not fully release any bond under provisions of this section until all applicable reclamation requirements of the regulatory program and the permit are fully met. Among other things, those requirements include restoration of the ecological function of perennial and intermittent streams under § 816.57 or § 817.57 of this chapter and completion of any fish and wildlife enhancement measures required in the permit in

accordance with § 780.16 or § 784.16 of this chapter.

§ 800.43 When and how must the regulatory authority provide notification of its decision on a bond release application?

(a) The regulatory authority will provide written notification of its decision on your bond release application to you, the surety (if applicable), any other persons with an interest in bond collateral who have requested notification under § 800.21(f) of this part, persons who filed objections in writing, and objectors who were a party to the hearing proceedings, if any. The regulatory authority will provide this notification—

(1) Within 60 days after you file the application, if there is no public hearing under § 800.44 of this part, or

(2) Within 30 days after a public hearing has been held under § 800.44 of this part.

(b) If the regulatory authority disapproves your application for release of the bond or portion thereof, the regulatory authority must notify you, the surety, and any person with an interest in collateral as provided in § 800.21(f) of this part, in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing an opportunity for a public hearing.

(c) When any application for total or partial bond release is filed with the regulatory authority, the regulatory authority must notify the municipality in which the surface coal mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond.

§ 800.44 Who may file an objection to a bond release application and how must the regulatory authority respond to an objection?

(a)(1) Any person with a valid legal interest that might be adversely affected by release of the bond, or the responsible officer or head of any federal, state, or local governmental agency with jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to those operations, has the right to file written objections to the proposed bond release with the regulatory authority within 30 days after the last publication of the notice required by § 800.40(b)(2) of this part.

(2) If written objections are filed and a hearing is requested, the regulatory authority must inform all interested parties of the time and place of the hearing, and hold a public hearing within 30 days after receipt of the request for the hearing. The regulatory authority must advertise the date, time, and location of the public hearing in a newspaper of general circulation in the locality for two consecutive weeks.

(3) The public hearing must be held in the locality of the surface coal mining operation for which bond release is sought, at the location of the regulatory authority office, or at the state capital, at the option of the objector.

(b)(1) For the purpose of the hearing under paragraph (a) of this section, the regulatory authority has the authority to administer oaths, subpoena witnesses or written or printed material, compel the attendance of witnesses or the production of materials, and take evidence including, but not limited to, inspection of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity.

(2) A verbatim record of each public hearing must be made, and a transcript must be made available on the motion of any party or by order of the regulatory authority.

(c) Without prejudice to the right of an objector or the applicant for bond release, the regulatory authority may hold an informal conference as provided in section 513(b) of the Act to resolve written objections. The regulatory authority must make a record of the informal conference unless waived by all parties, which must be accessible to all parties. The regulatory authority also must furnish all parties to the informal conference with a written finding based on the informal conference, and the reasons for the finding.

§ 800.50 When and how will a bond be forfeited?

(a) If a permittee or operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the permittee or operator defaults on the conditions under which the bond was accepted, the regulatory authority must take the following action to forfeit all or part of a bond or bonds for any permit area or an increment of a permit area:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the determination to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited. The amount must be based on the estimated total cost of achieving the reclamation plan requirements.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Those conditions may include, but are not limited to—

(i) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule that meets the conditions of the permit, the reclamation plan, and the regulatory program and a demonstration that the party has the ability to satisfy the conditions; or

(ii) The regulatory authority may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. Except where the reclamation work performed meets the criteria for partial bond release under § 800.42 of this part, no surety liability may be released until successful completion of all reclamation under the terms of the permit, including applicable liability periods of § 800.13 of this part.

(b) In the event forfeiture of the bond is required by this section, the regulatory authority shall—

(1) Proceed to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if rights of appeal, if any, have not been exercised within a time established by the regulatory authority, or if such appeal, if taken, is unsuccessful.

(2) Use funds collected from bond forfeiture to complete the reclamation plan, or portion thereof, on the permit area or increment, to which bond coverage applies.

(c) Upon default, the regulatory authority may cause the forfeiture of any and all bonds deposited to complete reclamation for which the bonds were posted. Unless specifically limited, as provided in § 800.11(c) of this part, bond liability will extend to the entire permit area under conditions of forfeiture.

(d)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the permittee or operator is liable for remaining costs. The regulatory authority may complete, or authorize completion of, reclamation of the bonded area and may recover from the permittee or operator all costs of reclamation in excess of the amount forfeited.

(2) In the event the amount of performance bond forfeited is more than the amount necessary to complete reclamation, the regulatory authority

must return the unused funds to the party from whom they were collected.

§ 800.60 What liability insurance must I carry?

(a) The regulatory authority must require the applicant to submit as part of its permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operations for which the permit is sought. The policy must provide for personal-injury and property-damage protection in an amount adequate to compensate any persons injured or property damaged as a result of the surface coal mining and reclamation operations, including the use of explosives, and who are entitled to compensation under the applicable provisions of state law. Minimum insurance coverage for bodily injury and property damage is $300,000 for each occurrence and $500,000 aggregate.

(b) The policy must be maintained in full force during the life of the permit or any renewal thereof and the liability period necessary to complete all reclamation operations under this chapter.

(c) The policy must include a rider requiring that the insurer notify the regulatory authority whenever substantive changes are made in the policy, including any termination or failure to renew.

(d) The regulatory authority may accept from the applicant, in lieu of a certificate for a public liability insurance policy, satisfactory evidence from the applicant that it satisfies applicable state self-insurance requirements approved as part of the regulatory program and the requirements of this section.

§ 800.70 What special bonding provisions apply to anthracite operations in Pennsylvania?

(a) All provisions of this subchapter apply to bonding and insuring anthracite surface coal mining and reclamation operations in Pennsylvania except that—

(1) The regulatory authority must determine specified bond limits in accordance with applicable provisions of Pennsylvania statutes, rules and regulations adopted thereunder, and implementing policies of the Pennsylvania regulatory authority.

(2) The period of liability for responsibility under each bond must be established for those operations in accordance with applicable laws of the Commonwealth of Pennsylvania, rules and regulations adopted thereunder, and implementing policies of the Pennsylvania regulatory authority.

(b) Upon amendment of the Pennsylvania permanent regulatory program with respect to specified bond limits and the period of revegetation responsibility for anthracite surface coal mining and reclamation operations, any person engaging in or seeking to engage in those operations must comply with additional regulations the Secretary may issue as are necessary to meet the purposes of the Act.

■ 32. Lift the suspensions of §§ 816.46(b)(2) and 816.101, and revise part 816 to read as follows:

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

Sec.

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Authority: 30 U.S.C. 1201 *et seq.*

§ 816.1 Scope: What does this part do?

This part sets forth the minimum environmental protection performance standards for surface mining activities under the Act.

§ 816.2 What is the objective of this part?

This part is intended to ensure that all surface mining activities are conducted in an environmentally sound manner in accordance with the Act.

§ 816.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–xxxx. Collection of this information is required under section 515 of SMCRA, which provides that permittees conducting surface coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 816.11 What signs and markers must I post?

(a) *General specifications.* Signs and markers required under this part must—

(1) Be posted and maintained by the person who conducts the surface mining activities;

(2) Be of a uniform design throughout the operation;

(3) Be easily seen and read;

(4) Be made of durable material; and

(5) Conform to local ordinances and codes.

(b) *Duration of maintenance.* You must maintain signs and markers during the conduct of all activities to which they pertain.

(c) *Mine and permit identification signs.* (1) You must display identification signs at each point of access to the permit area from public roads.

(2) The signs must show the name, business address, and telephone number of the person who conducts the surface mining activities and the identification number of the current permit authorizing surface mining activities.

(3) You must retain and maintain the signs until the release of all bonds for the permit area.

(d) *Perimeter markers.* You must clearly mark the perimeter of the permit area before beginning surface mining activities.

(e) *Stream buffer zone markers.* You must clearly mark the boundaries of any buffer to be maintained between surface mining activities and a perennial or intermittent stream in accordance with §§ 780.28 and 816.57 of this chapter to avoid disturbance by surface mining activities.

(f) *Topsoil markers.* You must clearly mark stockpiles of topsoil, subsoil, or other plant growth media segregated and stored as required in the permit in accordance with § 816.22 of this part.

§ 816.13 What special requirements apply to drilled holes, wells, and exposed underground openings?

(a) Except as provided in paragraph (f) of this section, you must case, line, otherwise manage each exploration hole, drilled hole, borehole, shaft, well, or other exposed underground opening in a manner approved by the regulatory authority to—

(1) Prevent acid or other toxic drainage from entering groundwater and surface water.

(2) Minimize disturbance to the prevailing hydrologic balance.

(3) Ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and the adjacent area.

(b) If the approved permit identifies an exploration hole, drilled hole, borehole, well, or other exposed underground opening for use to monitor groundwater or to return coal processing waste or water to underground workings, you must temporarily seal the hole or opening before use and protect it during use by installing barricades, fences, or other protective devices approved by the regulatory authority. You must periodically inspect these devices and maintain them in good operating condition.

(c) You may retain and transfer a drilled hole or groundwater monitoring well for use as a water well under the conditions established in § 816.39 of this part.

(d) Except as provided in paragraph (c) of this section, you must permanently close each exploration hole, drilled hole, borehole, well, or underground opening that mining activities uncover or expose within the permit area, unless the regulatory authority—

(1) Approves use of the hole, well, or opening for water monitoring purposes; or

(2) Authorizes other management of the hole or well.

(e)(1) Except as provided in paragraph (c) of this section, you must cap, seal, backfill, or otherwise properly manage each shaft, drift, adit, tunnel, exploratory hole, entryway or other opening to the surface from underground when no longer needed for monitoring or any other use that the regulatory authority approves after finding that the use will not adversely affect the environment or public health and safety.

(2) Permanent closure measures taken under paragraph (e)(1) of this section must be—

(i) Consistent with § 75.1771 of this title;

(ii) Designed to prevent access to the mine workings by people, livestock, fish and wildlife, and machinery; and

(iii) Designed to keep acid or toxic mine drainage from entering groundwater or surface water.

(f) The requirements of this section do not apply to holes drilled and used for blasting for surface mining purposes.

§ 816.14 [Reserved]

§ 816.15 [Reserved]

§ 816.22 How must I handle topsoil, subsoil, and other plant growth media?

(a) *Removal and salvage.* (1) You, the permittee, must separately remove and salvage all topsoil and other soil materials identified for salvage and use as postmining plant growth media in the soil handling plan approved in the permit under § 780.12(e) of this chapter. You must complete removal and salvage of these materials from the area to be disturbed before any drilling, blasting, mining, or other surface disturbance takes place on that area.

(2) The regulatory authority may choose not to require the removal of topsoil and other soil materials for minor disturbances that—

(i) Occur at the site of small structures, such as power poles, signs, or fence lines; or

(ii) Will not destroy the existing vegetation and will not cause erosion.

(b) *Storage.* (1) You must segregate and, except as provided in paragraph (b)(3) of this section, stockpile the materials removed under paragraph (a) of this section when it is impractical to

redistribute those materials promptly on regraded areas.

(2) Stockpiled materials must—

(i) Be selectively placed on a stable site within the permit area;

(ii) Be protected from contaminants and unnecessary compaction that would interfere with revegetation;

(iii) Be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick-growing, non-invasive vegetative cover or through other measures approved by the regulatory authority; and

(iv) Not be moved until required for redistribution unless approved by the regulatory authority.

(3) When stockpiling of organic matter and soil materials removed under paragraphs (a) and (f) of this section would be detrimental to the quality or quantity of those materials, you may temporarily redistribute those soil materials on an approved site within the permit area to enhance the current use of that site until the materials are needed for later reclamation, provided that—

(i) Temporary redistribution will not permanently diminish the capability of the topsoil of the host site; and

(ii) The redistributed material will be preserved in a condition more suitable for redistribution than if it were stockpiled.

(c) *Soil substitutes and supplements.* When the soil handling plan approved in the permit in accordance with § 780.12(e) of this chapter provides for the use of substitutes for or supplements to the existing topsoil or subsoil, you must salvage, store, and redistribute the overburden materials selected and approved for that purpose in a manner consistent with paragraphs (a), (b), and (e) of this section.

(d) *Site preparation.* (1) You must minimize grading of backfilled areas to avoid compaction of the reconstructed root zone, as specified in the soil handling plan approved in the permit in accordance with § 780.12(e) of this chapter. Compaction is allowed only to the extent necessary to ensure stability and to comply with water-quality standards.

(2) If necessary, you must rip, chisel-plow, or otherwise mechanically treat backfilled and graded areas before topsoil redistribution to reduce potential slippage of the redistributed material and to promote root penetration. You may conduct this treatment after soil redistribution if doing so will not harm the redistributed material.

(e) *Redistribution.* (1) You must redistribute the materials removed, salvaged, and, if necessary, stored under paragraphs (a) through (c) of this section in a manner that—

(i) Complies with the soil handling plan developed under § 780.12(e) of this chapter and approved as part of the permit.

(ii) Is consistent with the approved postmining land use, contours, and surface-water drainage systems.

(iii) Minimizes compaction of the materials to the extent possible and alleviates any excess compaction that may occur.

(iv) Protects the materials from wind and water erosion before and after seeding and planting to the extent necessary to ensure establishment of a successful vegetative cover and to avoid causing or contributing to a violation of applicable water quality standards.

(v) Achieves an approximately uniform, stable thickness across the regraded area, except that the thickness may vary when consistent with the postmining land use and when variations are necessary or desirable to achieve specific revegetation goals and ecological diversity, as set forth in the revegetation plan developed under § 780.12(g) of this chapter and approved as part of the permit.

(2) You must use a statistically valid sampling technique to document that soil materials have been redistributed in the locations and depths required by the soil handling plan developed under § 780.12(e) of this chapter and approved as part of the permit.

(3) The regulatory authority may choose not to require the redistribution of topsoil on the embankments of permanent impoundments or on the embankments of roads to be retained as part of the postmining land use if it determines that—

(i) Placement of topsoil on those embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) The embankments will be otherwise stabilized.

(f) *Organic matter.* (1) You must salvage duff, other organic litter, and vegetative materials such as tree tops, small logs, and root balls. You may not burn organic matter or bury it in the backfill.

(2) Except as otherwise provided in paragraph (f)(3) of this section, you must redistribute the materials salvaged under paragraph (f)(1) of this section across the regraded surface or incorporate them into the soil to control erosion, promote growth of vegetation, serve as a source of native plant seeds and soil inoculants to speed restoration of the soil's ecological community, and increase the moisture retention capability of the soil.

(3) Vegetative debris must be redistributed in accordance with paragraph (f)(2) of this section, used for stream restoration purposes, or used to construct fish and wildlife habitat enhancement features.

§ 816.34 How must I protect the hydrologic balance?

(a) You, the permittee, must conduct all surface mining and reclamation activities to—

(1) Minimize disturbance of the hydrologic balance within the permit and adjacent areas.

(2) Prevent material damage to the hydrologic balance outside the permit area.

(3) Protect streams in accordance with §§ 780.28 and 816.57 of this chapter.

(4) Assure the protection or replacement of water supplies to the extent required by § 816.40 of this part.

(5) Protect existing water rights under state law.

(6) Support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part.

(7) Comply with the hydrologic reclamation plan as submitted under § 780.22 of this chapter and approved in the permit.

(8) Protect groundwater quality by using the best technology currently available to handle earth materials and runoff in a manner that avoids the formation of acid or toxic mine drainage and by managing excavations and other disturbances to prevent or control groundwater degradation.

(9) Protect groundwater quantity by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and excess spoil fills, so as to allow the movement of water into the groundwater system.

(10) Protect surface-water quality by using the best technology currently available to handle earth materials, groundwater discharges, and runoff in a manner that—

(i) Avoids the formation of acid or toxic mine drainage.

(ii) Prevents additional contribution of suspended solids to streamflow or runoff outside the permit area to the extent possible.

(iii) Otherwise prevents water pollution.

(11) Protect surface-water quality and flow rates by handling earth materials and runoff in accordance with the steps outlined in the hydrologic reclamation

plan and the surface-water runoff control plan approved in the permit in accordance with §§ 780.22 and 780.29 of this chapter, respectively.

(b)(1) To the maximum extent practicable, you must use mining and reclamation practices that minimize water pollution, changes in flow, and adverse impacts on stream biota rather than relying upon water treatment to minimize those impacts.

(2) You must install, use, and maintain any necessary water-treatment facilities or water-quality controls if drainage control, materials handling, stabilization and revegetation of disturbed areas, diversion of runoff, mulching, and other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42 of this part.

(c) The regulatory authority may require that you take preventive, remedial, or monitoring measures in addition to those set forth in this part to prevent material damage to the hydrologic balance outside the permit area.

(d)(1) You must examine the hydraulic structures identified under § 780.29 of this chapter after each occurrence of the following precipitation events:

(i) In areas with an average annual precipitation of more than 26.0 inches, an event of a size equal to or greater than that of a storm with a 2-year recurrence interval. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flow for a storm with that recurrence interval.

(ii) In areas with an average annual precipitation of 26.0 inches or less, a significant event of a size specified by the regulatory authority.

(2) You must prepare a report, which must be certified by a registered professional engineer, and submit the report to the regulatory authority within 48 hours of cessation of the applicable precipitation event under paragraph (d)(1) of this section. The report must address the performance of the hydraulic structures, identify and describe any material damage to the hydrologic balance outside the permit area that occurred, and identify and describe the remedial measures taken in response to that damage.

§ 816.35 How must I monitor groundwater?

(a)(1)(i) You, the permittee, must monitor groundwater in the manner specified in the groundwater monitoring plan approved in the permit in accordance with § 780.23(a) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the entire bond amount for the monitored area has been fully released under § 800.42(d) of this chapter.

(b)(1) You must submit groundwater monitoring data to the regulatory authority every 3 months, or more frequently if prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take the actions required under § 773.17(e) of this chapter, if any, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the groundwater monitoring requirements, including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future changes in groundwater quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas when groundwater from the permit area provides all or part of the base flow of those streams.

(iv) Maintained the availability and quality of groundwater in a manner that can support existing and reasonably foreseeable uses.

(v) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring groundwater, consistent with §§ 816.13 and 816.39 of this part.

§ 816.36 How must I monitor surface water?

(a)(1)(i) You, the permittee, must monitor surface water in the manner specified in the surface-water monitoring plan approved in the permit in accordance with § 780.23(b) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the entire bond amount for the monitored area is fully released under § 800.42(d) of this chapter.

(b)(1) You must submit surface-water monitoring data to the regulatory authority every 3 months, or more frequently when prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(3) The reporting requirements of paragraph (b) of this section do not exempt you from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take the actions required under § 773.17(e) of this chapter, if any, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the surface-water monitoring requirements (except those required by the NPDES permitting authority), including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future changes in surface-water quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(iv) Maintained the availability and quality of surface water in a manner that can support existing and reasonably foreseeable uses and that does not preclude attainment of designated uses under section 101(a) or 303(c) of the Clean Water Act.

(v) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring surface water.

§ 816.37 How must I monitor the biological condition of streams?

(a)(1)(i) You must monitor the biological condition of perennial and intermittent streams in the manner specified in the plan approved in the permit in accordance with § 780.23(c) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter and use a bioassessment protocol that complies with § 780.19(e)(2) of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the entire bond amount for the monitored area has been fully released under § 800.42(d) of this chapter.

(b)(1) You must submit biological condition monitoring data to the regulatory authority on an annual basis, or more frequently if prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(c) Whenever the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take the actions required under § 773.17(e) of this chapter, if any, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter.

(d) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to meet the requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

§ 816.38 How must I handle acid-forming and toxic-forming materials?

You, the permittee, must use the best technology currently available to handle acid-forming and toxic-forming materials in a manner that will avoid the creation of acid or toxic mine drainage into surface water and groundwater. At a minimum, you must—

(a) Identify potential acid-forming and toxic-forming materials in overburden strata and the stratum immediately below the lowest coal seam to be mined and cover exposed coal seams and the stratum immediately beneath the lowest coal seam mined with a layer of compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil to minimize contact and interaction with water.

(b) Identify the anticipated postmining groundwater level for all locations at which you propose to place acid-forming or toxic-forming materials.

(c) Selectively handle and place acid-forming and toxic-forming materials within the backfill in accordance with the plan approved in the permit under § 780.12(d)(4) of this chapter, unless the permit allows placement of those materials in an excess spoil fill or a coal mine waste refuse pile. When placing those materials in the backfill, you must use one or more of the following techniques, as appropriate and as approved in the permit:

(1) Completely surround acid-forming and toxic-forming materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of adjacent less-compacted spoil.

(2) Place acid-forming and toxic-forming materials in a location below the water table where they will remain fully saturated at all times, provided that the permittee demonstrates, and the regulatory authority finds in writing in the permit, that complete saturation will prevent the formation of acid or toxic leachate.

(3) Treat or otherwise neutralize acid-forming and toxic-forming materials to prevent the formation of acid or toxic mine drainage. This technique also may be used in combination with either isolation under paragraph (c)(1) of this section or saturation under paragraph (c)(2) of this section.

(d) When approved in the permit, place acid-forming and toxic-forming materials in an excess spoil fill or a coal mine waste refuse pile, using one or both of the following techniques, as appropriate:

(1) Completely surround acid-forming and toxic-forming materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent uncompacted spoil or coal mine waste.

(2) Treat or otherwise neutralize acid-forming and toxic-forming materials to prevent the formation of acid or toxic mine drainage.

(e) Temporarily store acid-forming and toxic-forming materials only if the regulatory authority specifically approves temporary storage as necessary and finds in writing in the permit that the proposed storage method will protect surface water and groundwater by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water into aquifers. The regulatory authority must specify a maximum time for temporary storage, which may not exceed the period until burial first becomes feasible. In addition, storage must not result in any risk of water pollution, adverse impacts to the biological condition of perennial or intermittent streams, or other environmental damage.

(f) Adhere to disposal, treatment, and storage practices that are consistent with other material handling and disposal provisions of this chapter.

§ 816.39 What must I do with exploratory or monitoring wells when I no longer need them?

(a) Except as provided in paragraph (b) of this section, you, the permittee, must permanently seal exploratory or monitoring wells in a safe and environmentally sound manner in accordance with § 816.13 of this part before the regulatory authority may approve full release of the bond posted for the land on which the wells are located under section § 800.42(d) of this chapter.

(b) With the prior approval of the regulatory authority, you may transfer wells to another party for further use. The conditions of the transfer must comply with state and local laws. You will remain responsible for the proper

management of the wells until full release of the bond posted for the land on which the wells are located under § 800.42(d) of this chapter.

§ 816.40 What responsibility do I have to replace water supplies?

(a) *Replacement of adversely-impacted water supplies.* (1) You, the permittee, must replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source when the water supply has been adversely impacted by contamination, diminution, or interruption as a result of your surface mining activities.

(2) The replacement supply must be equivalent to the quantity and quality of the premining supply.

(3) Replacement includes provision of an equivalent water supply delivery system and payment of operation and maintenance expenses in excess of customary and reasonable delivery costs for the premining water supply. If you and the water supply owner agree, the obligation to pay operation and maintenance costs may be satisfied by a one-time payment in an amount that covers the present worth of the increased annual operation and maintenance costs for a period upon which you and the water supply owner agree.

(4) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, you may satisfy the replacement requirements by demonstrating that a suitable alternative water source is available and could feasibly be developed, provided you obtain written concurrence from the owner of the affected water supply.

(b) *Measures to address anticipated adverse impacts to protected water supply losses.* For anticipated loss of or damage to a protected water supply, you must adhere to the requirements set forth in the permit in accordance with § 780.22(b) of this chapter.

(c) *Measures to address unanticipated adverse impacts to protected water supplies.* For unanticipated loss of or damage to a protected water supply, you must—

(1) Provide an emergency temporary water supply within 24 hours of notification of the loss. The temporary supply must be adequate in quantity and quality to meet normal household needs.

(2) Develop and submit a plan for a permanent replacement supply to the regulatory authority within 30 days of receiving notice that an unanticipated loss of or damage to a protected water supply has occurred.

(3) Provide a permanent replacement water supply within 2 years of the date of receiving notice of an unanticipated loss of or damage to a protected water supply.

(d) *Basis for determination of adverse impact.* The regulatory authority must use the baseline hydrologic and geologic information required under § 780.19 of this chapter and all other available information to determine whether and to what extent the mining operation adversely impacted the damaged water supply.

§ 816.41 Under what conditions may I discharge water and other materials into an underground mine?

(a) You may not discharge any water or other materials from a surface coal mining and reclamation operation into an underground mine unless the regulatory authority specifically approves the discharge in writing, based upon a demonstration that—

(1) The discharge will be made in a manner that—

(i) Minimizes disturbances to the hydrologic balance within the permit area;

(ii) Prevents material damage to the hydrologic balance outside the permit area, including the hydrologic balance of the area in which the underground mine receiving the discharge is located;

(iii) Does not adversely impact the biological condition of perennial or intermittent streams; and

(iv) Otherwise eliminates public hazards resulting from surface mining activities.

(2) The discharge will not result in a violation of applicable water quality standards or effluent limitations.

(3)(i) The discharge will be at a known rate and of a quality that will meet the effluent limitations for pH and total suspended solids referenced in § 816.42 of this part.

(ii) The regulatory authority may approve discharges of water that exceed the effluent limitations for pH and total suspended solids if the available evidence indicates that there is no direct hydrologic connection between the underground mine and other waters and that those exceedances will not be inconsistent with paragraph (a)(1) of this section.

(4) The Mine Safety and Health Administration has approved the discharge.

(5) You have obtained written permission from the owner of the mine into which the discharge is to be made and you have provided a copy of that authorization to the regulatory authority.

(b) Discharges are limited to the following materials:

(1) Water.

(2) Coal processing waste.

(3) Fly ash from a coal-fired facility.

(4) Sludge from an acid-mine-drainage treatment facility.

(5) Flue-gas desulfurization sludge.

(6) Inert materials used for stabilizing underground mines.

(7) Underground mine development waste.

§ 816.42 What are my responsibilities to comply with water quality standards and effluent limitations?

(a) Discharges of water from surface mining activities and from areas disturbed by surface mining activities must be made in compliance with all applicable water quality laws and regulations, including the effluent limitations established in the National Pollutant Discharge Elimination System permit for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342.

(b) Discharges of overburden, coal mine waste, and other materials into waters of the United States must be made in compliance with section 404 of the Clean Water Act, 33 U.S.C. 1344, and its implementing regulations.

(c) You must construct water treatment facilities for discharges from the operation as soon as the need for those facilities becomes evident.

(d)(1) You must remove precipitates and otherwise maintain all water treatment facilities requiring the use of settling ponds or lagoons as necessary to maintain the functionality of those facilities.

(2) You must dispose of all precipitates removed from facilities under paragraph (d)(1) of this section either in an approved solid waste landfill or within the permit area in accordance with a plan approved by the regulatory authority.

(e) You must operate and maintain water treatment facilities until the regulatory authority authorizes removal based upon monitoring data demonstrating that influent to the facilities meets all applicable water quality standards and effluent limitations without treatment.

§ 816.43 How must I construct and maintain diversions and other channels to convey water?

(a) *General provisions.* (1) When approved in the permit, you may divert the following flows away from the

disturbed area by means of temporary or permanent diversions:

(i) Any flow from mined areas abandoned before May 3, 1978.

(ii) Any flow from undisturbed areas.

(iii) Any flow from reclaimed areas for which the criteria of § 816.46 of this part for siltation structure removal have been met.

(2) You may not divert water into underground mines without approval of the regulatory authority under § 816.41 of this part.

(3) When the permit requires the use of siltation structures for sediment control, you must construct diversions or other channels designed to the standards of this section to convey runoff from the disturbed area to a siltation structure unless the topography will naturally direct all runoff to a siltation structure.

(4) All diversions must be designed to—

(i) Ensure the safety of the public.

(ii) Minimize adverse impacts to the hydrologic balance, including the biological condition of perennial and intermittent streams, within the permit and adjacent areas.

(iii) Prevent material damage to the hydrologic balance outside the permit area.

(5) Each diversion and its appurtenant structures must be designed, located, constructed, maintained and used to—

(i) Be stable.

(ii) Provide and maintain a combination of channel and bank configuration adequate to pass safely the peak flow of surface runoff from a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flows.

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area.

(iv) Comply with all applicable federal, state, and local laws and regulations.

(6)(i) You must remove temporary diversions promptly when they are no longer needed to achieve the purpose for which they were authorized.

(ii) You must restore the land disturbed by the removal process in accordance with this part.

(iii) Before temporary diversions are removed, you must modify or remove downstream water-treatment facilities previously protected by the diversion when necessary to prevent overtopping or failure of the facilities. You must continue to maintain water-treatment facilities until they are no longer needed.

(7) The regulatory authority may specify additional design criteria for diversions to meet the requirements of this section.

(b) *Diversion of perennial and intermittent streams.* Sections 780.28 and 816.57 of this chapter contain additional requirements applicable to diversions of perennial and intermittent streams.

(c) *Diversion of miscellaneous flows.* (1) Miscellaneous flows, which consist of all surface-water flows except perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the regulatory authority.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows must meet the requirements of paragraph (a) of this section.

§ 816.45 What sediment control measures must I implement?

(a) You must design, construct, and maintain appropriate sediment control measures, using the best technology currently available to—

(1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(2) Meet the more stringent of the applicable effluent limitations referenced in § 816.42(a) of this part.

(3) Minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within and adjacent to the disturbed area. Sediment control measures consist of the use of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation.

(2) Shaping and stabilizing the backfilled material to promote a reduction in the rate and volume of runoff.

(3) Retaining sediment within disturbed areas.

(4) Diverting runoff away from disturbed areas.

(5) Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion.

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment.

(7) Treating with chemicals.

(8) Treating mine drainage in underground sumps.

§ 816.46 What requirements apply to siltation structures?

(a) *Scope.* For the purpose of this section only, *disturbed areas* do not include those areas—

(1) In which the only surface mining activities consist of diversions, siltation structures, or roads that are designed, constructed, and maintained in accordance with this part; and

(2) For which you do not plan to otherwise disturb the land surface upgradient of the diversion, siltation structure, or road.

(b) *General requirements.* (1) When siltation structures will be used to achieve the requirements of § 816.45 of this part, you must construct those structures before beginning any surface mining activities that will disturb the land surface.

(2) Upon completion of construction of a siltation structure, a qualified registered professional engineer, or, in any state that authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter, a qualified registered professional land surveyor, must certify that the structure has been constructed as designed and as approved in the reclamation plan in the permit.

(3) Any siltation structure that impounds water must be designed, constructed and maintained in accordance with § 816.49 of this chapter.

(4) You must maintain siltation structures until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated.

(5)(i) When a siltation structure is removed, you must regrade the land upon which the structure was located and revegetate the land in accordance with the reclamation plan and §§ 816.111 and 816.116 of this chapter.

(ii) Paragraph (b)(5)(i) of this section does not apply to sedimentation ponds approved by the regulatory authority for retention as permanent impoundments under § 816.49(b) of this part if the maintenance requirements of § 800.42(c)(5) of this chapter are met.

(c) *Sedimentation ponds.* (1) When used, sedimentation ponds must—

(i) Be located as near as possible to the disturbed area and outside perennial or intermittent stream channels unless approved by the regulatory authority in

the permit in accordance with §§ 780.28 and 816.57(c) of this chapter.

(ii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume.

(B) Provide adequate detention time to allow the effluent from the ponds to meet applicable effluent limitations.

(C) Contain or treat the 10-year, 24-hour precipitation event (''design event'') unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 816.42 of this part will be met.

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(ii)(B) of this section.

(E) Minimize short circuiting to the extent possible.

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event.

(G) Ensure against excessive settlement.

(H) Be free of sod, large roots, frozen soil, and acid-forming or toxic-forming materials.

(I) Be compacted properly.

(2) *Spillways.* A sedimentation pond must include either a combination of principal and emergency spillways or a single spillway configured as specified in § 816.49(a)(9) of this part.

(d) *Other treatment facilities.* (1) You must design other treatment facilities to treat the 10-year, 24-hour precipitation event unless the regulatory authority approves a lesser design event based upon terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 816.42 of this part will be met.

(2) You must design other treatment facilities in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* The regulatory authority may grant an exemption from the requirements of this section if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) You demonstrate that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed drainage area to meet the effluent limitations referenced in § 816.42 of this part and the applicable water quality standards for the receiving waters.

§ 816.47 What requirements apply to discharge structures for impoundments?

Discharges from sedimentation ponds, permanent and temporary impoundments, coal mine waste impounding structures, and diversions must be controlled by energy dissipators, riprap channels, and other devices, when necessary to reduce erosion, to prevent deepening or enlargement of stream channels, or to minimize disturbance of the hydrologic balance. Discharge structures must be designed according to standard engineering design procedures.

§ 816.49 What requirements apply to impoundments?

(a) Requirements that apply to both permanent and temporary impoundments—(1) *Impoundments with Significant Hazard Class or High Hazard Class dams.* Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class dams in ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the ''Minimum Emergency Spillway Hydrologic Criteria'' table in that publication and the requirements of this section. Technical Release No. 60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* A copy of this document is on file for public inspection and copying at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240. For information on the availability of this document at OSMRE, call 202–208–2823. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(2) *MSHA requirements.* An impoundment meeting the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216 of this title and this section.

(3) Design certification. As provided in § 780.25(a) of this chapter, a qualified registered professional engineer or a qualified registered professional land surveyor must certify that that the impoundment design meets the requirements of this part, current prudent engineering practices, and any design criteria established by the regulatory authority. The qualified registered professional engineer or qualified registered professional land surveyor must be experienced in the design and construction of impoundments.

(4) Stability. (i) An impoundment that meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that meets the criteria of § 77.216(a) of this title, must have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(4)(i) of this section, except for a coal mine waste impounding structure, must have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 780.25(c)(3) of this chapter.

(5) Freeboard. Impoundments must have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. Impoundments that meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60 must comply with the freeboard hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60.

(6) Foundation. (i) Foundations and abutments for an impounding structure must be stable during all phases of construction and operation and must be designed based on adequate and accurate information on the foundation conditions. If the impoundment meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or the criteria of § 77.216(a) of this title, you must conduct a foundation investigation, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability.

(ii) You must remove all vegetative and organic materials from the foundation area and excavate and prepare the foundation area to resist failure. You must install cutoff trenches if necessary to ensure stability.

(7) Protection of impoundment slopes. You must take measures to protect impoundment slopes from surface erosion and the adverse impacts of a sudden drawdown.

(8) Protection of embankment faces. Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(9) Spillways. An impoundment must include either a combination of

principal and emergency spillways or a single spillway configured as specified in paragraph (a)(9)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(9)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(9) of this section is:

(A) For an impoundment that meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, the emergency spillway hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60, or any greater event specified by the regulatory authority.

(B) For an impoundment meeting or exceeding the criteria of § 77.216(a) of this title, the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

(C) For an impoundment not included in paragraphs (a)(9)(ii) (A) and (B) of this section, the 25-year, 6-hour event, or any greater event specified by the regulatory authority.

(10) Highwalls. The vertical portion of any highwall remnant within the impoundment must be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users.

(11) Inspections. Except as provided in paragraph (a)(11)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer must inspect each impoundment as provided in paragraph (a)(11)(i) of this section. The professional engineer or specialist must be experienced in the construction of impoundments.

(i) Inspections must be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(ii) After each inspection required by paragraph (a)(11)(i) of this section, the qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(11)(iv) of this section, must promptly provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report must include a discussion of any appearance of instability, any structural weakness or other hazardous condition, the depth and elevation of any impounded waters, the existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(iii) You must retain a copy of the report at or near the minesite.

(iv) In any state that authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that does not meet the criteria of § 77.216(a) of this title, and certify and submit the report required by paragraph (a)(11)(ii) of this section, except that a qualified registered professional engineer must certify all coal mine waste impounding structures covered by § 816.84 of this chapter. The professional land surveyor must be experienced in the construction of impoundments.

(12) Examinations. Impoundments that meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that meet the criteria of § 77.216 of this title, must be examined in accordance with § 77.216–3 of this title. Impoundments that do not meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that are not subject to § 77.216 of this title, must be examined at least quarterly. A qualified person designated by the operator must examine impoundments for the appearance of structural weakness and other hazardous conditions.

(13) Emergency procedures. If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment must promptly inform the regulatory authority of the finding and of the emergency procedures formulated for public protection and remedial action. The regulatory authority must be notified immediately if adequate procedures cannot be formulated or implemented. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) Requirements that apply only to permanent impoundments. A permanent impoundment of water may be created if authorized by the regulatory authority in the approved permit based upon the following demonstration:

(1) The size and configuration of the impoundment will be adequate for its intended purposes.

(2) The quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable state and federal water quality standards. Discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable state and federal water quality standards.

(3) The water level will be sufficiently stable and be capable of supporting the intended use.

(4) Final grading will provide for adequate safety and access for proposed water users.

(5) The impoundment will not result in the diminution of the quality and quantity of water used by surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(6) The impoundment will be suitable for the approved postmining land use.

(7) Approval of the impoundment will not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour.

(8) Approval of the impoundment will not result in the creation of an excess spoil fill elsewhere within the permit area.

(9) The impoundment has been designed with dimensions and other characteristics that will enhance fish and wildlife habitat to the extent that doing so is not inconsistent with the intended use.

(c) *Requirements that apply only to temporary impoundments that rely primarily upon storage.* (1) In lieu of meeting the requirements in paragraph (a)(9)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when you demonstrate, and a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(a) of this chapter certifies, that the impoundment will safely control the design precipitation event.

(2) You must use current prudent engineering practices to safely remove the water from an impoundment constructed in accordance with paragraph (c)(1) of this section.

(3) An impoundment constructed in accordance with paragraph (c)(1) of this section must be located where failure would not be expected to cause loss of life or serious property damage, unless the impoundment meets one of the following exceptions:

(i) An impoundment that meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that meets the criteria of § 77.216(a) of this title, and is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or any greater event specified by the regulatory authority.

(ii) An impoundment not included in paragraph (c)(3)(i) of this section that is designed to control the precipitation of the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

§ 816.56 How must I rehabilitate sedimentation ponds, diversions, impoundments, and treatment facilities after I no longer need them?

Before abandoning a permit area or seeking bond release, you must ensure that all temporary structures are removed and reclaimed, and that all permanent sedimentation ponds, diversions, impoundments, and treatment facilities meet the requirements of this chapter for permanent structures, have been maintained properly, and meet the requirements of the approved reclamation plan for permanent structures and impoundments. You must renovate these structures if necessary to meet the requirements of this chapter and to conform to the approved reclamation plan.

§ 816.57 What additional performance standards apply to activities in, through, or adjacent to perennial or intermittent streams?

(a)(1) *General prohibition.* You, the permittee or operator, may not conduct surface mining activities in or through a perennial or intermittent stream, or that would disturb the surface of land within 100 feet of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so in the permit after making the findings required under § 780.28 of this chapter. The 100-foot distance must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(2) *Clean Water Act requirements.* You may conduct surface mining activities in waters of the United States only if you first obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *Requirements for mining through or diverting perennial or intermittent streams*—(1) *Compliance with permit.* If your permit authorizes you to mine through or divert a perennial or intermittent stream, you must comply with the designs and construction and maintenance plans approved in the permit.

(2) *Restoration of form and function.* You must restore the form and ecological function of the stream segment as expeditiously as practicable. You must do so either as part of the construction of a permanent stream-channel diversion or as part of the construction of a restored stream channel when the area in which the stream was located before mining is no longer needed for surface mining activities.

(i) *Form.* A restored stream channel or a stream-channel diversion need not exactly replicate the channel morphology that existed before mining, but, except as provided in paragraph (b)(4) of this section, it must have a channel morphology comparable to the premining form of the affected stream segment in terms of baseline stream pattern, profile, and dimensions, including channel slope, sinuosity, water depth, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate.

(ii) *Function.* (A) A stream flowing through a restored stream channel or a stream-channel diversion must meet the functional restoration criteria established by the regulatory authority under § 780.28(e)(1) of this chapter.

(B) The restored stream need not have precisely the same biological condition or biota as the stream segment did before mining, but the biological condition of the restored stream must be adequate to support the uses of that stream segment that existed before mining and it must not preclude attainment of the designated uses of that stream segment under section 101(a) or 303(c) of the Clean Water Act before mining.

(C) The biological condition of the restored stream must be determined using a protocol that meets the requirements of § 780.19(e)(2) of this chapter.

(D) Populations of organisms used to determine the biological condition must be self-sustaining within the restored stream segment.

(iii) *Bond and bond release requirements.* (A) The performance bond calculations for the operation must include a specific line item for restoration of the ecological function of the stream segment, as provided in § 800.14(b)(2) of this chapter.

(B) You must post a surety bond, a collateral bond, or a combination of surety and collateral bonds to cover the cost of restoration of the ecological function of the stream segment.

(C) You must demonstrate full restoration of the hydrological form of the stream segment before you can qualify for Phase I bond release under § 800.42(b)(1) of this chapter.

(D) You must demonstrate full restoration of the ecological function of the stream segment before you can qualify for final bond release under § 800.42(d) of this chapter.

(3) *Certification.* Upon completion of construction of a stream-channel diversion or a restored stream channel, you must obtain a certification from a qualified registered professional engineer that the stream-channel diversion or restored stream channel has been constructed in accordance with the design approved in the permit and meets all requirements of this section other than the functional restoration requirements of paragraph (b)(2)(ii) of this section.

(4) *Special provision for restoration of degraded stream segments.* If the stream segment to be mined through or diverted is in a degraded condition before mining, you must implement measures to enhance the form and ecological function of the segment as part of the restoration or diversion process.

(c) *Prohibition on placement of sedimentation control structures in streams.* (1) Except as provided in paragraph (c)(2) of this section, you may not construct a sedimentation pond in a perennial or intermittent stream or use perennial or intermittent streams as waste treatment systems to convey surface runoff from the disturbed area to a sedimentation pond.

(2) The prohibition in paragraph (c)(1) of this section does not apply to excess spoil fills or coal mine waste disposal facilities in steep-slope areas when use of a perennial or intermittent stream segment as a waste treatment system for sediment control or construction of a sedimentation pond in a perennial or an intermittent stream would have less overall adverse impact on fish, wildlife, and related environmental values than construction of diversions and sedimentation ponds on slopes above the stream.

(3) When the circumstances described in paragraph (c)(2) of this situation exist, the following requirements apply:

(i) You must minimize the length of the stream segment used as a waste treatment system to the extent possible

and, when practicable, maintain an undisturbed buffer along that segment in accordance with paragraph (a)(1) of this section.

(ii) You must place the sedimentation pond as close to the toe of the excess spoil fill or coal mine waste disposal structure as possible.

(iii) Following the completion of construction and revegetation of the fill or coal mine waste disposal structure, you must remove the sedimentation pond and restore the stream segment in accordance with paragraph (b)(2) of this section.

§ 816.59 How must I maximize coal recovery?

You must conduct surface mining activities so as to maximize the utilization and conservation of the coal, while using the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

§ 816.61 Use of explosives: General requirements.

(a) Compliance with other laws and regulations. You must comply with all applicable state and federal laws and regulations governing the use of explosives.

(b) Compliance with blasting schedule. Blasts that use more than 5 pounds of explosive or blasting agent must be conducted according to the schedule required by § 816.64 of this part.

(c) Requirements for blasters. (1) No later than 12 months after the blaster certification program for a state required by part 850 of this chapter has been approved under the procedures of subchapter C of this chapter, all blasting operations in that state must be conducted under the direction of a certified blaster. Before that time, all blasting operations in that state must be conducted by competent, experienced persons who understand the hazards involved.

(2) Certificates of blaster certification must be carried by blasters or be on file at the permit area during blasting operations.

(3) A blaster and at least one other person shall be present at the firing of a blast.

(4) Any blaster who is responsible for conducting blasting operations at a blasting site must:

(i) Be familiar with the blasting plan and site-specific performance standards; and

(ii) Give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew or who assist in the use of explosives.

(d) Blast design. (1) You must submit an anticipated blast design if blasting operations will be conducted within—

(i) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(ii) 500 feet of an active or abandoned underground mine.

(2) The blast design may be submitted as part of a permit application or, if approved by the regulatory authority, at a later date, provided that the design is submitted and approved before blasting begins.

(3) The blast design must contain—

(i) Sketches of the drill patterns, delay periods, and decking.

(ii) The type and amount of explosives to be used.

(iii) Critical dimensions.

(iv) The location and general description of structures to be protected.

(v) A discussion of design factors to be used to protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in § 816.67 of this part.

(4) A certified blaster must prepare and sign the blast design.

(5) The regulatory authority may require changes to the design submitted.

§ 816.62 Use of explosives: Preblasting survey.

(a) At least 30 days before initiation of blasting, you must notify, in writing, all residents or owners of dwellings or other structures located within ½ mile of the permit area how to request a preblasting survey.

(b)(1) A resident or owner of a dwelling or structure within ½ mile of any part of the permit area may request a preblasting survey. This request must be made, in writing, directly to you or to the regulatory authority. If the request is made to the regulatory authority, the regulatory authority will promptly notify you.

(2) You must promptly conduct a preblasting survey of the dwelling or structure and promptly prepare a written report of the survey.

(3) You must conduct an updated survey of any subsequent additions, modifications, or renovations to the dwelling or structure, if requested by the resident or owner.

(c) You must determine the condition of the dwelling or structure and document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Structures such as pipelines, cables, transmission lines, and cisterns, wells, and other water systems warrant special attention; however, the assessment of these structures may be limited to surface conditions and other readily available data.

(d)(1) The person who conducted the survey must sign the written report of the survey.

(2) You must promptly provide copies of the report to the regulatory authority and to the person requesting the survey.

(3) If the person requesting the survey disagrees with the contents or recommendations of the survey, he or she may submit a detailed description of the specific areas of disagreement to both you and the regulatory authority.

(e) You must complete any surveys requested more than 10 days before the planned initiation of blasting before the initiation of blasting.

§ 816.64 Use of explosives: Blasting schedule.

(a) General requirements. (1) You must conduct blasting operations at times approved by the regulatory authority and announced in the blasting schedule. The regulatory authority may limit the area covered, the timing, and the sequence of blasting if those limitations are necessary and reasonable to protect public health and safety or welfare.

(2) You must conduct all blasting between sunrise and sunset, unless the regulatory authority approves night-time blasting based upon a showing that the public will be protected from adverse noise and other impacts. The regulatory authority may specify more restrictive time periods for blasting.

(3)(i) You may conduct unscheduled blasts only where public or operator health and safety so require and for emergency blasting actions.

(ii) When you conduct an unscheduled blast, you must use audible signals to notify residents within ½ mile of the blasting site.

(iii) You must document the reason for the unscheduled blast in accordance with § 816.68(c)(16) of this part.

(b) Blasting schedule publication and distribution. (1) You must publish the blasting schedule in a newspaper of general circulation in the locality of the blasting site at least 10 days, but not more than 30 days, before beginning a blasting program.

(2) You must distribute copies of the schedule to local governments and public utilities and to each local residence within ½ mile of the proposed blasting site described in the schedule.

(3) You must republish and redistribute the schedule at least every 12 months and revise and republish the

schedule at least 10 days, but not more than 30 days, before blasting whenever the area covered by the schedule changes or actual times for blasting significantly differ from the prior announcement.

(c) Blasting schedule contents. The blasting schedule must contain, at a minimum, the—

(1) Name, address, and telephone number of the operator;

(2) Identification of the specific areas in which blasting will take place;

(3) Dates and times when explosives are to be detonated;

(4) Methods to be used to control access to the blasting area; and

(5) Type and patterns of audible blast warning and all-clear signals to be used before and after blasting.

§ 816.66 Use of explosives: Blasting signs, warnings, and access control.

(a) Blasting signs. Blasting signs must meet the specifications of § 816.11 of this part.

(1) You must place conspicuous signs reading ''Blasting Area'' along the edge of any blasting area that comes within 100 feet of any public road right-of-way and at the point where any other road provides access to the blasting area.

(2) You must place conspicuous signs reading ''Warning! Explosives in Use'' at all entrances to the permit area from public roads or highways. The signs must clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use and explain the marking of blasting areas and charged holes awaiting firing within the permit area.

(b) Warnings. You must give blast warning and all-clear signals of different character or pattern that are audible within a range of ½ mile from the point of the blast. You must notify each person within the permit area and each person who resides or regularly works within ½ mile of the permit area of the meaning of the signals in the blasting schedule.

(c) Access control. You must control access within the blasting area to prevent presence of livestock or unauthorized persons during blasting and until your authorized representative has reasonably determined that—

(1) No unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) Access to and travel within the blasting area can be safely resumed.

§ 816.67 Use of explosives: Control of adverse effects.

(a) General requirements. You must conduct blasting in a manner that prevents—

(1) Injury to persons;

(2) Damage to public or private property outside the permit area;

(3) Adverse impacts on any underground mine; or

(4) Change in the course, channel, or availability of surface water or groundwater outside the permit area.

(b) Airblast—(1) Limits. (i) Airblast must not exceed the maximum limits listed below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in paragraph (e) of this section.

Lower frequency limit of measuring system, in Hz (±3 dB)
0.1 Hz or lower—flat response[1]
2 Hz or lower—flat response
6 Hz or lower—flat response
C-weighted—slow response[1]

[1] Only when approved by the regulatory authority.

(ii) If necessary to prevent damage, the regulatory authority must specify lower maximum allowable airblast levels than those of paragraph (b)(1)(i) of this section for use in the vicinity of a specific blasting operation.

(2) Monitoring. (i) You must conduct periodic monitoring to ensure compliance with the airblast standards. The regulatory authority may require airblast measurement of any or all blasts and may specify the locations at which measurements are taken.

(ii) The measuring systems must have an upper-end flat-frequency response of at least 200 Hz.

(c) Flyrock. Flyrock travelling in the air or along the ground must not be cast from the blasting site—

(1) More than one-half the distance to the nearest dwelling or other occupied structure;

(2) Beyond the area of control required under § 816.66(c) of this part; or

(3) Beyond the permit boundary.

(d) Ground vibration—(1) General. (i) In all blasting operations, except as otherwise authorized in paragraph (e) of this section, the maximum ground vibration must not exceed the values approved in the blasting plan required under § 780.15 of this chapter.

(ii) The maximum ground vibration for protected structures listed in paragraph (d)(2)(i) of this section must be established in accordance with either the maximum peak-particle-velocity limits of paragraph (d)(2) of this section, the scaled-distance equation of paragraph (d)(3) of this section, the blasting-level chart of paragraph (d)(4) of this section, or by the regulatory authority under paragraph (d)(5) of this section.

(iii) All structures in the vicinity of the blasting area not listed in paragraph (d)(2)(i) of this section, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, must be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator in the blasting plan and approved by the regulatory authority.

(2) Maximum peak particle velocity. (i) The maximum ground vibration must not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Distance (*D*), from the blasting site, in feet	Maximum allowable peak particle velocity (*V* max) for ground vibration, in inches/second[1]	Scaled-distance factor to be applied without seismic monitoring[2] (*Ds*)
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

[1] Ground vibration must be measured as the particle velocity. Particle velocity must be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity applies to each of the three measurements.

[2] Applicable to the scaled-distance equation of paragraph (d)(3)(i) of this section.

(ii) You must provide a seismographic record for each blast.

(3) Scaled-distance equation. (i) You may use the scaled-distance equation, W = (D/Ds)2, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring, where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and Ds = the scaled-distance factor. The regulatory authority may initially approve the scaled-distance equation using the values for the scaled-distance factor listed in paragraph (d)(2)(i) of this section.

(ii) The regulatory authority may authorize development of a modified scaled-distance factor upon receipt of a written request by the operator, supported by seismographic records of blasting at the minesite. The modified scale-distance factor must be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (d)(2)(i) of this section at a 95-percent confidence level.

(4) Blasting-level chart. (i) You may use the ground-vibration limits in Figure 1 to determine the maximum allowable ground vibration.

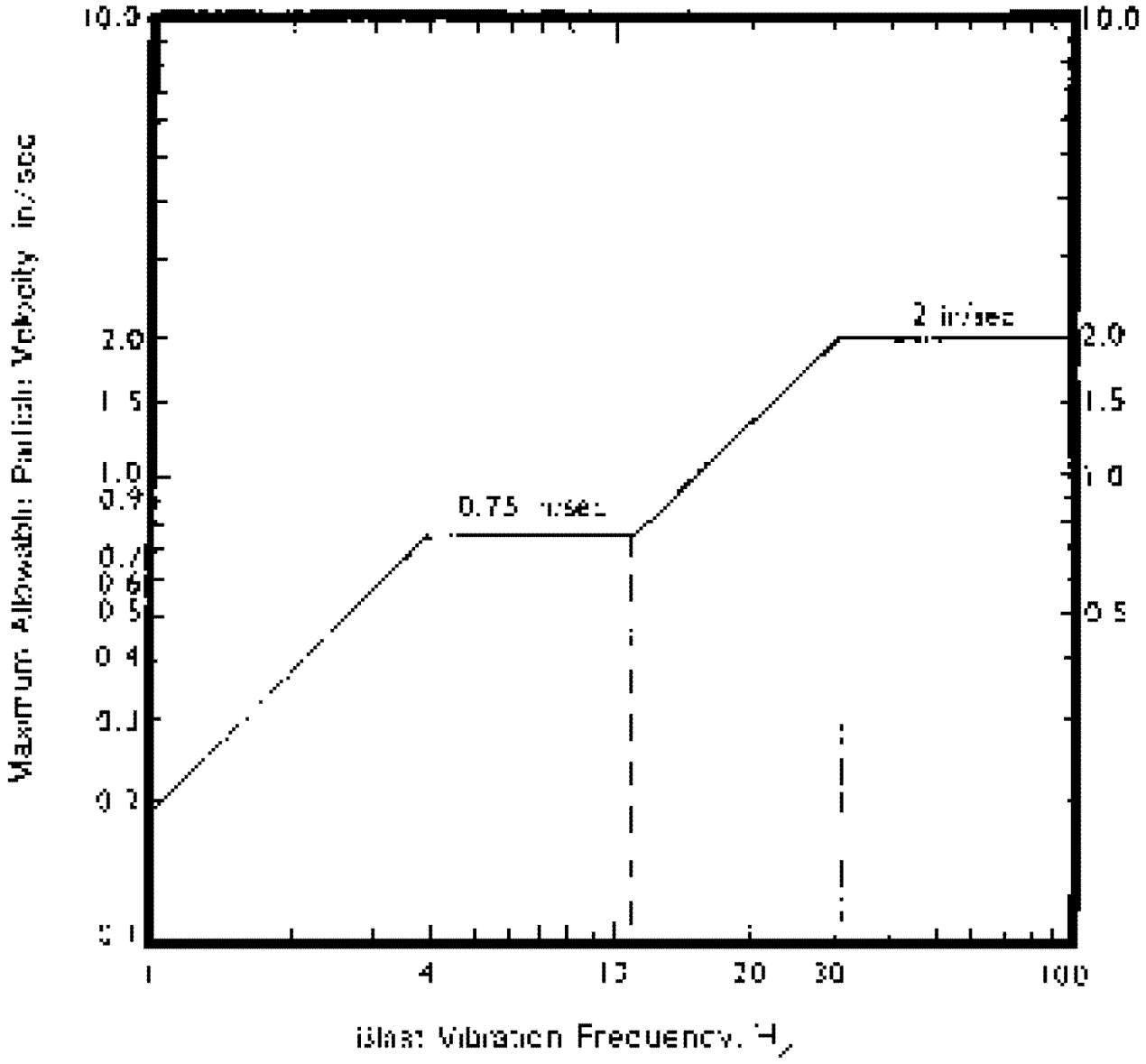

Figure 1. Alternative blasting level criteria

(Source: Modified from figure B-1, Bureau of Mines, RI 8507)

(ii) If the Figure 1 limits are used, you must provide a seismographic record including both particle velocity and vibration-frequency levels for each blast. The regulatory authority must approve the method for the analysis of the predominant frequency contained in the blasting records before application of this alternative blasting criterion.

(5) The regulatory authority must reduce the maximum allowable ground vibration beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

(6) The regulatory authority may require that you conduct seismic monitoring of any or all blasts or may specify the location at which the measurements are taken and the degree of detail necessary in the measurement.

(e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section do not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person.

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

§ 816.68 Use of explosives: Records of blasting operations.

(a) You must retain a record of all blasts for at least 3 years.

(b) Upon request, you must make copies of these records available to the regulatory authority and to the public for inspection.

(c) The records must contain the following data:

(1) Name of the operator conducting the blast.

(2) Location, date, and time of the blast.

(3) Name, signature, and certification number of the blaster conducting the blast.

(4) Identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building outside the permit area, except those described in § 816.67(e) of this part.

(5) Weather conditions, including those which may cause possible adverse blasting effects.

(6) Type of material blasted.

(7) Sketches of the blast pattern, including number of holes, burden, spacing, decks, and delay pattern.

(8) Diameter and depth of holes.

(9) Types of explosives used.

(10) Total weight of explosives used per hole.

(11) The maximum weight of explosives detonated in an 8-millisecond period.

(12) Initiation system.

(13) Type and length of stemming.

(14) Mats or other protections used.

(15) Seismographic and airblast records, if required, which must include—

(i) Type of instrument, sensitivity, and calibration signal or certification of annual calibration;

(ii) Exact location of instrument and the date, time, and distance from the blast;

(iii) Name of the person and firm taking the reading;

(iv) Name of the person and firm analyzing the seismographic record; and

(v) The vibration and/or airblast level recorded.

(16) Reasons and conditions for each unscheduled blast.

§ 816.71 How must I dispose of excess spoil?

(a) *General requirements.* You, the permittee or operator, must mechanically transport and place excess spoil in designated disposal areas, including approved valley fills and other types of approved fills, within the permit area in a controlled manner in compliance with the requirements of this section. In general, you must place excess spoil in a manner that will—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface water, groundwater, and the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final surface configuration of the fill is suitable for revegetation and the approved postmining land use or uses and is compatible with the natural drainage pattern and surroundings.

(4) Minimize disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(5) Ensure that the fill will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in damage from flooding when compared with the impacts of premining peak flows.

(6) Ensure that the fill will not preclude any existing or reasonably foreseeable use of surface water or groundwater or, for surface water downstream of the fill, preclude attainment of any designated use under section 101(a) or 303(c) of the Clean Water Act.

(7) Ensure that the fill will not cause or contribute to an exceedance of any applicable water quality standards.

(b) *Stability requirements*—(1) *Static safety factor.* You must design and construct the fill to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(2) *Special requirement for steep-slope conditions.* Where the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you must construct bench cuts (excavations into stable bedrock) or rock-toe buttresses to ensure fill stability.

(c) *Compliance with permit.* You must construct the fill in accordance with the design and plans approved in the permit in accordance with § 780.35 of this chapter.

(d) *Requirements for handling of organic matter and soil materials.* You must remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the excess spoil. You must store, redistribute, or otherwise use those materials in accordance with § 816.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 780.12(e) of this chapter.

(e) *Surface runoff control requirements.* (1) You must direct surface runoff from areas above the fill and runoff from the surface of the fill into stabilized channels designed to—

(i) Meet the requirements of § 816.43 of this part; and

(ii) Safely pass the runoff from the 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(2) You must grade the top surface of a completed fill such that the final slope after settlement will be toward properly designed drainage channels. You may not direct uncontrolled surface runoff over the outslope of the fill.

(f) *Control of water within the footprint of the fill*—(1) *General requirements.* If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(2) *Temporary diversions.* Temporary diversions must comply with the requirements of § 816.43 of this part.

(3) *Underdrains.* (i) You must construct underdrains that are comprised of hard rock that is resistant to weathering.

(ii) You must design and construct underdrains using current, prudent engineering practices and any design criteria established by the regulatory authority.

(iii) In constructing rock underdrains, you may use only hard rock that is resistant to weathering, such as well-cemented sandstone and massive limestone, and that is not acid-forming or toxic-forming. The underdrain must be free of soil and fine-grained, clastic rocks such as siltstone, shale, mudstone, and claystone. All rock used to construct underdrains must meet the criteria in the following table:

Test	ASTM standard	AASHTO standard	Acceptable results
Los Angeles Abrasion	C 131 or C 535	T 96	Loss of no more than 50 percent of test sample by weight.
Sulfate Soundness	C 88 or C 5240	T 104	Sodium sulfate test: Loss of no more than 12 percent of test sample by weight. Magnesium sulfate test: Loss of no more than 18 percent of test sample by weight.

(iv) The underdrain system must be designed and constructed to carry the maximum anticipated infiltration of water due to precipitation, snowmelt, and water from seeps and springs in the foundation of the disposal area away from the excess spoil fill.

(v) To provide a safety factor against future changes in local surface-water and groundwater hydrology, perforated pipe may be embedded within the rock underdrain to enhance the underdrain capacity to carry water in excess of the anticipated maximum infiltration away from the excess spoil fill. The pipe must be manufactured of materials that are not susceptible to corrosion and must be demonstrated to be suitable for the deep burial conditions commonly associated with excess spoil fill underdrains.

(vi) The underdrain system must be protected from material piping, clogging, and contamination by an adequate filter system designed and constructed using current, prudent engineering practices to ensure the long-term functioning of the underdrain system.

(g) *Placement of excess spoil.* (1) Using mechanized equipment, you must transport and place excess spoil in a controlled manner in horizontal lifts not exceeding 4 feet in thickness; concurrently compacted as necessary to ensure mass stability and to prevent mass movement during and after construction; and graded so that surface and subsurface drainage is compatible with the natural surroundings.

(2) You may not use any excess spoil transport and placement technique that involves end-dumping, wing-dumping, cast-blasting, gravity placement, or casting spoil downslope.

(3) *Acid-forming, toxic-forming, and combustible materials.* (i) You must handle acid-forming and toxic-forming materials in accordance with § 816.38 of this part and in a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(ii) You must cover combustible materials with noncombustible materials in a manner that will prevent sustained combustion and minimize adverse effects on plant growth and the approved postmining land use.

(h) *Final configuration.* (1) The final configuration of the fill must be suitable for the approved postmining land use, compatible with the natural drainage pattern and the surrounding terrain, and, to the extent practicable, consistent with natural landforms.

(2) You may construct terraces on the outslope of the fill if required for stability, to control erosion, to conserve soil moisture, or to facilitate the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h: 1v (50 percent).

(3)(i) You must configure the top surface of the fill to create a topography that includes ridgelines and valleys with varied hillslope configurations when practicable, compatible with stability and postmining land use considerations, and generally consistent with the premining topography.

(ii) The final surface elevation of the fill may exceed the elevation of the surrounding terrain when necessary to minimize placement of excess spoil in perennial and intermittent streams, provided the final configuration complies with the requirements of paragraphs (a)(3) and (h)(1) of this section.

(iii) The geomorphic reclamation requirements of paragraph (h)(3)(i) of this section do not apply in situations in which they would result in burial of a greater length of perennial or intermittent streams than traditional fill design and construction techniques.

(i) *Impoundments and depressions.* No permanent impoundments are allowed on the completed fill. You may construct small depressions if they—

(1) Are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(2) Are not incompatible with the stability of the fill;

(3) Are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter;

(4) Will not result in elevated levels of parameters of concern in discharges from the fill; and

(5) Are approved by the regulatory authority.

(j) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(k) *Inspections and examinations.* A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, must inspect the fill during construction. The professional engineer or specialist must be experienced in the construction of earth and rock fills.

(1) Complete inspections that include the entire fill must be made at least quarterly throughout construction, with additional complete inspections conducted during critical construction periods. Critical construction periods include, at a minimum—

(i) Foundation preparation, including the removal of all organic matter and soil materials.

(ii) Placement of underdrains and protective filter systems.

(iii) Installation of final surface drainage systems.

(iv) Final grading and revegetation of the fill.

(2) The engineer or specialist also must—

(i) Conduct daily examinations during placement and compaction of fill materials.

(ii) Maintain a log recording the daily examinations for each fill. The log must include a description of the specific work locations, excess spoil placement methods, compaction adequacy, lift thickness, suitability of fill material, special handling of acid-forming and toxic-forming materials, deviations from the approved permit, and remedial measures taken.

(3) The qualified registered professional engineer must provide a certified report to the regulatory authority promptly after each complete inspection conducted under paragraph (k)(1) of this section. The report must—

(i) Certify that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter.

(ii) Identify and discuss any evidence of instability, structural weakness, or other hazardous conditions. If one of more of those conditions exists, you must submit an application for a permit revision that includes appropriate remedial design specifications.

(iii) Include a review and summary of the logs maintained under paragraph (k)(2)(ii) of this section.

(4)(i) The certified report on the drainage system and protective filters must include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase must be certified separately.

(ii) The photographs accompanying each certified report must be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(5) You must retain a copy of each complete inspection report at or near the mine site.

(l) *Coal mine waste.* You may dispose of coal mine waste in excess spoil fills only if approved by the regulatory authority and only if—

(1) You demonstrate, and the regulatory authority finds in writing, that there is no credible evidence that

the disposal of coal mine waste in the excess spoil fill will cause or contribute to a violation of applicable water quality standards or effluent limitations or result in material damage to the hydrologic balance outside the permit area.

(2) The waste is placed in accordance with §§ 816.81 and 816.83 of this part.

(3) The waste is nontoxic-forming, nonacid-forming, and non-combustible.

(4) The waste is of the proper characteristics to be consistent with the design stability of the fill.

(m) *Underground disposal.* You may dispose of excess spoil in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 816.72 [Reserved]

§ 816.73 [Reserved]

§ 816.74 What special requirements apply to the disposal of excess spoil on a preexisting bench?

(a) *General requirements.* The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench on a previously mined area or a bond forfeiture site if—

(1) The proposed permit area includes the portion of the preexisting bench on which the spoil will be placed;

(2) The proposed operation will comply with the applicable requirements of § 816.102 of this part; and

(3) The requirements of this section are met.

(b) *Requirements for removal and disposition of vegetation, other organic matter, and soil materials.* You must remove all vegetation, other organic matter, topsoil, and subsoil from the disposal area prior to placement of the excess spoil and store, redistribute, or otherwise use those materials in accordance with § 816.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 780.12(e) of this chapter.

(c)(1) The fill must be designed and constructed using current, prudent engineering practices.

(2) The design must be certified by a registered professional engineer.

(3) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design must include underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability. Underdrains must comply with the requirements of § 816.71(f)(3) of this part.

(d)(1) The spoil must be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long-term static safety factor of 1.3 for all portions of the fill.

(2) Any spoil deposited on any fill portion of the bench must be treated as an excess spoil fill under § 816.71 of this part.

(e) You must grade the spoil placed on the preexisting bench to—

(1) Achieve a stable slope that does not exceed the angle of repose.

(2) Eliminate the preexisting highwall to the maximum extent technically practical, using all reasonably available spoil, as that term is defined in § 701.5 of this chapter.

(3) Minimize erosion and water pollution both on and off the site.

(f) All disturbed areas, including diversion channels that are not riprapped or otherwise protected, must be revegetated upon completion of construction.

(g) You may not construct permanent impoundments on preexisting benches on which excess spoil is placed under this section.

(h) The final configuration of the fill on the preexisting bench must—

(1) Be compatible with natural drainage patterns and the surrounding area.

(2) Support the approved postmining land use.

§ 816.79 What measures must I take to protect underground mines in the vicinity of my surface mine?

No surface mining activities may be conducted closer than 500 feet to any point of either an active or abandoned underground mine, except to the extent that—

(a) The activities result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public; and

(b) The nature, timing, and sequence of the activities that propose to mine closer than 500 feet to an active underground mine are jointly approved by the regulatory authority, the Mine Safety and Health Administration, and the state agency, if any, responsible for the safety of underground mine workers.

§ 816.81 How must I dispose of coal mine waste?

(a) *General requirements.* If you, the permittee, intend to dispose of coal mine waste in an area other than the mine workings or excavations, you must place the waste in new or existing disposal areas within a permit area in accordance with this section and, as applicable, §§ 816.83 and 816.84 of this part.

(b) *Basic performance standards.* You must haul or convey and place the coal mine waste in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface-water runoff on the quality and quantity of surface water and groundwater and on the biological condition of perennial and intermittent streams within the permit and adjacent areas to the extent possible, using the best technology currently available.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final disposal facility is suitable for revegetation, compatible with the natural surroundings, and consistent with the approved postmining land use.

(4) Not create a public hazard.

(5) Prevent combustion.

(6) Ensure that the disposal facility will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in damage from flooding when compared with the impacts of premining peak flows.

(7) Ensure that the disposal facility will not preclude any existing or reasonably foreseeable use of surface water or groundwater or, for surface water downstream of the facility, preclude attainment of any designated use under section 101(a) or 303(c) of the Clean Water Act.

(8) Ensure that the disposal facility will not cause or contribute to a violation of any applicable water quality standards.

(9) Ensure that the disposal facility will not discharge acid or toxic mine drainage.

(c) *Coal mine waste from outside the permit area.* You may dispose of coal mine waste materials from activities located outside the permit area within the permit area only if approved by the regulatory authority. Approval must be based upon a showing that disposal will be in accordance with the standards of this section.

(d) *Design and construction requirements.* (1)(i) You must design and construct coal mine waste disposal facilities using current, prudent engineering practices and any design or construction criteria established by the regulatory authority.

(ii) A qualified registered professional engineer, experienced in the design and construction of similar earth and waste structures, must certify the design of the disposal facility. The engineer must specifically certify that any existing and planned underground mine workings in

the vicinity of the disposal facility will not adversely impact the stability of the structure.

(iii) You must construct the disposal facility in accordance with the design and plans submitted under § 780.25 of this chapter and approved in the permit. A qualified registered professional engineer experienced in the design and construction of similar earth and waste structures must certify that the facility has been constructed in accordance with the requirements of this paragraph.

(2) You must design and construct the disposal facility to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

(e) *Foundation investigations.* You must perform sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability. The analyses of the foundation conditions must take into consideration the effect of any underground mine workings located in the permit and adjacent areas upon the stability of the disposal facility.

(f) *Soil handling requirements.* You must remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the coal mine waste. You must store, redistribute, or otherwise use those materials in accordance with § 816.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 780.12(e) of this chapter.

(g) *Emergency procedures.* (1) If any examination or inspection discloses that a potential hazard exists, you must inform the regulatory authority promptly of the finding and of the emergency procedures formulated for public protection and remedial action.

(2) If adequate procedures cannot be formulated or implemented, you must notify the regulatory authority immediately. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(h) *Underground disposal.* You may dispose of coal mine waste in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 816.83 What special requirements apply to coal mine waste refuse piles?

(a) *General requirements.* Refuse piles must meet the applicable requirements of § 816.81 of this part, the additional requirements of this section, and the requirements of §§ 77.214 and 77.215 of this title.

(b) *Surface runoff and drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct the refuse pile with diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility, and ensure stability.

(2) You may not direct or divert uncontrolled surface runoff over the outslope of the refuse pile.

(3) You must direct runoff from areas above the refuse pile and runoff from the surface of the refuse pile into stabilized channels designed to meet the requirements of § 816.43 of this part and to safely pass the runoff from the 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(4) Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile.

(5) Underdrains must comply with the requirements of § 816.71(f) of this part.

(c) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(d) *Final configuration and cover.* (1) The final configuration of the refuse pile must be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, erosion control, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h:1v (50 percent).

(2) No permanent impoundments or depressions are allowed on the completed refuse pile.

(3) Following final grading of the refuse pile, you must cover the coal mine waste with a minimum of 4 feet of the best available, nontoxic, and noncombustible material in a manner that does not impede drainage from the underdrains. The regulatory authority may allow less than 4 feet of cover material based on physical and chemical analyses showing that the revegetation requirements of §§ 816.111 and 816.116 of this part will be met.

(e) *Inspections.* You must comply with the inspection and examination requirements of § 816.71(l) of this part.

§ 816.84 What special requirements apply to coal mine waste impounding structures?

(a) Impounding structures constructed of coal mine waste or intended to impound coal mine waste must meet the requirements of § 816.81 of this part.

(b) You may not use coal mine waste to construct impounding structures unless you demonstrate, and the regulatory authority finds in writing, that the stability of such a structure conforms to the requirements of this part and that the use of coal mine waste will not have a detrimental effect on downstream water quality or the environment as a result of acid drainage or toxic seepage through the impounding structure. You must discuss the stability of the structure and the prevention and potential impact of acid drainage or toxic seepage through the impounding structure in detail in the design plan submitted to the regulatory authority in accordance with § 780.25 of this chapter.

(c)(1) You must design, construct, and maintain each impounding structure constructed of coal mine waste or intended to impound coal mine waste in accordance with paragraphs (a) and (c) of § 816.49 of this part.

(2) You may not retain these structures permanently as part of the approved postmining land use.

(3) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title must have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event or greater event as specified by the regulatory authority.

(d) You must design spillways and outlet works to provide adequate protection against erosion and corrosion. Inlets must be protected against blockage.

(e) You must direct surface runoff from areas above the disposal facility and runoff from the surface of the facility that may cause instability or erosion of the impounding structure into stabilized channels designed and constructed to meet the requirements of § 816.43 of this part and to safely pass the runoff from a 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(f) For an impounding structure constructed of or impounding coal mine waste, you must remove at least 90 percent of the water stored during the design precipitation event within the 10-day period following the design precipitation event.

§ 816.87 What special performance standards apply to burning and burned coal mine waste?

(a) Coal mine waste fires must be extinguished by the person who conducts the surface mining activities, in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration. The plan must contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, are involved in the extinguishing operations.

(b) No burning or burned coal mine waste may be removed from a permitted disposal area without a removal plan approved by the regulatory authority. Consideration must be given to potential hazards to persons working or living in the vicinity of the structure.

§ 816.89 How must I dispose of noncoal mine wastes?

(a)(1) Noncoal mine wastes including, but not limited to grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustible materials generated during mining activities must be placed and stored in a controlled manner in a designated portion of the permit area.

(2) Placement and storage of noncoal wastes must ensure that leachate and surface runoff do not degrade surface water or groundwater, that fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b)(1) Final disposal of noncoal mine wastes must be in a designated disposal site within the permit area or in a state-approved solid waste disposal area.

(2) Disposal sites within the permit area must meet the following requirements:

(i) The site must be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface water or groundwater.

(ii) Wastes must be routinely compacted and covered to prevent combustion and wind-borne waste.

(iii) When the disposal of noncoal wastes is completed, the site must be covered with a minimum of 2 feet of soil, slopes must be stabilized, and the site must be revegetated in accordance with §§ 816.111 through 816.116 of this part.

(iv) The disposal site must be operated in accordance with all local, state and federal requirements.

(c) At no time may any noncoal mine waste be deposited in a refuse pile or impounding structure, nor may an excavation for a noncoal mine waste disposal site be located within 8 feet of any coal outcrop or coal storage area.

§ 816.95 How must I protect surface areas from wind and water erosion?

(a) You must protect and stabilize all exposed surface areas to effectively control erosion and air pollution attendant to erosion.

(b)(1) You must fill, regrade, or otherwise stabilize rills and gullies that form in areas that have been regraded and upon which soil or soil substitute materials have been redistributed. This requirement applies only to rills and gullies that either—

(i) Disrupt the approved postmining land use or reestablishment of the vegetative cover; or

(ii) Cause or contribute to a violation of water quality standards for receiving waters.

(2) You must reapply soil materials to the filled or regraded rills and gullies when necessary to reestablish a vegetative cover. You must then replant those areas.

§ 816.97 How must I protect and enhance fish, wildlife, and related environmental values?

(a) *General requirements.* You, the permittee, must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable, as described in detail in the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 780.16 of this chapter.

(b) *Species listed or proposed for listing as threatened or endangered*—(1) *Federally-listed species.* (i) You may not conduct any surface mining activity that is likely to jeopardize the continued existence of threatened or endangered species listed by the Secretary or proposed for listing by the Secretary or that is likely to result in the destruction or adverse modification of designated critical habitat in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

(ii) You must promptly report to the regulatory authority any federally-listed threatened or endangered species within the permit area or the adjacent area of which you become aware. This requirement applies regardless of whether the species was listed before or after permit issuance.

(iii)(A) Upon receipt of a notification under paragraph (b)(2)(ii) of this section, the regulatory authority will contact and coordinate with the appropriate state and federal fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state and federal fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary, the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(iv) You must comply with any species-specific protection measures required by the regulatory authority in coordination with the U.S. Fish and Wildlife Service.

(v) Nothing in this chapter authorizes the taking of a threatened or endangered species in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

(2) *State-listed species.* (i) You must promptly report to the regulatory authority any state-listed threatened or endangered species within the permit are or the adjacent area of which you become aware. This requirement applies regardless of whether the species was listed before or after permit issuance.

(ii)(A) Upon receipt of a notification under paragraph (b)(2)(i) of this section, the regulatory authority will contact and coordinate with the appropriate state fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary, the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(c) *Bald and golden eagles.* (1) You may not conduct any surface mining activity in a manner that would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs.

(2) You must promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which you become aware.

(3) Upon notification, the regulatory authority will contact and coordinate with the U.S. Fish and Wildlife Service and, when appropriate, the state fish and wildlife agency to identify whether, and under what conditions, you may proceed.

(4) Nothing in this chapter authorizes the taking of a bald or golden eagle, its nest, or any of its eggs in violation of the

Bald and Golden Eagle Protection Act, 16 U.S.C. 668–668d.

(d) *Miscellaneous protective measures for other species of fish and wildlife.* To the extent possible, using the best technology currently available, you must—

(1) Ensure that electric power transmission lines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors and other avian species with large wingspans.

(2) Locate, construct, operate, and maintain haul and access roads and sedimentation control structures in a manner that avoids or minimizes impacts on important fish and wildlife species or other species protected by state or federal law.

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds that contain hazardous concentrations of toxic or toxic-forming materials.

(5) Reclaim and reforest lands that were forested at the time of application and lands that would revert to forest under conditions of natural succession in a manner that enhances recovery of the native forest ecosystem as expeditiously as practicable.

(e) *Wetlands and habitat of unusually high value for fish and wildlife.* To the extent possible, you must avoid disturbances to, restore or replace, and, where practicable, enhance, wetlands, riparian vegetation along rivers and streams, lentic vegetation bordering ponds and lakes, and habitat of unusually high value for fish and wildlife.

(f) *Vegetation requirements for fish and wildlife habitat postmining land use.* Where fish and wildlife habitat is a postmining land use, you must select and arrange the plant species to be used for revegetation to maximize the benefits to fish and wildlife. Plant species must be native to the area and must be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their value as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds.

(4) Their ability to sustain natural succession by allowing the establishment and spread of plant species across ecological gradients. You may not use invasive plant species that are known to inhibit natural succession.

(g) *Vegetation requirements for cropland postmining land use.* Where cropland is the postmining land use, and where appropriate for wildlife-management and crop-management practices, you must intersperse the crop fields with trees, hedges, or fence rows to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(h) *Vegetation requirements for forestry postmining land uses.* Where forestry, whether managed or unmanaged, is the postmining land use, you must plant native tree and understory species to the extent that doing so is not inconsistent with the type of forestry to be practiced as part of the postmining land use. In all cases, regardless of the type of forestry to be practiced as part of the postmining land use, you must intersperse plantings of commercial species with plantings of native trees and shrubs of high value to wildlife.

(i) *Vegetation requirements for other postmining land uses.* Where residential, public service, commercial, industrial, or intensive recreational uses are the postmining land use, you must establish—

(1) Greenbelts comprised of non-invasive native plants that provide food or cover for wildlife, unless greenbelts would be inconsistent with the approved postmining land use plan for that site.

(2)(i) A vegetated buffer at least 100 feet wide along each bank of all perennial and intermittent streams within the permit area. The width of the buffer must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel. The buffer must be planted with species native to the area, including species adapted to and suitable for planting in riparian zones within the buffer. The species planted must consist of native tree and understory species if the land was forested at the time of application or if it would revert to forest under conditions of natural succession.

(ii) Paragraph (i)(2)(i) of this section does not apply to situations in which a riparian buffer would be incompatible with an approved postmining land use that is implemented during the revegetation responsibility period before final bond release under § 800.42(d) of this chapter.

(j) *Planting arrangement requirements.* You must design and arrange plantings in a manner that optimizes benefits to wildlife to the extent practicable and consistent with the postmining land use.

§ 816.99 What measures must I take to prevent and remediate landslides?

(a) You, the permittee or operator, must provide an undisturbed natural barrier beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for the distance that the regulatory authority determines is needed to assure stability. The barrier must be retained in place to prevent slides.

(b)(1) You must notify the regulatory authority by the fastest available means whenever a landslide occurs that has the potential to adversely affect public property, health, safety, or the environment.

(2) You must comply with any remedial measures that the regulatory authority requires in response to the notification provided in paragraph (b)(1) of this section.

§ 816.100 What are the standards for conducting reclamation contemporaneously with mining?

You must reclaim all land disturbed by surface mining activities as contemporaneously as practicable with the mining operations, except when the mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities under § 785.18 of this chapter. Reclamation activities include, but are not limited to, backfilling, grading, soil replacement, revegetation, and stream restoration.

§ 816.101 [Reserved]

§ 816.102 How must I backfill the mined area and grade and configure the land surface?

(a) You, the permittee or operator, must backfill all mined areas and grade all disturbed areas in compliance with the plan approved in the permit in accordance with § 780.12(d) of this chapter to—

(1) Restore the approximate original contour as the final surface configuration, except in the following situations:

(i) Mountaintop removal mining operations approved under § 785.14 of this chapter.

(ii) Sites for which the regulatory authority has approved a variance under § 785.16 of this chapter.

(iii) Operations to which the thin overburden standards of § 816.104 of this part apply.

(iv) Operations to which the thick overburden standards of § 816.105 of this part apply.

(v) Remining operations on previously mined areas, but only to the extent specified in § 816.106(b) of this part.

(vi) Excess spoil fills constructed in accordance with § 816.71 or § 816.74 of this part.

(vii) Refuse piles constructed in accordance with § 816.83 of this part.

(viii) Permanent impoundments that meet the requirements of paragraph (a)(3)(ii) of this section and § 780.35(b)(4) of this chapter.

(ix) The placement, in accordance with § 780.35(b)(3) of this chapter, of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation when necessary to avoid or minimize construction of excess spoil fills on undisturbed land.

(2) Minimize the creation of uniform slopes and cut-and-fill terraces. The regulatory authority may approve cut-and-fill terraces only if—

(i) They are compatible with the approved postmining land use and are needed to conserve soil moisture, ensure stability, or control erosion on final-graded slopes; or

(ii) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land use.

(3) Eliminate all highwalls, spoil piles, impoundments, and depressions, except in the following situations:

(i) You may construct or retain small depressions if—

(A) They are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(B) They are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter; and

(C) You demonstrate that they will not result in elevated levels of parameters of concern in discharges from the backfilled and graded area.

(ii) The regulatory authority may approve the retention of permanent impoundments if—

(A) They meet the requirements of §§ 816.49 and 816.56 of this part;

(B) They are suitable for the approved postmining land use;

(C) You can demonstrate compliance with the future maintenance provisions of § 800.42(c)(5) of this chapter; and

(D) You have obtained all necessary approvals and authorizations under section 404 of the Clean Water Act when the impoundment is located in waters of the United States.

(iii) You may retain highwalls on previously mined areas to the extent provided in § 816.106(b) of this part.

(iv) You may retain modified highwall segments to the extent necessary to replace similar natural landforms removed by the mining operation. The regulatory program must establish the conditions under which these highwall segments may be retained and the modifications that must be made to the highwall to ensure that the retained segment resembles similar premining landforms and restores the ecological niches that the premining landforms provided. Nothing in this paragraph authorizes the retention of modified highwall segments in excess of the number, length, and height needed to replace similar premining landforms.

(4) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

(5) Minimize erosion and water pollution, including discharges of parameters of concern for which no numerical effluent limitations or water quality standards have been established, both on and off the site.

(6) Support the approved postmining land use.

(b) You must return all spoil to the mined-out area. This requirement does not apply to—

(1) Excess spoil disposed of in accordance with § 816.71 or § 816.74 of this part.

(2) Mountaintop removal mining operations approved under § 785.14 of this chapter.

(3) Spoil placed outside the mined-out area in non-steep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain, provided that you comply with the following requirements:

(i) You must remove all vegetation and other organic matter from the area outside the mined-out area before spoil placement begins. You may not burn or bury these materials; you must store, redistribute, or use them in the manner specified in § 816.22(f) of this part.

(ii) You must remove, segregate, store, and redistribute topsoil on the area outside the mined-out area in accordance with § 816.22 of this part.

(c) You must compact spoil and waste materials when necessary to ensure stability or to prevent the formation of acid or toxic mine drainage, but, to the extent possible, you must avoid compacting spoil, soil, and other materials placed in what will be the root zone of the species planted under the revegetation plan approved in the permit in accordance with § 780.12(g) of this chapter.

(d)(1) You must cover all exposed coal seams with material that is noncombustible, nonacid-forming, and nontoxic-forming.

(2) You must handle and dispose of all other combustible materials exposed, used, or produced during mining in accordance with § 816.89 of this part in a manner that will prevent sustained combustion, as approved in the permit in accordance with § 780.12(j) of this chapter.

(3) You must handle all other acid-forming and toxic-forming materials—

(i) In compliance with the plan approved in the permit in accordance with § 780.12(d)(4) of this chapter;

(ii) In compliance with § 816.38 of this part;

(iii) In compliance with the hydrologic reclamation plan approved in the permit in accordance with § 780.22(a) of this chapter; and

(iv) In a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(e) You must dispose of any coal mine waste placed in the mined-out area in accordance with §§ 816.81 and 816.83 of this part, except that a long-term static safety factor of 1.3 will apply instead of the 1.5 factor specified in § 816.81(d)(2) of this part.

(f) You must prepare final-graded surfaces in a manner that minimizes erosion and provides a surface for replacement of soil materials that will minimize slippage.

§ 816.104 What special provisions for backfilling, grading, and surface configuration apply to sites with thin overburden?

(a) *Applicability.* This section applies only where the thickness of all overburden strata multiplied by the swell factor for those strata plus the thickness of any waste materials to be returned to the mined-out area is less than the combined thickness of the overburden and coal seam or seams prior to removing the coal to the extent that there is insufficient material to restore the approximate original contour. Specifically, there is insufficient material to achieve a surface configuration that—

(1) Closely resembles the surface configuration of the mined area prior to any mining; and

(2) Blends into and complements the drainage pattern of the surrounding terrain.

(b) *Performance standards.* Where thin overburden as described in paragraph (a) of this section occurs

within the permit area, you must backfill all mined areas and grade all disturbed areas in accordance with the plan approved in the permit under § 780.12(d) of this chapter. At a minimum, you must—

(1) Use all spoil and waste materials available from the entire permit area to attain the lowest practicable grade that does not exceed the angle of repose.

(2) Comply with the requirements of paragraphs (a)(2) through (f) of § 816.102 of this part.

(3) Ensure that the final surface configuration blends into and complements the drainage pattern of the surrounding terrain to the extent possible.

§ 816.105 What special provisions for backfilling, grading, and surface configuration apply to sites with thick overburden?

(a) *Applicability.* This section applies only where the thickness of all overburden strata multiplied by the swell factor for those strata plus the thickness of any waste materials to be returned to the mined-out area exceeds the combined thickness of the overburden strata and the coal seam or seams in place to the extent that there is more material than can be used to restore the approximate original contour. Specifically, the amount of material to be returned to the mined-out area is so large that it is not possible to achieve a surface configuration that closely resembles the surface configuration of the mined land prior to any mining.

(b) *Performance standards.* Where thick overburden as described in paragraph (a) of this section occurs within the permit area, you must backfill all mined areas and grade all disturbed areas in accordance with the plan approved in the permit under § 780.12(d) of this chapter. At a minimum, you must—

(1) Backfill the mined-out area to the approximate original contour and then place the remaining spoil and waste materials on top of the backfilled area to the extent possible, as determined in accordance with the excess spoil minimization requirements of § 780.35(b) of this chapter.

(2) Grade the backfilled area to the lowest practicable grade that is ecologically sound, consistent with the postmining land use, and compatible with the surrounding region. No slope may exceed the angle of repose.

(3) Comply with the requirements of paragraphs (a)(2) through (f) of § 816.102 of this part.

(4) Dispose of any excess spoil in accordance with § 816.71 or § 816.74 of this part.

(5) Ensure that the final surface configuration blends into and complements the drainage pattern of the surrounding terrain to the extent possible.

§ 816.106 What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

(a) Remining operations on previously mined areas that contain a preexisting highwall must comply with the requirements of §§ 816.102 through 816.107 of this part, except as provided in this section.

(b) The highwall elimination requirements of § 816.102(a) of this part do not apply to remining operations for which you demonstrate in writing, to the regulatory authority's satisfaction, that the volume of all reasonably available spoil is insufficient to completely backfill the reaffected or enlarged highwall. Instead, for those operations, you must eliminate the highwall to the maximum extent technically practical in accordance with the following criteria:

(1) You must use all spoil generated by the remining operation and any other reasonably available spoil to backfill the area. You must include reasonably available spoil in the immediate vicinity of the remining operation within the permit area.

(2) You must grade the backfilled area to a slope that is compatible with the approved postmining land use and that provides adequate drainage and long-term stability.

(3) Any highwall remnant must be stable and not pose a hazard to the public health and safety or to the environment. You must demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) You must not disturb spoil placed on the outslope during previous mining operations if disturbance would cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

§ 816.107 What special provisions for backfilling, grading, and surface configuration apply to operations on steep slopes?

(a) Surface mining activities on steep slopes must comply with this section and the requirements of §§ 816.102 through 816.106 of this part, except where—

(1) Mining is conducted on flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area; or

(2) Operations are conducted in accordance with part 824 of this chapter.

(b) You may not place the following materials on the downslope:

(1) Spoil.

(2) Waste materials of any type.

(3) Debris, including debris from clearing and grubbing, except for woody materials used to enhance fish and wildlife habitat.

(4) Abandoned or disabled equipment.

(c) You may not disturb land above the highwall unless the regulatory authority finds that disturbance will facilitate compliance with the environmental protection standards of this subchapter and the disturbance is limited to that necessary to facilitate compliance.

(d) You must handle woody materials in accordance with § 816.22(f) of this part. You may not bury them in the backfill.

§ 816.111 How must I revegetate areas disturbed by mining activities?

(a) You, the permittee, must establish a diverse, effective, permanent vegetative cover on regraded areas and on all other disturbed areas except—

(1) Water areas approved as a postmining land use or in support of the postmining land use.

(2) The surfaces of roads approved for retention to support the postmining land use.

(3) Rock piles, water areas, and other non-vegetative features created to restore or enhance wildlife habitat under the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 780.16 of this chapter.

(4) Any other impervious surface, such as a building or a parking lot, approved as part of or in support of the postmining land use. This provision applies only to structures and facilities constructed before expiration of the revegetation responsibility period.

(b) The reestablished vegetative cover must—

(1) Comply with the revegetation plan approved in the permit in accordance with § 780.12(g) of this chapter.

(2) Be consistent with the approved postmining land use and the plant communities described in § 779.19 of this chapter.

(3) Be at least equal in extent of cover to the natural vegetation of the area.

(4) Be capable of stabilizing the soil surface and, in the long term, preventing erosion in excess of what would have occurred naturally had the site not been disturbed.

(5) Not inhibit the establishment of trees and shrubs when the revegetation

plan approved in the permit requires the use of woody plants.

(c) Volunteer plants of species that are desirable components of the plant communities described in the permit application under § 779.19 of this chapter and that are not inconsistent with the postmining land use may be considered in determining whether the requirements of §§ 816.111 and 816.116 have been met.

(d) You must stabilize all areas upon which you have redistributed soil or soil substitute materials. You must use one or a combination of the following methods, unless the regulatory authority determines that neither method is necessary to stabilize the surface and control erosion—

(1) Establishing a temporary vegetative cover consisting of noncompetitive and non-invasive species, either native or domesticated or a combination thereof.

(2) Applying a suitable mulch free of weed and noxious plant seeds. You must use native hay mulch to the extent that it is commercially available.

(e) You must plant all disturbed areas with the species needed to establish a permanent vegetative cover during the first normal period for favorable planting conditions after distribution of the topsoil or other plant-growth medium. The normal period for favorable planting conditions is the generally accepted local planting time for the type of plant materials approved in the permit as part of the revegetation plan under § 780.12(g) of this chapter.

§ 816.113 [Reserved]

§ 816.114 [Reserved]

§ 816.115 How long am I responsible for revegetation after planting?

(a) *General provisions.* (1) The period of extended responsibility for successful revegetation will begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with paragraph (d) of this section.

(2) The initial planting of small areas that are regraded and planted as a result of the removal of sediment control structures and associated structures and facilities such as diversion ditches, disposal and storage areas for accumulated sediment, sediment pond embankments, and ancillary roads used to access those structures need not be considered an augmented seeding necessitating an extended or separate revegetation responsibility period.

(b) *Areas of more than 26.0 inches of average annual precipitation.* In areas of more than 26.0 inches of annual average precipitation, the period of responsibility will continue for a period of not less than—

(1) Five full years, except as provided in paragraph (b)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Two full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing season of the last year of the responsibility period.

(c) *Areas of 26.0 inches or less average annual precipitation.* In areas of 26.0 inches or less average annual precipitation, the period of responsibility will continue for a period of not less than:

(1) Ten full years, except as provided in paragraph (c)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Five full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing seasons of the last two consecutive years of the responsibility period.

(d) *Normal husbandry practices.* (1) The regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSMRE in accordance with § 732.17 of this chapter that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if those practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success.

(2) Approved practices must be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

§ 816.116 What are the standards for determining revegetation success?

(a) The regulatory authority must select standards for revegetation success and statistically valid sampling techniques for measuring revegetation success. The standards and techniques must be made available to the public in written form.

(b) The standards for success applied to a specific permit must be adequate to demonstrate restoration of premining land use capability and must reflect the revegetation plan requirements of § 780.12(g) of this chapter. They must be based upon the following data—

(1) The plant community and vegetation information required under § 779.19 of this chapter.

(2) The soil type and productivity information required under § 779.21 of this chapter.

(3) The land use capability and productivity information required under § 779.22 of this chapter.

(4) The postmining land use approved under § 780.24 of this chapter, but only to the extent that the approved postmining land use actually will be implemented before expiration of the revegetation responsibility period. Otherwise, the site must be revegetated in a manner that will restore native plant communities and the revegetation success standards for the site must reflect that requirement.

(c) Except for the areas identified in § 816.111(a) of this part, standards for success must include—

(1) Species diversity.

(2) Areal distribution of species.

(3) Ground cover, except for land actually used for cropland after the completion of regrading and redistribution of soil materials.

(4) Production, for land used for cropland, pasture, or grazing land either before permit issuance or after the completion of regrading and redistribution of soil materials.

(5) Stocking, for areas revegetated with woody plants.

(d) The ground cover, production, or stocking of the revegetated area will be considered equal to the approved success standard for those parameters when the measured values are not less than 90 percent of the success standard, using a 90-percent statistical confidence

interval (*i.e.,* a one-sided test with a 0.10 alpha error).

(e) For all areas revegetated with woody plants, regardless of the postmining land use, the regulatory authority must specify minimum stocking and planting arrangements on the basis of local and regional conditions and after coordination with and approval by the state agencies responsible for the administration of forestry and wildlife programs. Coordination and approval may occur on either a program-wide basis or a permit-specific basis.

(f)(1) Only those species of trees and shrubs approved in the permit as part of the revegetation plan under § 780.12(g) of this chapter or volunteer trees and shrubs of species that meet the requirements of § 816.111(c) of this part may be counted in determining whether stocking standards have been met.

(2)(i) At the time of final bond release under § 800.42(d) of this chapter, at least 80 percent of the trees and shrubs used to determine success must have been in place for 60 percent of the applicable minimum period of responsibility under § 816.115 of this part.

(ii) Trees and shrubs counted in determining revegetation success must be healthy and have been in place for not less than two growing seasons. Any replanting must be done by means of transplants to allow for proper accounting of plant stocking.

(iii)(A) For purposes of paragraph (f)(2)(ii) of this section, volunteer trees and shrubs of species that meet the requirements of § 816.111(c) of this part may be deemed equivalent to planted specimens two years of age or older.

(B) Suckers on shrubby vegetation can be counted as volunteer plants when it is evident that the shrub community is vigorous and expanding.

(iv) The requirements of paragraphs (f)(2)(i) and (ii) of this section will be deemed met when records of woody vegetation planted show that—

(A) No woody plants were planted during the last two growing seasons of the responsibility period; and

(B) If any replanting of woody plants took place earlier during the responsibility period, the total number planted during the last 60 percent of that period is less than 20 percent of the total number of woody plants required to meet the stocking standard.

(3) Vegetative ground cover on areas planted with trees or shrubs must be of a nature that allows for natural establishment and succession of native plants, including trees and shrubs.

(g) *Special provision for areas that are to be developed within the revegetation responsibility period.* Portions of the permit area that are to be developed for industrial, commercial, or residential use within the revegetation responsibility period need not meet production or stocking standards. For those areas, the vegetative ground cover must not be less than that required to control erosion.

(h) *Special provision for previously mined areas.* Previously mined areas need only meet a vegetative ground cover standard, unless the regulatory authority specifies otherwise. At a minimum, the cover on the revegetated previously mined area must not be less than the ground cover existing before redisturbance and must be adequate to control erosion.

(i) *Special provision for prime farmland.* For prime farmland, the revegetation success standard provisions of § 823.15 of this chapter apply in lieu of the requirements of paragraphs (b) through (h) of this section.

§ 816.131 What actions must I take when I temporarily cease mining operations?

(a)(1) Each person who temporarily ceases to conduct surface mining activities at a particular site must effectively secure surface facilities in areas in which there are no current operations, but where operations are to be resumed under an approved permit.

(2) Temporary cessation does not relieve a person of his or her obligation to comply with any provisions of the approved permit.

(b)(1) You must submit a notice of intent to temporarily cease operations to the regulatory authority before ceasing mining and reclamation operations for 30 or more days, or as soon as you know that a temporary cessation will extend beyond 30 days.

(2) The notice of temporary cessation must include a statement of the—

(i) Exact number of surface acres disturbed within the permit area prior to temporary cessation;

(ii) Extent and kind of reclamation accomplished before temporary cessation; and

(iii) Backfilling, regrading, revegetation, environmental monitoring, and water treatment activities that will continue during temporary cessation.

§ 816.132 What actions must I take when I permanently cease mining operations?

(a) Persons who permanently cease surface mining activities at a particular site must close, backfill, or otherwise permanently reclaim all disturbed areas in accordance with this chapter and the permit approved by the regulatory authority.

(b) All equipment, structures, underground openings, or other facilities must be removed and the affected land reclaimed, unless the regulatory authority approves retention of those features because they are suitable for the postmining land use or environmental monitoring.

§ 816.133 What provisions concerning postmining land use apply to my operation?

Except as provided in § 780.24(c) of this chapter, you, the permittee, must restore all disturbed areas in a timely manner to conditions that are capable of supporting—

(a) The uses they were capable of supporting before any mining, as described under § 779.22 of this chapter; or

(b) Higher or better uses approved under § 780.24(b) of this chapter.

§ 816.150 What are the general standards for haul and access roads?

(a) *Road classification system.* (1) Each road meeting the definition of that term in § 701.5 of this chapter must be classified as either a primary road or an ancillary road.

(2) A primary road is any road that is—

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of 6 months; or

(iii) To be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) *Performance standards.* Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to—

(1) Control or prevent erosion, siltation, and air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.

(2) Control or prevent damage to fish, wildlife, or their habitat and related environmental values.

(3) Control or prevent additional contributions of suspended solids to streamflow or runoff outside the permit area;

(4) Neither cause nor contribute to, directly or indirectly, the violation of water quality standards applicable to receiving waters.

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels.

(6) Prevent or control damage to public or private property, including the

prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress.

(7) Use nonacid- and nontoxic-forming substances in road surfacing.

(c) *Design and construction limits and establishment of design criteria.* To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads must include appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the regulatory authority.

(d) *Location.* (1) No part of any road may be located in the channel of an intermittent or perennial stream unless specifically approved by the regulatory authority in accordance with § 780.28 of this chapter and § 816.57 of this part.

(2) Roads must be located to minimize downstream sedimentation and flooding.

(e) *Maintenance.* (1) A road must be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority.

(2) A road damaged by a catastrophic event, such as a flood or earthquake, must be repaired as soon as is practicable after the damage has occurred.

(f) *Reclamation.* A road not to be retained as part of an approved postmining land use must be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. Reclamation must include—

(1) Closing the road to traffic.

(2) Removing all bridges and culverts unless approved as part of the postmining land use.

(3) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements.

(4) Reshaping the slopes of road cuts and fills as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain.

(5) Protecting the natural drainage patterns by installing dikes or cross-drains as necessary to control surface runoff and erosion.

(6) Scarifying or ripping the roadbed, replacing topsoil or substitute material in accordance with § 816.22 of this part, and revegetating disturbed surfaces in accordance with §§ 816.111, 816.115, and 816.116 of this chapter.

§ 816.151 What additional standards apply to primary roads?

(a) Primary roads must meet the requirements of § 816.150 of this part and the additional requirements of this section.

(b) *Certification.* The construction or reconstruction of primary roads must be certified in a report to the regulatory authority by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified registered professional land surveyor with experience in the design and construction of roads. The report must indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(c) *Safety factor.* Each primary road embankment must have a minimum static factor of 1.3 or meet the requirements established under § 780.37(c) of this chapter.

(d) *Location.* (1) To minimize erosion, a primary road must be located, insofar as is practicable, on the most stable available surface.

(2) Fords of perennial or intermittent streams are prohibited unless they are specifically approved by the regulatory authority as temporary routes during periods of road construction.

(e) *Drainage control.* In accordance with the approved plan—

(1) Each primary road must be constructed, or reconstructed, and maintained to have adequate drainage control, using structures such as, but not limited to, bridges, ditches, cross drains, and ditch relief drains. The drainage control system must be designed to safely pass the peak runoff from the 10-year, 6-hour precipitation event, or any greater event specified by the regulatory authority.

(2) Drainage pipes and culverts must be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets.

(3) Drainage ditches must be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment.

(4) Culverts must be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road.

(5) Natural stream channels must not be altered or relocated without the prior approval of the regulatory authority in accordance with § 780.28 of this chapter and § 816.57 of this part.

(6) Except as provided in paragraph (d)(2) of this section, structures for perennial or intermittent stream channel crossings must be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current prudent engineering practices. The regulatory authority must ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or streambed and additional contributions of suspended solids to streamflow.

(f) *Surfacing.* Primary roads must be surfaced with material approved by the regulatory authority as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

§ 816.180 To what extent must I protect utility installations?

You must conduct all surface coal mining operations in a manner that minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines that pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the regulatory authority.

§ 816.181 What requirements apply to support facilities?

(a) You must operate each support facility in accordance with the permit issued for the mine or coal preparation plant to which the facility is incident or from which its operation results.

(b) In addition to the other provisions of this part, you must locate, maintain, and use support facilities in a manner that—

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) To the extent possible using the best technology currently available—

(i) Minimizes damage to fish, wildlife, and related environmental values; and

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions may not be in excess of limitations of state or federal law.

§ 816.200 [Reserved]

■ 33. Lift the suspensions of § 817.46(b)(2) and § 817.121(c)(4)(i)

through (iv), and revise part 817 to read as follows:

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

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Authority: 30 U.S.C. 1201 *et seq.*

§ 817.1 Scope: What does this part do?

This part sets forth the minimum environmental protection performance standards for surface mining activities under the Act.

§ 817.2 What is the objective of this part?

This part is intended to ensure that all underground mining activities are conducted in an environmentally sound manner in accordance with the Act.

§ 817.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–xxxx. Collection of this information is required under section 516 of SMCRA, which provides that permittees conducting underground coal mining operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that underground mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 817.11 What signs and markers must I post?

(a) *General specifications.* Signs and markers required under this part must—

(1) Be posted and maintained by the person who conducts the surface mining activities;

(2) Be of a uniform design throughout the operation;

(3) Be easily seen and read;

(4) Be made of durable material; and

(5) Conform to local ordinances and codes.

(b) *Duration of maintenance.* You must maintain signs and markers during the conduct of all activities to which they pertain.

(c) *Mine and permit identification signs.* (1) You must display identification signs at each point of access from public roads to areas of surface operations and facilities on permit areas for underground mining activities.

(2) The signs must show the name, business address, and telephone number of the person who conducts the underground mining activities and the identification number of the current regulatory program permit authorizing underground mining activities.

(3) You must retain and maintain the signs until the release of all bonds for the permit area.

(d) *Perimeter markers.* You must clearly mark the perimeter of all areas

to be disturbed by surface operations or facilities before beginning mining activities on the surface of land within the permit area.

(e) *Stream buffer zone markers.* You must clearly mark the boundaries of any buffer to be maintained between surface activities and a perennial or intermittent stream in accordance with §§ 784.28 and 817.57 of this chapter to avoid disturbance by surface operations and facilities.

(f) *Topsoil markers.* You must clearly mark stockpiles of topsoil, subsoil, or other plant growth media segregated and stored as required in the permit in accordance with § 817.22 of this part.

§ 817.13 What special requirements apply to drilled holes, wells, and exposed underground openings?

(a) Except as provided in paragraph (f) of this section, you must case, line, otherwise manage each exploration hole, drilled hole, borehole, shaft, well, or other exposed underground opening in a manner approved by the regulatory authority to—

(1) Prevent acid or other toxic drainage from entering groundwater and surface water.

(2) Minimize disturbance to the prevailing hydrologic balance.

(3) Ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and the adjacent area.

(b) You must prevent access to each temporarily inactive mine entry by constructing fences and barricades or other covering devices and posting signs that identify the hazardous nature of the opening. You must periodically inspect and maintain these fences and barricades in good operating condition.

(c) You must temporarily seal each exploration hole, drilled hole, borehole, shaft, well, or other exposed underground opening that the approved permit identifies for use to monitor groundwater or to return underground development waste, coal processing waste, or water to underground workings until you are ready to actually use the hole or opening for that purpose.

(d) You may retain a drilled hole or groundwater monitoring well for use as a water well under the conditions established in § 817.39 of this part.

(e) Except as provided in paragraph (d) of this section, you must permanently close each exploration hole, drilled hole, borehole, well, or underground opening that mining activities uncover or expose within the permit area, unless the regulatory authority—

(1) Approves use of the hole, well, or opening for water monitoring purposes; or

(2) Authorizes other management of the hole or well.

(f)(1) Except as provided in paragraph (d) of this section, you must cap, seal, backfill, or otherwise properly manage each shaft, drift, adit, tunnel, exploratory hole, entryway or other opening to the surface when no longer needed for monitoring or any other use that the regulatory authority approves after finding that the use would not adversely affect the environment or public health and safety.

(2) Permanent closure measures taken under paragraph (f)(1) of this section must be—

(i) Consistent with § 75.1771 of this title;

(ii) Designed to prevent access to the mine workings by people, livestock, fish and wildlife, and machinery; and

(iii) Designed to keep acid or toxic mine drainage from entering groundwater or surface water.

(g) The requirements of this section do not apply to holes drilled and used for blasting as part of surface operations.

§ 817.14 [Reserved]

§ 817.15 [Reserved]

§ 817.22 How must I handle topsoil, subsoil, and other plant growth media?

(a) *Removal and salvage.* (1) You, the permittee, must separately remove and salvage all topsoil and other soil materials identified for salvage and use as postmining plant growth media in the soil handling plan approved in the permit under § 784.12(e) of this chapter. You must complete removal and salvage of these materials from the area to be disturbed before any drilling, blasting, mining, or other surface disturbance takes place on that area.

(2) The regulatory authority may choose not to require the removal of topsoil and other soil materials for minor disturbances that—

(i) Occur at the site of small structures, such as power poles, signs, or fence lines; or

(ii) Will not destroy the existing vegetation and will not cause erosion.

(b) *Storage.* (1) You must segregate and, except as provided in paragraph (b)(3) of this section, stockpile the materials removed under paragraph (a) of this section when it is impractical to redistribute those materials promptly on regraded areas.

(2) Stockpiled materials must—

(i) Be selectively placed on a stable site within the permit area;

(ii) Be protected from contaminants and unnecessary compaction that would interfere with revegetation;

(iii) Be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick-growing, non-invasive vegetative cover or through other measures approved by the regulatory authority; and

(iv) Not be moved until required for redistribution unless approved by the regulatory authority.

(3) When stockpiling of organic matter and soil materials removed under paragraphs (a) and (f) of this section would be detrimental to the quality or quantity of those materials, you may temporarily redistribute those soil materials on an approved site within the permit area to enhance the current use of that site until the materials are needed for later reclamation, provided that—

(i) Temporary redistribution will not permanently diminish the capability of the topsoil of the host site; and

(ii) The redistributed material will be preserved in a condition more suitable for redistribution than if it were stockpiled.

(c) *Soil substitutes and supplements.* When the soil handling plan approved in the permit in accordance with § 784.12(e) of this chapter provides for the use of substitutes for or supplements to the existing topsoil or subsoil, you must salvage, store, and redistribute the overburden materials selected and approved for that purpose in a manner consistent with paragraphs (a), (b), and (e) of this section.

(d) *Site preparation.* (1) You must minimize grading of backfilled areas to avoid compaction of the reconstructed root zone, as specified in the soil handling plan approved in the permit in accordance with § 784.12(e) of this chapter. Compaction is allowed only to the extent necessary to ensure stability and to comply with water quality standards.

(2) If necessary, you must rip, chisel-plow, or otherwise mechanically treat backfilled and graded areas before topsoil redistribution to reduce potential slippage of the redistributed material and to promote root penetration. You may conduct this treatment after soil redistribution if doing so will not harm the redistributed material.

(e) *Redistribution.* (1) You must redistribute the materials removed, salvaged, and, if necessary, stored under paragraphs (a) through (c) of this section in a manner that—

(i) Complies with the soil handling plan developed under § 784.12(e) of this chapter and approved as part of the permit.

(ii) Is consistent with the approved postmining land use, contours, and surface-water drainage systems.

(iii) Minimizes compaction of the materials to the extent possible and alleviates any excess compaction that may occur.

(iv) Protects the materials from wind and water erosion before and after seeding and planting to the extent necessary to ensure establishment of a successful vegetative cover and to avoid causing or contributing to a violation of applicable water quality standards.

(v) Achieves an approximately uniform, stable thickness across the regraded area, except that the thickness may vary when consistent with the postmining land use and when variations are necessary or desirable to achieve specific revegetation goals and ecological diversity, as set forth in the revegetation plan developed under § 784.12(g) of this chapter and approved as part of the permit.

(2) You must use a statistically valid sampling technique to document that soil materials have been redistributed in the locations and depths required by the soil handling plan developed under § 784.12(e) of this chapter and approved as part of the permit.

(3) The regulatory authority may choose not to require the redistribution of topsoil on the embankments of permanent impoundments or on the embankments of roads to be retained as part of the postmining land use if it determines that—

(i) Placement of topsoil on those embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) The embankments will be otherwise stabilized.

(f) *Organic matter.* (1) You must salvage duff, other organic litter, and vegetative materials such as tree tops, small logs, and root balls. You may not burn organic matter or bury it in the backfill.

(2) Except as otherwise provided in paragraph (f)(3) of this section, you must redistribute the materials salvaged under paragraph (f)(1) of this section across the regraded surface or incorporate them into the soil to control erosion, promote growth of vegetation, serve as a source of native plant seeds and soil inoculants to speed restoration of the soil's ecological community, and increase the moisture retention capability of the soil.

(3) Vegetative debris must be redistributed in accordance with paragraph (f)(2) of this section, used for stream restoration purposes, or used to construct fish and wildlife habitat enhancement features.

§ 817.34 How must I protect the hydrologic balance?

(a) You, the permittee, must conduct all underground mining and reclamation activities to—

(1) Minimize disturbance of the hydrologic balance within the permit and adjacent areas.

(2) Prevent material damage to the hydrologic balance outside the permit area.

(3) Protect streams in accordance with §§ 784.28 and 817.57 of this chapter.

(4) Assure the replacement of water supplies to the extent required by § 817.40 of this part.

(5) Protect existing water rights under state law.

(6) Support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part.

(7) Comply with the hydrologic reclamation plan as submitted under § 784.22 of this chapter and approved in the permit.

(8) Protect groundwater quality by using the best technology currently available to handle earth materials and runoff in a manner that avoids the formation of acid or toxic mine drainage and by managing excavations and other disturbances to prevent or control groundwater degradation.

(9) Protect groundwater quantity by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and excess spoil fills, so as to allow the movement of water into the groundwater system.

(10) Protect surface-water quality by using the best technology currently available to handle earth materials, groundwater discharges, and runoff in a manner that—

(i) Avoids the formation of acid or toxic mine drainage.

(ii) Prevents additional contribution of suspended solids to streamflow or runoff outside the permit area to the extent possible.

(iii) Otherwise prevents water pollution.

(11) Protect surface-water quality and flow rates by handling earth materials and runoff in accordance with the steps outlined in the hydrologic reclamation plan and the surface-water runoff control plan approved in the permit in accordance with §§ 784.22 and 780.29 of this chapter, respectively.

(b)(1) To the maximum extent practicable, you must use mining and reclamation practices that minimize water pollution, changes in flow, and adverse impacts on stream biota rather than relying upon water treatment to minimize those impacts.

(2) You must install, use, and maintain any necessary water-treatment facilities or water-quality controls if drainage control, materials handling, stabilization and revegetation of disturbed areas, diversion of runoff, mulching, and other reclamation and remedial practices are not adequate to meet the requirements of this section and § 817.42 of this part.

(c) The regulatory authority may require that you take preventive, remedial, or monitoring measures in addition to those set forth in this part to prevent material damage to the hydrologic balance outside the permit area.

(d)(1) You must examine the hydraulic structures identified under § 784.29 of this chapter after each occurrence of the following precipitation events:

(i) In areas with an average annual precipitation of more than 26.0 inches, an event of a size equal to or greater than that of a storm with a 2-year recurrence interval. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flow for a storm with that recurrence interval.

(ii) In areas with an average annual precipitation of 26.0 inches or less, a significant event of a size specified by the regulatory authority.

(2) You must prepare a report, which must be certified by a registered professional engineer, and submit the report to the regulatory authority within 48 hours of cessation of the applicable precipitation event under paragraph (d)(1) of this section. The report must address the performance of the hydraulic structures, identify and describe any material damage to the hydrologic balance outside the permit area that occurred, and identify and describe the remedial measures taken in response to that damage.

§ 817.35 How must I monitor groundwater?

(a)(1)(i) You, the permittee, must monitor groundwater in the manner specified in the groundwater monitoring plan approved in the permit in accordance with § 784.23(a) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the entire bond amount for the monitored

area has been fully released under § 800.42(d) of this chapter.

(b)(1) You must submit groundwater monitoring data to the regulatory authority every 3 months, or more frequently if prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take the actions required under § 773.17(e) of this chapter, if any, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the groundwater monitoring requirements, including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future changes in groundwater quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas when groundwater from the permit area provides all or part of the base flow of those streams.

(iv) Maintained the availability and quality of groundwater in a manner that can support existing and reasonably foreseeable uses.

(v) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring groundwater, consistent with §§ 817.13 and 817.39 of this part.

§ 817.36 How must I monitor surface water?

(a)(1)(i) You, the permittee, must monitor surface water in the manner specified in the surface-water monitoring plan approved in the permit in accordance with § 784.23(b) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the entire bond amount for the monitored area has been fully released under § 800.42(d) of this chapter.

(b)(1) You must submit surface-water monitoring data to the regulatory authority every 3 months, or more frequently when prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(3) The reporting requirements of paragraph (b) of this section do not exempt you from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take the actions required under § 773.17(e) of this chapter, if any, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the surface-water monitoring requirements (except those required by the NPDES permitting authority), including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future changes in surface-water quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(iv) Maintained the availability and quality of surface water in a manner that can support existing and reasonably foreseeable uses and that does not preclude attainment of designated uses under section 101(a) or 303(c) of the Clean Water Act.

(v) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring surface water.

§ 817.37 How must I monitor the biological condition of streams?

(a)(1)(i) You must monitor the biological condition of perennial and intermittent streams in the manner specified in the plan approved in the permit in accordance with § 784.23(c) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter and use a bioassessment protocol that complies with § 784.19(e)(2) of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until final release of bond under § 800.42(d) of this chapter. As provided in § 800.42(a) of this chapter, the regulatory authority may not release any portion of the bond if an evaluation of monitoring data indicates that adverse trends exist that could result in material damage to the hydrologic balance outside the permit area.

(b)(1) You must submit biological condition monitoring data to the regulatory authority on an annual basis, or more frequently if prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(c) You must promptly notify the regulatory authority and take the actions required under § 773.17(e) of this chapter whenever the analysis of any sample indicates noncompliance with the terms and conditions of the permit.

(d) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to meet the requirements of the regulatory

program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

§ 817.38 How must I handle acid-forming and toxic-forming materials?

You, the permittee, must use the best technology currently available to handle acid-forming and toxic-forming materials and underground development waste in a manner that will avoid the creation of acid or toxic mine drainage into surface water and groundwater. At a minimum, you must—

(a) Identify potential acid-forming and toxic-forming materials in overburden strata and the stratum immediately below the lowest coal seam to be mined and cover exposed coal seams and the stratum immediately beneath the lowest coal seam mined with a layer of compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil to minimize contact and interaction with water.

(b) Identify the anticipated postmining groundwater level for all locations at which you propose to place acid-forming or toxic-forming materials.

(c) Selectively handle and place acid-forming and toxic-forming materials within the backfill in accordance with the plan approved in the permit under § 784.12(d)(4) of this chapter, unless the permit allows placement of those materials in an excess spoil fill or a coal mine waste refuse pile. When placing those materials in the backfill, you must use one or more of the following techniques, as appropriate and as approved in the permit:

(1) Completely surround acid-forming and toxic-forming materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of adjacent less-compacted spoil.

(2) Place acid-forming and toxic-forming materials in a location below the water table where they will remain fully saturated at all times, provided that the permittee demonstrates, and the regulatory authority finds in writing in the permit, that complete saturation will prevent the formation of acid or toxic leachate.

(3) Treat or otherwise neutralize acid-forming and toxic-forming materials to prevent the formation of acid or toxic mine drainage. This technique also may be used in combination with either isolation under paragraph (c)(1) of this section or saturation under paragraph (c)(2) of this section.

(d) When approved in the permit, place acid-forming and toxic-forming materials in an excess spoil fill or a coal mine waste refuse pile, using one or both of the following techniques, as appropriate:

(1) Completely surround acid-forming and toxic-forming materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil or coal mine waste.

(2) Treat or otherwise neutralize acid-forming and toxic-forming materials to prevent the formation of acid or toxic mine drainage.

(e) Temporarily store acid-forming and toxic-forming materials only if the regulatory authority specifically approves temporary storage as necessary and finds in writing in the permit that the proposed storage method will protect surface water and groundwater by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water into aquifers. The regulatory authority must specify a maximum time for temporary storage, which may not exceed the period until burial first becomes feasible. In addition, storage must not result in any risk of water pollution, adverse impacts to the biological condition of perennial or intermittent streams, or other environmental damage.

(f) Adhere to disposal, treatment, and storage practices that are consistent with other material handling and disposal provisions of this chapter.

§ 817.39 What must I do with exploratory or monitoring wells when I no longer need them?

(a) Except as provided in paragraph (b) of this section, you, the permittee, must permanently seal exploratory or monitoring wells in a safe and environmentally sound manner in accordance with § 817.13 of this part before the regulatory authority may approve full release of the bond posted for the land on which the wells are located under section § 800.42(d) of this chapter.

(b) With the prior approval of the regulatory authority, you may transfer wells to another party for further use. The conditions of the transfer must comply with state and local laws. You will remain responsible for the proper management of the wells until full release of the bond posted for the land on which the wells are located under § 800.42(d) of this chapter.

§ 817.40 What responsibility do I have to replace water supplies?

(a) Replacement of adversely-impacted water supplies. (1) You, the permittee, must promptly replace any drinking, domestic or residential water supply that is contaminated, diminished or interrupted as a result of underground mining activities that you conducted after October 24, 1992, if the affected well or spring was in existence before the date the regulatory authority received the permit application for the activities causing the loss, contamination or interruption.

(2) The replacement supply must be equivalent to the quantity and quality of the premining supply.

(3) Replacement includes provision of an equivalent water supply delivery system and payment of operation and maintenance expenses in excess of customary and reasonable delivery costs for the premining water supply. If you and the water supply owner agree, the obligation to pay operation and maintenance costs may be satisfied by a one-time payment in an amount that covers the present worth of the increased annual operation and maintenance costs for a period upon which you and the water supply owner agree.

(4) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, you may satisfy the replacement requirements by demonstrating that a suitable alternative water source is available and could feasibly be developed, provided you obtain written concurrence from the owner of the affected water supply.

(b) *Measures to address anticipated adverse impacts to protected water supplies.* For anticipated loss of or damage to a protected water supply, you must adhere to the requirements set forth in the permit in accordance with § 784.22(b) of this chapter.

(c) *Measures to address unanticipated adverse impacts to protected water supplies.* For unanticipated loss of or damage to a protected water supply, you must—

(1) Provide an emergency temporary water supply within 24 hours of notification of the loss. The temporary supply must be adequate in quantity and quality to meet normal household needs.

(2) Develop and submit a plan for a permanent replacement supply to the regulatory authority within 30 days of receiving notice that an unanticipated loss of or damage to a protected water supply has occurred.

(3) Provide a permanent replacement water supply within 2 years of the date

of receiving notice of an unanticipated loss of or damage to a protected water supply.

(d) Basis for determination of adverse impact. The regulatory authority must use the baseline hydrologic and geologic information required under § 784.19 of this chapter and all other available information to determine whether and to what extent the mining operation adversely impacted the damaged water supply.

§ 817.41 Under what conditions may I discharge water and other materials into an underground mine?

(a) You may not discharge any water or other materials from your operation into an underground mine unless the regulatory authority specifically approves the discharge in writing, based upon a demonstration that—

(1) The discharge will be made in a manner that—

(i) Minimizes disturbances to the hydrologic balance within the permit area;

(ii) Prevents material damage to the hydrologic balance outside the permit area, including the hydrologic balance of the area in which the underground mine receiving the discharge is located;

(iii) Does not adversely impact the biological condition of perennial or intermittent streams; and

(iv) Otherwise eliminates public hazards resulting from surface mining activities.

(2) The discharge will not result in a violation of applicable water quality standards or effluent limitations.

(3)(i) The discharge will be at a known rate and of a quality that will meet the effluent limitations for pH and total suspended solids referenced in § 817.42 of this part.

(ii) The regulatory authority may approve discharges of water that exceed the effluent limitations for pH and total suspended solids if the available evidence indicates that there is no direct hydrologic connection between the underground mine and other waters and that those exceedances will not be inconsistent with paragraph (a)(1) of this section.

(4) The Mine Safety and Health Administration has approved the discharge.

(5) You have obtained written permission from the owner of the mine into which the discharge is to be made and you have provided a copy of that authorization to the regulatory authority.

(b) Discharges are limited to the following materials:

(1) Water.

(2) Coal processing waste.

(3) Fly ash from a coal-fired facility.

(4) Sludge from an acid-mine-drainage treatment facility.

(5) Flue-gas desulfurization sludge.

(6) Inert materials used for stabilizing underground mines.

(7) Underground mine development waste.

§ 817.42 What are my responsibilities to comply with water quality standards and effluent limitations?

(a) Discharges of water from underground mining activities and from areas disturbed by underground mining activities must be made in compliance with all applicable water quality laws and regulations, including the effluent limitations established in the National Pollutant Discharge Elimination System permit for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342.

(b) Discharges of overburden, coal mine waste, and other materials into waters of the United States must be made in compliance with section 404 of the Clean Water Act, 33 U.S.C. 1344, and its implementing regulations.

(c) You must construct water treatment facilities for discharges from the operation as soon as the need for those facilities becomes evident.

(d)(1) You must remove precipitates and otherwise maintain all water treatment facilities requiring the use of settling ponds or lagoons as necessary to maintain the functionality of those facilities.

(2) You must dispose of all precipitates removed from facilities under paragraph (d)(1) of this section either in an approved solid waste landfill or within the permit area in accordance with a plan approved by the regulatory authority.

(e) You must operate and maintain water treatment facilities until the regulatory authority authorizes removal based upon monitoring data demonstrating that influent to the facilities meets all applicable water quality standards and effluent limitations without treatment.

§ 817.43 How must I construct and maintain diversions and other channels to convey water?

(a) *General provisions.* (1) When approved in the permit, you may divert the following flows away from the disturbed area by means of temporary or permanent diversions:

(i) Any flow from mined areas abandoned before May 3, 1978.

(ii) Any flow from undisturbed areas.

(iii) Any flow from reclaimed areas for which the criteria of § 817.46 of this part for siltation structure removal have been met.

(2) You may not divert water into underground mines without approval of the regulatory authority under § 817.41 of this part.

(3) When the permit requires the use of siltation structures for sediment control, you must construct diversions or other channels designed to the standards of this section to convey runoff from the disturbed area to a siltation structure unless the topography will naturally direct all runoff to a siltation structure.

(4) All diversions must be designed to—

(i) Ensure the safety of the public.

(ii) Minimize adverse impacts to the hydrologic balance, including the biological condition of perennial and intermittent streams, within the permit and adjacent areas.

(iii) Prevent material damage to the hydrologic balance outside the permit area.

(5) Each diversion and its appurtenant structures must be designed, located, constructed, maintained and used to—

(i) Be stable.

(ii) Provide and maintain a combination of channel and bank configuration adequate to pass safely the peak flow of surface runoff from a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flows.

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area.

(iv) Comply with all applicable federal, state, and local laws and regulations.

(6)(i) You must remove temporary diversions promptly when they are no longer needed to achieve the purpose for which they were authorized.

(ii) You must restore the land disturbed by the removal process in accordance with this part.

(iii) Before temporary diversions are removed, you must modify or remove downstream water-treatment facilities previously protected by the diversion when necessary to prevent overtopping or failure of the facilities. You must continue to maintain water-treatment facilities until they are no longer needed.

(7) The regulatory authority may specify additional design criteria for diversions to meet the requirements of this section.

(b) *Diversion of perennial and intermittent streams.* Sections 784.28

and 817.57 of this chapter contain additional requirements applicable to diversions of perennial and intermittent streams.

(c) *Diversion of miscellaneous flows.* (1) Miscellaneous flows, which consist of all surface-water flows except perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the regulatory authority.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows must meet the requirements of paragraph (a) of this section.

§ 817.44 What restrictions apply to gravity discharges from underground mines?

(a)(1) You must locate and manage surface entries and accesses to underground workings to prevent or control gravity discharge of water from the mine.

(2) The regulatory authority may approve gravity discharges of water from an underground mine, other than a drift mine subject to paragraph (b) of this section, if you—

(i) Demonstrate that the untreated or treated discharge will comply with the performance standards of this part and any additional National Pollutant Discharge Elimination System permit requirements under the Clean Water Act.

(ii) Design the discharge control structure to prevent a mine pool blowout.

(3) You must construct and maintain the discharge control structure in accordance with the design approved by the regulatory authority and any other conditions imposed by the regulatory authority.

(b) Notwithstanding anything to the contrary in paragraph (a) of this section, you must locate the surface entries and accesses of drift mines first used after the implementation of a state, federal, or federal lands program under this chapter and located in acid-producing or iron-producing coal seams in such a manner as to prevent any gravity discharge from the mine.

§ 817.45 What sediment control measures must I implement?

(a) You must design, construct, and maintain appropriate sediment control measures, using the best technology currently available to—

(1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(2) Meet the more stringent of the applicable effluent limitations referenced in § 817.42(a) of this part.

(3) Minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within and adjacent to the disturbed area. Sediment control measures consist of the use of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation.

(2) Shaping and stabilizing the backfilled material to promote a reduction in the rate and volume of runoff.

(3) Retaining sediment within disturbed areas.

(4) Diverting runoff away from disturbed areas.

(5) Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion.

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment.

(7) Treating with chemicals.

(8) Treating mine drainage in underground sumps.

§ 817.46 What requirements apply to siltation structures?

(a) *Scope.* For the purpose of this section only, *disturbed areas* do not include those areas—

(1) In which the only underground mining activities conducted on the land surface consist of diversions, siltation structures, or roads that are designed, constructed, and maintained in accordance with this part; and

(2) For which you do not plan to otherwise disturb the land surface upgradient of the diversion, siltation structure, or road.

(b) *General requirements.* (1) When siltation structures will be used to achieve the requirements of § 817.45 of this part, you must construct those structures before beginning any underground mining activities that will disturb the land surface.

(2) Upon completion of construction of a siltation structure, a qualified registered professional engineer, or, in any state that authorizes land surveyors to prepare and certify plans in accordance with § 784.25(a) of this chapter, a qualified registered professional land surveyor, must certify that the structure has been constructed as designed and as approved in the reclamation plan in the permit.

(3) Any siltation structure that impounds water must be designed, constructed and maintained in accordance with § 817.49 of this chapter.

(4) You must maintain siltation structures until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated.

(5)(i) When a siltation structure is removed, you must regrade the land upon which the structure was located and revegetate the land in accordance with the reclamation plan and §§ 817.111 and 817.116 of this chapter.

(ii) Paragraph (b)(5)(i) of this section does not apply to sedimentation ponds approved by the regulatory authority for retention as permanent impoundments under § 817.49(b) of this part if the maintenance requirements of § 800.42(c)(5) of this chapter are met.

(c) *Sedimentation ponds.* (1) When used, sedimentation ponds must—

(i) Be located as near as possible to the disturbed area and out of perennial or intermittent stream channels unless approved by the regulatory authority in the permit in accordance with §§ 784.28 and 817.57(c) of this chapter.

(ii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume.

(B) Provide adequate detention time to allow the effluent from the ponds to meet applicable effluent limitations.

(C) Contain or treat the 10-year, 24-hour precipitation event (''design event'') unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 817.42 of this part will be met.

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(ii)(B) of this section.

(E) Minimize short circuiting to the extent possible.

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event.

(G) Ensure against excessive settlement.

(H) Be free of sod, large roots, frozen soil, and acid-forming or toxic-forming materials.

(I) Be compacted properly.

(2) *Spillways.* A sedimentation pond must include either a combination of principal and emergency spillways or a single spillway configured as specified in § 817.49(a)(9) of this part.

(d) *Other treatment facilities.* (1) You must design other treatment facilities to treat the 10-year, 24-hour precipitation event unless the regulatory authority approves a lesser design event based upon terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 817.42 of this part will be met.

(2) You must design other treatment facilities in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* The regulatory authority may grant an exemption from the requirements of this section if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) You demonstrate that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed drainage area to meet the effluent limitations referenced in § 817.42 of this part and the applicable water quality standards for the receiving waters.

§ 817.47 What requirements apply to discharge structures for impoundments?

Discharges from sedimentation ponds, permanent and temporary impoundments, coal mine waste impounding structures, and diversions must be controlled by energy dissipators, riprap channels, and other devices, when necessary to reduce erosion, to prevent deepening or enlargement of stream channels, or to minimize disturbance of the hydrologic balance. Discharge structures must be designed according to standard engineering design procedures.

§ 817.49 What requirements apply to impoundments?

(a) Requirements that apply to both permanent and temporary impoundments—(1) Impoundments with Significant Hazard Class or High Hazard Class dams. Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class dams in ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the ''Minimum Emergency Spillway Hydrologic Criteria'' table in that publication and the requirements of this section. Technical Release No. 60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* A copy of this document is on file for public inspection and copying at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240. For information on the availability of this document at OSMRE, call 202–208–2823. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(2) MSHA requirements. An impoundment meeting the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216 of this title and this section.

(3) Design certification. As provided in § 784.25(a) of this chapter, a qualified registered professional engineer or a qualified registered professional land surveyor must certify that that the impoundment design meets the requirements of this part, current prudent engineering practices, and any design criteria established by the regulatory authority. The qualified registered professional engineer or qualified registered professional land surveyor must be experienced in the design and construction of impoundments.

(4) Stability. (i) An impoundment that meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that meets the criteria of § 77.216(a) of this title, must have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(4)(i) of this section, except for a coal mine waste impounding structure, must have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 784.25(c)(3) of this chapter.

(5) Freeboard. Impoundments must have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. Impoundments that meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60 must comply with the freeboard hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60.

(6) Foundation. (i) Foundations and abutments for an impounding structure must be stable during all phases of construction and operation and must be designed based on adequate and accurate information on the foundation conditions. If the impoundment meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or the criteria of § 77.216(a) of this title, you must conduct a foundation investigation, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability.

(ii) You must remove all vegetative and organic materials from the foundation area and excavate and prepare the foundation area to resist failure. You must install cutoff trenches if necessary to ensure stability.

(7) Protection of impoundment slopes. You must take measures to protect impoundment slopes from surface erosion and the adverse impacts of a sudden drawdown.

(8) Protection of embankment faces. Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(9) Spillways. An impoundment must include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(9)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(9)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(9) of this section is:

(A) For an impoundment that meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, the emergency spillway hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60, or any greater event specified by the regulatory authority.

(B) For an impoundment meeting or exceeding the criteria of § 77.216(a) of this title, the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

(C) For an impoundment not included in paragraphs (a)(9)(ii) (A) and (B) of this section, the 25-year, 6-hour event,

or any greater event specified by the regulatory authority.

(10) Highwalls. The vertical portion of any highwall remnant within the impoundment must be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users.

(11) Inspections. Except as provided in paragraph (a)(11)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer must inspect each impoundment as provided in paragraph (a)(11)(i) of this section. The professional engineer or specialist must be experienced in the construction of impoundments.

(i) Inspections must be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(ii) After each inspection required by paragraph (a)(11)(i) of this section, the qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(11)(iv) of this section, must promptly provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report must include a discussion of any appearance of instability, any structural weakness or other hazardous condition, the depth and elevation of any impounded waters, the existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(iii) You must retain a copy of the report at or near the minesite.

(iv) In any state that authorizes land surveyors to prepare and certify plans in accordance with § 784.25(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that does not meet the criteria of § 77.216(a) of this title, and certify and submit the report required by paragraph (a)(11)(ii) of this section, except that a qualified registered professional engineer must certify all coal mine waste impounding structures covered by § 817.84 of this chapter. The professional land surveyor must be experienced in the construction of impoundments.

(12) Examinations. Impoundments that meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that meet the criteria of § 77.216 of this title, must be examined in accordance with § 77.216–3 of this title. Impoundments that do not meet the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that are not subject to § 77.216 of this title, must be examined at least quarterly. A qualified person designated by the operator must examine impoundments for the appearance of structural weakness and other hazardous conditions.

(13) Emergency procedures. If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment must promptly inform the regulatory authority of the finding and of the emergency procedures formulated for public protection and remedial action. The regulatory authority must be notified immediately if adequate procedures cannot be formulated or implemented. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) Requirements that apply only to permanent impoundments. A permanent impoundment of water may be created if authorized by the regulatory authority in the approved permit based upon the following demonstration:

(1) The size and configuration of the impoundment will be adequate for its intended purposes.

(2) The quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable state and federal water quality standards. Discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable state and federal water quality standards.

(3) The water level will be sufficiently stable and be capable of supporting the intended use.

(4) Final grading will provide for adequate safety and access for proposed water users.

(5) The impoundment will not result in the diminution of the quality and quantity of water used by surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(6) The impoundment will be suitable for the approved postmining land use.

(7) Approval of the impoundment will not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour.

(8) Approval of the impoundment will not result in the creation of an excess spoil fill elsewhere within the permit area.

(9) The impoundment has been designed with dimensions and other characteristics that will enhance fish and wildlife habitat to the extent that doing so is not inconsistent with the intended use.

(c) *Requirements that apply only to temporary impoundments that rely primarily upon storage.* (1) In lieu of meeting the requirements in paragraph (a)(9)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when you demonstrate, and a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 784.25(a) of this chapter certifies, that the impoundment will safely control the design precipitation event.

(2) You must use current prudent engineering practices to safely remove the water from an impoundment constructed in accordance with paragraph (c)(1) of this section.

(3) An impoundment constructed in accordance with paragraph (c)(1) of this section must be located where failure would not be expected to cause loss of life or serious property damage, unless the impoundment meets one of the following exceptions:

(i) An impoundment that meets the criteria for High Hazard Class or Significant Hazard Class dams in TR–60, or that meets the criteria of § 77.216(a) of this title, and is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or any greater event specified by the regulatory authority.

(ii) An impoundment not included in paragraph (c)(3)(i) of this section that is designed to control the precipitation of the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

§ 817.56 How must I rehabilitate sedimentation ponds, diversions, impoundments, and treatment facilities after I no longer need them?

Before abandoning a permit area or seeking bond release, you must ensure that all temporary structures are removed and reclaimed, and that all permanent sedimentation ponds, diversions, impoundments, and treatment facilities meet the requirements of this chapter for permanent structures, have been

maintained properly, and meet the requirements of the approved reclamation plan for permanent structures and impoundments. You must renovate these structures if necessary to meet the requirements of this chapter and to conform to the approved reclamation plan.

§ 817.57 What additional performance standards apply to surface activities conducted in, through, or adjacent to a perennial or intermittent stream?

(a)(1) *General prohibition.* (i) You, the permittee or operator, may not conduct underground mining activities in or through a perennial or intermittent stream, or that would disturb the surface of land within 100 feet of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so in the permit after making the findings required under § 784.28 of this chapter. The 100-foot distance must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel.

(ii) The prohibition in paragraph (a)(1)(i) of this section applies only to activities conducted on the land surface. It does not apply to underground mining activities conducted beneath the land surface, including activities conducted beneath a perennial or intermittent stream.

(2) *Clean Water Act requirements.* You may conduct underground mining activities in waters of the United States only if you first obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *Requirements for mining through or diverting perennial or intermittent streams*—(1) *Compliance with permit.* If your permit authorizes you to mine through or divert a perennial or intermittent stream, you must comply with the designs and construction and maintenance plans approved in the permit.

(2) *Restoration of form and function.* You must restore the form and ecological function of the stream segment as expeditiously as practicable. You must do so either as part of the construction of a permanent stream-channel diversion or as part of the construction of a restored stream channel when the area in which the stream was located before mining is no longer needed for surface mining activities.

(i) *Form.* A restored stream channel or a stream-channel diversion need not exactly replicate the channel morphology that existed before mining, but, except as provided in paragraph (b)(4) of this section, it must have a channel morphology comparable to the premining form of the affected stream segment in terms of baseline stream pattern, profile, and dimensions, including channel slope, sinuosity, water depth, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate.

(ii) *Function.* (A) A stream flowing through a restored stream channel or a stream-channel diversion must meet the functional restoration criteria established by the regulatory authority under § 784.28(e)(1) of this chapter.

(B) The restored stream need not have precisely the same biological condition or biota as the stream segment did before mining, but the biological condition of the restored stream must be adequate to support the uses of that stream segment that existed before mining and it must not preclude attainment of the premining designated uses of that stream segment under section 101(a) or 303(c) of the Clean Water Act before mining.

(C) The biological condition of the restored stream must be determined using a protocol that meets the requirements of § 784.19(e)(2) of this chapter.

(D) Populations of organisms used to determine the biological condition must be self-sustaining within the restored stream segment.

(iii) *Bond and bond release requirements.* (A) The performance bond calculations for the operation must include a specific line item for restoration of the ecological function of the stream segment, as provided in § 800.14(b)(2) of this chapter.

(B) You must post a surety bond, a collateral bond, or a combination of surety and collateral bonds to cover the cost of restoration of the ecological function of the stream segment.

(C) You must demonstrate full restoration of the physical form of the stream segment before you can qualify for Phase I bond release under § 800.42(b)(1) of this chapter.

(D) You must demonstrate full restoration of the ecological function of the stream segment before you can qualify for final bond release under § 800.42(d) of this chapter.

(3) *Certification.* Upon completion of construction of a stream-channel diversion or a restored stream channel, you must obtain a certification from a qualified registered professional engineer that the stream-channel diversion or restored stream channel has been constructed in accordance with the design approved in the permit and meets all requirements of this section other than the functional restoration requirements of paragraph (b)(2)(ii) of this section.

(4) *Special provision for restoration of degraded stream segments.* If the stream segment to be mined through or diverted is in a degraded condition before mining, you must implement measures to enhance the form and ecological function of the segment as part of the restoration or diversion process.

(c) *Prohibition on placement of sedimentation control structures in streams.* (1) Except as provided in paragraph (c)(2) of this section, you may not construct a sedimentation pond in a perennial or intermittent stream or use perennial or intermittent streams as waste treatment systems to convey surface runoff from the disturbed area to a sedimentation pond.

(2) The prohibition in paragraph (c)(1) of this section does not apply to excess spoil fills or coal mine waste disposal facilities in steep-slope areas when use of a perennial or intermittent stream segment as a waste treatment system for sediment control or construction of a sedimentation pond in a perennial or intermittent stream would have less overall adverse impact on fish, wildlife, and related environmental values than construction of diversions and sedimentation ponds on slopes above the stream.

(3) When the circumstances described in paragraph (c)(2) of this situation exist, the following requirements apply:

(i) You must minimize the length of the stream segment used as a waste treatment system to the extent possible and, when practicable, maintain an undisturbed buffer along that segment in accordance with paragraph (a)(1) of this section.

(ii) You must place the sedimentation pond as close to the toe of the excess spoil fill or coal mine waste disposal structure as possible.

(iii) Following the completion of construction and revegetation of the fill or coal mine waste disposal structure, you must remove the sedimentation pond and restore the stream segment in accordance with paragraph (b)(2) of this section.

§ 817.59 How must I maximize coal recovery?

You must conduct underground mining activities so as to maximize the utilization and conservation of the coal, while using the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

§ 817.61 Use of explosives: General requirements.

(a) Applicability. Sections 817.61 through 817.68 apply to surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.

(b) Compliance with other laws and regulations. You must comply with all applicable state and federal laws and regulations governing the use of explosives.

(c) Requirements for blasters. (1) No later than 12 months after the blaster certification program for a state required by part 850 of this chapter has been approved under the procedures of subchapter C of this chapter, all blasting operations in that state must be conducted under the direction of a certified blaster. Before that time, all blasting operations in that state must be conducted by competent, experienced persons who understand the hazards involved.

(2) Certificates of blaster certification must be carried by blasters or be on file at the permit area during blasting operations.

(3) A blaster and at least one other person shall be present at the firing of a blast.

(4) Any blaster who is responsible for conducting blasting operations at a blasting site must:

(i) Be familiar with the site-specific performance standards; and

(ii) Give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew or who assist in the use of explosives.

(d) Blast design. (1) You must submit an anticipated blast design if blasting operations will be conducted within—

(i) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(ii) 500 feet of an active or abandoned underground mine.

(2) The blast design may be submitted as part of a permit application or, if approved by the regulatory authority, at a later date, provided that the design is submitted and approved before blasting begins.

(3) The blast design must contain—

(i) Sketches of the drill patterns, delay periods, and decking.

(ii) The type and amount of explosives to be used.

(iii) Critical dimensions.

(iv) The location and general description of structures to be protected.

(v) A discussion of design factors to be used to protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in § 817.67 of this part.

(4) A certified blaster must prepare and sign the blast design.

(5) The regulatory authority may require changes to the design submitted.

§ 817.62 Use of explosives: Preblasting survey.

(a) At least 30 days before initiation of blasting, you must notify, in writing, all residents or owners of dwellings or other structures located within ½ mile of the permit area how to request a preblasting survey.

(b)(1) A resident or owner of a dwelling or structure within ½ mile of any part of the permit area may request a preblasting survey. This request must be made, in writing, directly to you or to the regulatory authority. If the request is made to the regulatory authority, the regulatory authority will promptly notify you.

(2) You must promptly conduct a preblasting survey of the dwelling or structure and promptly prepare a written report of the survey.

(3) You must conduct an updated survey of any subsequent additions, modifications, or renovations to the dwelling or structure, if requested by the resident or owner.

(c) You must determine the condition of the dwelling or structure and document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Structures such as pipelines, cables, transmission lines, and cisterns, wells, and other water systems warrant special attention; however, the assessment of these structures may be limited to surface conditions and other readily available data.

(d)(1) The person who conducted the survey must sign the written report of the survey.

(2) You must promptly provide copies of the report to the regulatory authority and to the person requesting the survey.

(3) If the person requesting the survey disagrees with the contents or recommendations of the survey, he or she may submit a detailed description of the specific areas of disagreement to both you and the regulatory authority.

(e) You must complete any surveys requested more than 10 days before the planned initiation of blasting before the initiation of blasting.

§ 817.64 Use of explosives: General performance standards.

(a)(1) You must notify, in writing, residents within ½ mile of the blasting site and local governments of the proposed times and locations of blasting operations.

(2) You may provide this notice weekly, but in no case less than 24 hours before blasting will occur.

(b) You must conduct all blasting between sunrise and sunset, unless the regulatory authority approves night-time blasting based upon a showing that the public will be protected from adverse noise and other impacts. The regulatory authority may specify more restrictive time periods for blasting.

(c)(1) You may conduct unscheduled blasts only where public or operator health and safety so require and for emergency blasting actions.

(2) When you conduct an unscheduled blast, you must use audible signals to notify residents within ½ mile of the blasting site.

(3) You must document the reason for the unscheduled blast in accordance with § 817.68(c)(16) of this part.

§ 817.66 Use of explosives: Blasting signs, warnings, and access control.

(a) Blasting signs. Blasting signs must meet the specifications of § 817.11 of this part.

(1) You must place conspicuous signs reading ''Blasting Area'' along the edge of any blasting area that comes within 100 feet of any public road right-of-way and at the point where any other road provides access to the blasting area.

(2) You must place conspicuous signs reading ''Warning! Explosives in Use'' at all entrances to the permit area from public roads or highways. The signs must clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use and explain the marking of blasting areas and charged holes awaiting firing within the permit area.

(b) Warnings. You must give blast warning and all-clear signals of different character or pattern that are audible within a range of ½ mile from the point of the blast. You must notify each person within the permit area and each person who resides or regularly works within ½ mile of the permit area of the meaning of the signals in the blasting notification required in § 817.64(a) of this part.

(c) Access control. You must control access within the blasting area to prevent presence of livestock or unauthorized persons during blasting and until your authorized representative has reasonably determined that—

(1) No unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) Access to and travel within the blasting area can be safely resumed.

§ 817.67 Use of explosives: Control of adverse effects.

(a) General requirements. You must conduct blasting in a manner that prevents—

(1) Injury to persons;

(2) Damage to public or private property outside the permit area;

(3) Adverse impacts on any underground mine; or

(4) Change in the course, channel, or availability of surface water or groundwater outside the permit area.

(b) Airblast—(1) Limits. (i) Airblast must not exceed the maximum limits listed below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in paragraph (e) of this section.

Lower frequency limit of measuring system, in Hz (±3 dB)
0.1 Hz or lower—flat response[1]
2 Hz or lower—flat response
6 Hz or lower—flat response
C-weighted—slow response[1]

[1] Only when approved by the regulatory authority.

(ii) If necessary to prevent damage, the regulatory authority must specify lower maximum allowable airblast levels than those of paragraph (b)(1)(i) of this section for use in the vicinity of a specific blasting operation.

(2) Monitoring. (i) You must conduct periodic monitoring to ensure compliance with the airblast standards. The regulatory authority may require airblast measurement of any or all blasts and may specify the locations at which measurements are taken.

(ii) The measuring systems must have an upper-end flat-frequency response of at least 200 Hz.

(c) Flyrock. Flyrock travelling in the air or along the ground must not be cast from the blasting site—

(1) More than one-half the distance to the nearest dwelling or other occupied structure;

(2) Beyond the area of control required under § 817.66(c) of this part; or

(3) Beyond the permit boundary.

(d) Ground vibration—(1) General. (i) In all blasting operations, except as otherwise authorized in paragraph (e) of this section, the maximum ground vibration must not exceed the values approved in the blasting plan required under § 784.15 of this chapter.

(ii) The maximum ground vibration for protected structures listed in paragraph (d)(2)(i) of this section must be established in accordance with either the maximum peak-particle-velocity limits of paragraph (d)(2) of this section, the scaled-distance equation of paragraph (d)(3) of this section, the blasting-level chart of paragraph (d)(4) of this section, or by the regulatory authority under paragraph (d)(5) of this section.

(iii) All structures in the vicinity of the blasting area not listed in paragraph (d)(2)(i) of this section, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, must be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator in the blasting plan and approved by the regulatory authority.

(2) Maximum peak particle velocity. (i) The maximum ground vibration must not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Distance (*D*), from the blasting site, in feet	Maximum allowable peak particle velocity (*V* max) for ground vibration, in inches/second[1]	Scaled-distance factor to be applied without seismic monitoring[2] (*Ds*)
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

[1] Ground vibration must be measured as the particle velocity. Particle velocity must be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity applies to each of the three measurements.

[2] Applicable to the scaled-distance equation of paragraph (d)(3)(i) of this section.

(ii) You must provide a seismographic record for each blast.

(3) Scaled-distance equation. (i) You may use the scaled-distance equation, W = (D/Ds)2, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring, where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and Ds = the scaled-distance factor. The regulatory authority may initially approve the scaled-distance equation using the values for the scaled-distance factor listed in paragraph (d)(2)(i) of this section.

(ii) The regulatory authority may authorize development of a modified scaled-distance factor upon receipt of a written request by the operator, supported by seismographic records of blasting at the minesite. The modified scale-distance factor must be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (d)(2)(i) of this section at a 95-percent confidence level.

(4) Blasting-level chart. (i) You may use the ground-vibration limits in Figure 1 to determine the maximum allowable ground vibration.

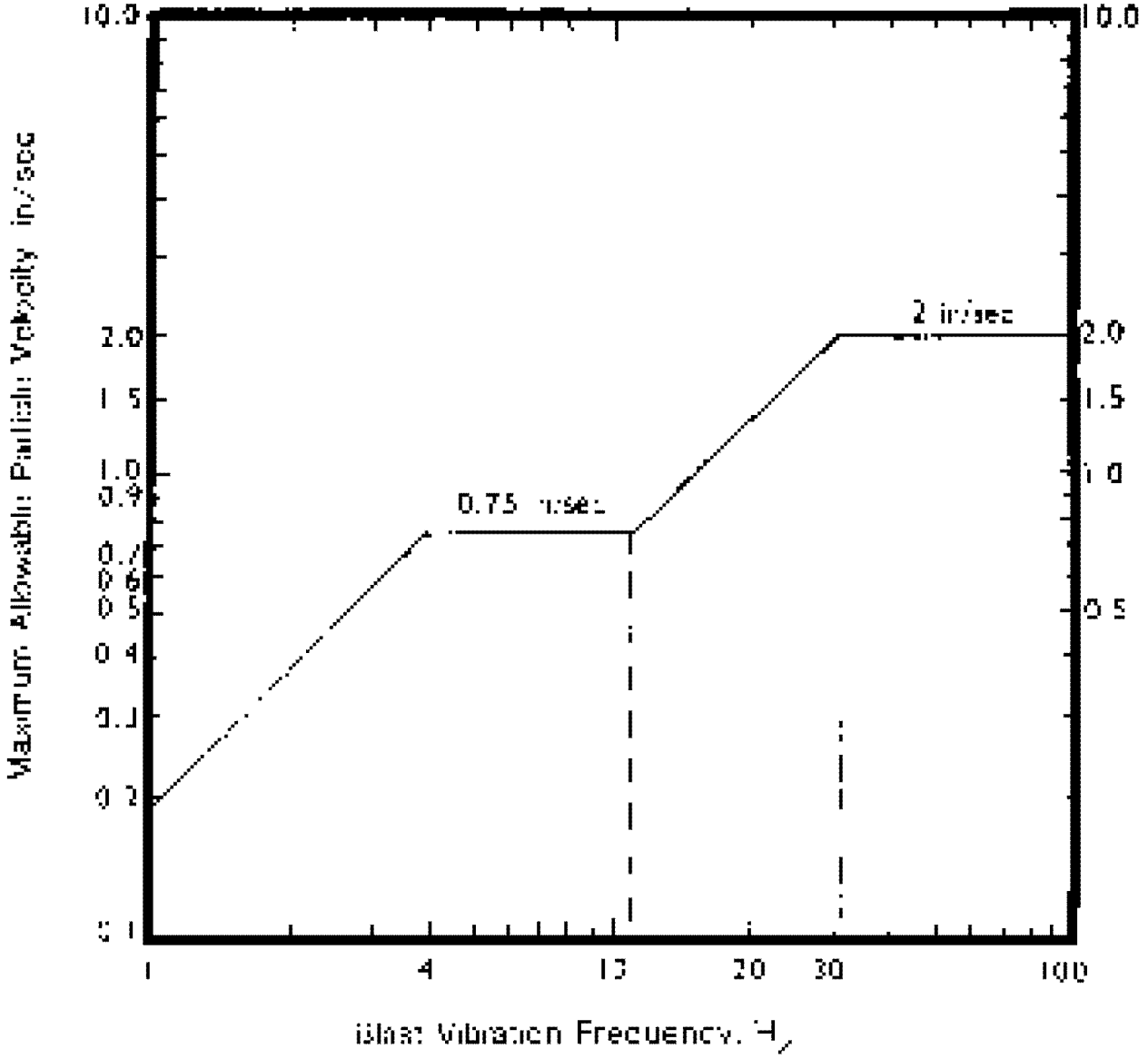

Figure 1. Alternative blasting level criteria

(Source: Modified from figure B-1, Bureau of Mines, RI 8507)

(ii) If the Figure 1 limits are used, you must provide a seismographic record including both particle velocity and vibration-frequency levels for each blast. The regulatory authority must approve the method for the analysis of the predominant frequency contained in the blasting records before application of this alternative blasting criterion.

(5) The regulatory authority must reduce the maximum allowable ground vibration beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

(6) The regulatory authority may require that you conduct seismic monitoring of any or all blasts or may specify the location at which the measurements are taken and the degree of detail necessary in the measurement.

(e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section do not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person.

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

§ 817.68 Use of explosives: Records of blasting operations.

(*a*) You must retain a record of all blasts for at least 3 years.

(b) Upon request, you must make copies of these records available to the regulatory authority and to the public for inspection.

(c) The records must contain the following data:

(1) Name of the operator conducting the blast.

(2) Location, date, and time of the blast.

(3) Name, signature, and certification number of the blaster conducting the blast.

(4) Identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building outside the permit

area, except those described in § 817.67(e) of this part.

(5) Weather conditions, including those which may cause possible adverse blasting effects.

(6) Type of material blasted.

(7) Sketches of the blast pattern, including number of holes, burden, spacing, decks, and delay pattern.

(8) Diameter and depth of holes.

(9) Types of explosives used.

(10) Total weight of explosives used per hole.

(11) The maximum weight of explosives detonated in an 8-millisecond period.

(12) Initiation system.

(13) Type and length of stemming.

(14) Mats or other protections used.

(15) Seismographic and airblast records, if required, which must include—

(i) Type of instrument, sensitivity, and calibration signal or certification of annual calibration;

(ii) Exact location of instrument and the date, time, and distance from the blast;

(iii) Name of the person and firm taking the reading;

(iv) Name of the person and firm analyzing the seismographic record; and

(v) The vibration and/or airblast level recorded.

(16) Reasons and conditions for each unscheduled blast.

§ 817.71 How must I dispose of excess spoil?

(a) *General requirements.* You, the permittee or operator, must mechanically transport and place excess spoil in designated disposal areas, including approved valley fills and other types of approved fills, within the permit area in a controlled manner in compliance with the requirements of this section. In general, you must place excess spoil in a manner that will—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface water, groundwater, and the biological condition of perennial and intermittent streams within the permit and adjacent areas.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final surface configuration of the fill is suitable for revegetation and the approved postmining land use or uses and is compatible with the natural drainage pattern and surroundings.

(4) Minimize disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(5) Ensure that the fill will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in damage from flooding when compared with the impacts of premining peak flows.

(6) Ensure that the fill will not preclude any existing or reasonably foreseeable use of surface water or groundwater or, for surface water downstream of the fill, preclude attainment of any designated use under section 101(a) or 303(c) of the Clean Water Act.

(7) Ensure that the fill will not cause or contribute to an exceedance of any applicable water quality standards.

(b) *Stability requirements.* (1) *Static safety factor.* You must design and construct the fill to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(2) *Special requirement for steep-slope conditions.* Where the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you must construct bench cuts (excavations into stable bedrock) or rock-toe buttresses to ensure fill stability.

(c) *Compliance with permit.* You must construct the fill in accordance with the design and plans approved in the permit in accordance with § 784.35 of this chapter.

(d) *Requirements for handling of organic matter and soil materials.* You must remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the excess spoil. You must store, redistribute, or otherwise use those materials in accordance with § 817.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 784.12(e) of this chapter.

(e) *Surface runoff control requirements.* (1) You must direct surface runoff from areas above the fill and runoff from the surface of the fill into stabilized channels designed to—

(i) Meet the requirements of § 817.43 of this part; and

(ii) Safely pass the runoff from a 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(2) You must grade the top surface of a completed fill such that the final slope after settlement will be toward properly designed drainage channels. You may not direct uncontrolled surface runoff over the outslope of the fill.

(f) *Control of water within the footprint of the fill.* (1) General requirements. If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(2) *Temporary diversions.* Temporary diversions must comply with the requirements of § 817.43 of this part.

(3) *Underdrains.* (i) You must construct underdrains that are comprised of hard rock that is resistant to weathering.

(ii) You must design and construct underdrains using current, prudent engineering practices and any design criteria established by the regulatory authority.

(iii) In constructing rock underdrains, you may use only hard rock that is resistant to weathering, such as well-cemented sandstone and massive limestone, and that is not acid-forming or toxic-forming. The underdrain must be free of soil and fine-grained, clastic rocks such as siltstone, shale, mudstone, and claystone. All rock used to construct underdrains must meet the criteria in the following table:

Test	ASTM standard	AASHTO standard	Acceptable results
Los Angeles Abrasion	C 131 or C 535	T 96	Loss of no more than 50 percent of test sample by weight.
Sulfate Soundness	C 88 or C 5240	T 104	Sodium sulfate test: Loss of no more than 12 percent of test sample by weight. Magnesium sulfate test: Loss of no more than 18 percent of test sample by weight.

(iv) The underdrain system must be designed and constructed to carry the maximum anticipated infiltration of water due to precipitation, snowmelt, and water from seeps and springs in the foundation of the disposal area away from the excess spoil fill.

(v) To provide a safety factor against future changes in local surface-water and groundwater hydrology, perforated pipe may be embedded within the rock underdrain to enhance the underdrain capacity to carry water in excess of the anticipated maximum infiltration away from the excess spoil fill. The pipe must be manufactured of materials that are not susceptible to corrosion and must be demonstrated to be suitable for the deep burial conditions commonly associated with excess spoil fill underdrains.

(vi) The underdrain system must be protected from material piping, clogging, and contamination by an adequate filter system designed and constructed using current, prudent engineering practices to ensure the long-term functioning of the underdrain system.

(g) *Placement of excess spoil.* (1) Using mechanized equipment, you must transport and place excess spoil in a controlled manner in horizontal lifts not exceeding 4 feet in thickness; concurrently compacted as necessary to ensure mass stability and to prevent mass movement during and after construction; and graded so that surface and subsurface drainage is compatible with the natural surroundings.

(2) You may not use any excess spoil transport and placement technique that involves end-dumping, wing-dumping, cast-blasting, gravity placement, or casting spoil downslope.

(3) *Acid-forming, toxic-forming, and combustible materials.* (i) You must handle acid-forming and toxic-forming materials in accordance with § 817.38 of this part and in a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(ii) You must cover combustible materials with noncombustible materials in a manner that will prevent sustained combustion and minimize adverse effects on plant growth and the approved postmining land use.

(h) *Final configuration.* (1) The final configuration of the fill must be suitable for the approved postmining land use, compatible with the natural drainage pattern and the surrounding terrain, and, to the extent practicable, consistent with natural landforms.

(2) You may construct terraces on the outslope of the fill if required for stability, to control erosion, to conserve soil moisture, or to facilitate the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h: 1v (50 percent).

(3)(i) You must configure the top surface of the fill to create a topography that includes ridgelines and valleys with varied hillslope configurations when practicable, compatible with stability and postmining land use considerations, and generally consistent with the premining topography.

(ii) The final surface elevation of the fill may exceed the elevation of the surrounding terrain when necessary to minimize placement of excess spoil in perennial and intermittent streams, provided the final configuration complies with the requirements of paragraphs (a)(3) and (h)(1) of this section.

(iii) The geomorphic reclamation requirements of paragraph (h)(3)(i) of this section do not apply in situations in which they would result in burial of a greater length of perennial or intermittent streams than traditional fill design and construction techniques.

(i) *Impoundments and depressions.* No permanent impoundments are allowed on the completed fill. You may construct small depressions if they—

(1) Are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(2) Are not incompatible with the stability of the fill;

(3) Are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter;

(4) Will not result in elevated levels of parameters of concern in discharges from the fill; and

(5) Are approved by the regulatory authority.

(j) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(k) *Inspections and examinations.* A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, must inspect the fill during construction. The professional engineer or specialist must be experienced in the construction of earth and rock fills.

(1) Complete inspections that include the entire fill must be made at least quarterly throughout construction, with additional complete inspections conducted during critical construction periods. Critical construction periods include, at a minimum—

(i) Foundation preparation, including the removal of all organic matter and soil materials.

(ii) Placement of underdrains and protective filter systems.

(iii) Installation of final surface drainage systems.

(iv) Final grading and revegetation of the fill.

(2) The engineer or specialist also must—

(i) Conduct daily examinations during placement and compaction of fill materials.

(ii) Maintain a log recording the daily examinations for each fill. The log must include a description of the specific work locations, excess spoil placement methods, compaction adequacy, lift thickness, suitability of fill material, special handling of acid-forming and toxic-forming materials, deviations from the approved permit, and remedial measures taken.

(3) The qualified registered professional engineer must provide a certified report to the regulatory authority promptly after each complete inspection conducted under paragraph (k)(1) of this section. The report must—

(i) Certify that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter.

(ii) Identify and discuss any evidence of instability, structural weakness, or other hazardous conditions. If one of more of those conditions exists, you must submit an application for a permit revision that includes appropriate remedial design specifications.

(iii) Include a review and summary of the logs maintained under paragraph (k)(2)(ii) of this section.

(4)(i) The certified report on the drainage system and protective filters must include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase must be certified separately.

(ii) The photographs accompanying each certified report must be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(5) You must retain a copy of each complete inspection report at or near the mine site.

(l) *Coal mine waste.* You may dispose of coal mine waste in excess spoil fills only if approved by the regulatory authority and only if—

(1) You demonstrate, and the regulatory authority finds in writing, that there is no credible evidence that

the disposal of coal mine waste in the excess spoil fill will cause or contribute to a violation of applicable water quality standards or effluent limitations or result in material damage to the hydrologic balance outside the permit area.

(2) The waste is placed in accordance with §§ 817.81 and 817.83 of this part.

(3) The waste is nontoxic-forming, nonacid-forming, and non-combustible.

(4) The waste is of the proper characteristics to be consistent with the design stability of the fill.

(m) *Underground disposal.* You may dispose of excess spoil in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 817.72 [Reserved]

§ 817.73 [Reserved]

§ 817.74 What special provisions apply to disposal of excess spoil on a preexisting bench?

(a) General requirements. The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench on a previously mined area or a bond forfeiture site if—

(1) The proposed permit area includes the portion of the preexisting bench on which the spoil will be placed;

(2) The proposed operation will comply with the applicable requirements of § 817.102 of this part; and

(3) The requirements of this section are met.

(b) *Requirements for removal and disposition of vegetation, other organic matter, and soil materials.* You must remove all vegetation, other organic matter, topsoil, and subsoil from the disposal area prior to placement of the excess spoil and store, redistribute, or otherwise use those materials in accordance with § 817.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 784.12(e) of this chapter.

(c)(1) The fill must be designed and constructed using current, prudent engineering practices.

(2) The design must be certified by a registered professional engineer.

(3) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design must include underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability. Underdrains must comply with the requirements of § 817.71(f)(3) of this part.

(d)(1) The spoil must be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long-term static safety factor of 1.3 for all portions of the fill.

(2) Any spoil deposited on any fill portion of the bench must be treated as an excess spoil fill under § 817.71 of this part.

(e) You must grade the spoil placed on the preexisting bench to—

(1) Achieve a stable slope that does not exceed the angle of repose.

(2) Eliminate the preexisting highwall to the maximum extent technically practical, using all reasonably available spoil, as that term is defined in § 701.5 of this chapter.

(3) Minimize erosion and water pollution both on and off the site.

(f) All disturbed areas, including diversion channels that are not riprapped or otherwise protected, must be revegetated upon completion of construction.

(g) You may not construct permanent impoundments on preexisting benches on which excess spoil is placed under this section.

(h) The final configuration of the fill on the preexisting bench must—

(1) Be compatible with natural drainage patterns and the surrounding area.

(2) Support the approved postmining land use.

§ 817.81 How must I dispose of coal mine waste?

(a) *General requirements.* If you, the permittee, intend to dispose of coal mine waste in an area other than the mine workings or excavations, you must place the waste in new or existing disposal areas within a permit area in accordance with this section and, as applicable, §§ 817.83 and 817.84 of this part.

(b) *Basic performance standards.* You must haul or convey and place the coal mine waste in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface-water runoff on the quality and quantity of surface water and groundwater and on the biological condition of perennial and intermittent streams within the permit and adjacent areas to the extent possible, using the best technology currently available.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final disposal facility is suitable for revegetation, compatible with the natural surroundings, and consistent with the approved postmining land use.

(4) Not create a public hazard.

(5) Prevent combustion.

(6) Ensure that the disposal facility will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in damage from flooding when compared with the impact of premining peak flows.

(7) Ensure that the disposal facility will not preclude any existing or reasonably foreseeable use of surface water or groundwater or, for surface water downstream of the facility, preclude attainment of any designated use under section 101(a) or 303(c) of the Clean Water Act.

(8) Ensure that the disposal facility will not cause or contribute to a violation of any applicable water quality standards.

(9) Ensure that the disposal facility will not discharge acid or toxic mine drainage.

(c) *Coal mine waste from outside the permit area.* Coal mine waste materials from activities located outside a permit area may be disposed of within the permit area only if approved by the regulatory authority. Approval must be based upon a showing that disposal will be in accordance with the standards of this section.

(d) *Design and construction requirements.* (1)(i) You must design and construct coal mine waste disposal facilities using current, prudent engineering practices and any design and construction criteria established by the regulatory authority.

(ii) A qualified registered professional engineer, experienced in the design and construction of similar earth and waste structures, must certify the design of the disposal facility. The engineer must specifically certify that any existing and planned underground mine workings in the vicinity of the disposal facility will not adversely impact the stability of the structure.

(iii) You must construct the disposal facility in accordance with the design and plans submitted under § 784.25 of this chapter and approved in the permit. A qualified registered professional engineer experienced in the design and construction of similar earth and waste structures must certify that the facility has been constructed in accordance with the requirements of this paragraph.

(2) You must design and construct the disposal facility to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

(e) *Foundation investigations.* (1) You must perform sufficient foundation investigations, as well as any necessary

laboratory testing of foundation material, to determine the design requirements for foundation stability. The analyses of the foundation conditions must take into consideration the effect of any underground mine workings located in the permit and adjacent areas upon the stability of the disposal facility.

(f) *Soil handling requirements.* You must remove all vegetation, organic matter, and soil materials from the disposal area prior to placement of the coal mine waste. You must store, redistribute, or otherwise use those materials in accordance with § 817.22 of this part. You may use soil substitutes and substitutes if approved in the permit in accordance with § 784.12(e) of this part.

(g) *Emergency procedures.* (1) If any examination or inspection discloses that a potential hazard exists, you must inform the regulatory authority promptly of the finding and of the emergency procedures formulated for public protection and remedial action.

(2) If adequate procedures cannot be formulated or implemented, you must notify the regulatory authority immediately. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(h) *Underground disposal.* You may dispose of coal mine waste in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 817.83 What special performance standards apply to coal mine waste refuse piles?

(a) *General requirements.* Refuse piles must meet the requirements of § 817.81, the additional requirements of this section, and the requirements of §§ 77.214 and 77.215 of this title.

(b) *Surface runoff and drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct the refuse pile with diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility, and ensure stability.

(2) You may not direct or divert uncontrolled surface runoff over the outslope of the refuse pile.

(3) You must direct runoff from areas above the refuse pile and runoff from the surface of the refuse pile into stabilized channels designed to meet the requirements of § 817.43 of this part and to safely pass the runoff from the 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(4) Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile.

(5) Underdrains must comply with the requirements of § 817.71(f) of this part.

(c) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(d) *Final configuration and cover.* (1) The final configuration of the refuse pile must be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, erosion control, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h:1v (50 percent).

(2) No permanent impoundments or depressions are allowed on the completed refuse pile.

(3) Following final grading of the refuse pile, you must cover the coal mine waste with a minimum of 4 feet of the best available, nontoxic, and noncombustible material in a manner that does not impede drainage from the underdrains. The regulatory authority may allow less than 4 feet of cover material based on physical and chemical analyses showing that the revegetation requirements of §§ 817.111 and 817.116 of this part will be met.

(e) *Inspections.* You must comply with the inspection and examination requirements of § 817.71(l) of this part.

§ 817.84 What special performance standards apply to coal mine waste impounding structures?

(a) Impounding structures constructed of coal mine waste or intended to impound coal mine waste must meet the requirements of § 817.81 of this part.

(b) You may not use coal mine waste to construct impounding structures unless you demonstrate, and the regulatory authority finds in writing, that the stability of such a structure conforms to the requirements of this part and that the use of coal mine waste will not have a detrimental effect on downstream water quality or the environment as a result of acid drainage or toxic seepage through the impounding structure. You must discuss the stability of the structure and the prevention and potential impact of acid drainage or toxic seepage through the impounding structure in detail in the design plan submitted to the regulatory authority in accordance with § 784.25 of this chapter.

(c)(1) You must design, construct, and maintain each impounding structure constructed of coal mine waste or intended to impound coal mine waste in accordance with paragraphs (a) and (c) of § 817.49 of this part.

(2) You may not retain these structures permanently as part of the approved postmining land use.

(3) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title must have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority.

(d) You must design spillways and outlet works to provide adequate protection against erosion and corrosion. Inlets must be protected against blockage.

(e) You must direct surface runoff from areas above the disposal facility and runoff from the surface of the facility that may cause instability or erosion of the impounding structure into stabilized channels designed and constructed to meet the requirements of § 817.43 of this part and to safely pass the runoff from a 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(f) For an impounding structure constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event must be removed within the 10-day period following the design precipitation event.

§ 817.87 What special performance standards apply to burning and burned coal mine waste?

(a) Coal mine waste fires must be extinguished by the person who conducts the mining activities, in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration. The plan must contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the

procedures to be used, are involved in the extinguishing operations.

(b) No burning or burned coal mine waste may be removed from a permitted disposal area without a removal plan approved by the regulatory authority. Consideration must be given to potential hazards to persons working or living in the vicinity of the structure.

§ 817.89 How must I dispose of noncoal mine wastes?

(a)(1) Noncoal mine wastes including, but not limited to grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustible materials generated during mining activities must be placed and stored in a controlled manner in a designated portion of the permit area.

(2) Placement and storage of noncoal wastes must ensure that leachate and surface runoff do not degrade surface water or groundwater, that fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b)(1) Final disposal of noncoal mine wastes must be in a designated disposal site within the permit area or in a state-approved solid waste disposal area.

(2) Disposal sites within the permit area must meet the following requirements:

(i) The site must be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface water or groundwater.

(ii) Wastes must be routinely compacted and covered to prevent combustion and wind-borne waste.

(iii) When the disposal of noncoal wastes is completed, the site must be covered with a minimum of 2 feet of soil, slopes must be stabilized, and the site must be revegetated in accordance with §§ 817.111 through 817.116 of this part.

(iv) The disposal site must be operated in accordance with all local, state and federal requirements.

(c) At no time may any noncoal mine waste be deposited in a refuse pile or impounding structure, nor may an excavation for a noncoal mine waste disposal site be located within 8 feet of any coal outcrop or coal storage area.

§ 817.95 How must I protect surface areas from wind and water erosion?

(a) You must protect and stabilize all exposed surface areas to effectively control erosion and air pollution attendant to erosion.

(b)(1) You must fill, regrade, or otherwise stabilize rills and gullies that form in areas that have been regraded and upon which soil or soil substitute materials have been redistributed. This requirement applies only to rills and gullies that either—

(i) Disrupt the approved postmining land use or reestablishment of the vegetative cover; or

(ii) Cause or contribute to a violation of water quality standards for receiving waters.

(2) You must reapply soil materials to the filled or regraded rills and gullies when necessary to reestablish a vegetative cover. You must then replant those areas.

§ 817.97 How must I protect and enhance fish, wildlife, and related environmental values?

(a) *General requirements.* You, the permittee, must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable, as described in detail in the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 784.16 of this chapter.

(b) *Species listed or proposed for listing as threatened or endangered.* (1) *Federally-listed species.* (i) You may not conduct any underground mining activity that is likely to jeopardize the continued existence of threatened or endangered species listed by the Secretary or proposed for listing by the Secretary or that is likely to result in the destruction or adverse modification of designated critical habitat in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

(ii) You must promptly report to the regulatory authority any federally-listed threatened or endangered species within the permit area or the adjacent area of which you become aware. This requirement applies regardless of whether the species was listed before or after permit issuance.

(iii)(A) Upon receipt of a notification under paragraph (b)(2)(ii) of this section, the regulatory authority will contact and coordinate with the appropriate state and federal fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state and federal fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary, the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(iv) You must comply with any species-specific protection measures required by the regulatory authority in coordination with the U.S. Fish and Wildlife Service.

(v) Nothing in this chapter authorizes the taking of a threatened or endangered species in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

(2) *State-listed species.* (i) You must promptly report to the regulatory authority any state-listed threatened or endangered species within the permit area or the adjacent area of which you become aware. This requirement applies regardless of whether the species was listed before or after permit issuance.

(ii)(A) Upon receipt of a notification under paragraph (b)(2)(i) of this section, the regulatory authority will contact and coordinate with the appropriate state fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary, the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(c) *Bald and golden eagles.* (1) You may not conduct any underground mining activity in a manner that would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs.

(2) You must promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which you become aware.

(3) Upon notification, the regulatory authority will contact and coordinate with the U.S. Fish and Wildlife Service and, when appropriate, the state fish and wildlife agency to identify whether, and under what conditions, you may proceed.

(4) Nothing in this chapter authorizes the taking of a bald or golden eagle, its nest, or any of its eggs in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. 668–668d.

(d) *Miscellaneous protective measures for other species of fish and wildlife.* To the extent possible, using the best technology currently available, you must—

(1) Ensure that electric power transmission lines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors and other avian species with large wingspans.

(2) Locate, construct, operate, and maintain haul and access roads and sedimentation control structures in a manner that avoids or minimizes impacts on important fish and wildlife

species or other species protected by state or federal law.

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds that contain hazardous concentrations of toxic or toxic-forming materials.

(5) Reclaim and reforest lands that were forested at the time of application and lands that would revert to forest under conditions of natural succession in a manner that enhances recovery of the native forest ecosystem as expeditiously as practicable.

(e) *Wetlands and habitat of unusually high value for fish and wildlife.* To the extent possible, you must avoid disturbances to, restore or replace, and, where practicable, enhance, wetlands, riparian vegetation along rivers and streams, lentic vegetation bordering ponds and lakes, and habitat of unusually high value for fish and wildlife.

(f) *Vegetation requirements for fish and wildlife habitat postmining land use.* Where fish and wildlife habitat is a postmining land use, you must select and arrange the plant species to be used for revegetation to maximize the benefits to fish and wildlife. Plant species must be native to the area and must be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their value as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds.

(4) Their ability to sustain natural succession by allowing the establishment and spread of plant species across ecological gradients. You may not use invasive plant species that are known to inhibit natural succession.

(g) *Vegetation requirements for cropland postmining land use.* Where cropland is the postmining land use, and where appropriate for wildlife-management and crop-management practices, you must intersperse the crop fields with trees, hedges, or fence rows to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(h) *Vegetation requirements for forestry postmining land uses.* Where forestry, whether managed or unmanaged, is the postmining land use, you must plant native tree and understory species to the extent that doing so is not inconsistent with the type of forestry to be practiced as part of the postmining land use. In all cases, regardless of the type of forestry to be practiced as part of the postmining land use, you must intersperse plantings of commercial species with plantings of native trees and shrubs of high value to wildlife.

(i) *Vegetation requirements for other postmining land uses.* Where residential, public service, commercial, industrial, or intensive recreational uses are the postmining land use, you must establish—

(1) Greenbelts comprised of non-invasive native plants that provide food or cover for wildlife, unless greenbelts would be inconsistent with the approved postmining land use plan for that site.

(2)(i) A vegetated buffer at least 100 feet wide along each bank of all perennial and intermittent streams within the permit area. The width of the buffer must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel. The buffer must be planted with species native to the area, including species adapted to and suitable for planting in riparian zones within the buffer. The species planted must consist of native tree and understory species if the land was forested at the time of application or if it would revert to forest under conditions of natural succession.

(ii) Paragraph (i)(2)(i) of this section does not apply to situations in which a riparian buffer would be incompatible with an approved postmining land use that is implemented during the revegetation responsibility period before final bond release under § 800.42(d) of this chapter.

(j) *Planting arrangement requirements.* You must design and arrange plantings in a manner that optimizes benefits to wildlife to the extent practicable and consistent with the postmining land use.

§ 817.99 What measures must I take to prevent and remediate landslides?

(a) You must notify the regulatory authority by the fastest available means whenever a landslide occurs that has the potential to adversely affect public property, health, safety, or the environment.

(b) You must comply with any remedial measures that the regulatory authority requires in response to the notification provided in paragraph (a) of this section.

§ 817.100 What are the standards for conducting reclamation contemporaneously with mining?

(a) You must reclaim all areas disturbed by surface impacts incident to an underground coal mine as contemporaneously as practicable with the mining operations, except when the mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities under § 785.18 of this chapter. Reclamation activities include, but are not limited to, backfilling, grading, soil replacement, revegetation, and stream restoration.

(b) The regulatory authority may establish schedules that define contemporaneous reclamation.

§ 817.102 How must I backfill surface excavations and grade and configure the land surface?

(a) You, the permittee or operator, must backfill all surface excavations and grade all disturbed areas in compliance with the plan approved in the permit in accordance with § 784.12(d) of this chapter to—

(1) Restore the approximate original contour as the final surface configuration, except in the following situations:

(i) Sites for which the regulatory authority has approved a variance under § 785.16 of this chapter.

(ii) Remining operations on previously mined areas, but only to the extent specified in § 817.106(b) of this part.

(iii) Excess spoil fills constructed in accordance with § 817.71 or § 817.74 of this part.

(iv) Refuse piles constructed in accordance with § 817.83 of this part.

(v) Permanent impoundments that meet the requirements of paragraph (a)(3)(ii) of this section and § 784.35(b)(4) of this chapter.

(vi) The placement, in accordance with § 784.35(b)(3) of this chapter, of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation when necessary to avoid or minimize construction of excess spoil fills on undisturbed land.

(vii) Regrading of settled and revegetated spoil storage sites at the conclusion of underground mining activities, provided the following conditions are met:

(A) The settled and revegetated storage sites are composed of spoil or non-acid-forming or non-toxic-forming underground development waste.

(B) The spoil or underground development waste is not located so as to be detrimental to the environment,

the health and safety of the public, or the approved postmining land use.

(C) You demonstrate, through standard geotechnical analysis, that the spoil or underground development waste has a 1.3 static safety factor for material placed on a solid bench and a 1.5 static safety factor for material not placed on a solid bench.

(D) The surface of the spoil or underground development waste is revegetated in accordance with §§ 817.111 and 817.116 of this part.

(E) Surface runoff is controlled in accordance with § 784.29 of this chapter and §§ 817.43 and 817.45 of this part.

(F) The regulatory authority determines that disturbance of the existing spoil or underground development waste would increase environmental harm or adversely affect the health or safety of the public.

(G) The spoil is not needed to eliminate the highwall or to meet other regulatory program requirements.

(2) Minimize the creation of uniform slopes and cut-and-fill terraces. The regulatory authority may approve cut-and-fill terraces only if—

(i) They are compatible with the approved postmining land use and are needed to conserve soil moisture, ensure stability, or control erosion on final-graded slopes; or

(ii) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land use.

(3) Eliminate all highwalls, spoil piles, impoundments, and depressions, except in the following situations:

(i) You may construct or retain small depressions if—

(A) They are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(B) They are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter; and

(C) You demonstrate that they will not result in elevated levels of parameters of concern in discharges from the backfilled and graded area.

(ii) The regulatory authority may approve the retention of permanent impoundments if—

(A) They meet the requirements of §§ 817.49 and 817.56 of this part;

(B) They are suitable for the approved postmining land use; and

(C) You can demonstrate compliance with the future maintenance provisions of § 800.42(c)(5) of this chapter.

(D) You have obtained all necessary approvals and authorizations under section 404 of the Clean Water Act when the impoundment is located in waters of the United States.

(iii) You may retain highwalls on previously mined areas to the extent provided in § 817.106(b) of this part.

(iv) You may retain modified highwall segments to the extent necessary to replace similar natural landforms removed by the mining operation. The regulatory program must establish the conditions under which these highwall segments may be retained and the modifications that must be made to the highwall to ensure that the retained segment resembles similar premining landforms and restores the ecological niches that the premining landforms provided. Nothing in this paragraph authorizes the retention of modified highwall segments in excess of the number, length, and height needed to replace similar premining landforms.

(v) You may retain settled and revegetated spoil storage sites under the conditions specified in paragraph (a)(1)(vii) of this section.

(4) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

(5) Minimize erosion and water pollution, including discharges of parameters of concern for which no numerical effluent limitations or water quality standards have been established, both on and off the site.

(6) Support the approved postmining land use.

(b) You must return all spoil to the surface excavations from which the spoil was removed. This requirement does not apply to—

(1) Excess spoil disposed of in accordance with § 817.71 or § 817.74 of this part.

(2) Spoil placed outside surface excavations in non-steep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain, provided that you comply with the following requirements:

(i) You must remove all vegetation and other organic matter from the area upon which you intend to place spoil for blending purposes. You may not burn or bury these materials; you must store, redistribute, or use them in the manner specified in § 817.22(f) of this part.

(ii) You must remove, segregate, store, and redistribute topsoil, in accordance with § 817.22 of this part, from the area upon which you intend to place spoil for blending purposes.

(3) Settled and revegetated spoil storage sites under the conditions specified in paragraph (a)(1)(vii) of this section.

(c) You must compact spoil and waste materials when necessary to ensure stability or to prevent the formation of acid or toxic mine drainage, but, to the extent possible, you must avoid compacting spoil, soil, and other materials placed in what will be the root zone of the species planted under the revegetation plan approved in the permit in accordance with § 784.12(g) of this chapter.

(d)(1) You must cover all exposed coal seams with material that is noncombustible, nonacid-forming, and nontoxic-forming.

(2) You must handle and dispose of all other combustible materials exposed, used, or produced during mining in accordance with § 817.89 of this part in a manner that will prevent sustained combustion, as approved in the permit in accordance with § 784.12(j) of this chapter.

(3) You must handle all other acid-forming and toxic-forming materials—

(i) In compliance with the plan approved in the permit in accordance with § 784.12(d)(4) of this chapter;

(ii) In compliance with § 817.38 of this part;

(iii) In compliance with the hydrologic reclamation plan approved in the permit in accordance with § 784.22(a) of this chapter; and

(iv) In a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(e) You must dispose of any coal mine waste placed in the surface excavation in accordance with §§ 817.81 and 817.83 of this part, except that a long-term static safety factor of 1.3 will apply instead of the 1.5 factor specified in § 817.81(d)(2) of this part.

(f) You must prepare final-graded surfaces in a manner that minimizes erosion and provides a surface for replacement of soil materials that will minimize slippage.

§ 817.106 What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

(a) Remining operations on previously mined areas that contain a preexisting highwall must comply with the requirements of §§ 817.102 through 817.107 of this part, except as provided in this section.

(b) The highwall elimination requirements of § 817.102(a) of this part do not apply to remining operations for

which you demonstrate in writing, to the regulatory authority's satisfaction, that the volume of all reasonably available spoil is insufficient to completely backfill the reaffected or enlarged highwall. Instead, for those operations, you must eliminate the highwall to the maximum extent technically practical in accordance with the following criteria:

(1) You must use all spoil generated by the remining operation and any other reasonably available spoil to backfill the area. You must include reasonably available spoil in the immediate vicinity of the remining operation within the permit area.

(2) You must grade the backfilled area to a slope that is compatible with the approved postmining land use and that provides adequate drainage and long-term stability.

(3) Any highwall remnant must be stable and not pose a hazard to the public health and safety or to the environment. You must demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) You must not disturb spoil placed on the outslope during previous mining operations if disturbance would cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

§ 817.107 What special provisions for backfilling, grading, and surface configuration apply to operations on steep slopes?

(a) Underground mining activities on steep slopes must comply with this section and the requirements of §§ 817.102 through 817.106 of this part.

(b) You may not place the following materials on the downslope:

(1) Spoil.

(2) Waste materials of any type.

(3) Debris, including debris from clearing and grubbing, except for woody materials used to enhance fish and wildlife habitat.

(4) Abandoned or disabled equipment.

(c) You may not disturb land above the highwall unless the regulatory authority finds that disturbance will facilitate compliance with the environmental protection standards of this subchapter and the disturbance is limited to that necessary to facilitate compliance.

(d) You must handle woody materials in accordance with § 817.22(f) of this part. You may not bury them in the backfill.

§ 817.111 How must I revegetate the area disturbed by mining?

(a) You, the permittee, must establish a diverse, effective, permanent vegetative cover on regraded areas and on all other disturbed areas except—

(1) Water areas approved as a postmining land use or in support of the postmining land use.

(2) The surfaces of roads approved for retention to support the postmining land use.

(3) Rock piles, water areas, and other non-vegetative features created to restore or enhance wildlife habitat under the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 784.16 of this chapter.

(4) Any other impervious surface, such as a building or a parking lot, approved as part of or in support of the postmining land use. This provision applies only to structures and facilities constructed before expiration of the revegetation responsibility period.

(b) The reestablished vegetative cover must—

(1) Comply with the revegetation plan approved in the permit in accordance with § 784.12(g) of this chapter.

(2) Be consistent with the approved postmining land use and the plant communities described in § 783.19 of this chapter.

(3) Be at least equal in extent of cover to the natural vegetation of the area.

(4) Be capable of stabilizing the soil surface and, in the long term, preventing erosion in excess of what would have occurred naturally had the site not been disturbed.

(5) Not inhibit the establishment of trees and shrubs when the revegetation plan approved in the permit requires the use of woody plants.

(c) Volunteer plants of species that are desirable components of the plant communities described in the permit application under § 783.19 of this chapter and that are not inconsistent with the postmining land use may be considered in determining whether the requirements of §§ 817.111 and 817.116 have been met.

(d) You must stabilize all areas upon which you have distributed soil or soil substitute materials. You must use one or a combination of the following methods, unless the regulatory authority determines that neither method is necessary to stabilize the surface and control erosion—

(1) Establishing a temporary vegetative cover consisting of noncompetitive and non-invasive species, either native or domesticated or a combination thereof.

(2) Applying suitable mulch free of weed and noxious plant seeds. You must use native hay mulch to the extent that it is commercially available.

(e) You must plant all disturbed areas with the species needed to establish a permanent vegetative cover during the first normal period for favorable planting conditions after redistribution of the topsoil or other plant-growth medium. The normal period for favorable planting conditions is the generally accepted local planting time for the type of plant materials approved in the permit as part of the revegetation plan under § 784.12(g) of this chapter.

§ 817.113 [Reserved]

§ 817.114 [Reserved]

§ 817.115 How long am I responsible for revegetation after planting?

(a) *General provisions.* (1) The period of extended responsibility for successful revegetation will begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with paragraph (d) of this section.

(2) The initial planting of small areas that are regraded and planted as a result of the removal of sediment control structures and associated structures and facilities such as diversion ditches, disposal and storage areas for accumulated sediment and sediment pond embankment material, and ancillary roads used to access those structures need not be considered an augmented seeding necessitating an extended or separate revegetation responsibility period.

(b) *Areas of more than 26.0 inches of average annual precipitation.* In areas of more than 26.0 inches of annual average precipitation, the period of responsibility will continue for a period of not less than—

(1) Five full years, except as provided in paragraph (b)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Two full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard

during the growing season of the last year of the responsibility period.

(c) *Areas of 26.0 inches or less average annual precipitation.* In areas of 26.0 inches or less average annual precipitation, the period of responsibility will continue for a period of not less than:

(1) Ten full years, except as provided in paragraph (c)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Five full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing seasons of the last two consecutive years of the responsibility period.

(d) *Normal husbandry practices.* (1) The regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSMRE in accordance with § 732.17 of this chapter that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if those practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success.

(2) Approved practices must be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

§ 817.116 What are the standards for determining revegetation success?

(a) The regulatory authority must select standards for revegetation success and statistically valid sampling techniques for measuring revegetation success. The standards and techniques must be made available to the public in written form.

(b) The standards for success applied to a specific permit must be adequate to demonstrate restoration of premining land use capability and must reflect the revegetation plan requirements of § 784.12(g) of this chapter. They must be based upon the following data—

(1) The plant community and vegetation information required under § 783.19 of this chapter.

(2) The soil type and productivity information required under § 783.21 of this chapter.

(3) The land use capability and productivity information required under § 783.22 of this chapter.

(4) The postmining land use approved under § 784.24 of this chapter, but only to the extent that the approved postmining land use actually will be implemented before expiration of the revegetation responsibility period. Otherwise, the site must be revegetated in a manner that will restore native plant communities and the revegetation success standards for the site must reflect that requirement.

(c) Except for the areas identified in § 817.111(a) of this part, standards for success must include—

(1) Species diversity.

(2) Areal distribution of species.

(3) Ground cover, except for land actually used for cropland after the completion of regrading and redistribution of soil materials.

(4) Production, for land used for cropland, pasture, or grazing land either before permit issuance or after the completion of regrading and redistribution of soil materials.

(5) Stocking, for areas revegetated with woody plants.

(d) The ground cover, production, or stocking of the revegetated area will be considered equal to the approved success standard for those parameters when the measured values are not less than 90 percent of the success standard, using a 90-percent statistical confidence interval (*i.e.,* a one-sided test with a 0.10 alpha error).

(e) For all areas revegetated with woody plants, regardless of the postmining land use), the regulatory authority must specify minimum stocking and planting arrangements on the basis of local and regional conditions and after coordination with and approval by the state agencies responsible for the administration of forestry and wildlife programs. Coordination and approval may occur on either a program-wide basis or a permit-specific basis.

(f)(1) Only those species of trees and shrubs approved in the permit as part of the revegetation plan under § 784.12(g) of this chapter or volunteer trees and shrubs of species that meet the requirements of § 817.111(c) of this part may be counted in determining whether stocking standards have been met.

(2)(i) At the time of final bond release under § 800.42(d) of this chapter, at least 80 percent of the trees and shrubs used to determine success must have been in place for 60 percent of the applicable minimum period of responsibility under § 817.115 of this part.

(ii) Trees and shrubs counted in determining revegetation success must be healthy and have been in place for not less than two growing seasons. Any replanting must be done by means of transplants to allow for proper accounting of plant stocking.

(iii)(A) For purposes of paragraph (f)(2)(ii) of this section, volunteer trees and shrubs of species that meet the requirements of § 817.111(c) of this part may be deemed equivalent to planted specimens two years of age or older.

(B) Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding.

(iv) The requirements of paragraphs (f)(2)(i) and (ii) of this section will be deemed met when records of woody vegetation planted show that—

(A) No woody plants were planted during the last two growing seasons of the responsibility period; and,

(B) If any replanting of woody plants took place earlier during the responsibility period, the total number planted during the last 60 percent of that period is less than 20 percent of the total number of woody plants required to meet the stocking standard.

(3) Vegetative ground cover on areas planted with trees or shrubs must be of a nature that allows for natural establishment and succession of native plants, including trees and shrubs.

(g) *Special provision for areas that are developed within the revegetation responsibility period.* Portions of the permit area that are developed for industrial, commercial, or residential use within the revegetation responsibility period need not meet production or stocking standards. For those areas, the vegetative ground cover must not be less than that required to control erosion.

(h) *Special provision for previously mined areas.* Previously mined areas need only meet a vegetative ground cover standard, unless the regulatory authority specifies otherwise. At a minimum, the cover on the revegetated previously mined area must not be less than the ground cover existing before redisturbance and must be adequate to control erosion.

(i) *Special provision for prime farmland.* For prime farmland, the revegetation success standard provisions of § 823.15 of this chapter

apply in lieu of the requirements of paragraphs (b) through (h) of this section.

§ 817.121 What measures must I take to prevent, control, or correct damage resulting from subsidence?

(a) *Measures to prevent or minimize damage.* (1) You, the permittee or operator, must either—

(i) Adopt measures consistent with known technology that prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or

(ii) Adopt mining technology that provides for planned subsidence in a predictable and controlled manner.

(2) If you employ mining technology that provides for planned subsidence in a predictable and controlled manner under paragraph (a)(1)(ii) of this section, you must take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings and occupied residential dwellings and structures related thereto unless—

(i) You have obtained the written consent of the owners of those structures; or

(ii) The costs of those measures would exceed the anticipated costs of repair. This exception does not apply if the anticipated damage would constitute a threat to health or safety.

(3) Nothing in this part prohibits the standard method of room-and-pillar mining.

(b) You must comply with all provisions of the subsidence control plan prepared pursuant to § 784.30 of this chapter and approved in the permit.

(c) *Repair of damage to surface lands.* To the extent technologically and economically feasible, you must correct any material damage resulting from subsidence caused to surface lands by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage occurred.

(d) *Repair or compensation for damage to non-commercial buildings and dwellings and related structures.* (1) You must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining.

(2) If you select the repair option, you must fully rehabilitate, restore, or replace the damaged structure.

(3) If you select the compensation option, you must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. You may provide compensation by the purchase, before mining, of a non-cancelable, premium-prepaid insurance policy.

(4) The requirements of paragraph (d) of this section apply only to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

(e) *Repair or compensation for damage to other structures.* To the extent required under applicable provisions of state law, you must correct material damage resulting from subsidence caused to any structures or facilities not protected by paragraph (d) of this section by either repairing the damage or compensating the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase before mining of a non-cancelable, premium-prepaid insurance policy.

(f) *Information to be considered in determination of causation.* The regulatory authority must consider all relevant and reasonably available information in determining whether damage to protected structures was caused by subsidence from underground mining.

(g) *Adjustment of bond amount for subsidence damage.* (1) When subsidence-related material damage to land, structures or facilities protected under paragraphs (c) through (e) of this section occurs, or when contamination, diminution, or interruption to a water supply protected under § 817.40 of this part occurs, the regulatory authority must require the permittee to post additional performance bond until the repair, compensation, or replacement is completed.

(2) The amount of additional bond required under paragraph (g)(1) of this section must equal the—

(i) Estimated cost of the repairs if the repair option is selected.

(ii) Decrease in value if the compensation option is selected.

(iii) Estimated cost to replace the protected water supply if the permittee will be replacing the water supply.

(3) The requirements of paragraph (g)(1) of this section do not apply if repair, compensation, or replacement is completed within 90 days of the occurrence of damage. The regulatory authority may extend the 90-day time frame, provided that the total time allowed does not exceed one year, if you demonstrate, and the regulatory authority finds in writing, that subsidence is not complete, that all probable subsidence-related material damage has not yet occurred, or that all reasonably anticipated changes that may affect the protected water supply have not yet occurred, and that therefore it would be unreasonable to complete the repair of the subsidence-related material damage to lands or protected structures or the replacement of the protected water supply within 90 days.

(h) *Prohibitions and limitations on underground mining.* (1) You may not conduct underground mining activities beneath or adjacent to—

(i) Public buildings and facilities.

(ii) Churches, schools, and hospitals.

(iii) Impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more.

(2) The prohibitions of paragraph (h)(1) of this section do not apply if the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, the features or facilities listed in paragraphs (h)(1)(i) through (iii) of this section.

(3) The regulatory authority may limit the percentage of coal extracted under or adjacent to the features and facilities listed in paragraphs (h)(1)(i) through (iii) of this section if it determines that the limitation is necessary to minimize the potential for material damage to those features or facilities or to any aquifer or body of water that serves as a significant water source for any public water supply system.

(i) If subsidence causes material damage to any of the features or facilities listed in paragraphs (h)(1)(i) through (iii) of this section, the regulatory authority may suspend mining under or adjacent to those features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to those features or facilities.

(j) The regulatory authority must suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if it finds that the mining activities pose an imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities.

(k) You must submit a detailed plan of the underground workings of your

mine in accordance with a schedule approved by the regulatory authority. The detailed plan must include maps and descriptions, as appropriate, of significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the regulatory authority. The regulatory authority may hold the information submitted with the detailed plan as confidential, in accordance with § 773.6(d) of this chapter, upon your request.

§ 817.122 How and when must I provide notice of planned underground mining?

(a) At least 6 months prior to mining, or within that period if approved by the regulatory authority, you, the underground mine operator, must mail a notification to all owners and occupants of surface property and structures above the planned underground workings.

(b) The notification must include, at a minimum—

(1) Identification of specific areas in which mining will take place;

(2) Dates that specific areas will be undermined; and

(3) The location or locations where the subsidence control plan may be examined.

§ 817.131 What actions must I take when I temporarily cease mining operations?

(a)(1) Each person who temporarily ceases to conduct underground mining activities at a particular site must effectively support and maintain all surface access openings to underground operations and secure surface facilities in areas in which there are no current operations, but where operations are to be resumed under an approved permit.

(2) Temporary cessation does not relieve a person of his or her obligation to comply with any provisions of the approved permit.

(b)(1) You must submit a notice of intent to temporarily cease operations to the regulatory authority before ceasing mining and reclamation operations for 30 or more days, or as soon as you know that a temporary cessation will extend beyond 30 days.

(2) The notice of temporary cessation must include a statement of the—

(i) Exact number of surface acres disturbed within the permit area prior to temporary cessation;

(ii) Extent and kind of reclamation accomplished before temporary cessation; and

(iii) Backfilling, regrading, revegetation, environmental monitoring, underground opening closures, and water treatment activities that will continue during temporary cessation.

§ 817.132 What actions must I take when I permanently cease mining operations?

(a) Persons who permanently cease conducting underground mining activities at a particular site must close, backfill, or otherwise permanently reclaim all disturbed areas in accordance with this chapter and the permit approved by the regulatory authority.

(b) All underground openings, surface equipment, surface structures, or other surface facilities must be removed and the affected land reclaimed, unless the regulatory authority approves retention of those features because they are suitable for the postmining land use or environmental monitoring.

§ 817.133 What provisions concerning postmining land use apply to my operation?

Except as provided in § 784.24(c) of this chapter, you, the permittee, must restore all disturbed areas in a timely manner to conditions that are capable of supporting—

(a) The uses they were capable of supporting before any mining; as described under § 783.22 of this chapter; or

(b) Higher or better uses approved under § 784.24(b) of this chapter.

§ 817.150 What are the general standards for haul and access roads?

(a) *Road classification system.* (1) Each road meeting the definition of that term in § 701.5 of this chapter must be classified as either a primary road or an ancillary road.

(2) A primary road is any road that is—

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of 6 months; or

(iii) To be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) *Performance standards.* Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to—

(1) Control or prevent erosion, siltation, and air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.

(2) Control or prevent damage to fish, wildlife, or their habitat and related environmental values.

(3) Control or prevent additional contributions of suspended solids to streamflow or runoff outside the permit area.

(4) Neither cause nor contribute to, directly or indirectly, the violation of water quality standards applicable to receiving waters.

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels.

(6) Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress.

(7) Use nonacid- and nontoxic-forming substances in road surfacing.

(c) *Design and construction limits and establishment of design criteria.* To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads must include appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the regulatory authority.

(d) *Location.* (1) No part of any road may be located in the channel of an intermittent or perennial stream unless specifically approved by the regulatory authority in accordance with § 784.28 of this chapter and § 817.57 of this part.

(2) Roads must be located to minimize downstream sedimentation and flooding.

(e) *Maintenance.* (1) A road must be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority;

(2) A road damaged by a catastrophic event, such as a flood or earthquake, must be repaired as soon as is practicable after the damage has occurred.

(f) *Reclamation.* A road not to be retained as part of an approved postmining land use must be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. Reclamation must include—

(1) Closing the road to traffic.

(2) Removing all bridges and culverts unless approved as part of the postmining land use.

(3) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements.

(4) Reshaping the slopes of road cuts and fills as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain.

(5) Protecting the natural drainage patterns by installing dikes or cross-drains as necessary to control surface runoff and erosion.

(6) Scarifying or ripping the roadbed, replacing topsoil or substitute material in accordance with § 817.22 of this part, and revegetating disturbed surfaces in accordance with §§ 817.111, 817.115, and 817.116 of this chapter.

§ 817.151 What additional standards apply to primary roads?

(a) Primary roads must meet the requirements of § 817.150 of this part and the additional requirements of this section.

(b) *Certification.* The construction or reconstruction of primary roads must be certified in a report to the regulatory authority by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads. The report must indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(c) *Safety factor.* Each primary road embankment must have a minimum static factor of 1.3 or meet the requirements established under § 784.37(c) of this chapter.

(d) *Location.* (1) To minimize erosion, a primary road must be located, insofar as is practicable, on the most stable available surface.

(2) Fords of perennial or intermittent streams are prohibited unless they are specifically approved by the regulatory authority as temporary routes during periods of road construction.

(e) *Drainage control.* In accordance with the approved plan—

(1) Each primary road must be constructed (or reconstructed) and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains. The drainage control system must be designed to safely pass the peak runoff from the 10-year, 6-hour precipitation event, or any greater event specified by the regulatory authority.

(2) Drainage pipes and culverts must be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets.

(3) Drainage ditches must be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment.

(4) Culverts must be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road.

(5) Natural stream channels must not be altered or relocated without the prior approval of the regulatory authority in accordance with § 784.28 of this chapter and § 817.57 of this part.

(6) Except as provided in paragraph (d)(2) of this section, structures for perennial or intermittent stream channel crossings must be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current prudent engineering practices. The regulatory authority must ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or streambed and additional contributions of suspended solids to streamflow.

(f) *Surfacing.* Primary roads must be surfaced with material approved by the regulatory authority as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

§ 817.180 To what extent must I protect utility installations?

You must conduct all underground coal mining operations in a manner that minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines that pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the regulatory authority.

§ 817.181 What requirements apply to support facilities?

(a) You must operate each support facility in accordance with the permit issued for the mine or coal preparation plant to which the facility is incident or from which its operation results.

(b) In addition to the other provisions of this part, you must locate, maintain, and use support facilities in a manner that—

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) To the extent possible using the best technology currently available—

(i) Minimizes damage to fish, wildlife, and related environmental values; and

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions may not be in excess of limitations of state or federal law.

§ 817.200 [Reserved]

PART 824—SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS—MOUNTAINTOP REMOVAL MINING OPERATIONS

■ 34. Revise the authority citation for part 824 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 35. Revise the heading for part 824 to read as set forth above.

■ 36. Revise § 824.11 to read as follows:

§ 824.11 What special performance standards apply to mountaintop removal mining operations?

(a) *Applicability.* This section applies to all operations for which the regulatory authority has approved a permit under § 785.14 of this chapter.

(b) *Performance standards.* (1) You, the permittee, must comply with all applicable requirements of this subchapter and the regulatory program, other than the approximate original contour restoration requirements of § 816.102(a)(1) of this chapter and the thick overburden requirements of § 816.105 of this chapter.

(2)(i) You must retain an outcrop barrier, consisting of the toe of the lowest coal seam and its associated overburden, of sufficient width to prevent slides and erosion. You must construct drains through the barrier to the extent necessary to prevent saturation of the backfill.

(ii) The outcrop barrier requirement in paragraph (b)(2)(i) of this section does not apply if the proposed mine site was mined prior to May 3, 1978, and the toe of the lowest coal seam has already been removed.

(iii) You may remove a coal barrier adjacent to a head-of-hollow fill after the elevation of the fill attains the elevation of the coal barrier if the head-of-hollow fill provides the stability otherwise ensured by the retention of a coal barrier.

(iv) The regulatory authority may allow removal of the outcrop barrier required by paragraph (b)(2)(i) of this section if the regulatory program establishes standards for and requires construction of a barrier comprised of alternative materials that will provide equivalent stability.

(3) The final graded slopes must be less than 1v:5h, so as to create a level plateau or gently rolling configuration. The outslopes of the plateau may not exceed 1v:2h except where engineering data substantiate, and the regulatory authority finds in writing and includes in the permit under § 785.14 of this chapter that an alternative configuration will achieve a minimum static safety factor of 1.5.

(4) You must grade the plateau or gently rolling contour to drain inward from the outslope, except at specified points where it drains over the outslope in stable and protected channels.

(5) You must place sufficient spoil on the mountaintop bench to achieve the approved postmining land use. You must place all spoil material not retained on the mountaintop bench in accordance with the excess spoil disposal requirements of § 816.71 or § 816.74 of this chapter.

PART 827—SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE

■ 37. The authority citation for part 827 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 38. Revise § 827.12 to read as follows:

§ 827.12 What performance standards apply to coal preparation plants?

Except as provided in § 827.13 of this part, construction, operation, maintenance, modification, reclamation, and removal activities at coal preparation plants must comply with the following provisions of part 816 of this chapter: §§ 816.11, 816.22, 816.34 through 816.57, 816.71, 816.74, 816.79, 816.81 through 816.97, 816.100, 816.102, 816.104, 816.106, 816.111 through 816.116, 816.131 through 816.133, 816.150, 816.151, and 816.181.

[FR Doc. 2015–17308 Filed 7–24–15; 8:45 am]

BILLING CODE 4310–05–P

FEDERAL REGISTER

Vol. 80 Monday,

No. 143 July 27, 2015

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Stream Protection Rule; Draft Regulatory Impact Analysis; Notice

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[Docket ID: OSM–2015–0002; S1D1SS08011000SX064A000156S180110; S2D2SS08011000SX064A00015X501520]

Stream Protection Rule; Draft Regulatory Impact Analysis

AGENCY: Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

ACTION: Notice of Availability; Draft Regulatory Impact Analysis.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing that the draft regulatory impact analysis (RIA) of the potential economic and social impacts of the proposed stream protection rule and alternatives to that rule is available for public review and comment.

DATES: *Electronic or Written Comments:* We will accept electronic or written comments on or before September 25, 2015.

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

Federal eRulemaking Portal: http://www.regulations.gov. The Docket ID for the draft RIA is OSM–2015–0002. Please follow the online instructions for submitting comments.

Mail/Hand-Delivery/Courier: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252 SIB, 1951 Constitution Avenue NW., Washington, DC 20240. Please include the appropriate Docket ID: OSM–2015–0002 for the draft regulatory impact analysis.

You may review the proposed rule, the draft environmental impact statement, and the draft regulatory impact analysis online at *www.osmre.gov.* You also may review these documents in person at the location listed below and at the addresses listed under **SUPPLEMENTARY INFORMATION.** Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101 SIB, 1951 Constitution Avenue NW., Washington, DC 20240, 202–208–4264.

FOR FURTHER INFORMATION CONTACT: Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2716.

SUPPLEMENTARY INFORMATION:

Background

The draft RIA evaluates the economic and social costs and benefits of the proposed stream protection rule and its alternatives. The draft RIA was developed in accordance with Executive Order 12866—Regulatory Planning and Review, as modified by Executive Order 13563.

Significant advances in scientific knowledge and mining and reclamation techniques have occurred in the more than 30 years that have elapsed since the enactment of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.,* and the adoption of federal regulations implementing that law. The primary purpose of the proposed stream protection rule is to update our regulations and provide regulatory certainty to industry using advances in scientific knowledge to minimize the adverse impacts of surface coal mining operations on surface water, groundwater, fish, wildlife, and related environmental values, with particular emphasis on protecting or restoring streams and aquatic ecosystems.

How do I comment on the draft RIA?

We invite the public to comment on the draft RIA during the 60-day comment period. Please see **ADDRESSES** and **DATES** for more information.

We will review and consider all comments submitted to *www.regulations.gov* or to the office listed under **ADDRESSES** by the close of the comment period (see **DATES**). We cannot ensure that comments received after the close of the comment period or at a location other than the office and Web site listed under **ADDRESSES** will be included in the docket for this draft RIA or considered in the development of a final RIA.

Please include the Docket ID ''OSM–2015–0002'' at the beginning of all comments on the draft RIA. Your comments should refer to a specific portion of the draft RIA (citation to the chapter, section, page, paragraph, and sentence to which your comment applies would be helpful), be confined to issues pertinent to the draft RIA, explain the reason for any recommended change or objection, and include supporting data when appropriate.

Before including your address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. You may ask us in your comment to withhold your personally identifiable information from public review, but we cannot guarantee that we will be able to do so.

You may review the proposed rule, the draft environmental impact statement, and the draft regulatory impact analysis online at the Web sites listed in **ADDRESSES** or in person at the headquarters office location listed in **ADDRESSES** and at the following OSMRE regional, field, and area office locations:

Appalachian Regional Office
Three Parkway Center
Pittsburgh, Pennsylvania 15220
Phone: (412) 937–2828

Mid-Continent Regional Office
William L. Beatty Federal Building
501 Belle Street, Room 216
Alton, Illinois 62002
Phone: (618) 463–6460

Western Regional Office
1999 Broadway, Suite 3320
Denver, Colorado 80201
Phone: (303) 844–1401

Charleston Field Office
1027 Virginia Street, East
Charleston, West Virginia 25301
Phone: (304) 347–7158

Knoxville Field Office
710 Locust Street, 2nd floor
Knoxville, Tennessee 37902
Phone: (865) 545–4103

Lexington Field Office
2675 Regency Road
Lexington, Kentucky 40503
Phone: (859) 260–3900

Beckley Area Office
313 Harper Park Drive
Beckley, West Virginia 25801
Phone: (304) 255–5265

Harrisburg Area Office
215 Limekiln Road
New Cumberland, Pennsylvania 17070
Phone: (717) 730–6985

Albuquerque Area Office
100 Sun Avenue NE
Pan American Building, Suite 330
Albuquerque, New Mexico 87109
Phone: (505) 761–8989

Casper Area Office
Dick Cheney Federal Building
150 East B Street
Casper, Wyoming 82601
Phone: (307) 261–6550

Birmingham Field Office
135 Gemini Circle, Suite 215
Homewood, Alabama 35209
Phone: (205) 290–7282

Tulsa Field Office
1645 South 101st East Avenue, Suite 145
Tulsa, Oklahoma 74128
Phone: (918) 581–6430

Dated: July 7, 2015.

Sterling Rideout,

Assistant Director, Program Support.

[FR Doc. 2015–17292 Filed 7–24–15; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 80 Monday,

No. 143 July 27, 2015

Part IV

Department of Labor

Employee Benefits Security Administration

Proposed Exemptions from Certain Prohibited Transaction Restrictions; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions from Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: D–11788, D–11789, D–11790, D–11791, and D–11792, The Les Schwab Tire Center of Washington, Inc., the Les Schwab Tire Centers of Idaho, Inc., and the Les Schwab Tire Centers of Portland, Inc.; L–11795, New England Carpenters Training Fund; D–11818, Virginia Bankers Association Defined Contribution Plan for First Capital Bank; D–11823, Idaho Veneer Company/Ceda-Pine Veneer, Inc. Employees' Retirement Plan; D–11835, United States Steel and Carnegie Pension Fund; D–11836, Roberts Supply, Inc. Profit Sharing Plan and Trust; D–11763, D–11764 and D–11765, Red Wing Shoe Company Pension Plan for Hourly Employees, The Red Wing Shoe Company Retirement Plan and the S.B. Foot Tanning Company Employees' Pension Plan; and D–11781, Frank Russell Company and Affiliates.

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice.

ADDRESSES: Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via email or FAX. Any such comments or requests should be sent either by email to: *moffitt.betty@dol.gov*, or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1515, 200 Constitution Avenue NW., Washington, DC 20210.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).[1] Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

The Les Schwab Tire Centers of Washington, Inc. (Les Schwab Washington), the Les Schwab Tire Centers of Idaho, Inc. (Les Schwab Idaho), and the Les Schwab Tire Centers of Portland, Inc. (Les Schwab Portland), (Collectively, With Their Affiliates, Les Schwab or the Applicant), Located in Bothell, Washington; Lacey, Washington; Renton, Washington; Twin Falls, Idaho; and Sandy, Oregon

[Application Nos. D–11699, D–11700, D–11701, D–11702, and D–11703]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA), and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[2]

Section I. Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A), 4975(c)(1)(D) and 4975(c)(1)(E) of the Code, shall not apply to the sales (the Sales) by the Les Schwab Profit Sharing Retirement Plan (the Plan) of the following parcels of real property (each, a ''Parcel'' and together, ''the Parcels'') to the Applicant:

(a) The Parcel located at 19401 Bothell Everett Highway in Bothell, Washington (the Bothell Parcel);

(b) The Parcel located at 150 Marvin Road, SE Lacey, Washington (the Lacey Parcel);

(c) The Parcel located at 354 Union Ave NE., Renton, Washington (the Renton Parcel);

(d) The Parcel located at 21 Blue Lakes Boulevard North Twin Falls, Idaho (the Twin Falls Parcel); and

(e) The Parcel located at 37895 Highway 26, Sandy, Oregon (the Sandy Parcel);

where the Applicant is a party in interest with respect to the Plan, provided that the conditions set forth in

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

[2] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Section II of this proposed exemption are met.

Section II. Conditions

(a) The price paid by Les Schwab to the Plan (the Purchase Price) for each Parcel no less than the fair market value of each Parcel (exclusive of the buildings or other improvements paid for by Les Schwab, to which Les Schwab retains title), as determined by qualified independent appraisers (the Appraisers), working for CBRE, Inc., in separate appraisal reports (the Appraisals) that are updated on the date of the Sale.

(b) Each Sale is a one-time transaction for cash.

(c) The Plan does not pay any costs, including brokerage commissions, fees, appraisal costs, or any other expenses associated with each Sale.

(d) A qualified independent fiduciary (the Independent Fiduciary) represents the interests of the Plan with respect to each Sale, and in doing so:

(1) Determines that it is prudent to go forward with each Sale;

(2) Approves the terms and conditions of each Sale;

(3) Reviews and approves the methodologies used by the Appraisers and ensures that such methodologies are properly applied in determining the fair market values of the Parcels on the date of the Sales;

(4) Reviews and approves the determination of the Purchase Price; and

(5) Monitors each Sale throughout its duration on behalf of the Plan for compliance with the terms of the transaction and with the conditions of this exemption, if granted, and takes any appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries.

(e) The Appraisers determine the fair market value of their assigned Parcel, on the date of the Sale, using commercially accepted methods of valuation for unrelated third-party transactions, taking into account the following considerations:

(1) The fact that a lease between Les Schwab and the Plan is a ground lease and not a standard commercial lease;

(2) The assemblage value of the Parcel, where applicable;

(3) Any special or unique value the Parcel holds for Les Schwab; and

(4) Any instructions from the Independent Fiduciary regarding the terms of the Sale, including the extent to which the Appraiser should consider the effect that Les Schwab's option to purchase a Parcel would have on the fair market value of the Parcel.

(f) The terms and conditions of each Sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

Summary of Facts and Representations [3]

Background

1. According to the Applicant, Les Schwab Tire Centers (together with its affiliates, Les Schwab) was founded by its namesake in 1952 in Prineville, Oregon, in order to sell tires, batteries and other automotive equipment, and provide vehicle maintenance services. There are now approximately 430 Les Schwab tire and automotive service centers located primarily in the Northwest and with over $1 billion dollars in annual sales. Their facilities are located in Alaska, Washington, Oregon, Montana, Nevada, Utah and California.

2. Les Schwab, which has elected to be treated as a sub-chapter ''S'' corporation under the Code, is made up of eleven distinct entities, each with an overlapping ownership structure and part of a single controlled group. The eleven entities include Les Schwab Washington, Les Schwab Idaho, Les Schwab Portland, and the Les Schwab Warehouse Center, Inc. (the Warehouse Center). Furthermore, the Applicant represents that all of the officers and directors of the participating employers are also officers and directors of the Warehouse Center.

3. According to the Applicant, all entities within the Les Schwab controlled group are owned by Alan Schwab, Diana Tomseth, Julie Waibel, and Leslie Tuftin (or by trusts for the benefit of such individuals and/or their children). Mr. Schwab and Ms. Tomseth are siblings and Ms. Waibel and Ms. Tuftin are siblings. These four individuals are the grandchildren of Les Schwab and they are also currently employees of the Warehouse Center and board members of Les Schwab. The Applicant states that each of these four individuals is a Plan participant, as well as an owner-employee because they each own more than 5 percent of the stock of Les Schwab.[4]

4. The Plan is a qualified multiple-employer, defined contribution profit-sharing plan located in Bend, Oregon. The Plan is sponsored by the Warehouse Center. Thirteen employers, including Les Schwab Washington, Les Schwab Idaho, and Les Schwab Portland participate in the Plan. As of December 31, 2013, the Plan had 6,976 participants and beneficiaries. Also, as of December 31, 2013, the Plan had total assets of $653,315,345.00. The Applicant states that the Plan is the sole retirement plan available for Les Schwab employees.

5. The Administrative and Investment Committee of the Plan (the Committee) has the sole discretionary investment authority over the Plan and is a named fiduciary. The Committee has the exclusive right and discretionary authority to control, manage and operate the Plan. This includes the authority to direct the investment of the Plan's assets and to appoint and remove the Plan's Trustees and investment managers.

The Committee consists of seven trustees (the Trustees), who include executives and officers of Les Schwab. The Trustees are appointed by the Chief Executive Officer of the Warehouse Center. All of the Trustees are employees of the Warehouse Center, and some are officers of the Warehouse Center and Les Schwab Washington, Les Schwab Idaho and Les Schwab Portland.

Parcel Purchases

6. Over time, the Plan purchased twenty-six parcels of real property. As described below, following the purchases, the Plan entered into ground leases with various Les Schwab entities.[5] These Parcels of real property were then improved by buildings paid for by the Les Schwab entities. Under the terms of the leases, the Les Schwab entities retained title to these buildings.

The Applicant asserts that the Plan was initially motivated to purchase and lease the Parcels of real property to Les Schwab as a means to provide a secure return on Plan investments. In this

[3] The Summary of Facts and Representations is based solely on the representations of the Applicant and does not reflect the views of the Department, unless indicated otherwise.

[4] The term ''owner-employee'' is defined under section 408(d) of the Act to include persons as defined in section 401(c)(3) of the Code, such as an employee who owns the entire interest in an unincorporated trade or business, or in the case of a partnership, a partner who owns more than 10 percent of either the capital interest or profits interest of such partnership. The term ''owner-employee'' also includes, in relevant part, (a) a shareholder-employee, which is an employee or officer of an S corporation who owns more than 5 percent of the outstanding stock of such corporation; (b) a member of the family of such owner-employee; or (c) a corporation in which such shareholder-employee owns, directly or indirectly, 50% or more of the total combined voting power of all classes of voting stock of a corporation or 50% or more of the total value of all classes of stock of such corporation.

[5] The Applicant represents that these leases are exempt under section 408(e) of the Act. Section 408(e) of the Act provides, in pertinent part, that the restrictions of sections 406 and 407 of the Act shall not apply to the acquisition, sale or lease by a plan of qualifying employer real property if—(a) such acquisition, sale, or lease is for adequate consideration; (b) no commission is charged with respect thereto; and (c) the plan is an eligible individual account plan.

regard, the Plan had intimate knowledge of Les Schwab's business success and creditworthiness, and determined that leasing the Parcels of real property to Les Schwab was a prudent investment decision.

The Applicant seeks an individual exemption for the Sales. The Sales involve five of the Parcels of real property on which Les Schwab has constructed buildings at its own expense (the Parcels). Given that Les Schwab has retained title to such buildings, pursuant to the terms of the relevant leases, the purchases do not involve the buildings themselves. Each Parcel is described below in further detail.

The Bothell Parcel

8. The Plan purchased the Bothell Parcel, which consists of approximately 40,947 square feet, in three separate transactions from unrelated parties. The first transaction involved the purchase by the Plan in November 1986 of approximately 29,382 square feet of land located at 19401 Bothell Everett Highway in Bothell, Washington for $159,791.00. The second purchase involved the Plan's acquisition on August 5, 1988 of an adjacent piece of land, located at 19411 Bothell Way SE., Bothell, Washington, and consisting of approximately 9,420 square feet of land for approximately $63,362.00. The third purchase involved the Plan's acquisition on September 10, 1988 of another piece of adjacent land, consisting of approximately 2,145 square feet and purchased for approximately $50,000.00.

9. The Plan and Les Schwab Washington entered into a ground lease of the Bothell Parcel (the Bothell Lease) on January 1, 1987, with the Plan as landlord and with Les Schwab Washington as tenant. The initial lease term commenced on January 1, 1987, and continued through December 31, 1996. The Bothell Lease also contained a provision for lease renewals of four terms, each of five years' duration. The initial base rent was $1,065.00 per month. Beginning on January 1, 1989 the monthly rent was increased to $1,487.00 to reflect the Plan's acquisition of the additional land. Beginning on September 10, 1998, the base rent was increased to $2,454.00, to reflect the Plan's inclusion of the third parcel of land and the increase in the ten-year the Consumer Price Index (the CPI).

The rent has been increased on the first day of each successive renewal period in proportion to the percentage increase in the CPI during the ''applicable period'' preceding the effective date of each such increase. Beginning with the renewal term commencing January 1, 2012, the monthly rent has been increased to $3,498.00.

The Bothell Lease permits Les Schwab Washington to construct improvements on the Bothell Parcel with the Plan's approval. Pursuant to the terms of the Bothell Lease, Les Schwab Washington constructed a tire center, an internal warehouse, and a large vehicle service facility, as well as other improvements (the Bothell Improvements).

As provided under the terms of the Bothell Lease, Les Schwab Washington retains sole responsibility with respect to the payment of property taxes and utilities on the Bothell Parcel, as well as sole responsibility for repairing, maintaining, renovating, and insuring the Bothell Improvements. As also provided under the terms of the Bothell Lease, Les Schwab Washington may not assign its interest, absent the Plan's written consent, and must indemnify the Plan against losses.

Finally, the Bothell Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Bothell Parcel as of the following dates: (a) The date on which Les Schwab Washington permanently discontinues operations on the Bothell Parcel; (b) the date the Bothell Lease terminates; (c) the end date of the initial Bothell Lease term; or (d) the end date of any renewal term for which Les Schwab Washington elects to renew. Pursuant to the terms of the Bothell Lease, the applicable option price is based on the greater of $273,153, or the fair market value of the Bothell Parcel (exclusive of the building and other improvements made by Les Schwab Washington) as determined by an appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Bothell Parcel.

The Lacey Parcel

10. The Plan purchased the Lacey Parcel on February 1, 1991 from Puget Sound National Bank,[6] an unrelated party, for a total purchase price of $499,069.00. The Lacey Parcel is comprised of 2.07 acres or approximately 90,169 square feet of land area. Aside from the initial purchase price, the Plan has not incurred any further expenses with respect to the Lacey Parcel.

11. The Plan and Les Schwab Washington entered into a ground lease of the Lacey Parcel (the Lacey Lease) on March 1, 1991, with the Plan as landlord and with Les Schwab Washington as tenant. The initial term for the Lacey Lease ran for a period of twenty years and nine months (March 1, 1991 through December 31, 2011). The Lacey Lease also includes four renewal terms, with each term set at five years' duration. The base rent for the Lacey Parcel was initially set at $3,746.00 per month and has been subject to adjustment every five years since January 1, 1997. As of each adjustment date, the monthly rent amount has been increased in proportion to corresponding increases to the CPI during the five lease years preceding the effective date of the increase, not to exceed 20%. Since January 1, 2012, Les Schwab Washington has been paying the Plan $9,150.00 per month, which includes the CPI increase.

The Lacey Lease allows Les Schwab Washington to construct improvements on the Lacey Parcel. Accordingly, Les Schwab Washington constructed a 13,013 square foot retail tire center, a vehicle service area, a 4,800 square foot warehouse, and made certain other improvements (the Lacey Improvements). Pursuant to the terms of the Lacey Lease, permissible uses of the Lacey Parcel include the construction and operation of a facility for the retail sale of merchandise, and the provision of automotive services. Additional uses of the Lacey Parcel require the Plan's consent.

As provided under the terms of the Lacey Lease, Les Schwab Washington retains sole responsibility with respect to the payment of property taxes and utilities on the Lacey Parcel, as well as sole responsibility for repairing, maintaining, renovating, and insuring the Lacey Improvements. As also provided under the terms of the Lacey Lease, Les Schwab Washington may not assign its interest, absent the Plan's written consent, and must indemnify the Plan against losses.

The Lacey Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Lacey Parcel as of the following dates: (a) The date on which Les Schwab Washington permanently discontinues operations on the Lacey Parcel; (b) The date such lease terminates; (c) the end date of the initial Lacey Lease term; or (d) the end date of any renewal term for which Les Schwab Washington elects to renew. Pursuant to the terms of the Lacey Lease, the applicable option price is based on: (a) The greater of $499,514.35, plus the Plan's total cost of improvements made on the Lacey Parcel, or (b) the fair market value of Lacey Parcel (exclusive

[6] Puget Sound National Bank merged into KeyBank in 1992.

of the improvements made by Les Schwab Washington made by Les Schwab Washington), as determined by an appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Lacey Parcel from the Plan.

The Renton Parcel

12. The Plan purchased the Renton Parcel in two separate transactions. On May 6, 1986, the Plan entered into a contract to purchase a 34,478 square foot piece of land located in Renton, Washington, from an unrelated party. Subsequently, the Plan purchased an additional 20,266 square feet of adjoining land in a sale that closed in October 1988, from an unrelated party. The two combined parcels make up the Renton Parcel, and cover 1.26 acres, or approximately 54,744 square feet of land area. The combined purchase price for the two parcels, including closing costs, was $317,796.00.

13. The Plan and Les Schwab Washington entered into a lease agreement for the Renton Parcel (the Renton Lease) on October 1, 1986, with the Plan, as landlord, and Les Schwab Washington, as tenant. The initial lease term commenced on October 1, 1986, and ran through December 31, 1996. The Renton Lease includes four renewal terms, each of five years' duration. The Renton Lease provides for an initial base rent amount of $1,297.00 per month and for rent escalations in the event that the Plan incurs any costs in connection with the provision of any additional improvements to the Renton Parcel.

With respect to the Renton Lease, rent escalations occurred on November 1, 1988, and subsequent rent escalations have occurred on the first day of each renewal period, where the rent has been increased in proportion to the percentage increase of the CPI during the ''applicable period'' preceding the effective date of the increase. Based on these calculations, Les Schwab Washington has been paying the Plan $4,334 per month since January 1, 2012.

The Renton Lease allows Les Schwab Washington to construct improvements on the Renton Parcel. Les Schwab Washington constructed a 13,300 square foot retail tire center, a vehicle service area, a large warehouse, and other improvements (the Renton Improvements). Pursuant to the terms of the Renton Lease, permissible uses of the Renton Parcel also include the operation of a facility for the retail sale of merchandise and the provision of automotive services. Additional uses of the Renton Parcel require the Plan's consent.

As provided under the terms of the Renton Lease, Les Schwab Washington retains sole responsibility with respect to the payment of property taxes and utilities on the Renton Parcel, as well as sole responsibility for repairing, maintaining, renovating, and insuring the Renton Improvements. As also provided under the terms of the Renton Lease, Les Schwab Washington may not assign its interest, absent the Plan's written consent, and must indemnify the Plan against losses.

The Renton Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Renton Parcel as of the following dates: (a) The date on which Les Schwab Washington permanently discontinues operations on the Renton Parcel; (b) the date the Renton Lease terminates; (c) the end date of the initial Renton Lease term; or (d) the end date of any renewal term for which Les Schwab Washington elects to renew. Pursuant to the terms of the Renton Lease, the applicable option price is based on the greater of $194,537.09, or the fair market value of the Renton Parcel (exclusive of the building and other improvements on the Renton Parcel made by Les Schwab Washington), as determined by an appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Renton Parcel from the Plan.

The Twin Falls Parcel

14. The Plan purchased the Twin Falls Parcel from unrelated parties in September 1986, at a final purchase price of $248,250.00. The Twin Falls Parcel is comprised of 1.72 acres or approximately 74,923 square feet of land that is rectangular in shape.

15. The Plan and Les Schwab Idaho entered into a lease agreement (the Twin Falls Lease) on October 1, 1986, with the Plan, as landlord, and Les Schwab Idaho, as tenant. The initial lease term commenced on October 1, 1986, and continued through December 31, 1996. The Twin Falls Lease contains a provision for lease renewals of four terms, each of five years' duration. The initial base rent was set at $1,655.00 per month, and provided for rent escalations in the event the Plan incurred any costs in connection with providing any additional improvements to the Parcel (the Twin Falls Improvements). A scheduled rent escalation occurred on January 1, 1992. Subsequent rent escalations have occurred on the first day of each renewal period. In this regard, rent was increased in proportion to the percentage increase in the CPI. Beginning with the renewal term commencing January 1, 2012, Les Schwab Idaho has been paying the Plan $3,382.00 per month.

In accordance with the Twin Falls Lease, Les Schwab Idaho constructed a 13,000 square foot retail tire center and a 9,216 square foot warehouse on the Twin Falls Parcel. Les Schwab also made additional improvements, which included utilities, parking, landscaping, and a fenced tire storage area.

Pursuant to the Twin Falls Lease, Les Schwab Idaho retains sole responsibility with respect to the payment of property taxes and utilities on the Twin Falls Parcel, as well as sole responsibility for repairing, maintaining, renovating, and insuring the Twin Falls Improvements. As also provided under the terms of the Twin Falls Lease, Les Schwab Idaho may not assign its interest, absent the Plan's written consent.

The Twin Falls Lease includes a purchase option under which Les Schwab Idaho has the right to purchase the Twin Falls Parcel as of the following dates: (a) The date on which Les Schwab Idaho permanently discontinues operations on the Twin Falls Parcel; (b) the date the Twin Falls Lease terminates; (c) the end date of the initial Twin Falls Lease term; or (d) the end date of any renewal term for which Les Schwab Idaho elects to renew. Pursuant to the terms of the Twin Falls Lease, the applicable option price is based on the greater of $248,250.82, or the fair market value of the Twin Falls Parcel (exclusive of the building and other improvements made by Les Schwab Idaho), as determined by an appraisal. Les Schwab Idaho now seeks to exercise its option to purchase the Twin Falls Parcel from the Plan.

The Sandy Parcel

16. The Plan purchased the Sandy Parcel in August 1986 from unrelated parties for $144,671.73. The Sandy Parcel is comprised of 1.08 acres, or approximately 47,045 square feet of land area. Added to the contract price were certain obligations for offsite improvements, as well as shared expenses for an entrance easement with a neighboring property owner.

17. The Plan and Les Schwab Portland entered into a lease agreement (the Sandy Lease) on September 1, 1986, with the Plan, as landlord, and Les Schwab Portland, as tenant. The initial lease term ran until December 31, 1996. The Sandy Lease also contained a provision for lease renewals of four terms, each of five years' duration. The initial base rent under the Sandy Lease was set at $964.00 per month and provided for rent escalations in the event the Plan incurred any costs in

connection with the provision of additional improvements to the Parcel. Scheduled rent escalations occurred on January 1, 1997 and on the first day of each renewal period. On the date of each such renewal, the rent amount was increased in proportion to the percentage increase of the CPI for the ''applicable period'' preceding the effective date of such increase. Since January 1, 2012, Les Schwab Portland has been paying the Plan $1,980.00 per month.

Pursuant to the Sandy Lease, Les Schwab Portland constructed an 8,352 square foot retail tire center on the Sandy Parcel, as well as other improvements including utilities, parking and landscaping (the Sandy Improvements).

As provided under the terms of the Sandy Lease, Les Schwab Portland retains sole responsibility with respect to the payment of property taxes and utilities on the Sandy Parcel, as well as sole responsibility for repairing, maintaining, renovating, and insuring the Sandy Improvements. As also provided under the terms of the Sandy Lease, Les Schwab Portland may not assign its interest, absent the Plan's written consent.

The Sandy Lease includes a purchase option under which Les Schwab Portland has the right to purchase the Sandy Parcel as of the following dates: (a) The date Les Schwab Portland permanently discontinues operation on the premises; (b) the date the Sandy Lease terminates; (c) at the end of the initial Sandy Lease term; or (d) on the date of each renewal term for which Les Schwab Portland elects to renew. Under the terms of the Sandy Lease, the option price will be the greater of $144,671.73 or the fair market value of the Sandy Parcel (exclusive of the building and other improvements made by Les Schwab Portland) as determined by an appraisal. Les Schwab Portland now seeks to exercise the option to purchase the Sandy Parcel.

Request for Exemptive Relief

18. The Applicant requests an administrative exemption for the proposed Sales of the Parcels by the Plan to Les Schwab Washington, Les Schwab Idaho, and Les Schwab Portland. Accordingly, the Applicant requests exemptive relief from section 406(a)(1)(A) and (D) and section 406(b)(1) and (b)(2) of the Act for such transactions.

19. Section 406(a)(1)(A) of the Act provides, in pertinent part, that a fiduciary with respect to a plan may not cause the plan to engage in a transaction if such fiduciary knows or should know that such a transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party in interest. Section 406(a)(1)(D) of the Act provides, in pertinent part, that a fiduciary with respect to a plan may not cause the plan to engage in a transaction if such fiduciary knows or should know that such a transaction constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, any assets of the Plan.

Section 3(14)(C) of the Act defines the term ''party in interest'' to include an employer, any of whose employees are covered by such Plan. The Applicant is a participating employer in the Plan, and as such, the Applicant's employees are covered by the Plan. The Applicant is thus a party in interest with respect to the Plan under section 3(14)(C) and the Sales would violate section 406(a)(1)(A) and (D) of the Act.

Section 406(b)(1) of the Act prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Section 406(b)(2) of the Act prohibits a fiduciary, with respect to a plan, from acting in a transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or of its participants and beneficiaries. As described above, the Trustees and the Committee are fiduciaries of the Plan. Additionally, the Trustees are also comprised of certain executive officers of Les Schwab, including officers of the Warehouse Center, Les Schwab Washington, Les Schwab Idaho, and Les Schwab Portland, and are appointed by the Chief Executive Officer of the Warehouse Center, the Plan sponsor.

According to the Applicant, the proposed Sales of the Parcels by the Plan to Les Schwab would involve a violation of section 406(b)(1) of the Act because Les Schwab, as a Plan fiduciary, would be dealing with the assets of the Plan for its own interest or own account. Additionally, the Applicant states that Les Schwab, as a Plan fiduciary, in effecting the Sales, could be viewed as simultaneously acting on behalf of itself and of the Plan in violation of section 406(b)(2) of the Act.[7]

Terms of the Sales

20. Each Sale will be a one-time transaction for cash. At the time of the Sales, the Plan will receive no less than the fair market value of each Parcel, as determined by the Appraisers, whose current Appraisals will be updated on the date of the Sales. In this regard, to the extent the terms of any Lease allow a Sale price that is greater than a Parcel's fair market value, then the price received by the Plan for such Parcel will equal such greater Sale price. In addition, the Plan will not pay any costs, including brokerage commissions, fees, appraisal costs, or any other expenses associated with the Sales. Further, the terms and conditions of each Sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party. Finally, an Independent Fiduciary will represent the interests of the Plan with respect to each Sale. Among other things, the Independent Fiduciary will monitor each sale throughout its duration, review and approve the Appraiser's methodology and ultimate valuation determination, and determine, on behalf of the Plan, whether it is prudent to proceed with the transaction.

The Appraisers

21. Appraisals of the subject Parcels were completed by CBRE, Inc. (CBRE). Specifically, with respect to the Bothell and Lacey Parcels, the Appraisals were conducted by Mitchell J. Olsen and Whitney Haucke. For the Twin Falls and Renton Parcels, the Appraisals were conducted by Shawn Wayt and Whitney Haucke. Finally, with respect to the Sandy Parcel, the Appraisal was conducted by Mike Hall and Whitney Haucke. (Mr. Olsen, Mr. Hall, Ms. Haucke and Ms. Wayt are referred to herein as the ''Appraisers.'')

Mr. Olsen and Ms. Haucke are Certified General Real Estate Appraisers in the State of Washington. Mr. Olsen is an Associate Member of the Appraisal Institute, and has experience in appraising residential properties, vacant land, and commercial properties. Ms. Haucke is also a Designated Member of the Appraisal Institute in Seattle, Washington. Her experience includes valuing special use projects, mixed-use developments, as well as commercial and residential properties.

[7] As noted above, section 408(e) of the Act states, in pertinent part, that section 406 of the Act does not apply to the acquisition, sale or lease of qualifying employer real property by a plan to a party in interest, provided that certain conditions are satisfied. However, section 408(d)(3) of the Act provides, in pertinent part, that the statutory exemption set forth in section 408(e) does not apply to any transaction in which a plan sells any property to a corporation in which owner-employee with respect to such plan owns, directly or indirectly 50 percent or more of the total combined voting power of all classes of stock entitled to vote on 50 percent or more of the total value of shares of all classes of stock of the corporation. Since Mr. Schwab, Ms. Weibel, Ms. Tomseth, and Ms. Tuftin are owner-employees with respect to the Plan, and such individuals own, indirectly, 50% or more of Les Schwab Idaho, Les Schwab Washington, and Les Schwab Portland, the statutory exemption under section 408(e) of the Act is not available.

Mr. Wayt is a licensed Real Estate Appraiser in the State of Washington. Since 2012, Mr. Wayt has been appraising investment properties and commercial properties.

Mr. Hall is a designated member of the Appraisal Institute and is a certified Real Estate Appraiser in the State of Washington. Since 2001, Mr. Hall has been appraising retail, industrial, office, multi-family and local properties.

Pursuant to its Appraisal Engagement Letter, CBRE was retained to perform the following tasks, on behalf of the Plan: (a) Provide a fair market valuation of the Parcels using commercially acceptable methods of valuation for unrelated third party transactions, (b) explain whether or not, in the Appraisers' opinion, the Plan has received adequate consideration from the leases, and (c) opine on whether the proper CPI was used for the rent increases for each Parcel. CBRE represents that the total fees it earned from Les Schwab represent less than 2.0% of CBRE's revenues for 2014.

The Appraisals

22. In valuing the Parcels, the Appraisers applied the Sales Comparison Approach to valuation. As represented by the Appraisers, the Sales Comparison Approach is typically used for retail sites that are feasible for either immediate or near-term development.[8] The Appraisers omitted the use of other valuation methodologies, stating that such methodologies are primarily used when comparable land sales data is non-existent.

23. *Bothell.* According to the Bothell Appraisal, the Appraisers physically inspected the Bothell Parcel on July 26, 2013. They also inspected the Snohomish County Assessor's records and a previous appraisal dated September 30, 2011, which was prepared by Brown, Chudleigh, Schuler, Myers and Associates (BCSMA). In addition, the Appraisers reviewed applicable tax data, zoning requirements, flood zone status, demographics and comparable data.

The Bothell Appraisal provides that the Appraisers evaluated five prior sales of similar Parcels based on zoning and intended uses. Using the Sales Comparison Approach methodology, the Appraisers calculated the value of the Bothell Parcel at $26.86 per square foot, which multiplied by the actual square footage of the Bothell Parcel equaled a fair market value of $1,100,000.00 as of July 31, 2013. In an addendum to the Bothell Appraisal, dated September 22, 2014, the Appraisers projected the fair market value of the Bothell Parcel at $1,150,000.00 as of September 30, 2014. The Appraisers attributed the $50,000.00 increase in value to improved market conditions.

24. *Lacey.* The Lacey Appraisal indicates that the Appraisers physically inspected the Lacey Parcel on June 26, 2013. They also inspected the Thurston County Assessor's Records, reviewed a lease provided by the Plan, and analyzed a previous appraisal dated September 30, 2011, prepared by another appraisal firm. In addition, the Appraisers reviewed the applicable tax data, zoning requirements, flood zone status, demographics and other comparable data.

The Lacey Appraisal provides that the Appraisers valued the Lacey Parcel using the Sales Comparison Approach. In this regard, the Appraisers evaluated six similar sale-listings in the area and determined that land sales ranged from $13.15 per square foot to $15.99 per square foot, with an average of $14.94 per square foot.

The Appraisers placed an emphasis on two of the six Parcels due to the closing date and location. For purposes of the Lacey Appraisal, the Plan instructed the Appraisers to examine the Lacey Parcel without considering the improvements to such Parcel.

The Appraisers determined that the Lacey Parcel value would equate to $14.97 per square foot or a fair market value of $1,350,000 as of July 31, 2013. In an addendum to the Lacey Appraisal dated September 22, 2014, the Appraisers projected the fair market value of the Lacey Parcel at $1,350,000.00, as of September 30, 2014.

25. *Renton.* In connection with the Renton Appraisal, the Appraisers conducted interviews with regional and local market participants, reviewed available published data and other various resources. Additional research included a review of the applicable tax data, zoning requirements, flood zone status, demographics and comparable data.

In valuing the Renton Parcel, the Appraisers applied the Sales Comparison Approach to valuation. The Appraisers evaluated five similar sale-listings in the area and determined that land sales ranged from $10.80 per square foot to $25.01 per square foot, with an average of $18.61 per square foot. The Appraisers placed an emphasis on one of the six Parcels due to its identical characteristics in comparison with the Renton Parcel.

Based on their review and analysis of the Renton Parcel, the Appraisers placed the fair market value of the Parcel at $1,000,000 as of July 31, 2013. In an addendum to the Renton Appraisal dated September 22, 2014, the Appraisers projected the fair market value of the Renton Parcel at $1,000,000.00 as of September 30, 2014.

26. *Twin Falls.* According to the Twin Falls Appraisal, the Appraisers physically inspected the Twin Falls Parcel, conducted interviews with regional and local market participants, and reviewed available published data and other various resources. Additional research included a review of the applicable tax data, zoning requirements, flood zone status, demographics and comparable data.

In valuing the Twin Falls Parcel, the Appraisers applied the Sales Comparison Approach to valuation. The Appraisers evaluated five similar sale-listings in the area and determined that land sales ranged from $12.25 per square foot to $20.00 per square foot, with an average of $15.45 per square foot. The Appraisers placed an emphasis on one of the five Parcels, due to its close proximity to the Twin Falls Parcel.

Based on their review and analysis, the Appraisers placed the fair market value of the Twin Falls Parcel at $1,100,000 as of July 31, 2013. In an addendum to the Twin Falls Appraisal dated September 19, 2014, the Appraisers projected the fair market value of the Twin Falls Parcel at $1,300,000 as of September 30, 2014.

27. *Sandy.* As described in the Sandy Appraisal, the Appraisers also conducted interviews with regional and local market participants, reviewed available published data and other various resources. Additional research included a review of the applicable tax data, zoning requirements, flood zone status, demographics and comparable data.

For the purposes of the Sandy Appraisal, the Appraisers used the Sales Comparison Approach. The Appraisers evaluated five similar sale-listings in the area and determined that land sales ranged from $12.50 per square foot to $17.89 per square foot, with an average of $14.45 per square foot. The Appraisers placed an emphasis on two of the six Parcels due to the location of both sites.

Based on their review and analysis of the Sandy Property, the Appraisers placed the fair market value of the Parcel at $680,000 as of July 31, 2013. In an addendum to the Sandy Appraisal dated September 19, 2014, the Appraiser (Ms. Haucke) projected the

[8] According to the Appraisers, the Twin Falls, Sandy and Renton Parcels are suitable for near-term development and the Bothell Property is suitable for immediate development.

fair market value of the Sandy Parcel to be $680,000 as of September 30, 2014.

The Independent Fiduciary

28. On May 1, 2013, Les Schwab retained American Realty Advisors as the Independent Fiduciary to the Plan with respect to the proposed Sales. The Independent Fiduciary, located in Glendale, California, is an investment management firm managing institutional commercial real estate portfolios, with more than 280 investors and over $5.3 billion assets under management, as of March 31, 2013. The Independent Fiduciary maintains an exclusive focus on commercial real estate investment management. Furthermore, the Independent Fiduciary represents that it has over twenty-four years of real estate experience including, but not limited to, the following: (a) Acquiring real estate for investment; (b) representing secured lenders in real property transactions; (c) providing real estate asset management services; (d) disposing of real estate assets; (e) restructuring and working out of real estate loan assets; and (f) providing independent fiduciary services with respect to real estate assets.

29. The Independent Fiduciary represents that, beyond its engagement as Independent Fiduciary with respect to the Sales, it does not have any relationship with the parties involved in the proposed transactions. The Independent Fiduciary also represents that derived less than 2% of its 2014 gross revenues from Les Schwab.

30. The duties and the responsibilities of the Independent Fiduciary are being undertaken by Daniel Robinson and Alex Miller. Mr. Robinson is the Managing Director of American Realty Advisors, and has thirty years of experience as a licensed real estate broker, and has served as a Qualified Professional Asset Manager (QPAM) for ERISA-covered plans. Mr. Miller is an investment analyst at American Realty Advisors and has been a commercial real estate analyst for nine years.

31. As part of its duties and responsibilities, the Independent Fiduciary completed the following tasks: (a) Toured each of the Parcels and inspected comparable land sales, as outlined in each of the Appraisals; (b) engaged the Appraisers and instructed them with respect to the objectives of each Appraisal, the specific nuances of the leases between Les Schwab and the Plan (the Leases), and the valuation process, taking into account the questions posed by the Department during its review of the Application; (c) reviewed the Appraisals; (d) reviewed the annual audited financial statements for the Plan from 1988 to the present to assess the treatment of the Leases by the auditor and obtained additional documentation from the Warehouse Center in support of the rental payments made under the Leases; (e) reviewed and summarized the terms and conditions of the Leases and relevant amendments; (f) researched additional questions posed by the Department; and (g) reviewed the composition of the existing real estate portfolio of the Plan and the Plan's Statement of Investment Policy dated September 1, 2011.

The Independent Fiduciary also examined whether all twenty-six parcels of land owned by the Plan, including the Parcels, and leased by Les Schwab and its other affiliates, received their rental income on a timely basis from 1988 to 2012. Further, the Independent Fiduciary reviewed copies of the Plan's audited financial statements, prepared by PriceWaterhouseCoopers from 1998 to 2005 and by Jones & Roth from 2006 to 2012.

32. The Independent Fiduciary represents that it will represent the interests of the Plan in the proposed Sales. In so doing, the Independent Fiduciary will: (a) Determine whether it is prudent to go forward with each Sale; (b) negotiate, review, and approve the terms and conditions of each Sale; (c) monitor and manage the Sales on behalf of the Plan throughout their duration, taking any appropriate actions it deems necessary to safeguard the interests of the Plan.

Independent Fiduciary Reports

33. In the Independent Fiduciary Reports, the Independent Fiduciary states that the appraised value of each Parcel, as presented by the Appraisers, is an accurate reflection of the current market conditions and forms the basis for establishing a fair market price for the Sale of each respective Parcel to the Plan. The Independent Fiduciary Reports also notes that the Plan's real estate holdings are approximately 15.5% of the total assets of the Plan, and are within the 15–25% parameters of the Plan's Statement of Investment Policy (SIP) dated September 1, 2011. According to the Independent Fiduciary, the proposed Sale of each of the Parcels would reduce the real estate holdings of the Plan to approximately 14.6% of the total assets of the Plan and would modestly increase the liquidity of the Plan. Further, according to the Independent Fiduciary, the Sale of the Parcels would result in a real estate allocation that is nominally under the SIP range and would allow the Plan to continue its diversification strategy away from directly owned real estate.

The Independent Fiduciary concludes that it is an advantageous time for the Plan to sell the Parcels. Specifically, the Independent Fiduciary notes that the Parcels have produced a cash return of 6.70% under the Leases, which is deemed ''good'' to such fiduciary. However, because of the age of the improvements to the Parcels, the limited future value of the underlying improvements, and the mature nature of the Parcels' locations, the Independent Fiduciary represents that it is prudent for the Plan to sell the Parcels and to reinvest the proceeds in real estate with better future appreciation prospects.

Finally, the Independent Fiduciary states that it would not be appropriate for the Plan to receive a reversionary interest in the improvements that were constructed on the Parcels, given the fact that the Leases, when they were negotiated, were reflective of market conditions at the time, including the purchase option provisions, and given the fact that the Plan contributed nothing toward the construction of the improvements on the Parcels.

Statutory Findings

34. The Applicant represents that the proposed transactions are administratively feasible because they involve one-time Sales of the Parcels for cash. As such, the transactions will not require ongoing oversight by the Department. The Applicant also states that the sale of qualifying employer real property, such as the Parcels, by a plan to an employer participating in the plan is a common and customary transaction.

35. The Applicant represents that the proposed exemption is in the interest of the Plan and its participants and beneficiaries, because: (a) The Sales would reduce the effect of fluctuations in the rental and market values of the qualifying employer real property held as Plan assets; (b) under the express terms of the Sales, the Plan would avoid having to pay real estate brokerage commissions, fees or other expenses in connection with the Sales, which could equal 10% or more of the Purchase Price; (c) the Plan would receive the full fair market value of the Parcels in a lump-sum cash payment; and (d) the Sales would enable the Plan to diversify its assets.

The Applicant represents that after the Plan's divestiture of the Parcels, the Plan will continue to hold twenty-one other parcels of property that satisfy the definition of ''qualifying employer real property,'' as set forth in section

407(d)(4) of the Act.[9] The Applicant represents that these remaining parcels of property are geographically dispersed, suitable for more than one use, and are being leased to Les Schwab at a fair market rental value. Therefore, according to the Applicant, once the Sales are consummated, the remaining parcels owned by the Plan and leased to Les Schwab will continue to comply with the exemptive relief provided in section 408(e) of the Act.

36. The Applicant represents that the proposed exemption is protective of the participants and beneficiaries because the Independent Fiduciary will represent the interests of the Plan's participants and beneficiaries with respect to: The decision to sell the Parcels to the Applicant; the terms and execution of the Sales; and the selection of a qualified independent appraiser.

Additionally, the Applicant states that the Independent Fiduciary will determine whether the transactions are prudent and in the best interest of the participants and beneficiaries, including whether or not the terms and conditions of the Sales are equivalent to an arm's length transaction with an unrelated third party.

Furthermore, the Applicant states that the Appraisers will appraise the fair market value of the Parcels as of the transaction date and ensure that the Plan receives adequate consideration. The Applicant also states that the amount received by the Plan will at least equal the fair market value of each Parcel on the date of the Sale (exclusive of the buildings or other improvements that are paid for by Les Schwab, to which Les Schwab retains title). An appropriate appraisal methodology will be used by the Appraisers and the Appraisals report will be updated on the date of each Sale.

Lastly, the Applicant represents that the aggregate value of the Parcels being sold represents a small, non-material portion of the Plan's total investments and the investments of the Plan will remain adequately diversified after the transactions are consummated.

Summary

37. In summary, the Applicant represents that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the reasons described above, including the following:

(a) The purchase price to be paid by Les Schwab for each Parcel will be no less than the fair market value of each Parcel, exclusive of buildings or other improvements paid for by Les Schwab, to which Les Schwab retains title), as determined the Appraisers, in updated Appraisals on the date of the Sale;

(b) The Plan will not pay any costs, fees, or commissions associated with each Sale;

(c) The Appraisers will determine the fair market value of their assigned Parcel, on the date of the proposed Sale, using commercially accepted methods of valuation for unrelated third-party transactions; and

(d) The Independent Fiduciary will represent the interests of the Plan with respect to each Sale.

Notice to Interested Parties

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include all individuals who are participants and beneficiaries in the Plan. It is represented that all such interested persons will be notified of the publication of the Notice by first class mail to each such interested person's last known address within fifteen (15) days of publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(a)(2), which will advise all interested persons of their right to comment on and/or to request a hearing. All written comments or hearing requests must be received by the Department from interested persons within forty-five (45) days of the publication of this proposed exemption in the **Federal Register**. All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Erin Brown or Mr. Joseph Brennan of the Department at (202) 693–8352 or (202) 693–8456, respectively. (These are not toll-free numbers.)

New England Carpenters Training Fund (the Plan or the Applicant) Located in Millbury, Massachusetts

[Application No. L–11795]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) of the Act shall not apply to the purchase (the Purchase), by the Plan, of a parcel of improved real property (the Property) from the Connecticut Carpenters Local 24 (Local 24), a party in interest with respect to the Plan; provided that the following conditions are satisfied:

(1) The Purchase price paid by the Plan for the Property is the lesser of $1,280,000 or the fair market value of such Property, as determined by an independent, qualified appraiser (the Appraiser), as of the date of the Purchase;

(2) The Purchase is a one-time transaction for cash;

(3) The terms and conditions of the Purchase are no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's-length with unrelated third parties;

(4) Prior to entering into the Purchase, an independent, qualified fiduciary (the I/F) determines that the Purchase is in the interest of, and protective of the Plan and of its participants and beneficiaries;

(5) The I/F: (a) Has negotiated, reviewed, and approved the terms of the Purchase prior to the consummation of such transaction; (b) has reviewed and approved the methodology used by the Appraiser; (c) ensures that such methodology is properly applied in determining the fair market value of the Property at the time the transaction occurs, and determines whether it is prudent to go forward with the proposed transaction; and (d) represents the interests of the Plan at the time the proposed transaction is consummated;

(6) Immediately following the Purchase, the fair market value of the Property does not exceed 3 percent (3%) of the fair market value of the total assets of the Plan; and

(7) The Plan does not incur any fees, costs, commissions, or other charges as a result of engaging in the Purchase, other than the necessary and reasonable fees payable to the I/F and to the Appraiser, respectively.

[9] The Department is not expressing a view on whether the remaining parcels of property that would be owned by the Plan after the Sales would constitute qualifying employer real property under section 407(d)(4) of the Act, or whether the leases of such parcels of property by the Plan to Les Schwab would satisfy the provisions of section 408(e) of the Act.

Summary of Facts and Representations [10]

1. The Plan is a multiemployer apprenticeship and training fund, which provides education and training in residential and commercial construction skills to carpenter apprentices and journeyman carpenters in six New England states. The carpenter apprentices and journeyman are members of local carpenters unions (the Unions) that are affiliated with the New England Regional Council of Carpenters (the NERCC). The Plan is jointly sponsored by the Unions and signatory building contractors (the Contributing Employers). As of April 30, 2015, the Plan had net assets valued at $36,184,388.30. As of May 1, 2015, the Plan had 1,166 active apprentices in the program (that does not include Connecticut).

2. The Plan is administered by a fourteen member Board of Trustees (the Trustees), consisting of seven Trustees representing the Contributing Employers (the Employer Trustees) and seven Trustees representing the Unions (the Union Trustees). In accordance with the Plan's investment policy, the Trustees have the authority to invest the Plan's assets in real estate and other investments. The Plan currently owns two training facilities in Massachusetts and Maine, and it rents facilities located in New Hampshire, Vermont and Rhode Island. The Plan provides all of its classes and training at these facilities.[11]

3. Local 24 is a local labor organization that is affiliated with the NERCC. The NERCC is an organization made up of 30 local carpenter unions in the six New England states, including Local 24. No officials of Local 24 sit on the Plan's Board of Trustees.

4. The Connecticut Carpenters Training Fund (the CT Fund) is the only carpenters training fund in New England that has not merged into the Plan. The CT Fund has a Board of Trustees, consisting of five trustees that represent its union and four trustees that represent the contributing employers (the CT Fund Trustees).[12] The Business Manager of Local 24 sits on the Board of Trustees of the CT Fund. As of March 31, 2014, the CT Fund had total net assets of $1,336,104, and 312 participants.

5. The CT Fund operates from a training facility that is located at 500 Main Street, Yalesville, Connecticut. The training facility is owned by Local 24 and is the subject Property of this exemption request. Local 24 uses a portion of the Property as its administrative office and for periodic Executive Board and membership meetings. The Property consists of a 25,560 square foot one-story building. The CT Fund leases 15,949.5 of interior square feet of space in the building from Local 24. An additional 3,142 square feet of interior space in the building is shared jointly by Local 24 and the CT Fund.[13]

6. At their December 12, 2012 Trustee meeting, the Employer Trustees of the Plan voted to begin negotiations for a merger with the CT Fund and to purchase the Property for continuing use as a training facility. The vote was further subject to review by an I/F and the Department's granting an individual exemption. All of the Union Trustees recused themselves from the vote to (a) merge the two training funds, (b) hire an I/F, and (c) purchase the Property.[14]

7. Local 24 has decided to sell the Property because it no longer wishes to retain ownership or to act as landlord to the CT Fund. If the Plan does not purchase the Property, it is represented that the Plan will be at risk of losing its current facility and will need to purchase or lease a new Property in order to continue to provide its training programs. In addition, it is represented that the Property is hard to duplicate in the market. To find buildings of the same caliber, the Plan will either need to spend more money on a facility or relocate to a different market.

It is also represented that during the merger discussions, the Plan Trustees and the CT Fund Trustees agreed that it was important to maintain a training facility in Connecticut after the merger. The Plan Trustees and the CT Fund Trustees further determined that in order for the Plan to best serve the Connecticut carpenter apprentices, it would be desirable to maintain the facility in Yalesville, Connecticut due to the suitability of the facility for training purposes and the location.

8. Therefore, an administrative exemption is requested from the Department to allow the Plan to purchase the Property from Local 24. The proposed transaction will be subject to a number of conditions. In this regard, the Purchase price paid by the Plan for the Property will be the lesser of $1,280,000 or the fair market value of such Property, as determined by the Appraiser, on the date of the transaction. In addition, the Purchase will be a one-time transaction for cash. The terms and conditions of the Purchase will reflect arm's-length dealings between the Plan and Local 24. Further, the Purchase has been negotiated, reviewed, and approved by an I/F, who will monitor such transaction on behalf of the Plan and its participants and beneficiaries. The I/F has selected the Appraiser to determine the fair market value of the Property and has reviewed and approved the methodology used by the Appraiser. Finally, the Plan will not incur any fees, costs, commissions, or other charges as a result of engaging in the Purchase, other than the necessary and reasonable fees that will be paid to the I/F and to the Appraiser, respectively.

9. The Purchase would violate section 406(a)(1)(A) and (D) of the Act.[15] Section 406(a)(1)(A) of the Act provides, in relevant part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such

[10] The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

[11] It is represented that there are no leases on these properties between the Plan and parties in interest.

[12] It is represented that the CT Fund has only four employer trustees sitting CT Fund Board of Trustees because one employer trustee resigned, and his position has not been filled due to the pending merger transaction that is described herein in Representations 6 and 7. It is further represented that the union and employer trustees comprising the CT Fund Trustees have a unit vote, so one side cannot outvote the other.

[13] The Department notes that the CT Fund is not a party to the proposed transaction that is described herein. Therefore, the Department has not considered whether the leasing arrangement and the joint sharing of space in the Property between Local 24 and the CT Fund fit within the statutory exemptive relief provided under section 408(b)(2) of the Act or Prohibited Transaction Exemption (PTE) 78–6 (43 FR 23024, May 30, 1978).

Section 408(b)(2) of the Act allows a plan to contract or make reasonable arrangements with a party in interest for office space, legal, accounting or other services necessary for the establishment or operation of the plan. Under section 408(b)(2), exemptive relief is permitted from violations of section 406(a) of the Act, exclusively.

PTE 78–6 is a class exemption that allows a contributing employer, a wholly owned subsidiary of a contributing employer, or an employee organization such as a union, to lease real property, other than office space, to an apprenticeship or training plan. PTE 78–6 provides relief from section 406(a)(1)(A),(C) and (D), only.

To the extent the leasing/joint sharing arrangements between Local 24 and the CT Fund do not comply with the terms and conditions of section 408(b)(2) of the Act (and the regulations that have been promulgated thereunder) or PTE 78–6, the Department is not providing an administrative exemption for such arrangements.

[14] To date, there has been no vote regarding the proposed lease of the Property by the Plan to Local 24. Once the Purchase takes place, and when that vote is taken, the Applicant represents that all of the Union Trustees will recuse themselves from the leasing decision.

[15] The Department notes that the Purchase does not appear to violate the fiduciary self-dealing and conflict of interest provisions of section 406(b)(1) and (b)(2) of the Act because no officials of Local 24 sit on the Plan's Board of Trustees. Therefore, exemptive relief is being provided herein from section 406(a)(1)(A) and (D) only.

transaction constitutes a direct or indirect sale of Property between a plan and a party in interest. The term ''party in interest'' is defined under section 3(14)(A) of the Act to include, a fiduciary such as the Trustees. Under section 3(14)(D), the term party in interest also includes an employee organization, any of whose employees or members are covered by such plan. Local 24 is a party in interest with respect to the Plan because it is an employee organization whose members are covered by the Plan.

In addition, section 406(a)(1)(D) of the Act provides that a fiduciary shall not cause a plan to engage in a transaction, if he knows or should know that such transaction constitutes a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. As fiduciaries, the Plan's Trustees would be causing the Plan, in the process of purchasing the Property, to transfer funds to Local 24 in order to consummate the transaction. Thus, in the absence of an administrative exemption, the Purchase would violate section 406(a)(1)(A) and (D) of the Act.

10. As stated above, Local 24 currently maintains office space in the portion of the Property that the CT Fund does not presently occupy. If the Property is sold to the Plan, Local 24 intends to lease the same portion of the Property that it currently occupies from the Plan. According to the Applicant, the rental rate will be based on the fair market rental rates for office space in the Yalesville, Connecticut area, and the terms of the lease will comply with PTEs 76–1 and 77–10.[16]

11. Integra Realty Resources, Inc. (Integra) of New York City, New York has been retained to serve as the Appraiser. Specifically, Mark Bates, the Senior Managing Director for Integra and a Member of the Appraisal Institute, prepared the appraisal report (the Appraisal Report) for the Property to determine the fair market value of the Property. Mr. Bates represents that he provides advisory and valuation services to leading institutions, developers and owners, involving major commercial and residential properties throughout the United States. He also represents that Integra's gross revenues received from parties in interest with respect to the Plan, including the preparation of the Appraisal Report, represents less than 1% of Integra's actual gross revenues in 2014.

12. In the Appraisal Report dated July 3, 2014, Mr. Bates describes the Property as an existing industrial building containing 25,560 square feet of rentable area, including 53% finished office space used as administration space and classrooms. He explains that the improvements were constructed in 1973 and are 100% owner-occupied as of the effective appraisal date. The site consists of 3.10 acres or 135,036 square feet.

13. Mr. Bates considered two standard approaches for valuing older properties similar to the Property: (a) The Income Capitalization Approach; and (b) the Sales Comparison Approach. According to Mr. Bates, the Income Capitalization Approach is an applicable valuation method because there is an active rental market for similar properties that permits the estimation of the Property's income-generating potential. However, he believes the Sales Comparison Approach is the best valuation method because: (a) There is an active market for similar properties plus sufficient sales data available for analysis; (b) this approach directly considers the prices of alternative properties having similar utility; and (c) this approach is typically most relevant for owner-user properties.

Using the Sales Comparison Approach, Mr. Bates arrived at a value for the Property of $1,280,000, as of July 3, 2014, or 3% of the value of the Plan's assets. The Appraisal Report will be updated by the Appraiser on the date of the closing.

14. The Plan's Employer Trustees retained Gallagher Fiduciary Advisors, LLC (GFA) of Newark, NJ to serve as the I/F on behalf of the Plan. Under its engagement letter, the I/F agreed to: (a) Evaluate the proposed transaction to determine whether it is in the interest of the Plan's participants and beneficiaries; (b) negotiate and agree on behalf of the Plan to the specific terms of the proposed transaction, to decide on behalf of the Plan whether to consummate the proposed transaction, and (c) to direct the appropriate Plan fiduciaries to execute the instruments necessary for the proposed transaction, if it is consummated.

15. The I/F is a registered investment adviser subsidiary of Gallagher Benefit Services, Inc., an employee benefits consulting firm. The I/F has served, and continues to serve, as an independent fiduciary in connection with numerous pension and welfare funds' investment transactions, involving substantial issues under the fiduciary responsibility provisions of the Act. GFA has acted in a variety of independent fiduciary roles, including independent fiduciary, named fiduciary, investment manager and advisor or special consultant.

16. The I/F represents that it is a ''qualified independent fiduciary'' because it and its employees have the appropriate training, experience, and facilities to act on behalf of the Plan regarding the proposed transaction, in accordance with the fiduciary duties and responsibilities prescribed by the Act. In this regard, the I/F states that its staff includes professionals experienced with the management and disposition of portfolio assets, including real estate, as well as ERISA lawyers, who are aware of the fiduciary responsibilities involving investment activities.

The I/F further represents that it is ''independent'' because it has no relationship with Local 24 or other parties in interest, except for its role as the Plan's independent fiduciary with respect to the proposed transaction. The I/F's fee for its services for the Plan will be less than 1% of its annual gross revenues.

17. Besides retaining the Appraiser, the I/F retained Cardno ATC of Portland, Oregon (U.S. headquarters) to conduct a property condition assessment (PCA). The PCA identified some immediately needed repairs, which the I/F will require to be made by Local 24 before closing or ''reserved for in the Purchase price,'' meaning the value of the cost of those repairs will be deducted from the Purchase price. The repairs identified by Cardno ATC are site conditions, structural frame repair, HVAC system repair and handicapped access, totaling $35,200.

The I/F also retained Cardno ATC to conduct a phase one environmental survey of the Property. The survey identified an open question regarding the previous removal of an underground storage tank. This will likely require additional testing to ascertain soil conditions. The I/F will require this to be fully resolved or otherwise reserved prior to closing.

18. In addition, the I/F retained real estate consultants Bertram & Cochran,

[16] Part C of PTE 76–1 (41 FR 12740, March 26, 1976, as corrected at 41 FR 16620 (April 20, 1976)) provides exemptive relief from the prohibited transaction provisions of sections 406(a) and 407(a) of the Act for the leasing of office space, or the provision of administrative services, or the sale or leasing of goods by a multiple employer plan to a participating employee organization, participating employer or another multiple employer plan. PTE 77–10 (42 FR 33918, July 1, 1977), which complements PTE 76–1, provides exemptive relief from the prohibited transaction provisions of section 406(b)(2) of the Act with respect to the sharing of office space, administrative services or goods, or the leasing of office space, or the provision of administrative services or the sale or leasing of goods. In addition, with respect to the sharing of office space, PTE 77–10 requires that the plan must receive reasonable compensation. The costs of securing such space are assessed and paid on a pro-rata basis with respect to each party's use of such space, services and goods.

Notwithstanding the applicant's views on the applicability of PTEs 76–1 and 77–10 to the proposed leases, the Department expresses no opinion on whether the lease will satisfy the terms and conditions of these class exemptions.

Inc (B&C) of Hartford, Connecticut, to conduct a survey of other available properties that were potentially suitable for the purchase or leasing by the Plan. As mentioned above, the result of the survey was that purchasing the Property was the least expensive alternative and in the interest of the Plan's participants.

19. The I/F has reviewed and approved the methodology used by the Appraiser and it will ensure that such methodology is properly applied in determining the fair market value of the Property. In addition, the I/F will determine whether it is prudent to go forward with the proposed transaction. Further, the I/F will represent the interests of the Plan at the time the proposed transaction is consummated.

In carrying out its duties, the I/F requested, received and reviewed numerous documents concerning the Plan and the transaction. Among the documents the I/F reviewed were the: (a) Exemption application; (b) recent audited financial statements of the Plan; (c) the Appraisal Report for the Property; (d) the PCA; (e) the environmental assessment of the Property; (f) a competitive property market evaluation; (g) Local 24 financial statements; and (h) the existing lease between Local 24 and the CT Fund. In addition, the I/F visited the Property and met with the Plan's counsel and the NERCC Business Representative.

The I/F represents that the exemption request is administratively feasible because the purchase by the Plan from Local 24 will be a one-time transaction for cash, rather than a mortgage arrangement. Further, once the Property is owned by the Plan, the I/F represents that there will be no oversight required by the Department other than its usual and customary regulatory audits of all welfare benefit plans.

The I/F has opined that it is less expensive for the Plan to purchase the Property rather than find a similar facility and expend even more funds to convert it to an appropriate carpenter training facility. In this regard, the I/F hired a real estate appraiser to seek out other facilities that might serve as a training facility for the Plan that would also be less expensive than purchasing the Property. The result of the survey was that purchasing the Property was the least expensive alternative and in the interest of the Plan's participants.

20. In summary, it is represented that the proposed transaction has satisfied or will satisfy the statutory requirements for an exemption under section 408(a) of the Act because:

(a) The Purchase price paid by the Plan for the Property will be the lesser of $1,280,000 or the fair market value of such Property, as determined by an Appraiser, as of the date of the Purchase;

(b) The Purchase will be a one-time transaction for cash;

(c) The terms and conditions of the Purchase will be no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties;

(d) Prior to entering into the Purchase, the I/F will determine that the Purchase is in the interest of, and protective of the Plan and of its participants and beneficiaries;

(e) The I/F has negotiated, reviewed, and approved the terms of the Purchase prior to the consummation of such transaction;

(f) The I/F has reviewed and approved the methodology used by the Appraiser, and it will ensure that such methodology is properly applied in determining the fair market value of the Property, and determine whether it is prudent to go forward with the proposed transaction. In addition, the I/F will represent the interests of the Plan at the time the proposed transaction is consummated;

(g) Immediately following the Purchase, the fair market value of the Property will not exceed 3 percent (3%) of the fair market value of the total assets of the Plan; and

(h) The Plan will not incur any fees, costs, commissions, or other charges as a result of engaging in the Purchase, other than the necessary and reasonable fees payable to the I/F and to the Appraiser.

Notice to Interested Persons

Notice of the proposed exemption (the Notice) will be given to interested persons within 7 days of the date of publication of the Notice in the **Federal Register**. The Notice will be given to interested persons by first class mail, with postage prepaid. Such Notice will contain a copy of the Notice, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 37 days of the publication of the Notice in the **Federal Register**.

All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Blessed Chuksorji-Keefe of the Department at (202) 693–8567. (This is not a toll-free number).

Virginia Bankers Association Defined Contribution Plan for First Capital Bank (the Plan), Located in Glen Allen, Virginia

[Application No. D–11818]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A) and 4975(c)(1)(E) of the Code,[17] shall not apply to: (1) The acquisition of certain warrants (the Warrants) to purchase a half-share of common stock (the Stock) of First Capital Bancorp, Inc. (First Capital) by the participant-directed accounts (the Accounts) of certain participants in the Plan (the Participants) in connection with a rights offering (the Rights Offering) of shares of Stock by First Capital, a party in interest with respect to the Plan; and (2) the holding of the Warrants received by the Accounts, provided that the conditions set forth in Section II below were satisfied for the duration of the acquisition and holding.

Section II. Conditions for Relief

(a) The acquisition of the Warrants by the Accounts of the Participants occurred in connection with the exercise of subscription rights to purchase Stock and Warrants (the Subscription Rights) pursuant to the Rights Offering, which was made available by First Capital to all

[17] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

shareholders of Stock, including the Plan;

(b) The acquisition of the Warrants by the Accounts of the Participants resulted from their participation in the Rights Offering, an independent corporate act of First Capital;

(c) Each shareholder of Stock, including each of the Accounts of the Participants, was entitled to receive the same proportionate number of Warrants, and this proportionate number of Warrants was based on the number of shares of Stock held by each such shareholder on the record date of the Rights Offering;

(d) The Warrants were acquired pursuant to, and in accordance with, provisions under the Plan for individually-directed investments of the Accounts by the individual participants in the Plan, a portion of whose Accounts in the Plan held the Stock;

(e) The decisions with regard to the acquisition, holding, and disposition of the Warrants by an Account have been made, and will continue to be made, by the individual Participant whose Account received the Subscription Right in respect of which such Warrants were acquired;

(f) The trustee of the Plan's fund maintained to hold Stock, the First Capital Stock Fund, will not allow Participants to exercise the Warrants unless the fair market value of the Stock exceeds the exercise price of the Warrants on the date of exercise; and

(g) No brokerage fees, commissions, or other fees or expenses were paid or will be paid by the Plan in connection with the acquisition, holding and/or exercise of the Subscription Right or the Warrants.

Effective Date: This proposed exemption, if granted, will be effective for the period beginning on April 30, 2012, until the date the Warrants are exercised or expire.

Summary of Facts and Representations [18]

Background

1. First Capital Bancorp, Inc. (First Capital or the Applicant) is a Virginia corporation maintaining its principal place of business in Glen Allen, Virginia. First Capital Bank (the Bank) is a subsidiary of First Capital that maintains its principal place of business in Glen Allen, Virginia.

2. First Capital represents that the Bank sponsors the Virginia Bankers Association Defined Contribution Plan for First Capital Bank (the Plan), a 401(k) plan that provides for participant-directed investments. The Applicant represents that the Plan was adopted by the Bank effective May 1, 1999. As of December 31, 2012, the Plan had total assets of approximately $4,252,512 and 97 participants.

3. First Capital represents that the participants in the Plan (the Participants) may direct the investments of their Plan accounts (individually, the Account, and collectively, the Accounts) into various investment funds, including a First Capital Stock Fund (the Stock Fund). The Applicant represents that the Plan does not impose requirements with respect to investing in First Capital Stock (the Stock). First Capital represents that, as of December 31, 2012, the Stock Fund was valued at $332,197, which represented approximately 8% of the fair market value of total Plan assets, and those shares of the Stock Fund were allocated to the Accounts of 35 Participants.

First Capital represents that Participants may make investment directions in the Stock Fund in increments of 1% of their pre-tax elective deferral Account under the Plan, subject to a 25% limit. Account balances invested in the Stock Fund are distributed in whole shares of Stock and cash instead of fractional shares.

4. First Capital represents that, at the time the transactions described herein occurred, the VBA Benefits Corporation, located in Glen Allen, Virginia, served as the trustee of the Plan (the Trustee). However, effective June 1, 2014, Reliance Trust Company (Reliance), located in Atlanta, Georgia, assumed the role of Trustee and is the Custodian of the Stock Fund (the Custodian). The Applicant represents that the Trustee holds the Plan's assets, and executes investment directions in accordance with Participants' instructions.

The Rights Offering

5. In a prospectus, dated February 13, 2012 (the Offering Prospectus), First Capital initiated a rights offering (the Rights Offering) to permit shareholders of record as of February 10, 2012 (the Record Date), including the Plan, to purchase Stock and transferable 10-year warrants (the Warrants). As of the Record Date, there were 2,971,171 shares of Stock issued and outstanding.

6. The Applicant represents that the Rights Offering was undertaken as an independent act on the part of First Capital, as a corporate entity under which all shareholders of Stock, including the Plan, were treated in a like manner. The Applicant represents that First Capital engaged in the Rights Offering in order to raise equity capital and improve its capital position. Under the terms set forth in the Offering Prospectus, the Rights Offering commenced on February 13, 2012, and was intended to terminate on April 16, 2012 (the Subscription Period). First Capital had reserved the right to extend the Subscription Period to no later than June 29, 2012. On April 4, 2012, First Capital exercised its right to extend the Subscription Period, and extended it until April 30, 2012.

7. First Capital represents that the Stock and the Warrants were issued separately, but were offered together as ''Units'' consisting of one share of Stock and one Warrant to purchase one-half of a share of Stock at a price of $2.00 per share. The Rights Offering provided that, for every share of Stock held as of the Record Date, each shareholder had the nontransferable right to subscribe for up to three Units (the Subscription Right) for an exercise price of $2.00 per Unit. Furthermore, First Capital represents, shareholders who exercised the Subscription Right in full for three Units subsequently had the opportunity to purchase Units not purchased by other shareholders (the Over-Subscription Privilege). The Applicant represents that the exercise of the Over-Subscription Privilege was subject to a right of first refusal that First Capital granted to a private investor (the Standby Purchaser).[19]

8. First Capital represents that, while the Stock is traded on the NASDAQ under the ticker symbol ''FCVA,'' neither the Subscription Rights nor the Warrants were listed for trading on the NASDAQ or any other stock exchange or market.[20] First Capital represents that the shares of Stock issuable upon the exercise of the Warrants will be listed for trading on the NASDAQ with the other outstanding shares of Stock.

9. First Capital represents that Participants were offered the opportunity to purchase Units through the Stock Fund investment option under the Plan. In this regard, Participants completed a Rights Offering Election Form (the Election Form) and submitted it to the Bank, indicating the total number of Units to be purchased for their Accounts and the total purchase

[18] The Summary of Facts and Representations is based on First Capital's representations and does not reflect the views of the Department, unless indicated otherwise.

[19] The Applicant represents that First Capital also entered into a standby purchase agreement (the Standby Agreement) with the Standby Purchaser, pursuant to which the Standby Purchaser agreed to acquire from First Capital, at the price of $2.00 per Unit, 350,000 Units if such Units were available after exercise of the Subscription Right.

[20] First Capital reserved its right to apply to list the Warrants for trading on the NASDAQ following the Rights Offering. However, the Applicant represents that First Capital has thus far not elected to do so and does not currently expect to do so.

price, or their election not to participate in the Rights Offering. First Capital represents that the Election Form also provided for the Participant to designate which Plan investment fund(s) in the Participant's Account were to be liquidated in order to pay for the Units and the designated amounts to be liquidated from each fund. The Applicant represents that the Bank provided the Election Form to the Custodian to facilitate the Participants' elections to participate in or opt out of the Rights Offering.

10. The Applicant represents that First Capital engaged a financial advisor, Davenport & Company LLC (Davenport), to advise it on the Rights Offering. The Applicant represents that First Capital paid Davenport's fees in connection with the Rights Offering, with no fees paid with Plan assets. The Applicant represents that Davenport helped to negotiate the terms of the Standby Agreement and render a fairness opinion to the First Capital's Board of Directors that the consideration to be received by First Capital for the Units was fair.

First Capital represents that, on February 13, 2012, the closing sale price of the Stock on the NASDAQ Capital Market (NASDAQ) was $2.65 per share. First Capital further notes that, on April 30, 2012, the closing sale price of the Stock on the NASDAQ was $2.03 per share. Therefore, the per-Unit exercise price of $2.00 per share was below the price at which the Stock was trading on the date that the Rights Offering commenced as well as the date of the exercise of the Rights.

The Warrants

11. As described above, the Warrants entitled each shareholder who participated in the Rights Offering the right to purchase one-half a share of Stock at $2.00 per share, paid in cash at the time of exercise. Pursuant to the Offering Prospectus, each Warrant was exercisable immediately upon completion of the Rights Offering and will expire on the tenth anniversary of the end of the Subscription Period. The Offering Prospectus notes that the Warrants will be subject to redemption by First Capital for $0.01 per Warrant, on not less than 30 days written notice, at any time after the closing price of the Stock exceeds $4.00 per share for 20 consecutive business days ending within 15 days of the date on which notice of redemption is given, provided that the Warrant may not be redeemed before the first anniversary of the completion of the Rights Offering.[21] The Offering Prospectus indicates that the Warrants will be adjusted to reflect any stock split, stock dividend or similar recapitalization with respect to the Stock. Furthermore, as no fractional shares of Stock would be issued, the Offering Prospectus explains that if a shareholder purchased an odd number of Units, the number of shares of Stock to be purchased through the Warrants would be rounded down to the nearest whole share.

12. First Capital represents that, with respect to the exercise and disposition of the Warrants, the Trustee will follow the directions of the Participants in accordance with the procedures set forth in the Warrant Certificate and established by the Bank. However, First Capital states, the Trustee will not allow Participants to exercise the Warrants unless the fair market value of the Stock exceeds the exercise price of the Warrants. The Applicant represents that the shares of Stock received upon the exercise of the Warrants will be credited to Participants' Accounts.

13. First Capital represents that all shareholders of Stock, including Participants, were treated in a similar manner with respect to their acquisition and holding of the Warrants. First Capital further represents that no Participant in the Plan paid, or will pay, any fees or commissions in connection with the acquisition, holding or exercise of the Warrants. Finally, First Capital represents that all decisions regarding the acquisition, holding, and disposition of the Warrants have been and will be made by the Participants to whose Plan accounts the Warrants were allocated.

Exemptive Relief Requested

14. First Capital previously requested retroactive exemptive relief to cover the Plan's acquisition and holding of both the Subscription Rights and the Warrants. However, the Department was unable to make the required statutory findings under section 408(a) of the Act for retroactive exemptive relief, due to, among other things, the length of time between the end of the Subscription Period and the filing of the application for exemptive relief, and the inadequacy of the information presented to Participants with respect to the Rights Offering. Consequently, First Capital withdrew its request for retroactive exemptive relief with respect to the acquisition and holding of Subscription Rights by the Plan. First Capital filed a Form 5330 with the IRS disclosing a prohibited transaction with no related loss.[22] Therefore, the Department is proposing relief only for the acquisition and holding of the Warrants.

15. First Capital states that the acquisition and holding of the Warrants violates certain prohibited transaction restrictions of the Act. In this regard, First Capital states that, although the Warrants constitute ''employer securities'' as defined under section 407(d)(1) of the Act, they do not satisfy the definition of ''qualifying employer securities'' as defined under section 407(d)(5) of the Act because they are not stock or marketable debt securities. Under section 407(a)(1)(A) of the Act, a plan may not acquire or hold any ''employer security'' which is not a ''qualifying employer security.'' In addition, section 406(a)(1)(E) of the Act prohibits the acquisition, on behalf of a plan, of any ''employer security in violation of section 407(a) of the Act.'' Finally, section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any ''employer security'' in violation of section 407(a) of the Act. Therefore, First Capital states that the acquisition and holding of the Warrants by the Plan constitute prohibited transactions in violation of sections 406(a)(1)(E) and 406(a)(2) of the Act.

16. Furthermore, First Capital states that the acquisition of the Warrants violates section 406(a)(1)(A) of the Act. First Capital notes that, in relevant part, section 406(a)(1)(A) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if the fiduciary knows or should know that the transaction is a sale or exchange of any property between a plan and a party in interest. First Capital states that, because the Plan fiduciaries acquired the Warrants on behalf of Participants through the exercise of Subscription Rights in the Rights Offering, the acquisition of the Warrants constituted a sale or exchange of property between a Plan and a party in interest, in violation of section 406(a)(1)(A) of the Act.

17. First Capital states further that the acquisition and holding of the Warrants may violate sections 406(b)(1) and 406(b)(2) of the Act. First Capital notes that section 406(b)(1) of the Act prohibits a fiduciary from dealing with the assets of a plan in his own interest

[21] The Department notes that the redemption of the Warrants by First Capital from the Plan in exchange for cash would constitute a prohibited transaction under sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act, for which exemptive relief is not provided hereunder.

[22] The Department is taking no view herein regarding whether First Capital properly filed the Form 5330, including properly reporting such loss amount.

or for his own account. Furthermore, section 406(b)(2) of the Act prohibits a fiduciary with respect to a plan from acting in any transaction involving the plan on behalf of a party, or representing a party, whose interests are adverse to the interests of the plan or its participants and beneficiaries. First Capital states that, in effecting the Plan's participation in the Rights Offering and allowing the Plan to purchase and hold the Warrants, the Plan fiduciaries may have violated section 406(b)(1) of the Act because they dealt with the assets of the Plan in their own interest. Furthermore, the Applicant states that the Plan fiduciaries may have violated section 406(b)(2) of the Act because they acted on their own behalf as well as the Plan's behalf in the Rights Offering. Therefore, First Capital requests that the Department grant an exemption from the prohibitions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act, for the acquisition and holding of the Warrants.

18. As explained above, First Capital represents that the acquisition of the Warrants has been completed. First Capital represents that, to date, no Plan Participants have exercised any of their Accounts' Warrants. First Capital further represents that, to date, no Plan Participants have transferred any Warrants in their Accounts to third parties. According to First Capital, all Accounts that received the Warrants may hold them until exercised for Stock or transferred to a third party, or until the Warrants expire, ten years from the date that the Rights Offering closed. First Capital seeks retroactive relief effective from April 30, 2012, the date that the Accounts of Participants exercised their Subscription Rights, until the Warrants are exercised or expire.

Statutory Findings

19. First Capital represents that the proposed exemption is administratively feasible. First Capital represents that all shareholders, including the Plan, were, and will continue to be treated in a like manner with respect to the acquisition and holding of the Warrants. First Capital represents that the Plan recordkeeper has indicated that it can administer the Warrants as part of the Plan's assets, of which the Warrants comprise less than 1 percent. As such, First Capital represents that there is no reason for any continuing Departmental oversight with respect to the holding of the Warrants.

20. First Capital represents that the Plan's acquisition of the Warrants through its participation in the Rights Offering was in the interests of the Plan and its Participants because it provides Participants with the opportunity to purchase additional Stock at below fair market value price. Furthermore, First Capital represents that rights offerings are a very common approach used by banks and other issuers to raise capital, and that they provide shareholders, including the Plan, with an additional opportunity to invest in the entity. Furthermore, the price of a Unit, which included one share of Stock and one Warrant to purchase a half-share of Stock, was lower than the price of Stock, as reflected on the NASDAQ, on the date the Rights Offering commenced and the date of the exercise of the Rights.

21. First Capital represents that the acquisition and holding of the Warrants in the Rights Offering was protective of the rights of Participants and beneficiaries because all decisions regarding the holding, exercise and disposition of the Warrants by an Account were made or will be made by the Participant whose Account received such Warrants. Furthermore, the Trustee will not allow Participants to exercise the Warrants unless the fair market value of the Stock exceeds the exercise price of the Warrants on the date of exercise.

Summary

22. In summary, First Capital represents that the proposed exemption satisfies the statutory criteria for an exemption under section 408(a) of the Act for the reasons stated above and for the following reasons:

a. The acquisition of the Warrants by the Accounts of the Participants occurred in connection with the exercise of Subscription Rights pursuant to the Rights Offering, which was made available by First Capital to all shareholders of Stock, including the Plan;

b. The acquisition of the Warrants by the Accounts of the Participants resulted from their participation in the Rights Offering, an independent corporate act of First Capital;

c. Each shareholder of Stock, including each of the Accounts of the Participants, was entitled to receive the same proportionate number of Warrants, and this proportionate number of Warrants was based on the number of shares of Stock held by each such shareholder;

d. The Warrants were acquired pursuant to, and in accordance with, provisions under the Plan for individually-directed investments of the Accounts by the individual Participants, a portion of whose Accounts in the Plan held the Stock;

e. The decisions with regard to the holding, exercise and disposition of the Warrants by an Account were made and are to be made by the Participant whose Account received the Warrants;

f. The Trustee will not allow Participants to exercise the Warrants unless the fair market value of the Stock exceeds the exercise price of the Warrants on the date of exercise; and

g. No brokerage fees, commissions, or other fees or expenses were paid by the Plan in connection with the acquisition, holding or exercise of any of the Warrants.

Notice to Interested Persons

Notice of the proposed exemption will be given to all Interested Persons within 15 days of the publication of the notice of proposed exemption in the **Federal Register**, by first class U.S. mail to the last known address of all such individuals. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice of proposed exemption in the **Federal Register**.

All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Idaho Veneer Company/Ceda-Pine Veneer, Inc. Employees' Retirement Plan, Located in Post Falls, ID

[Application No. D–11823]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the

Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[23]

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A), (D) and (E) of the Code, shall not apply to the in-kind contribution (the Contribution) by Idaho Veneer Company (Idaho Veneer or the Applicant) of unimproved real property (the Property) to the Idaho Veneer Company/Ceda-Pine Veneer, Inc. Employees' Retirement Plan (the Plan), provided that the conditions described in Section II below have been met.

Section II. Conditions for Relief

(a) The Property is contributed to the Plan at the greater of either: (1) $1,249,000; or (2) the fair market value of the Property, as determined by a qualified independent appraiser, in an appraisal (the Appraisal) that is updated on the date of the Contribution;

(b) A qualified independent fiduciary (the Independent Fiduciary), acting on behalf of the Plan, represents the interests of the Plan and its participants and beneficiaries with respect to the Contribution, and in doing so: (1) Determines that the Contribution is in the interests of the Plan and of its participants and beneficiaries and is protective of the rights of participants and beneficiaries of the Plan; (2) reviews the Appraisal to approve of the methodology used by the appraiser and to verify that the appraiser's methodology was properly applied; and (3) ensures compliance with the terms of the Contribution and the conditions for the proposed exemption, if granted;

(c) All rights exercisable in connection with any existing third-party lease for billboard space (the Lease) on the Property are transferred to the Plan along with the Property;

(d) The Plan does not incur any expenses with respect to the Contribution;

(e) As of the date of the Contribution, there are no adverse claims, liens or debts to be levied against the Property, and Idaho Veneer is not aware of any pending adverse claims, liens or debts to be levied against the Property;

(f) On the date of the Contribution, and to the extent that the value of the Property as of the date of the Contribution is less than the cumulative cash contributions Idaho Veneer would have been required to make to the Plan in the absence of the Contribution, Idaho Veneer will make a cash contribution to the Plan equal to the difference between the value of the Property at the date of the Contribution and the outstanding required cash contributions;

(g) The Property represents no more than 20% of the fair market value of the total assets of the Plan at the time it is contributed to the Plan; and

(h) The terms and conditions of the Contribution are no less favorable to the Plan than those the Plan could negotiate in an arms-length transaction with an unrelated third party.

Effective Date: The proposed exemption, if granted, will be effective as of the date that a final notice of granted exemption is published in the **Federal Register**.

Summary of Facts and Representations[24]

Background

1. Idaho Veneer Company (Idaho Veneer or the Applicant) is a producer of white pine lumber and veneer products based in Post Falls, Idaho. Idaho Veneer was first established in 1953 and has operated from its headquarters in Post Falls for over 60 years. Idaho Veneer also owns a property in Samuels, Idaho, on which it operated a mill until recently. From 1993 to 2013, Idaho Veneer and Ceda-Pine Veneer, Inc. (Ceda-Pine) were wholly-owned subsidiaries of Excaliber, Inc. (Excaliber), a holding company for all Idaho Veneer and Ceda-Pine stock. In October 2013, Ceda-Pine was liquidated and dissolved. Idaho Veneer was merged with Excaliber, the surviving corporation, which subsequently changed its name to ''Idaho Veneer Company.'' The Applicant represents that during its boom years in the 1980s, Idaho Veneer employed more than 200 workers and distributed its products in North America, Asia, and Europe. However, the Applicant explains, a decline in demand for timber products in recent years caused Idaho Veneer to modify its product lineup, and has occasionally resulted in seasonal layoffs. The Applicant represents that, due to low demand, Idaho Veneer ceased production at the Samuels Mill in 2009 and auctioned the mill equipment in May 2012.

2. Idaho Veneer is the sponsor of the Idaho Veneer Company/Ceda-Pine Veneer, Inc. Employees' Retirement Plan (the Plan), a defined benefit plan established effective December 4, 1972. The Plan was later amended to freeze benefit accruals, effective December 31, 2006. In addition, no future accrual service would be credited and no future compensation will be taken into account when determining the participant's accrued benefit, and no additional employees will become active participants. As of December 31, 2013, the Plan had 236 participants and total net assets valued at $7,139,481. Idaho Veneer represents that the current trustees of the Plan (the Trustees) include: John Malloy, the President and ⅓ owner of Idaho Veneer; Daniel J. Malloy, Director and ⅓ owner of Idaho Veneer; and Terry Newcomb, the chief financial officer of Idaho Veneer.

3. Idaho Veneer represents that it owns a parcel of vacant, unimproved land (the Property), consisting of 11.8 acres bordering Interstate 90, and in close proximity to its primary business location and mill site in Post Falls. The Applicant purchased the Property in 1980 from John and Julia Gregor, the original founders of Idaho Veneer. Idaho Veneer represents that it originally purchased the Property with the intention to expand its mill site operations. However, Idaho Veneer represents that it ultimately abandoned its plans for expansion onto the Property as another site proved adequate.

4. Idaho Veneer represents that the Property, though currently undeveloped, generates advertising revenue from two billboard signs located on the Property. On September 14, 2010, Idaho Veneer entered into a ten-year lease (the Lease) with the Lamar Advertising Company (Lamar) beginning on December 1, 2010. Lamar is one of the largest advertising companies in North America, with more than 300,000 displays in the United States, Canada, and Puerto Rico. Lamar offers billboard, interstate logo, and transit advertising formats, as well as a network of digital billboards with over 2,000 displays. The Lease provides Lamar access to the Property to construct and maintain the billboards, in exchange for paying Idaho Veneer the greater of $5,000 annually or 20% of the annual gross income generated from the billboard rentals. Idaho Veneer represents that it has earned approximately $18,000 per year in

[23] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[24] The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

advertising income in 2013 and 2014 through its ownership of the Property. Idaho Veneer states that, as of May 14, 2014, the Property has an appraised value of $1,249,000. Idaho Veneer represents that it paid $9,140 in 2013 and $8,736 in 2014 in property taxes with respect to the Property.

Plan Funding Shortfalls

5. According to projections prepared by Milliman, the Plan's actuary (the Actuary), the Plan had a 78% Adjusted Funding Target Attainment Percentage (AFTAP)funded status as of January 1, 2015.[25] The projections indicate that the Plan's funded status will decline to 77.6% funded after 1 year, 75% after 2 years, and 55.8% after 7 years. Idaho Veneer further represents that it lacks the financial resources to meet its current minimum required contribution, as required under section 305 of the Act and section 412(d) of the Code, through a contribution of cash. Idaho Veneer explains that it applied for and was granted a partial Minimum Funding Waiver (the Waiver) from the IRS for the 2011 Plan year. Pursuant to the terms of the Waiver, Idaho Veneer, on June 7, 2012, contributed the first two quarterly payments for the 2011 Plan year, in the amounts of $78,705 and $78,709. However, the Applicant explains, the partial relief provided under the Waiver did not sufficiently improve Idaho Veneer's financial condition so as to allow it to make its minimum required contributions for either Plan years 2012 or 2013.[26]

The In-Kind Contribution

6. Idaho Veneer wishes to satisfy its funding obligation to the Plan through an in-kind contribution of the Property to the Plan (the Contribution). The Applicant represents that the Contribution will fully satisfy Idaho Veneer's minimum funding obligations with respect to the 2011 and 2012 Plan Years. The Applicant further contends that the Contribution will satisfy most of the minimum funding obligation for the 2013 Plan Year, and that Idaho Veneer will contribute the remaining amount for the 2013 Plan Year in cash. Furthermore, Milliman projects, the Plan's AFTAP following the Contribution will increase to 91.4% after 1 year, then decrease to 89.1% after 2 years, and 67.5% after 7 years.

7. The Trustees have determined that the Property is a prudent investment for the Plan. Idaho Veneer represents that, although the Property is already valuable, the Trustees believe there is still significant opportunity for increased upside as the real estate market in the western United States continues to recover. On the other hand, the Applicant notes, if the Property does decline in value, Idaho Veneer will have to supplement its future contributions in order to account for any resulting shortfall in the Plan's funding status.

8. The Applicant notes that Idaho Veneer has previously used the Property for storage space. However, all items owned by Idaho Veneer will be removed from the Property, and nothing will be stored on the Property after the Contribution. According to Idaho Veneer, the Property is clear of any adverse claims and there are no liens or debts to be levied against the Property, and Idaho Veneer is not aware of any pending adverse claims, liens or debts to be levied against the Property. Idaho Veneer represents that all rights under the Lease will transfer to the Plan along with the Property. Furthermore, Idaho Veneer represents that a Phase 1 environmental site assessment was done on October 21, 2013 by Hoy Environmental, PLLC located in Spokane, Washington. According to Idaho Veneer, the assessment revealed no evidence of recognized adverse environmental conditions.

9. Idaho Veneer notes that it has been actively marketing the Property. A third-party buyer, Active West Development, LLC, has expressed interest in purchasing the Property, as well as another parcel Idaho Veneer owns, as part of a larger development in Post Falls.[27] The Applicant notes that, if the proposed exemption is granted and Idaho Veneer contributes the Property to the Plan, the Trustees will continue to market the Property for sale to potential buyers. According to Idaho Veneer, the Property is currently zoned industrial, but re-zoning is not required for the Plan to market the Property.

10. The Applicant represents that, to the extent that the value of the Property at the date of the Contribution is less than the cumulative cash contributions Idaho Veneer would have been required to make to the Plan in the absence of the Contribution, Idaho Veneer will make a cash contribution to the Plan on the date of the Contribution equal to the difference between the value of the Property at the date of the Contribution and the outstanding required cash contributions.

11. The Applicant represents that Idaho Veneer plans to satisfy its minimum required contributions for any subsequent years following the Contribution. The Applicant represents that Idaho Veneer intends to take into account the value of the Property in calculating its minimum required payment.

The Independent Fiduciary Report

12. The Trustees engaged William J. Kropkof, Managing Member of the ERISA Advisory Group, to serve as the qualified independent fiduciary (the Independent Fiduciary) on behalf of the Plan. The Independent Fiduciary represents that he has served in various engagements as a qualified independent fiduciary for 19 years, including reviewing various types of real estate transactions for ERISA-covered plans.

13. The Independent Fiduciary represents that he understands that his duties and responsibilities under ERISA require him to act on behalf of the participants and beneficiaries of the Plan, and not on behalf of Idaho Veneer. To this end, the Independent Fiduciary represents that he has no current or former relationship with any party in interest with respect to the Contribution, including Stanley Moe of Columbia Valuation Group, Inc., the qualified independent appraiser (the Appraiser), or any affiliates except to the extent necessary to perform his duties as Independent Fiduciary. The Independent Fiduciary estimates that the percentage of his current revenue derived from any party in interest involved in the proposed transaction will be 1.26%, determined by comparing, in fractional form, his revenues from Idaho Veneer (or its affiliates) and any party in interest, in the current federal income tax year (expressed as a numerator), and his revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior federal income tax year (expressed as a denominator).

14. The Independent Fiduciary submitted to the Department his report, dated November 4, 2014 (the Independent Fiduciary Report), in which he analyzed the proposed transaction and submitted and formulated recommendations for the Trustees.

In the Independent Fiduciary Report, the Independent Fiduciary explains that he identified and considered several issues in forming the recommendation,

[25] Idaho Veneer notes that the funding valuation results prepared by the Actuary were made utilizing interest rate assumptions provided under the Moving Ahead for Progress in the 21st Century Act (MAP–21) legislation enacted on July 6, 2012, that, among other things, changed the interest rate that pension plans use to measure their liabilities.

[26] The Applicant represents that it has filed a Form 5330 with the IRS in connection with Idaho Veneer's missed minimum required contributions.

[27] The Applicant expects that discussions with Active West Development, LLC will continue after the Contribution and that the Plan may be able to sell the Property shortly after the Contribution.

including: The prudence of the proposed transaction; the impact of the proposed transaction on the Plan, including the need to diversify the Plan's investments, the Plan's current and projected liquidity needs based on actuarial models, and the Property's fit with the Plan's other investments in light of the overall investment objectives; the impact of alternatives to proceeding with the proposed transaction; the risks associated with the proposed transaction; and the need to monitor the Plan's real estate investments going forward.

15. In the Independent Fiduciary Report, the Independent Fiduciary represents that he evaluated numerous aspects of the proposed transaction in analyzing the impact of the Contribution on the Plan. The Independent Fiduciary reviewed the appraisal of the Property (the Appraisal), completed by the Appraiser. Furthermore, the Independent Fiduciary discussed the actuarial projections with the Actuary and analyzed the Plan's ability to pay required benefits as well as the liquidity of all the Plan's assets. The Independent Fiduciary represents that he also conducted an analysis of the Plan's existing investment allocation mix and the impact the Contribution would have on the Plan's overall investment strategy. Finally, the Independent Fiduciary evaluated the current real estate conditions and the potential for short- and mid-term appreciation of the value of the Property.

16. After performing the necessary due diligence, the Independent Fiduciary recommends in the Independent Fiduciary Report that the parties engage in the Contribution. The Independent Fiduciary notes that the Plan currently has sufficient liquidity to pay benefits as they become due. The asset projections prepared for the Plan indicate that the Plan will continue to have sufficient liquidity to meet its benefit obligations for at least the next 10 years, with or without the Contribution.

17. Furthermore, according to the Independent Fiduciary Report, the Independent Fiduciary believes that the Contribution is in the interests of the Plan's Participants. The Independent Fiduciary Report notes that the Contribution will satisfy most of the minimum funding requirements for Plan years 2012 and 2013. As such, the Independent Fiduciary contends that the Contribution would alleviate the cash burden on Idaho Veneer, and make it more likely that Idaho Veneer will remain financially stable and able to make required cash contributions to the Plan in future years.[28]

18. The Independent Fiduciary represents that he reviewed the credentials of the Appraiser and determined that he is a certified appraiser in good standing with the Idaho Bureau of Occupational Licenses and the Washington State Department of Licensing. Based on the Appraiser's credentials and the Appraisal completed in connection with the Contribution, the Independent Fiduciary believes that the valuation is fair and reasonable.

19. The Independent Fiduciary also notes that because local real estate values remain depressed relative to historical trends, the Property has significant upside potential. The Independent Fiduciary states that, based on recent interest in the Property by third-party potential buyers, even a sale in the near future may yield proceeds in excess of the current appraised value. Furthermore, according to the Independent Fiduciary, the Property generates a stable cash flow through the Lease without posing substantial risks to the Plan.

20. In the Independent Fiduciary Report, the Independent Fiduciary concludes that the Contribution is protective of the rights of the Plan participants and beneficiaries because the Trustees will perform the following duties on an on-going basis: Inspect the Property at least annually; review the Plan's financial stability each year; review and update the insurance provided for the Property (including liability and fire insurance) as necessary; commission a full appraisal of the Property every three years and order an update from the Appraiser every year in which a full appraisal is not done; review with the Actuary the impact that the continued investment in the Property will have on the Plan's liquidity; negotiate all current and/or future leases, collect stated rents and ensure tenant(s) are performing consistent with the terms of those leases; periodically (at least annually) review compliance with the terms of any current or future leases; maintain the Property in a safe, stable and marketable condition, including performing any necessary maintenance on, or removal of, personal property, improvements, or other items that are in the best interest of the Plan, and keeping the Property free of hazards, noxious weeds and other items that could increase risk to the Plan or interfere with the Property's value; periodically (at least annually) discuss the current strategy for holding the Property and document any changes to such strategy; and review, and approve or reject, all purchase offers or other proposed transactions involving real estate held by the Plan.

The Appraisal of the Property

21. In the Appraisal, dated May 14, 2014, and addendum, dated July 9, 2014, the Appraiser represents that he was hired to perform a market appraisal of the property, to be submitted to the Department for the purpose of obtaining a prohibited transaction exemption, and that the Appraisal was completed solely on behalf of the Plan. The Appraiser represents that he is a Member of the Appraisal Institute and has performed real estate appraisals in Idaho since 1976. The Appraiser represents that he has performed two Appraisals on behalf of the Plan. However, the Appraiser represents that he has no other relationship with any party in interest with respect to the Contribution, or its affiliates, that may influence the Appraiser's actions. The Appraiser represents that less than 1% of his revenue in 2014 was derived from Idaho Veneer.

22. In the Appraisal, the Appraiser represents that he employed the sales comparison approach to valuing the property. The Appraiser explains that the sales comparison approach reflects the opinions of buyers and sellers of comparable properties in the local real estate market, evaluating certain benchmark value indicators such as price per square foot, price per unit, price per room, or an indication of value through some variant of the gross income multiplier. The Appraiser states that the sales comparison approach is usually the only applicable valuation method for unimproved real property.

23. In the Appraisal, the Appraiser explains that he examined four land sales and one active listing that represent the most recent comparable land deals with similarities to the Property. The Appraiser represents that, after adjustments for differences in economic and physical conditions, the land sales indicate a range of value between $1.89 and $2.40 per square foot for the Property. The Appraiser concludes that this is the most probable transaction range in which a sale of the subject property would occur. The Appraiser also observes that location, configuration, access and utility are all considered good for light industrial or a mixed use development, although access and visibility from the freeway are less than ideal. Based on the

[28] The Independent Fiduciary states that the interests of the Plan sponsor, Idaho Veneer, are relevant only insofar as the Contribution will affect the Applicant's continuing financial viability and its ability to fund the Plan.

comparison, the Appraiser derived the current market value of the Property at $2.25 per square foot, or $1,157,000.

24. The Appraiser then considered the effect that the Lease would have on the value of the Property. The Appraiser notes that the signs cover very little land area and are located close to the freeway in the least likely location to place buildings. As such, even if a prospective buyer wished to develop the Property, a prudent investor would continue leasing to Lamar. The Lease would add income to whatever other use might develop over time. Therefore, the Appraiser reasons, the minimum value added would be the present value income over the remaining Lease term. In calculating the present value, the Appraiser applied a discount rate of 8%, recognizing this income is virtually guaranteed for 7 more years. The Appraiser concluded that the added value from the Lease would be $92,000. As such, the Appraiser concluded that the total value of the Property, including the Lease, is $1,249,000.

Exemptive Relief Requested

25. Idaho Veneer requests exemptive relief from certain of the prohibited transaction restrictions of section 406 of ERISA for the Contribution.[29] Idaho Veneer represents that the Contribution violates section 406(a)(1)(A) of the Act, which prohibits the sale or exchange of property between a plan and a party in interest. Idaho Veneer notes that the Department concluded in Interpretive Bulletin 2509.94–3 that an in-kind contribution of property by a plan sponsor to an employee pension plan constitutes a prohibited transaction in violation of section 406(a)(1)(A) of the Act. Furthermore, an employer whose employees participate in the plan is a ''party in interest'' under section 3(14) of the Act. As such, Idaho Veneer requests exemptive relief from section 406(a)(1)(A) of the Act for the transfer of the Property to the Plan through the Contribution.

26. Idaho Veneer states that section 406(a)(1)(D) of the Act provides that any transfer to, or use by or for the benefit of, a party in interest or disqualified person, of any assets of the Plan is a prohibited transaction. Idaho Veneer states that, accordingly, the Contribution may also violate section 406(a)(1)(D) of the Act. Thus, Idaho Veneer requests exemptive relief from 406(a)(1)(D) of the Act.

27. The Applicant further requests exemptive relief from sections 406(b)(1) and 406(b)(2) of the Act. The Applicant represents that section 406(b)(1) of the Act prohibits a plan fiduciary from dealing with the assets of the plan in its own interest or for its own account (*i.e.,* self-dealing). The Applicant represents that the current Trustees, other than the Independent Fiduciary, are full-time executives and are each ⅓ owners of Idaho Veneer. As such, the proposed Contribution may constitute transactions in which the Trustees deal with Plan assets in a manner which benefits themselves by strengthening the financial prospects of Idaho Veneer. The Applicant states further that section 406(b)(2) of the Act prohibits a fiduciary from acting in its individual or any other capacity in any transaction involving the plan, on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. In acting on behalf of the Plan as Trustees and on behalf of Idaho Veneer as executives and owners in connection with the Contribution, the Trustees will have acted on behalf of a party whose interests are adverse to the interests of the Plan.

Statutory Findings

28. Idaho Veneer represents that the proposed exemption is administratively feasible because the Contribution is a one-time transaction. The Applicant represents that Idaho Veneer has clear title to the Property and that it is authorized to transfer title to the Plan. Idaho Veneer further represents that the Independent Fiduciary will review and approve the terms of the Contribution on behalf of the Plan. Idaho Veneer represents that, once the Contribution is completed, the Plan Trustees will continue to seek a third-party buyer for the Property, unrelated to either the Plan or the parties in interest.

29. Idaho Veneer represents that the Contribution is in the interests of the Plan and its participants and beneficiaries because the Plan will enjoy the potential appreciation of the Property. Furthermore, the Property has the potential for future development because of its prime location close to a major interstate highway. In addition, there will be no restrictions on the resale of the Property by the Plan, and the Trustees have stated that they intend to market its subsequent sale to third parties. The Applicant notes further that, as Idaho Veneer's current financial state precludes it from making its timely minimum required contributions, the Contribution currently provides the only means of providing additional assets to the Plan.

30. Finally, Idaho Veneer represents that the Contribution is protective of the rights of the participants and beneficiaries because the Property will be contributed at the greater of (1) $1,249,000, or (2) the fair market value of the Property, as determined by a qualified independent appraiser updated on the date of the Contribution. Furthermore, the Independent Fiduciary was engaged by the Plan to represent the Plan's interests related to the Contribution. In this capacity, the Independent Fiduciary represents that it reviewed the terms of the Contribution and the Appraisal; approved of the methodology used in the Appraisal; and verified that the Appraiser's methodology was properly applied. The Independent Fiduciary will ensure compliance with the terms of the Contribution and the conditions for the proposed exemption, if granted. Idaho Veneer represents that all rights exercisable in connection with the Lease on the Property will be transferred to the Plan along with the Property. Idaho Veneer notes that the Plan will not incur any expenses with respect to the Contribution. In addition, the Property will represent no more than 20% of the fair market value of the total assets of the Plan at the time it is contributed to the Plan. Finally, Idaho Veneer represents that the Trustees will closely monitor the Plan's investment in the Property and will continue to solicit third-party buyers for the Property in order to facilitate an expeditious sale.

Summary

31. In summary, in addition to the reasons described above, Idaho Veneer represents that the proposed exemption, if granted, satisfies the statutory criteria of section 408 of the Act for the following reasons:

(a) The Property will be contributed to the Plan at the greater of either: (1) $1,249,000; or (2) its fair market value of the Property, as determined in the Appraisal that is updated on the date of the Contribution;

(b) The Independent Fiduciary has been retained to represent the interests of the Plan and its participants and beneficiaries with respect to the Contribution, and in doing so: (1) Determined that the Contribution is in the interests of the Plan and of its participants and beneficiaries and is protective of the rights of participants and beneficiaries of the Plan; (2) reviewed the Appraisal to approve of the methodology used by the Appraiser and to verify that the Appraiser's methodology was properly applied; and (3) will ensure compliance with the terms of the Contribution and the

[29] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

conditions for the proposed exemption, if granted;

(c) All rights exercisable in connection with any existing Lease will be transferred to the Plan along with the Property;

(d) As of the date of the Contribution, there are no adverse claims, liens or debts to be levied against the Property, and Idaho Veneer is not aware of any pending adverse claims, liens or debts to be levied against the Property;

(e) On the date of the Contribution, and to the extent that the value of the Property as of the date of the Contribution is less than the cumulative cash contributions the Applicant would have been required to make to the Plan in the absence of the Contribution, the Applicant will make a cash contribution to the Plan equal to the difference between the value of the Property at the date of the Contribution and the outstanding required cash contributions; and

(f) The Property represents no more than 20% of the fair market value of the total assets of the Plan at the time it is contributed to the Plan.

Notice to Interested Persons

Notice of the proposed exemption will be given to all Interested Persons in the manner agreed to with the Department within 15 days of the publication of the notice of proposed exemption in the **Federal Register**, by first class U.S. mail to the last known address of all such individuals. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice of proposed exemption in the **Federal Register**.

All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

United States Steel and Carnegie Pension Fund (UCF or the Applicant), Located in New York, New York

[Application No. D–11835]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, as amended, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[30]

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective from January 1, 2015, through December 31, 2017, to a transaction between a party in interest with respect to Former U.S. Steel Related Plan(s), as defined in Section II(e), and an investment fund, as defined in Section II(k), in which such plans have an interest (the Fund), provided that UCF has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 (the 1940 Act) that has, as of the last day of its most recent fiscal year, total client assets, including in-house plan assets (the In-House Plan Assets), as defined in Section II(g), under its management and control in excess of $100,000,000 and equity, as defined in Section II(j), in excess of $1,000,000 (as measured yearly on UCF's most recent balance sheet prepared in accordance with generally accepted accounting principles); and provided UCF has acknowledged in a written management agreement that it is a fiduciary with respect to each Former U.S. Steel Related Plan that has retained it;

(b) At the time of the transaction, as defined in Section II(m), the party in interest, as defined in Section II(h), or its affiliate, as defined in Section II(a), does not have the authority to—

(1) Appoint or terminate UCF as a manager of any of the plan assets of the Former U.S. Steel Related Plans, or

(2) Negotiate the terms of the management agreement with UCF (including renewals or modifications thereof) on behalf of the Former U.S. Steel Related Plans.

(c) The transaction is not described in—

(1) Prohibited Transaction Exemption 2006–16 (PTE 2006–16),[31] relating to securities lending arrangements (as amended or superseded);

(2) Prohibited Transaction Exemption 83–1 (PTE 83–1),[32] relating to acquisitions by plans of interests in mortgage pools (as amended or superseded), or

(3) Prohibited Transaction Exemption 88–59 (PTE 88–59),[33] relating to certain mortgage financing arrangements (as amended or superseded);

(d) The terms of the transaction are negotiated on behalf of the Fund by, or under the authority and general direction of, UCF, and either UCF, or (so long as UCF retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by UCF, makes the decision on behalf of the Fund to enter into the transaction;

(e) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of UCF, the terms of the transaction are at least as favorable to the Fund as the terms generally available in arm's-length transactions between unrelated parties;

(f) Neither UCF nor any affiliate thereof, as defined in Section II(b), nor any owner, direct or indirect, of a 5 percent (5%) or more interest in UCF is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) Any felony involving abuse or misuses of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) Any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) Income tax evasion;

(4) Any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion,

[30] For purposes of this proposed exemption references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[31] 71 FR 63786, October 31, 2006.

[32] 48 FR 895, January 7, 1983.

[33] 53 FR 24811, June 30, 1988.

or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) Any other crimes described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

(g) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(h) The party in interest dealing with the Fund:

(1) Is a party in interest with respect to the Former U.S. Steel Related Plans (including a fiduciary) solely by reason of providing services to the Former U.S. Steel Related Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets; and

(3) Is neither UCF nor a person related to UCF, as defined, in Section II(i).

(i) UCF adopts written policies and procedures that are designed to assure compliance with the conditions of this proposed exemption;

(j) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act, and who so represents in writing, conducts an exemption audit, as defined in Section II(f) of this proposed exemption, on an annual basis. Following completion of each such exemption audit, the independent auditor must issue a written report to the Former U.S. Steel Related Plans that engaged in such transactions, presenting its specific findings with respect to the audited sample regarding the level of compliance with the policies and procedures adopted by UCF, pursuant to Section I(i) of this proposed exemption, and with the objective requirements of this proposed exemption. The written report also shall contain the auditor's overall opinion regarding whether UCF's program as a whole complies with the policies and procedures adopted by UCF and the objective requirements of this proposed exemption. The independent auditor must complete each such exemption audit and must issue such written report to the administrators, or other appropriate fiduciary of the Former U.S. Steel Related Plans, within six (6) months following the end of the year to which each such exemption audit and report relates; and

(k)(1) UCF or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2) to determine whether the conditions of this proposed exemption have been met, except that (A) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of UCF and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (B) no party in interest or disqualified person other than UCF shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by Section I(k)(2), of this proposed exemption.

(2) Except as provided in Section I(k)(3), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), of this proposed exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor (the Department) or of the Internal Revenue Service;

(B) Any fiduciary of any of the Former U.S. Steel Related Plans investing in the Fund or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any of the Former U.S. Steel Related Plans investing in the Fund or any duly authorized employee representative of such employer;

(D) Any participant or beneficiary of any of the Former U.S. Steel Related Plans investing in the Fund, or any duly authorized representative of such participant or beneficiary; and

(E) Any employee organization whose members are covered by such Former U.S. Steel Related Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), of this proposed exemption shall be authorized to examine trade secrets of UCF or its affiliates or commercial or financial information which is privileged or confidential.

Section II. Definitions

(a) For purposes of Section I(b) of this proposed exemption, an ''affiliate'' of a person means—

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person,

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, five percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets.

A named fiduciary (within the meaning of section 402(a)(2) of the Act) or a plan, with respect to the plan assets and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of Section I(b), if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), of this proposed exemption, an ''affiliate'' of a person means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person,

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person) or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of plan assets.

(c) For purposes of Section II(e) and (g), of this proposed exemption, an ''affiliate'' of UCF includes a member of either:

(1) A controlled group of corporations, as defined in section

414(b) of the Code, of which United States Steel Corporation (U.S. Steel) is a member, or

(2) A group of trades or business under common control, as defined in section 414(c) of the Code of which U.S. Steel is a member; provided that ''50 percent'' shall be substituted for ''80 percent'' wherever ''80 percent'' appears in section 414(b) or 414(c) or the rules thereunder.

(d) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) ''Former U.S. Steel Related Plan(s)'' mean:

(1) The Marathon Petroleum Retirement Plan and the Speedway Retirement Plan (the Marathon Plans);

(2) The Pension Plan of RMI Titanium Company, the Pension Plan of Eligible Employees of RMI Titanium Company, the Pension Plan for Eligible Salaried Employees of RMI Titanium Company, and the TRADCO Pension Plan;

(3) Any plan the assets of which include or have included assets that were managed by UCF as an in-house asset manager, pursuant to Prohibited Transaction Class Exemption 96–23 (PTE 96–23) [34] but as to which PTE 96–23 is no longer available because such assets are not held under a plan maintained by an affiliate of UCF (as defined in Section II(c) of this proposed exemption); and

(4) Any plan (an Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of UCF (as defined in Section II(c), of this proposed exemption; provided that:

(A) The assets of the Add-On Plan are invested in a commingled fund (the Comingled Fund), as defined in Section II(n) of this proposed exemption, with the assets of a plan or plans, described in Section II(e)(1)–(3) of this proposed exemption and

(B) The assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the initial commingling of their assets (the 25% Test). For purposes of the 25% Test, as set forth in Section II(e)(4);

(i) In the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund;

(ii) Where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section II(e)(1)–(3) of this proposed exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund;

(iii) If the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section II(e), this requirement shall continue to be satisfied notwithstanding that the assets of such Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of:

(AA) A distribution to a participant in a Former U.S. Steel Related Plan;

(BB) Periodic employer or employee contributions made in accordance with the terms of the governing plan documents;

(CC) The exercise of discretion by a Former U.S. Steel Related Plan participant to re-allocate an existing account balance in a Commingled Fund managed by UCF or to withdraw assets from a Commingled Fund; or

(DD) An increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation;

(iv) If, as a result of a decision by an employer or a sponsor of a plan, described in Section II(e)(1)–(3) of this proposed exemption, to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund; and

(v) Where the assets of a Commingled Fund include assets of plans other than Former U.S. Steel Related Plans, as defined in Section II(e) of this proposed exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

(f) An ''Exemption Audit'' of any of the Former U.S. Steel Related Plans must consist of the following:

(1) A review by an independent auditor of the written policies and procedures adopted by UCF, pursuant to Section I(i), for consistency with each of the objective requirements of this proposed exemption (as described in Section II(f)(5)).

(2) A test of a representative sample of the subject transactions during the audit period that is sufficient in size and nature to afford the auditor a reasonable basis:

(A) To make specific findings regarding whether UCF is in compliance with

(i) The written policies and procedures adopted by UCF pursuant to Section I(i) of the proposed exemption and

(ii) The objective requirements of the proposed exemption; and

(B) To render an overall opinion regarding the level of compliance of UCF's program with this Section II(f)(2)(A)(i) and (ii) of the proposed exemption;

(3) A determination as to whether UCF has satisfied the requirements of Section I(a), of this proposed exemption;

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings; and

(5) For purposes of Section II(f) of this proposed exemption, the written policies and procedures must describe the following objective requirements of the proposed exemption and the steps adopted by UCF to assure compliance with each of these requirements:

(A) The requirements of Section I(a) of this proposed exemption regarding registration under the 1940 Act, total assets under management, and equity;

(B) The requirements of Section I(d) of this proposed exemption regarding the discretionary authority or control of UCF with respect to the assets of the Former U.S. Steel Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former U.S. Steel Related Plans to enter into the transaction;

(C) That any procedure for approval of the transaction meets the requirements of Section I(d);

(D) The transaction is not entered into with any person who is excluded from relief under Section I(h)(1) of this proposed exemption or Section I(h)(2), to the extent that such person has

[34] 61 FR 15975, April 10, 1996.

discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(E) The transaction is not described in any of the class exemptions listed in Section I(c) of this proposed exemption.

(g) ''In-house Plan Assets'' mean the assets of any plan maintained by an affiliate of UCF, as defined in Section II(c) of this proposed exemption, and with respect to which UCF has discretionary authority of control.

(h) The term ''party in interest'' means a person described in section 3(14) of the Act and includes a ''disqualified person,'' as defined in section 4975(e)(2) of the Code.

(i) UCF is ''related'' to a party in interest for purposes of Section I(h)(3) of this proposed exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in U.S. Steel, or if UCF (or a person controlling, or controlled by UCF) owns a 5 percent (5%) or more interest in the party in interest.

For purposes of this definition:

(1) The term ''interest'' means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation;

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(j) For purposes of Section I(a) of this proposed exemption, the term ''equity'' means the equity shown on the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this proposed exemption, in accordance with generally accepted accounting principles.

(k) ''Investment Fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trust and common collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of UCF) is subject to the discretionary authority of UCF.

(l) The term ''relative'' means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(m) The ''time of the transaction'' is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the effective date of this Final Exemption or a renewal that requires the consent of UCF occurs on or after such effective date and the requirements of this proposed exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as authorizing a transaction entered into by an Investment Fund which becomes a transaction described in section 406(a) of the Act or section 4975(c)(1)(A) through (D) of the Code while the transaction is continuing, unless the conditions of this proposed exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this proposed exemption. In determining compliance with the conditions of this proposed exemption at the time that the transaction was entered into for purposes of the preceding sentence, Section I(h) of this proposed exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(n) ''Commingled Fund'' means a trust fund managed by UCF containing assets of some or all of the plans described in Section II(e)(1)–(3) of this proposed exemption, plans other than Former U.S. Steel Related Plans, and if applicable, any Add-On Plan, as to which the 25% Test provided in Section II(e)(4) of this proposed exemption has been satisfied; provided that:

(1) Where UCF manages a single sub-fund or investment portfolio within such trust, the sub-Fund or portfolio will be treated as a single Commingled Fund; and

(2) Where UCF manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by UCF within such trust will be treated as though such aggregate assets were invested in a single Commingled Fund.

Effective Date: If granted, this proposed exemption will be effective for the period beginning on January 1, 2015, and ending on the day which is two (2) years from the effective date.

Summary of Facts and Representations [35]

UCF

1. UCF, with principal offices in New York, New York, is a Pennsylvania non-profit non-stock membership corporation created in 1914 to manage the pension plan of the United States Steel Corporation (the Original U.S. Steel) and an endowment fund created by Andrew Carnegie for the benefit of that company's employees. Being a non-stock membership corporation, UCF has no shareholders, but is governed currently by eight (8) members who serve as directors of UCF and manage UCF's affairs in that capacity. The majority of these members are employees of U.S. Steel. Vacancies in the membership are filled by the vote of the majority of the remaining members.

UCF, a registered investment adviser under the 1940 Act, currently serves as the plan administrator and trustee of several employee benefit plans sponsored by United States Steel Corporation (U.S. Steel), the successor to the Original U.S. Steel, and by affiliates and joint ventures of U.S. Steel, as well as certain former affiliates of U.S. Steel. The Original U.S. Steel was for many years a part of the USX Corporation (USX).

As of December 31, 2013, UCF held a total of $9.9 billion in assets under management. The majority of these assets, $6.3 billion, are held in a group trust and managed by UCF for the benefit of a defined benefit plan covering certain employees of U.S. Steel. With respect to the remainder of UCF's assets under management, approximately $1.1 billion is managed for pension plans of U.S. Steel Canada, Inc., a wholly-owned foreign subsidiary of U.S. Steel,[36] and approximately $1.0 billion is managed for certain funds used to provide the steelworkers with welfare benefits. UCF also manages $1.9 million in assets for the U.S. Steel Foundation, a tax-exempt organization not subject to the Act, $162 million for pension plans of RMI, $145 million in legacy investments for pension plans of Marathon Petroleum Company (Marathon Petroleum), and $214 million

[35] The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

[36] In 2007, U.S. Steel acquired Stelco Inc., renaming the Canadian wholly-owned subsidiary as U.S. Steel Canada Inc. UCF took over management of the investment of assets and certain administrative functions of its defined benefit pension plans in August 2008.

for pension plans of USS/POSCO Industries (UPI).[37]

Investments managed by UCF include domestic and international equity securities (both public and private), fixed-income securities, real estate, mineral interests, timber and investment trusts.

USX Spin-Offs and Divestitures

2. The current U.S. Steel is the result of a series of spin-offs and divestitures by USX of several of its subsidiaries. The major divestitures relevant to this proposed exemption are RTI International Metals, Inc. (RTI), Marathon Oil Corporation (Marathon Oil), and Marathon Petroleum.

Following these divestitures, UCF continued to manage the assets of plans sponsored by the spun-off entities. These plans include the Pension Plan of RMI Titanium Company, the Pension Plan of Eligible Employees of RMI Titanium Company, the Pension Plan for Eligible Employees of RMI Titanium Company, and the TRADCO Pension Plan (the RMI Plans), as well as the Marathon Petroleum Retirement Plan and the Speedway Retirement Plan (the Marathon Plans).

Reasons for Continuing To Use UCF

3. The assets of both the RTI Plans and the Marathon Plans had been managed by UCF for several years since the separation of their respective sponsors from what is now U.S. Steel. The Applicant represents that, based on past experience with UCF, both companies were familiar and comfortable with UCF's investment management style, and believed it prudent to continue to have the assets of their plans invested with UCF. In addition, it is represented that because UCF is a non-profit organization, it is able to provide its services at a relatively low cost.

INHAM and QPAM Issues

4. Prohibited Transaction 96–23 (PTE 96–23) (61 FR 15795, April 10, 1996, as amended at 76 FR 18255, April 1, 2011), provides an exemption from certain of the prohibited transaction rules for the management of plan assets by an in-house asset manager (INHAM). Section IV(a) of the exemption specifically contemplates that an INHAM may be a ''membership nonprofit corporation a majority of whose members are officers or directors of . . . an employer or parent organization [of an employer].'' Because a majority of the members of UCF were officers or directors of USX, UCF relied on PTE 96–23 in connection with its management of the assets of the plans of USX and USX affiliates, including the RTI Plans and the Marathon Plans.

Following the spin-off of the U.S. Steel Group from USX at the end of 2001, the majority of the UCF members are employees of U.S. Steel, and not employees of Marathon Oil. As Marathon Oil is no longer an affiliate of the parent organization whose officers and directors constitute a majority of UCF's members, UCF no longer qualifies as an INHAM with respect to the Marathon Plans. For the same reason, UCF also no longer qualifies as an INHAM with respect to the RTI Plans.

Part I of Prohibited Transaction Exemption 84–14 (PTE 84–14) (49 FR 9494, March 13, 1994, as amended at 67 FR 9483, March 1, 2002 and 75 FR 38837, July 6, 2010), provides relief from section 406(a) of the Act for investment transactions between plans and parties in interest, provided that such transactions are negotiated by a qualified professional asset manager (QPAM), and provided further that certain conditions are satisfied.

The Applicant represents that UCF meets substantially all of the requirements to qualify as a QPAM as to the RTI Plans and the Marathon Plans. In this regard, UCF is registered as an investment adviser under the 1940 Act. UCF also meets the capitalization requirement, pursuant to PTE 84–14 that a QPAM have either (a) equity in excess of $1,000,000, or (b) payment of all its liabilities unconditionally guaranteed by an affiliate, if the investment advisor and the affiliate together have equity in excess of $1,000,000. Further, UCF meets the assets under management test in Section VI(a) of PTE 84–14, which requires an investment adviser to have (as of the last day of its most recent fiscal year) total client assets under its management and control in excess of $85 million. In this regard, UCF represents that it currently manages assets of the RTI Plans and the Marathon Plan with a value in excess of $306 million.

However, UCF represents that it is unable to rely on PTE 84–14, because it does not satisfy the ''diverse clientele test,'' as set forth in that class exemption. This test requires that the assets of a plan when combined with the assets of other plans maintained by the same employer (or its affiliates) managed by the QPAM must not represent more than 20 percent (20%) of the QPAM's total client assets. Although the assets of the RTI Plans and the Marathon Plan managed by UCF comprise less than 20 percent (20%) of the assets under UCF's management, the vast majority of the remaining assets consist of plan assets for which UCF acts as an INHAM which do not count as ''client assets'' for purposes of the ''diverse clientele test.'' Accordingly, UCF is unable to act as a QPAM with respect to the RTI Plan and the Marathon Plans.

Prior Relief

5. Previously, UCF requested and was granted final authorization on February 15, 2003 (FAN 2003–03E) under the Department's expedited exemption procedure (Prohibited Transaction Exemption 96–62, 67 FR 44622, July 3, 2002) or ''EXPRO.'' The authorization afforded relief similar to that provided in Part I of PTE 84–14 for transactions involving the assets of (a) the RTI Plans; (b) the Retirement Plan of Marathon Oil Company;[38] (c) the Marathon Plans; (d) any plans, the assets of which include or have included assets that were managed by UCF as an INHAM, pursuant to PTE 96–23, but as to which PTE 96–23 is no longer available because such assets are not held under a plan maintained by an affiliate of UCF; and (e) any Add-On Plan that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of UCF, provided certain conditions were satisfied. FAN 2003–03E was only made effective for five (5) years.

FAN 2003–03E required that an exemption audit be conducted on an ''annual basis.'' The report for the exemption audit for the year 2003 was not completed until November 15, 2007, more than three and a half years after the period being audited, and similar questions were raised for the years 2004–2006. UCF sought and was granted on September 1, 2009, a final administrative exemption (PTE 2009–24). PTE 2009–24 (74 FR 45294, September 1, 2009) provided retroactive relief for the period from February 15, 2003, through December 31, 2007, interim relief from January 1, 2008, to the effective date of prospective relief, and prospective relief beginning with the first day of the first fiscal year of UCF after the date of the publication of the final exemption in the **Federal**

[37] In 1986, U.S. Steel and Pohang Iron and Steel Company entered into a steel-producing joint venture in Pittsburg, California, named UPI. U.S. Steel owns 50 percent of UPI. UCF took over management of the investment of assets of the two (2) UPI pension plans in July 2012.

[38] It is represented that, effective July 1, 2011, the assets of the Retirement Plan of Marathon Oil Company were removed from the master trust and placed in a separate trust, which continued to be managed by UCF. However, UCF was terminated as trustee for this plan, effective September 30, 2012. Therefore, the Retirement Plan of Marathon Oil Company is not included in the current application.

Register and expiring five (5) years from that date. The relief provided by PTE 2009–24 expired on January 1, 2015.

Current Request

6. On September 19, 2014, UCF submitted a request (E–00754) for an authorization, pursuant to EXPRO, seeking an extension of the relief provided by PTE 2009–24 for an additional period of five (5) years for the Former U.S. Steel Related Plan, as defined in Section II(e). On November 4, 2014, at the Department's request, UCF withdrew the EXPRO submission, and acknowledged that the request would be processed as an individual administrative exemption. Accordingly, UCF's request was assigned the case number ''D–11835'' and transferred to the administrative process, pursuant to 408(a) of the Act.

Retroactive and Prospective Relief

7. The proposed exemption would permit UCF to continue managing the assets of the Former U.S. Steel Related Plans without change to the investment of those assets, which is represented to be in the interests of those plans. The relief provided by this proposed exemption is temporary in nature. Although UCF originally requested relief for a five (5) year period, this proposed exemption, if granted, will provide relief only for a two (2) year period. Accordingly, the proposed exemption is effective for the period commencing January 1, 2015, through December 31, 2017.

Merits of the Proposed Transaction

8. It is represented that the proposed exemption is administratively feasible because it would not impose any administrative burdens on either UCF or the Department beyond those described in PTE 84–14 and PTE 96–23. The proposed exemption would also be effective only for two (2) years. Further, UCF would maintain and offer to make available certain records necessary to enable Federal agencies and other interested parties to determine whether the conditions of exemption, if granted, have been met.

9. The Applicant represents that the proposed exemption is in the interests of the former U.S. Steel Related Plans and the participants and beneficiaries of such plans because it would allow UCF, on behalf of the Former U.S. Steel Related Plans, to negotiate transactions that might involve parties in interest where the transactions are in the best interests of the Former U.S. Steel Related Plans. Absent the exemption, the Former U.S. Steel Related Plans may be precluded from engaging in such transactions, even where the transactions offer favorable investment opportunities.

10. The Applicant represents that the proposed exemption is protective of the rights of the participants and beneficiaries of the former U.S. Steel related Plans because it incorporates safeguards that the Department has previously found to be protective of the rights of participants and beneficiaries of affected plans, since UCF would be subjected to the requirements of PTE 84–14 and to certain procedural requirements of PTE 96–23. In this regard, UCF would be required to maintain written policies and procedures designed to ensure compliance with the exemption and to retain an independent auditor to evaluate UCF's compliance with such policies and procedures and with the objective requirements of the exemption. The auditor must report his findings on an annual basis.

Denial of Exemption and Resulting Hardships

11. UCF represents that a denial of the proposed exemption could deprive UCF of the ability to provide a full range of investment opportunities to the Former U.S. Steel Related Plans without undue administrative costs. Absent authorization of the proposed exemption, UCF would be unable to offer the full range of investment opportunities to the Former U.S. Steel Related Plans, which could substantially reduce UCF's overall effectiveness as an investment manager with respect to the former U.S. Steel Related Plans.

12. UCF represents that the proposed exemption is administratively feasible because it would not impose administrative burdens on the Department beyond those described in PTE 84–14 and PTE 96–23. UCF emphasizes that the proposed exemption will only be effective for five years and asserts that it will maintain and offer to make available certain records to enable government agencies and other interested parties to determine whether the conditions of the proposed exemption have been met.

13. In summary, it is represented that the subject transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) UCF is an investment adviser registered under the 1940 Act that has, as of the last day of its most recent fiscal year, total client assets, including In-House Plan Assets, under its management and control in excess of $100,000,000 and equity in excess of $1,000,000 (as measured yearly on UCF's most recent balance sheet prepared in accordance with generally accepted accounting principles);

(b) UCF has acknowledged in a written management agreement that it is a fiduciary with respect to each of the Former U.S. Steel Related Plans that have retained it;

(c) At the time of the transaction, the party in interest or its affiliate does not have the authority to appoint or terminate UCF as a manager of any of the plan assets of the Former U.S. Steel Related Plans, or to negotiate the terms of the management agreement with UCF (including renewals or modifications thereof) on behalf of the Former U.S. Steel Related Plans.

(d) The transactions that are the subject of the proposed exemption are not described in PTE 2006–16 (as amended or superseded); PTE 83–1 (as amended or superseded), or PTE 88–59 (as amended or superseded);

(e) The terms of the transaction are negotiated on behalf of the Fund by, or under the authority and general direction of UCF, and either UCF, or (so long as UCF retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by UCF, makes the decision on behalf of the Fund to enter into the transaction;

(f) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of UCF, the terms of the transaction are at least as favorable to the Fund as the terms generally available in arm's-length transactions between unrelated parties;

(g) Neither UCF nor any affiliate thereof, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in UCF is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of any felony, as set forth in Section I(f) of this proposed exemption;

(h) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(i) The party in interest dealing with the Fund is a party in interest with respect to the Former U.S. Steel Related Plans (including a fiduciary) solely by reason of providing services to the Former U.S. Steel Related Plans, or solely by reason of a relationship to a service provider; and does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not

render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets; and is neither UCF nor a person related to UCF;

(j) UCF adopts written policies and procedures that are designed to assure compliance with the conditions of this proposed exemption;

(k) An independent auditor, who has appropriate technical training, or experience and proficiency with the fiduciary responsibility provisions of the Act, and who so represents in writing, conducts an exemption audit on an annual basis. Following completion of each such exemption audit, the independent auditor must issue a written report to the Former U.S. Steel Related Plans that engaged in such transactions, presenting its specific findings with respect to the audited sample regarding the level of compliance with the policies and procedures adopted by UCF, pursuant to Section I(i) of this proposed exemption, and with the objective requirements of this proposed exemption. The written report also shall contain the auditor's overall opinion regarding whether UCF's program as a whole complies with the policies and procedures adopted by UCF and the objective requirements of this proposed exemption. The independent auditor must complete each such exemption audit and must issue such written report to the administrators, or other appropriate fiduciary of the Former U.S. Steel Related Plans, within six (6) months following the end of the year to which each such exemption audit and report relates; and

(l) UCF or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the Department, the IRS, and other persons to determine whether the conditions of this proposed exemption have been met.

Notice to Interested Persons

UCF will furnish a copy of the notice of proposed exemption (the Notice) along with the supplemental statement described at 29 CFR 2570.43(a)(2) to the investment committee or other appropriate fiduciaries of the RTI Plans and the Marathon Plans to inform them of the pendency of the proposed exemption, by hand delivery or by first class mail (return receipt requested) within fifteen (15) days of the publication of the Notice in the **Federal Register**. Comments and request for hearing are due on or before 45 days from the date of the publication of the Notice in the **Federal Register**. A copy of the final exemption, if granted, will also be provided to the Former U.S. Steel Related Plans.

All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Joseph Brennan of the Department telephone (202) 693–8456 (This is not a toll-free number.)

Roberts Supply, Inc. Profit Sharing Plan and Trust (the Plan), Located in Winter Park, FL

[Exemption Application No. D–11836]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975(c)(2)of the Internal Revenue Code of 1986, as amended, (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[39] If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act, shall not apply to the cash sale (the Sale) by the Plan of a parcel of improved real property located at 7457 Aloma Avenue, Winter Park, Florida (the Property) to Roberts Brothers Development, LLC (Roberts Development), a party in interest with respect to the Plan, provided that the following conditions have been met:

(a) The Sale is a one-time transaction for cash;

(b) The Plan receives an amount of cash in exchange for the Property, equal to the greater of $900,000, or the current fair market value of the Property as determined by a qualified independent appraiser (the Appraiser) in a written appraisal that is updated on the date the Sale is consummated;

(c) The Plan incurs no real estate fees, commissions, or other expenses in connection with the Sale, aside from the appraisals; and

(d) The terms and conditions of the Sale are at least as favorable to the Plan as those obtainable in an arms-length transaction with an unrelated third party.

Summary of Facts and Representations [40]

Background

1. Roberts Supply, Inc. (Roberts Supply) is an outdoor power equipment distributor based in Winter Park, Florida. Roberts Supply is majority-owned by two brothers, Wayne P. Roberts and William H. Roberts, in equal proportions of 46.84% (Wayne P. Roberts and William H. Roberts, Jr. are hereinafter collectively referred to as the ''Applicant''). The brothers are also owners of Roberts Brothers Development, LLC (Roberts Development), which was formed in May of 2008 for the purpose of investing in commercial real estate. Roberts Development is currently owned 50% each by Wayne P. Roberts and his wife, Robin Roberts; and by William Roberts, Jr. and his wife, Mary Roberts. Currently, the LLC owns several small free standing buildings and two small office buildings.

2. The Roberts Supply, Inc. Profit Sharing Plan and Trust (the Plan) is a frozen defined contribution profit sharing plan sponsored by Roberts Supply, with an original effective date of March 1, 1977. Under the Plan, the participants may receive employer contributions which are then invested by the board of trustees (the Board) on their behalf in investments which the Board considers suitable for a retirement plan. Plan participants are always 100% vested in the employer contributions received by the Plan on their behalf. Each participant's account value is based on a proportionate percentage of the total value of the Plan assets. According to the Applicant, as of November 6, 2014, the Plan had six participants [41] and approximately $11,200,000 in total assets.

3. The Applicant states that the current members of the Board (the Trustees) are Wayne P. Roberts and William H. Roberts, Jr. The Trustees are advised by Wells Fargo Advisors, LLC and Raymond James & Associates, Inc., who also manage the investment portfolios for the Plan.

4. According to the Applicant, the Plan currently owns an office building located at 7457 Aloma Avenue, Winter Park, Florida, and an adjacent parking

[39] For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[40] The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

[41] The participants in the Plan include Wayne P. Roberts, William H. Roberts, Jr., Robin Roberts, Mary Roberts, and two unrelated individuals.

lot located at 4920 Palm Avenue, Winter Park, Florida (together, the Property). The Property is a three-story, multi-tenant professional office building of approximately 13,212 square feet and an adjacent parking lot of 0.20 acres. The Applicant represents that the Property was initially purchased by the Plan in 1990 for a total initial purchase price of $557,000. The Property was transferred within the Plan to the Roberts Supply Profit Sharing, LLC in 2008. The LLC's assets include cash in a Wells Fargo checking account, and the subject Property.

5. The Applicant represents that the purpose of the investment was to diversify Plan assets and provide income to the Plan. In this regard, during the course of the Plan holding the Property, the Plan leased it to various tenants, including one principal tenant. However, the principal tenant outgrew the space, and vacated in July 2014. The Plan currently leases space to one tenant and is attempting to secure new occupants.

6. As provided by the Applicant, the income versus expenses for the previous five years was as follows:

	2010	2011	2012	2013	2014
Annual Income	94,195.31	94,239.15	106,704.58	107,170.06	66,373.60
Annual Expense	24,080.32	35,478.20	38,571.39	36,640.51	44,140.53
Net Income	70,114.99	58,760.95	68,133.19	70,529.55	22,233.07

The Applicant represents that these figures are representative of the income versus expenses over the course of the Plan holding the property.

7. The Property was appraised by Central Florida Appraisal Consultants (Central Florida) in connection with this application for exemption in October 2014, at $900,000. The October 2014 appraisal is discussed in more detail below.

8. The Applicant notes that the Plan does not own any real property aside from the Property. The Applicant represents that no parties in interest with respect to the Plan own or lease any property adjacent to the Property. In addition, the Applicant further represents that the Property has not been leased to, or used by, any party in interest with respect to the Plan since the date of acquisition.

The Sale

9. The Applicant represents that they wish for the Plan to sell the Property as they intend to terminate the Plan and distribute the proceeds to the participants. The Applicant represents that because of the number of participants, a proportionate distribution of the Property is impractical. Further, because of the value of the Property, it would not be appropriate to distribute it to any one participant. According to the Applicant, the Plan has had the Property listed for sale since July 2013 and has not received any serious offers. The Applicant therefore seeks this proposed exemption, which, if granted, would permit the Plan to sell the Property to Roberts Development.

10. Section 406(a)(1)(A) of the Act prohibits a fiduciary from causing a plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between a plan and a party in interest. Section 406(a)(1)(D) of the Act prohibits a fiduciary from causing the Plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. The Applicant states that, because Roberts Development, jointly owned by Wayne P. Roberts and William H. Roberts, Jr., and their spouses, is a party in interest to the Plan under section 3(14)(G) of the Act, the Sale would constitute a prohibited transaction under sections 406(a)(1)(A) and (D) of the Act. Furthermore, section 406(b)(1) of the Act prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Section 406(b)(2) of the Act prohibits a fiduciary, in his individual or in any other capacity, from acting in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Because Wayne P. Roberts and William H. Roberts, Jr. have an interest in Roberts Development, the Sale represents a violation of section 406(b)(1) of the Act. Furthermore, by acting on both sides of the proposed Sale, the Trustees would violate section 406(b)(2) of the Act. Therefore, the Applicant requests an administrative exemption from sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act for the Sale.

The Appraisal

11. Applicant represents that, in connection with the proposed Sale, the Plan arranged for a qualified, independent appraiser to conduct an appraisal of the Property. In its October 24, 2014, appraisal report (the Appraisal Report), Central Florida valued the Property at $900,000. The Applicant represents that the Property's decline in value from earlier appraisals can be attributed to a general decline in real estate values in the Orlando area as a result of the 2008 recession.

12. As provided in the Appraisal Report, Daniel L. Peele (the Appraiser) has worked as an appraiser for Central Florida since 1994, and is currently its president. He has over 25 years of full-time commercial real estate appraisal experience. Central Florida represents that the Appraiser is also certified by the State of Florida as a General Real Estate Appraiser, and is a Designated Member of the American Society of Appraisers. In the Appraisal Report, the Appraiser represents that there is no relationship between him and the Plan or Roberts Development. Furthermore, Central Florida represents and warrants that it meets the revenue test for a qualified independent appraiser for 2014, the year of the appraisal, as the fees received from the Plan were less than 2% of its annual revenues for income tax year 2013.

13. The Appraisal Report provides that the Appraiser utilized the Sales Comparison and Income Capitalization approaches in arriving at his valuation for the Property. In using the Sales Comparison Approach, the Appraiser evaluated two recent sales of properties purchased for owner-occupancy. The Appraiser then adjusted those prices to account for financing terms, conditions of sale, market conditions, location, land area, property size, property condition and age, parking ratios, and other features. Based on his analysis, the Appraiser derived a value of $890,000 for the Property.

14. In utilizing the Income Capitalization Approach, the Appraiser evaluated the leasing information from three comparable rentals within the Orlando marketplace. According to the Appraisal Report, the Appraiser adjusted those prices to account for differences in lease types, age, condition, size, and location. Based on

his analysis, the Appraiser derived a total value of $900,000 for the Property.

15. The Appraisal Report provides that the Sales Comparison Approach provided a good indication of market value and was given primary weight, while the Income Approach was given secondary weight. Thus, the Appraiser arrived at his valuation of the Property at $900,000.

Statutory Findings

16. The Applicant represents that the requested exemption is administratively feasible because the Sale is a one-time transaction for cash, which will not require continuous or future monitoring by the Department.

The Applicant represents that the requested exemption is in the interest of the Plan and its participants and beneficiaries because it will facilitate the distribution of Plan assets to participants upon termination. As described earlier, the Applicant represents that a proportionate distribution of the Property is impractical; a distribution to any one participant of the whole Property is inappropriate; and the Applicant has been unable to sell the property to a third-party.

The Applicant represents that the requested exemption is protective of the rights of the Plan and its participants and beneficiaries, because a qualified, independent appraiser was retained by the Plan to appraise the Property for the purpose of determining the purchase price. Furthermore, the Plan will pay no commissions, fees, or other charges in connection with the Sale, aside from the appraisals; and the Sale will be for the greater of $900,000, or the current fair market value.

Summary

17. In summary, the Applicant represents that the proposed exemption satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons, among others:

(a) The Sale will be a one-time transaction for cash;

(b) The Plan receives an amount of cash in exchange for the Property, equal to the greater of $900,000, or the current fair market value of the Property as determined by a qualified independent appraiser (the Appraiser) in a written appraisal that is updated on the date the Sale is consummated;

(c) The Plan will incur no real estate fees, commissions, or other expenses in connection with the Sale, aside from the appraisals; and

(d) The terms and conditions of the Sale will be at least as favorable to the Plan as those obtainable in an arms-length transaction with an unrelated third party.

Notice to Interested Persons

Notice of the proposed exemption will be given to all interested persons within 15 days of the publication of the notice of proposed exemption in the **Federal Register**, by first class U.S. mail to the last known address of all such individuals. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice of proposed exemption in the **Federal Register**. All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Erica R. Knox of the Department, telephone (202) 693–8644. (This is not a toll-free number.)

Red Wing Shoe Company Pension Plan for Hourly Employees, the Red Wing Shoe Company Retirement Plan and the S.B. Foot Tanning Company Employees' Pension Plan (Collectively, the Plans), Located in Red Wing, MN

[Application Nos. D–11763, D–11764, and D–11765]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[42]

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A), (B), (D) and (E) of the Code, shall not apply to: (1) The in-kind contribution (the Contribution) of shares (the Shares) in Red Wing International, Ltd. (RWI) to the Plans by Red Wing Shoe Company, Inc. (Red Wing or the Applicant), a party in interest with respect to the Plans; (2) the sale of the Shares by the Plans to Red Wing or an affiliate of Red Wing in connection with the exercise of the Terminal Put Option, the Call Option, or the Liquidity Put Option in accordance with the terms thereof; and (3) the deferred payment of: (i) The price of the Shares by Red Wing or its affiliate to the Plans in connection with the exercise of the Liquidity Put Option, the Terminal Put Option and the Call Option; and (ii) any Make-Whole Payments by Red Wing; provided that the conditions described in Section II below have been met.

Section II. Conditions

(a) The Plans acquire the Shares solely through one or more in-kind Contributions by Red Wing;

(b) An Independent Fiduciary acts on behalf of the Plans with respect to the acquisition, management and disposition of the Shares. Specifically, such Independent Fiduciary will: (1) Determine, prior to entering into any of the transactions described herein, that each such transaction, including the Contribution, is in the interest of the Plans; (2) negotiate and approve, on behalf of the Plans, the terms of the Contribution Agreements, and the terms of any of the transactions described herein; (3) manage the holding and sale of the Shares on behalf of the Plans, taking whatever actions it deems necessary to protect the rights of the Plans with respect to the Shares; and (4) ensure that all of the conditions of this exemption, if granted, are met;

(c) An Independent Appraiser selected by the Independent Fiduciary determines the fair market value of the Shares contributed to each Plan as of the date of the Contribution, and for purposes of the Make-Whole Payments, the Terminal Put Option, the Liquidity Put Option, and the Call Option;

(d) Immediately after the Contribution, the aggregate fair market

[42] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

value of the Shares held by any Plan will represent no more than 10 percent (10%) of the fair market value of such Plan's assets;

(e) The Plans incur no fees, costs or other charges in connection with any of the transactions described herein;

(f) For as long as the Plans hold the Shares, Red Wing makes the Periodic Make-Whole Payments and, if applicable, a Terminal Make-Whole Payment to the Plans in accordance with the terms thereof;

(g) The Liquidity Put Option and the Terminal Put Option are exercisable by the Independent Fiduciary in its sole discretion in accordance with the terms thereof;

(h) Each year, Red Wing will make a cash contribution to each Plan that is the greater of: (1) The minimum required contribution, as determined by section 430 of the Code; or (2) the lesser of: (i) The minimum required contribution, as determined by section 430 of the Code, as of the Plan's valuation date, except that the value of the assets will be reduced by an amount equal to the value of a Share, multiplied by the number of Shares in the Plan at the end of the Plan year, and (ii) the contribution that would result in the respective Plan attaining a 100% FTAP funded status (reflecting assets reduced by the credit balance) at the valuation date determining the contributions based on the value of all Plan assets, including the Shares. Any cash contributions in excess of the minimum required contribution described above will not be used to create additional prefunding credit balance;

(i) The terms of any transactions between the Plans and Red Wing are no less favorable to the Plans than terms negotiated at arm's-length under similar circumstances between unrelated third parties.

Section III. Definitions

(a) ''affiliate'' means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; or

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

For the purposes of clause (a)(1) above, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(b) ''Contribution Agreement'' means the written agreement governing the contribution of Shares to a Plan, by and between Red Wing and Vanguard Fiduciary Trust Company, to be executed prior to any Contribution to which such agreement relates.

(c) ''Commission Agreement'' means the written Sales Agent Contract between Red Wing and RWI, to be executed prior to the Contributions, that governs the relationship between the parties and obligates RWI to act as a sales agent for Red Wing with respect to sales of certain Red Wing products for a ten-year term.

(d) ''Make-Whole Payments'' means either Periodic Make-Whole Payments or Terminal Make-Whole Payments.

(e) ''Periodic Make-Whole Payments'' means periodic payments made to each Plan every five years as follows:

(1) Each periodic payment shall be made in an amount equal to the excess, if any, of:

(A) A presumed 7.5% annual return, compounded annually, on the value of the Shares calculated from the beginning of the Holding Period, less

(B) the sum of (i) the after-tax total return on such Shares (*i.e.,* appreciation of the Shares' fair market value (whether realized or unrealized) plus after-tax dividend income), plus (ii) any Periodic Make-Whole Payments previously made to each Plan over the Holding Period with respect to such Shares.

For purposes of calculating this reduction, any realized gains on the Shares will be credited with a presumed 7.5% annual return, compounded annually, calculated from the date the cash was received by the Plan. The after-tax dividend amounts and any previously paid Periodic Make-Whole Payments will be credited at the Plan's actual rate of return on its investments, compounded annually, calculated from the date the cash was received by the Plan.

(2) A separate Periodic Make-Whole Payment will be calculated with respect to each Contribution to a Plan, every five years as of the anniversary date of such Contribution.

(3) Each Periodic Make-Whole Payment will be due and payable to each Plan 60 days after the five-year anniversary date of the Contribution to which it relates. During the 60-day period, any unpaid portion of a Periodic Make-Whole Payment will accrue interest, compounded annually, at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%), to be confirmed by the Independent Fiduciary, over the period from the five-year anniversary date of the Contribution to which it relates to the date of payment.

(4) The amount of any Make-whole Payment otherwise payable at any five-year term will be reduced (but not below zero) to the extent all or any portion of the Make-Whole Payment then payable would cause a Plan's ''funding target attainment percentage,'' as determined under section 430 of the Code and as calculated by its enrolled actuary and confirmed by the Independent Fiduciary immediately following such Contribution, to exceed: (A) 110%; or (B) if an amendment is adopted to terminate the Plan pursuant to the Plan's governing document, that Plan's termination liability as determined by its enrolled actuary and confirmed by the Independent Fiduciary.

(f) ''Terminal Make-Whole Payment'' means a one-time cash contribution made to the Plans in the event of a Catastrophic Loss of Value of the Shares arising from a termination of the Commission Agreement between Red Wing and RWI, due and payable to each Plan 90 days after the date of a written demand by the Independent Fiduciary (the demand date) as follows:

(1) The Terminal Make-Whole Payment, if triggered, will terminate Red Wing's obligation to make Periodic Make-Whole Payments calculated as of any date that is after the Catastrophic Loss of Value.

(2) The amount of the Terminal Make-Whole Payment will be calculated as the excess, if any, of:

(A) The fair market value of the Shares as of the date of Contribution of such Shares to each Plan increased by a 7.5% annual growth rate, compounded annually, over the Holding Period, less

(B) the sum of (i) the amount of the after-tax dividends on the Shares received during such Shares' Holding Period, and (ii) any Periodic Make-Whole Payments made to each Plan with respect to the Shares, further subtracted by

(C) any previous realized gains on such Shares during their Holding Period.

For purposes of calculating this reduction, any realized gains on the Shares will be credited with a presumed 7.5% annual return, compounded annually, calculated from the date the cash was received by the Plan. The after-tax dividend amounts and any previously paid Periodic Make-Whole Payments will be credited at the Plan's actual rate of return on its investments, compounded annually, calculated from the date the cash was received by the Plan.

(3) The Terminal Make-Whole Payment will be further reduced by any

remaining fair market value of the Shares after the Catastrophic Loss of Value.

(4) In the event of Catastrophic Loss of Value, the Shares held by a Plan will be subject to a put option (the Terminal Put Option) exercisable by the Independent Fiduciary to sell the Shares back to Red Wing at the Shares' fair market value as of the demand date as determined by the Independent Fiduciary; provided that, if the fair market value of the Shares is equal to $0.00 s a result of the Catastrophic Loss of Value, the Shares shall be transferred to Red Wing upon payment of the Terminal Make-Whole Payment.

(5) The Terminal Make-Whole Payment, as well as the exercise price on the Terminal Put Option (if any) subsequently exercised by the Independent Fiduciary, can be paid in five equal annual installments. Any unpaid portion of the Terminal Make-Whole Payment or exercise price of the Terminal Put Option will accrue interest (compounded annually as of the anniversary of the demand date or the exercise date of the Terminal Put Option, as applicable) at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%), to be confirmed by the Independent Fiduciary, over each 12-month period.

(6) The amount of any Terminal Make-Whole Payment will also be reduced (but not below zero) to the extent all or any portion of the Terminal Make-Whole Payment then payable would cause a Plan's ''funding target attainment percentage'' as determined under Code section 430, and as calculated by its enrolled actuary to exceed: (A) 110%; or (B) if an amendment is adopted to terminate the Plan pursuant to the Plan's governing document, that Plan's termination liability as determined by its enrolled actuary and confirmed by the Independent Fiduciary).

(g) ''Holding Period'' means, for purposes of calculating the Make-Whole Payments with respect to certain Shares, the period of time over which each Plan has held such Shares, beginning from the date such Shares were received by each Plan through the date of calculation of such Periodic Make-Whole Payment.

(h) ''Catastrophic Loss of Value'' means, for purposes of triggering the Terminal Make-Whole Payment, any diminution of the value of the Shares held by the Plans arising from a termination of the Commission Agreement.

(i) ''Liquidity Put Option'' means a put option granting each Plan the right to require Red Wing to purchase some or all of the Shares from the Plan at the Shares' fair market value as of the date of exercise, payable in cash no later than 60 days following the date of exercise. During this 60-day period, any unpaid portion of the purchase price for the Shares payable by Red Wing in connection with the exercise of the Liquidity Put Option will accrue interest, compounded annually, at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%), to be confirmed by the Independent Fiduciary, over the period from the date of exercise of the Liquidity Put Option to the date of payment of such unpaid portion of the purchase price. The Liquidity Put Option is exercisable as follows:

(1) For a period of 60 days leading up to a Change of Control, the Liquidity Put Option will be exercisable by the Independent Fiduciary on behalf of the Plans; and

(2) Upon a Plan becoming entitled to receive a Periodic Make-Whole Payment, the Independent Fiduciary may exercise the Liquidity Put Option on behalf of the Plan with respect to as much as 20% of the original number of Shares to which the Periodic Make-Whole Payment relates, no later than 45 days following the five-year anniversary date of the Contribution, as follows:

(A) If the Plan elects to exercise its Liquidity Put Option with respect to any of the Shares to which the Periodic Make-Whole Payment relates in the first year in which the Liquidity Put Option is exercisable, the Plan will be able to exercise a Liquidity Put Option for as much as an additional 20% of the original number of Shares to which the Periodic Make-Whole Payment relates upon each of the four succeeding anniversaries of the Contribution to the Plan, but no later than 45 days following each such anniversary; and

(B) The exercise of a Liquidity Put Option for any of the Shares to which the Periodic Make-Whole Payment applies in the first year that the Liquidity Put Option is exercisable will eliminate the Plan's right to that Periodic Make-Whole Payment with respect to all Shares to which the Periodic Make-Whole Payment in that year relates, but any Shares for which the Liquidity Put Option is not exercised will continue to be eligible for future Periodic Make-Whole Payments.

(3) Upon the occurrence of the tenth anniversary (the Anniversary Date) of a Contribution to a Plan, the Independent Fiduciary on behalf of the Plan will be able to exercise the Liquidity Put Option with respect to as much as 20% of the number of Shares to which such Contribution relates, in each year following the Anniversary Date.

(4) Upon the effective date of a Plan's termination and at any time until the final distribution date of the Plan's assets, the Plan will have the right to exercise the Liquidity Put Option for any or all Shares remaining in the Plan, and Red Wing will have the right to exercise the Call Option.

(j) ''Call Option'' means Red Wing's right to cause a Plan to sell any or all remaining Shares held in the Plan to Red Wing, exercisable upon the effective date of a Plan's termination, in exchange for cash at the Shares' fair market value on the date of exercise. The Plan will transfer its Shares to Red Wing and Red Wing will pay cash for such Shares no later than 60 days after Red Wing exercises the Call Option. During this 60-day period, any unpaid portion of the purchase price for the Shares payable by Red Wing in connection with its exercise of the Call Option will accrue interest, compounded annually, at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%), to be confirmed by the Independent Fiduciary.

(k) ''Change of Control'' means, for purposes of triggering the Liquidity Put Option, the sale or other transfer for value of all or substantially all of Red Wing's assets in a transaction or series of related transactions to a Third Party purchaser, or a transaction or series of transactions in which a Third Party acquires more than 50% of the voting power of Red Wing's outstanding shares. A ''Third Party'' for this purpose is an individual or entity other than: (1) (i) A current shareholder of Red Wing, or a spouse or issue of such shareholder, (ii) a trust created for the shareholder, his spouse, or his issue, or (iii) a shareholder of a shareholder; or (2) an entity controlled by an individual or entity described in (1), or an entity under common control with such an entity.

(l) ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (GFA) or another fiduciary of the Plans who: (1) Is independent or unrelated to Red Wing and its affiliates, and has the appropriate training, experience, and facilities to act on behalf of the Plan regarding the covered transactions in accordance with the fiduciary duties and responsibilities prescribed by ERISA (including, if necessary, the responsibility to seek the counsel of knowledgeable advisors to assist in its compliance with ERISA); and (2) if relevant, succeeds GFA in its capacity as Independent Fiduciary to the Plans in connection with the transactions

described herein. The Independent Fiduciary will not be deemed to be independent of and unrelated to Red Wing and its affiliates if: (i) Such Independent Fiduciary directly or indirectly controls, is controlled by or is under common control, with Red Wing and its affiliates; (ii) such Independent Fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this proposed exemption other than for acting as Independent Fiduciary in connection with the transactions described herein, provided that the amount or payment of such compensation is not contingent upon, or in any way affected by, the Independent Fiduciary's ultimate decision; and (iii) the annual gross revenue received by the Independent Fiduciary, during any year of its engagement, from Red Wing and its affiliates, exceeds two percent (2%) of the Independent Fiduciary's annual gross revenue from all sources (for federal income tax purposes) for is prior tax year.

(m) ''Independent Appraiser'' means an individual or entity meeting the definition of a ''Qualified Independent Appraiser'' under Department Regulation 25 CFR 2570.31(i) retained to determine, on behalf of the Plans, the fair market value of the Shares as of the date of the Contributions and while the Shares are held on behalf of the Plans, and may be the Independent Fiduciary, provided it satisfies the definition of Independent Appraiser herein.

Summary of Facts and Representations [43]

Background

1. Red Wing Shoe Company, Inc. (Red Wing or the Applicant) is a privately-held corporation based in Red Wing, Minnesota that produces footwear sold to both consumer and industrial customers in the United States and in more than 100 countries around the world. Five members of the Sweasy family own the largest percentages of Red Wing stock, either in their individual capacities or within trusts established by or for the benefit of these individuals. The Applicant operates domestic manufacturing facilities in Red Wing, Minnesota; Potosi, Missouri; and Danville, Kentucky. The Applicant also sources products from contract manufacturers in China and the Dominican Republic, as well as owning and operating international subsidiaries in Japan and the Netherlands.

The Applicant also owns and operates S.B. Foot Tanning Company based in Red Wing, Minnesota. S.B. Foot Tanning Company finishes and supplies leather for shoes, apparel, furniture and other applications. In addition to the shoe business, the Applicant's wholly-owned subsidiary Red Wing Hotel Corporation owns and operates The St. James Hotel located in downtown Red Wing, Minnesota. The Applicant earned revenues of $625 million during fiscal year 2013, representing a 10% growth over the reporting period in 2012.

2. The Applicant represents that it owns approximately 38% of the outstanding shares (the Shares) of Red Wing International, Ltd. (RWI), a Delaware corporation incorporated in 1982 that operates as a Domestic International Sales Corporation (DISC). The Applicant explains that a DISC is a corporation whose ''qualified export revenues'' are generally exempt from federal income taxes. According to the Applicant, RWI operates under the provisions of Sections 991 through 997 of the Code, which were enacted by Congress to encourage and subsidize the export of products made in the United States. The Applicant represents that there are currently 39,272 issued and outstanding Shares. The Applicant represents further that all of the current shareholders of RWI are also shareholders of the Applicant.

3. The Applicant represents that RWI contracts annually with Red Wing to be its commissioned agent for the sale and export of the Applicant's qualifying domestically-produced goods. The Applicant represents that Red Wing currently maintains a ''Sales Agent Contract'' with RWI (the Commission Agreement), which is terminable at will by either party, that governs the relationship between the parties and obligates RWI to act as a sales agent for Red Wing with respect to certain sales of Red Wing products.[44] The Applicant represents that Red Wing has been RWI's only client since the DISC's incorporation. The Applicant represents that it pays RWI a tax-deductible sales commission for these services. RWI, in turn, pays no income tax on its ''qualifying export commissions.''

4. The Applicant represents that RWI's income (which it derives solely from these sales commissions) is then distributed to RWI's shareholders as dividends and is taxed against the shareholders at their applicable dividend tax rate. The Applicant represents that its international revenues in 2013 increased 11% to $150.4 million, representing 24% of the Applicant's consolidated revenues. Furthermore, RWI's qualifying DISC revenues decreased 7% to $63 million. The RWI dividend payment to shareholders was $157.40 per share in 2013, a decrease of 5.9% from 2012.

5. Because neither the common stock of Red Wing nor the Shares are publically traded, they are valued at the conclusion of each fiscal year by an independent valuation firm, Duff & Phelps Corporation (Duff & Phelps). The Applicant represents that the independent valuation completed by Duff & Phelps for fiscal year 2013, using the discounted cash flow valuation method, valued the Shares at $2,050 per share, a 10.6% increase over the 2012 value.

The Plans

6. The Applicant represents that the three pension plans involved in the proposed transaction are: (1) The Red Wing Shoe Company Pension Plan for Hourly Wage Employees (the Hourly Plan); (2) the Red Wing Shoe Company Retirement Plan (the Salary Plan); and (3) the S.B. Foot Tanning Company Employees' Pension Plan (the S.B. Foot Plan) (collectively, the Plans).

7. Red Wing is the sponsor of the Hourly Plan and the Salary Plan with the authority, either directly or through a committee of officers or employees (the Pension Committee), to appoint and remove trustees and investment managers. The Applicant is the plan administrator and the named fiduciary of the Hourly Plan and the Salary Plan for purposes of section 402(a) of the Act. The Applicant represents that it retains the authority to amend and terminate the Hourly Plan and the Salary Plan, subject to collective bargaining limitations, and to transfer assets and liabilities to and from the Plans.

8. The Applicant represents that other fiduciaries include Vanguard Fiduciary Trust Company (Vanguard), Vanguard Institutional Advisory Services, certain employees of the Applicant and its affiliates, and the Pension Committee as it relates to the Hourly Plan and the Salary Plan. The Applicant states that Red Wing, as the sponsor of the Hourly

[43] The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

[44] Under the Commission Agreement, these sales generally include: (1) A sale to a purchaser outside of the United States including delivery to a carrier or freight forwarder for delivery outside of the United States, regardless of the point or place of passage of title, whether to a United States or foreign purchaser; (2) a sale to an entity unrelated to Red Wing or RWI that qualifies as a DISC; or (3) a sale in which delivery occurs within the United States, provided that after the sale there is no further sale, use, assembly or other processing within the United States, and the property is delivered outside of the United States within one year after the sale.

Plan and the Salary Plan, by and through the Pension Committee, generally has discretion with respect to the investments of those particular Plans' assets.

9. The Applicant represents that the Hourly Plan covers substantially all employees who are paid on an hourly rate basis or whose compensation is determined under a collective bargaining agreement with the United Food and Commercial Workers Boot & Shoe Union Local 527. Accrual of benefits under the Hourly Plan was frozen in 2004, and the Hourly Plan was frozen to new participants in 2011.

10. The Applicant represents that the Salary Plan covers substantially all of the Applicant's salaried employees and sales personnel (other than employees at the Danville, Kentucky, and Potosi, Missouri facilities). The Salary Plan also covers a small group of employees and former employees whose employment with the Applicant is or was covered by a collective bargaining agreement with the International Brotherhood of Teamsters Warehousing Employees Local Union 160.

11. Red Wing represents that it has made timely minimum funding contributions to the Hourly Plan and the Salary Plan and it intends to continue to do so. The Applicant represents that contributions required to fund the Hourly Plan and the Salary Plan are made to, and held under separate trust agreements for, each Plan. Vanguard is the trustee of the Hourly Plan and the Salary Plan's trust. Red Wing represents that, as of the most recent valuation, the Hourly Plan is 89.8% funded, and the Salary Plan is 95.7% funded.[45]

12. S.B. Foot Tanning Company is the sponsor of the S.B. Foot Plan with the authority to appoint and remove trustees and investment managers. S.B. Foot Tanning Company is also the plan administrator and a named fiduciary of S.B. Foot Plan for purposes of section 402(a) of the Act, and retains the authority to amend and terminate the S.B. Foot Plan and to transfer assets and liabilities to and from the Plan. Furthermore, S.B. Foot Tanning Company generally has discretion with respect to the investment of the S.B. Foot Plan's assets.

13. The Applicant represents that the S.B. Foot Plan covers substantially all salaried and hourly employees of S.B. Foot Tanning Company. Amendments to the Salary Plan and S.B. Foot Plan in June 2008 froze those Plans to new entrants, though all participants in both Plans at the time of the freeze continue to accrue benefits.

14. The Applicant represents that S.B. Foot Tanning Company has made timely minimum funding contributions to the S.B. Foot Plan and it intends to continue to do so. The Applicant represents that contributions required to fund the S.B. Foot Plan are made to and held under separate trust agreements for the Plan. Vanguard is also the trustee of the S.B. Foot Plan's trust. As of the most recent valuation, the S.B. Foot Plan is 98% funded.

The In-Kind Contributions

15. The Applicant seeks to make one or more in-kind contributions (individually, the Contribution, and collectively, the Contributions) of all or a portion of the Shares it owns to the Plans. The Applicant represents that, if this proposed exemption is granted, the value of Shares contributed to any Plan, when added to the Shares previously contributed to that Plan by the Applicant, will not exceed 10% of the aggregate fair market value of the respective Plan's assets as of the date of any Contribution.

16. The Applicant represents that for each Plan year in which a Plan holds Shares at the end of the Plan year, Red Wing will continue to make a cash contribution to each Plan equal to the greater of: (1) The minimum required contribution, as determined by section 430 of the Code; or (2) the lesser of: (i) The minimum required contribution, as determined by section 430 of the Code, as of the Plan's valuation date, except that the value of the assets will be reduced by an amount equal to the value of a Share, multiplied by the number of Shares in the Plan at the end of the Plan year, and (ii) the contribution that would result in the respective Plan attaining a 100% FTAP funded status (reflecting assets reduced by the credit balance) at the valuation date determining the contributions based on the value of all Plan assets, including the Shares. The Applicant represents that any cash contributions in excess of the minimum required contribution described in (1) above will not be used to create additional prefunding credit balance.

17. The Applicant represents that the proposed transactions would benefit the Plans and their participants because the current value of the Shares would improve each Plan's funded status over time, and the expected cash flows from dividends paid on the Shares would provide additional liquidity each year. The Applicant represents that, while the expected investment return used by the Plans' actuary is approximately 7.0%, the average dividend yield on the Shares from 2006 through 2013 was approximately 11% per year.

18. The Applicant represents that, although dividends paid to the Plans by RWI would be subject to the unrelated business income tax, the net after-tax yield to the Plans based on the prior 6-year average dividend yield would be approximately 8.76%, applying the 20% income tax rate for qualified dividends. Thus, the Applicant represents, the anticipated after-tax cash dividends alone will likely equal or exceed each Plan's actuarially assumed return on investments without any appreciation of the Shares. The Applicant represents that this cash liquidity will enhance each Plan's ability to satisfy its benefit obligations as they become due without the necessity for liquidating other investments.

19. The Applicant represents that, based on comparative funding projections prepared by Mercer, the Plans' actuary, the Contributions will increase each Plan's funded status, even assuming no appreciation in the fair market value of the Shares over the time period covered by the projections other than a conservative after-tax cash dividend amount of 7.0% consistent with the growth assumption applicable to the Plans' other investments. The Applicant represents that the actuarial projections assume the Applicant or an affiliate will continue to make minimum required contributions to each Plan each year in an amount not less than the Plan's minimum required contributions under section 303 of ERISA and section 430 of the Code. For this purpose, the fair market value of the Shares held by each Plan each year after the initial Contribution will be taken into account for purposes of determining the difference between the Plans' benefit obligations and assets.

20. The Applicant states that, under the terms of the ''Agreement Between Red Wing Shoe Company, Inc. and Vanguard Fiduciary Trust Company regarding Contribution of Property'' entered into between Red Wing and Vanguard in connection with the Contributions to each Plan (collectively, the Contribution Agreements), to be executed prior to the Contributions, Gallagher Fiduciary Advisors, LLC (GFA), in its capacity as qualified, independent fiduciary (the Independent Fiduciary), will make all decisions on behalf of each Plan and each Plan's trust regarding the acceptance of the Contributions, engage a qualified, independent appraiser (the Appraiser)

[45] The Applicant notes that the funding valuation results prepared by the enrolled actuary were made utilizing interest rate assumptions provided under the Moving Ahead for Progress in the 21st Century Act (MAP–21), legislation enacted on July 6, 2012, that, among other things, changed the interest rate that pension plans use to measure their liabilities.

to determine the value of the Shares held by each Plan's trust, and make such other decisions with regard to the Shares as are contemplated by the proposed transaction.

Value Protection Features

21. The Applicant represents that the proposed transactions will be structured to ensure the Plans' continued protection against the risks of illiquidity of the Shares and adverse business conditions that could impair their value. The value protection features negotiated by GFA will consist of the following: (a) A new Commission Agreement with a ten-year term; (b) periodic cash payments (Periodic Make-Whole Payments) by the Applicant to the Plans for as long as the Plans hold the Shares; (c) a terminal cash payment (Terminal Make-Whole Payment) from the Applicant to the Plans in the event of the termination of the Commission Agreement; and (d) a put option given to the Plans (the Liquidity Put Option), which gives the Plans the right to require Red Wing to purchase some or all of the Shares from the Plan. The Applicant represents that GFA will negotiate on behalf of the Plans the formal, binding instruments documenting the transactions, including the value protection features described in more detail below.

22. *New Commission Agreement.* The Applicant represents that a new Commission Agreement between Red Wing and RWI will be entered into, amending and superseding the existing Commission Agreement to provide for a 10-year term certain. In the event of a breach of the 10-year term, the Plans will receive Terminal Make-Whole Payments from Red Wing and may exercise a put option for the remaining value of the Shares (the Terminal Put Option), as described in further detail below.

23. *Periodic Make-Whole Payments.* Red Wing may be required to make a Periodic Make-Whole Payment every five years as of the anniversary date of each Contribution. Each Periodic Make-Whole Payment will be due and payable to each Plan 60 days after the applicable anniversary date. The Applicant represents that any unpaid portion of a Periodic Make-Whole Payment will accrue interest, compounded annually, at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%) over the period from the applicable anniversary date to the date of payment. The Applicant represents that the Independent Fiduciary will verify Red Wing's corporate borrowing rate. A separate Periodic Make-Whole Payment will be calculated with respect to each Contribution to a Plan, every five years as of the anniversary date of such Contribution.

24. The Applicant states that the amount of each Periodic Make-Whole Payment with respect to a Contribution of Shares will be calculated as the excess, if any, of a presumed 7.5% annual return, to be compounded annually, on the value of the Shares calculated from the beginning of the period of time over which a Plan has held such Shares (the Holding Period), minus the sum of: (1) the after-tax total return on the Shares (*i.e.,* the appreciation of the Shares' fair market value (whether realized or unrealized) plus after-tax dividend income), and (2) any Periodic Make-Whole Payments previously made to the Plan with respect to such Shares over the Holding Period. The Applicant states that, for purposes of calculating this reduction, any realized gains on the Shares will be credited with a presumed 7.5% annual return, compounded annually, calculated from the date the cash was received by the Plan. Furthermore, the after-tax dividend amounts and any previously paid Periodic Make-Whole Payments will be credited at the Plan's actual rate of return on its investments, compounded annually, calculated from the date the cash was received by the Plan.

25. The Applicant states that the amount of any Periodic Make-Whole Payment will be further reduced (but not below zero) to the extent all or any portion of the Make-Whole Payment then payable would cause a Plan's ''funding target attainment percentage,'' as determined under section 430 of the Code and as calculated by its enrolled actuary immediately following such contribution, to exceed 110% (or if an amendment is adopted to terminate the Plan pursuant to the Plan's governing document, that Plan's termination liability as determined by its enrolled actuary and confirmed by the Independent Fiduciary).

26. *Terminal Make-Whole Payment.* Red Wing will be required to make a one-time cash Terminal Make-Whole Payment to each Plan in the event of the Shares' loss of value arising from a termination of the Commission Agreement (Catastrophic Loss), which is due and payable to each Plan 90 days after the date of a written demand by the Independent Fiduciary (the demand date). The Applicant represents that the Terminal Make-Whole Payment, if triggered, will terminate Red Wing's obligation to make future Periodic Make-Whole Payments calculated as of any date that is after the Catastrophic Loss.

27. The Applicant represents that the amount of the Terminal Make-Whole Payment will be calculated as the excess, if any, of: The fair market value of the Shares as of the date of the respective Contribution to each Plan increased by a 7.5% annual growth rate, compounded annually, over the Holding Period, minus the sum of: (1) The amount of the after-tax dividends on the Shares received during the Holding Period, and (2) any Periodic Make-Whole Payments made to each Plan with respect to such Shares, and (3) any previous realized gains on such Shares during their Holding Period. The Applicant notes that, for purposes of calculating this reduction, any realized gains on the Shares will be credited with a presumed 7.5% annual return, compounded annually, calculated from the date the cash was received by the Plan. Furthermore, the after-tax dividend amounts and any previously paid Periodic Make-Whole Payments will be credited at the Plan's actual rate of return on its investments, compounded annually, calculated from the date the cash was received by the Plan. The Applicant represents that the Terminal Make-Whole Payment will be further reduced by any remaining fair market value of the Shares after the Catastrophic Loss.

28. The Applicant represents that the Shares will also be subject to the Terminal Put Option, exercisable by the Independent Fiduciary in the event of a Catastrophic Loss, to sell the Shares back to Red Wing at the Shares' fair market value as of the date of exercise. If the fair market value of the Shares is zero at the time of the Catastrophic Loss, the Shares will be transferred to Red Wing upon payment of the Terminal Make-Whole Payment.

29. The Applicant represents that the Terminal Make-Whole Payment as well as the exercise price on the Terminal Put Option may be paid in five equal annual installments. The Applicant further represents that any unpaid portion of the Terminal Make-Whole Payment or exercise price of the Terminal Put Option during this period will accrue interest (compounded annually as of the anniversary of the demand date or the exercise date of the Terminal Put Option, as applicable) at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%) over each 12-month period. The Applicant represents that the Independent Fiduciary will be responsible for verifying Red Wing's corporate

borrowing rate in the event of a Catastrophic Loss.

30. The Applicant represents that the amount of any Terminal Make-Whole Payment will also be reduced (but not below zero) to the extent all or any portion of the Contribution then payable would cause a Plan's ''funding target attainment percentage,'' as determined under section 430 of the Code and as calculated by its enrolled actuary immediately following such Contribution, to exceed 110% (or if an amendment is adopted to terminate the Plan pursuant to the Plan's governing document, that Plan's termination liability as determined by its enrolled actuary and confirmed by the Independent Fiduciary).

31. *Liquidity Put Option.* The Liquidity Put Option will give the Plans the ability to cause Red Wing to purchase some or all of the Shares from the Plan at the Shares' fair market value as of the date of exercise, payable in cash no later than 60 days following the date of exercise. Any unpaid portion of the purchase price for the Shares payable by Red Wing in connection with the exercise of the Liquidity Put Option will accrue interest, compounded annually, at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%), to be confirmed by the Independent Fiduciary, over the period from the date of exercise of the Liquidity Put Option to the date of payment of such unpaid portion of the purchase price.

32. Pursuant to the Liquidity Put Option, in the event of a Change of Control, all or a portion of the Shares held by a Plan will be exercisable for a period of 60 days by the Independent Fiduciary on behalf of the Plan. The Applicant represents that, for purposes of triggering the Liquidity Put Option, a ''Change of Control'' includes the sale or other transfer for value of all or substantially all of Red Wing's assets in a transaction or series of related transactions to a Third Party purchaser, or a transaction or series of transactions in which a Third Party acquires more than 50% of the voting power of Red Wing's outstanding shares. A ''Third Party'' for this purpose is an individual or entity other than: (1) (i) A current shareholder of Red Wing, or a spouse or issue of such shareholder, (ii) a trust created for the shareholder, his spouse, or his issue, or (iii) a shareholder of a shareholder; or (2) an entity controlled by an individual or entity described in (1), or an entity under common control with such an entity.

33. Pursuant to the Liquidity Put Option, upon a Plan's becoming entitled to receive a Periodic Make-Whole Payment, the Independent Fiduciary on behalf of the Plan may exercise as much as 20% of the original number of Shares to which the Periodic Make-Whole Payment relates, no later than 45 days following the five-year anniversary date of the Contribution. The Applicant represents that, if the Plan exercises its Liquidity Put Option with respect to any of the Shares to which the Periodic Make-Whole Payment relates in the first year in which the Liquidity Put Option is exercisable, the Plan may exercise a Liquidity Put Option for as much as an additional 20% of the original number of Shares to which the Periodic Make-Whole payment relates upon each of the four succeeding anniversaries of the Contribution to the Plan, but no later than 45 days following each such anniversary. The Applicant represents that the exercise of a Liquidity Put Option for any of the Shares to which the Periodic Make-Whole Payment applies in the first year in which the Liquidity Put Option is exercisable eliminates the Plan's right to that Periodic Make-Whole Payment with respect to all Shares to which the Periodic Make-Whole Payment in such year relates, but any Shares for which the Liquidity Put Option is not exercised will continue to be eligible for future Periodic Make-Whole Payments, if any.

34. Pursuant to the Liquidity Put Option, upon the occurrence of the tenth anniversary (the Anniversary Date) of a Contribution to a Plan, the Independent Fiduciary on behalf of the Plan may exercise the Liquidity Put Option with respect to as much as 20% of the number of Shares to which such Contribution relates, in each year following the Anniversary Date.

35. Pursuant to the Liquidity Put Option, upon the effective date of a Plan's termination and at any time until the final distribution date of the Plan's assets, the Independent Fiduciary on behalf of the Plan may exercise the Liquidity Put Option for any or all Shares remaining in the Plan, and Red Wing will have the right to cause a Plan to sell any or all remaining Shares held in the Plan to Red Wing (the Call Option).

36. *Call Option.* Red Wing may exercise the Call Option upon the effective date of a Plan's termination. The Applicant represents that in such event, the Plan will transfer its Shares to Red Wing in exchange for a cash payment equal to the Shares' fair market value on the date of exercise as determined by the Independent Fiduciary, no later than 60 days after Red Wing exercises the Call Option. Any unpaid portion of the purchase price for the Shares payable by Red Wing in connection with its exercise of the Call Option will accrue interest, compounded annually, at the average of Red Wing's regular corporate borrowing rate (but at a rate no less than LIBOR plus 1%), to be confirmed by the Independent Fiduciary, over the period from the date of exercise of the Call Option to the date of payment of such unpaid portion of the purchase price.

Exemptive Relief Requested

37. The Applicant requests exemptive relief from certain of the prohibited transaction restrictions of sections 406 and 407 of the Act and section 4975 of the Code for the Contributions. Section 407(a)(1)(A) of the Act precludes a plan from acquiring or holding any employer security which is not a ''qualifying employer security.'' Moreover, section 406(a)(1)(E) of the Act prohibits the acquisition, on behalf of a plan, of any ''employer security in violation of section 407(a) of the Act.'' Finally, section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any ''employer security'' that violates section 407(a) of the Act.

38. The Applicant represents that, with respect to the Plans, the Shares constitute ''employer securities,'' as defined in section 407(d)(1) of the Act. The Applicant notes that, to be an ''employer security,'' the Shares must be issued by an employer of employees covered by the plan or by an affiliate of such employer. According to the Applicant, although RWI is not the employer of any employees covered by the plans, RWI can be considered an affiliate of Red Wing. The Applicant notes that section 407(d)(7) of the Act defines an ''affiliate'' as an entity that is a member of the employer's controlled group, as defined by section 1563(a) of the Code, but by substituting 50% for 80% ownership for purposes of establishing control. The Applicant notes also that the stock ownership attribution rules set forth in section 1563(a) of the Code could cause the Sweasy family to own both RWI and Red Wing.[46] In this regard, the

[46] Section 1563(a)(2) of the Code provides that a brother-sister controlled group of corporate entities applies to ''two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own. . .stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.''

Applicant explains that the largest percentages of Red Wing stock and RWI Shares, attributing Shares owned by Red Wing to Red Wing shareholders, are owned by five members of the Sweasy family or trusts established by or for the benefit of such individuals. With respect to three trusts established by one of these individuals and her husband, the Applicant contends that certain assumptions concerning the control the individual or her husband exercises over the trusts or the beneficiaries of the trusts could cause RWI and Red Wing to be considered members of a brother-sister controlled group under section 1563(a)(2) of the Code. As such, the Applicant believes that RWI can be considered an ''affiliate'' of Red Wing under section 407(d)(7) of the Act, and the Shares would thus constitute ''employer securities'' under section 407(d)(1) of the Act. The Applicant contends that the Shares are not ''qualifying employer securities'' within the meaning of Section 407(d)(5) of the Act, because the Shares will not satisfy the requirements of Section 407(f)(1) following the Contributions.[47] As such, the Applicant requests an exemption from sections 406(a)(1)(E) and 406(a)(2), and section 407(a)(1)(A) of the Act.

39. The Applicant notes that section 406(a)(1)(A) of the Act provides that any sale, exchange, or leasing of any property between a plan and a party in interest constitutes a prohibited transaction. According to the Applicant, the Department concluded in Interpretive Bulletin 2509.94–3 that an in-kind contribution of property by a plan sponsor to an employee pension plan constitutes a prohibited transaction in violation of section 406(a)(1)(A). Furthermore, an employer whose employees participate in the plan is a ''party in interest'' under section 3(14) of the Act. The Applicant states that Red Wing is prohibited from purchasing the Shares from the Plans in connection with the Plans' exercise of the Terminal Put Option and the Liquidity Put Option as well as Red Wing's exercise of the Call Option. Therefore, the Applicant requests an exemption from section 406(a)(1)(A) of the Act for the transactions described above.

40. The Applicant notes that section 406(a)(1)(B) of the Act provides that any lending of money or other extension of credit between the plan and a party in interest constitutes a prohibited transaction. The Applicant represents that the Terminal Make-Whole Payment and the exercise price on the Terminal Put Option are due and payable 90 days after the demand date, and can be paid over a five-year period, with interest. Such arrangement may constitute a prohibited extension of credit between the Plans and Red Wing. As such, the Applicant requests an exemption from section 406(a)(1)(B) of the Act.

41. The Applicant represents that section 406(a)(1)(D) of the Act provides that any transfer to, or use by or for the benefit of, a party in interest, of any assets of the Plans is a prohibited transaction. The Applicant states that, accordingly, the proposed transactions also violate section 406(a)(1)(D) of the Act, in that in connection with the Plans' acceptance of the Contributions, Red Wing proposes to transfer assets of the Plans to itself upon the exercise of the Terminal Put Option, the Liquidity Put Option, or the Call Option.

42. The Applicant notes that section 406(b)(1) of the Act prohibits a plan fiduciary from dealing with the assets of the plan in its own interest or for its own account. Furthermore, the Applicant notes that section 406(b)(2) of the Act prohibits a fiduciary of a plan from acting in its individual or any other capacity in any transaction involving the plan, or on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. The Applicant represents that Red Wing is a fiduciary of the Plans. The Applicant states that it is possible that the Contributions could be considered to violate section 406(b)(1) of the Act because of the possible ancillary effects to the Applicant of reduced future cash contributions due to additional funding of the Plans. Moreover, according to the Applicant, it is possible that the Contributions could violate section 406(b)(2) of the Act because the Applicant, a fiduciary with respect to the Plans, will be acting on behalf of another party (itself) whose interests may be adverse to those of the Plan. Therefore, the Applicant requests an exemption from section 406(b)(1) and (2) of the Act for the transactions described herein.

The Independent Fiduciary

43. The Applicant represents that it has retained GFA to act as the Independent Fiduciary and investment manager of the Plans with respect to the acquisition, management and disposition of the Shares on behalf of the Plans. GFA represents that it is qualified to serve as Independent Fiduciary on behalf of the Plans with respect to the covered transactions by virtue of its experience and expertise. GFA represents that it has acted as an independent fiduciary regarding numerous ERISA-covered plans' acquisitions and holdings of securities issued by or contributed by the current or former employer of plan participants. GFA represents further that it serves as an investment consultant to ERISA-covered plans with assets totaling approximately $36.5 billion. GFA represents that it regularly evaluates matters of investment policy, diversification, and expected risk and return for a variety of asset classes, including privately-held securities.

44. The Applicant represents that GFA does not provide any other services to the Applicant or its affiliates other than as the Independent Fiduciary. Red Wing represents that it is paying GFA for the entirety of its engagement with respect to the proposed transactions. GFA represents that its compensation for services related to the proposed transactions is less than 1% of its revenue. GFA has retained Lincoln Partners Advisors LLC (Lincoln) to prepare a preliminary valuation study of RWI which GFA has utilized in determining the valuation of the Shares to be contributed to the Plans. GFA has complete discretion to determine the valuation methodologies as well as the ultimate value of the Shares contributed to the Plans.

45. The Applicant represents that GFA reviewed relevant Plan documents and financial information. In addition, the Applicant represents that GFA conducted extensive negotiations with the Applicant's management and advisors regarding the value protection features described above.

46. The Applicant represents that GFA will have discretion and authority to negotiate the final terms and conditions of the Contributions, including any administrative security provisions, provided such terms comply with the requirements of the exemption. The Applicant represents that the contributed Shares will be held in an Investment Fund account within each Plan's trust, that is separate and distinct from the Plans' other assets. The Investment Fund account will be under

[47] Section 407(d)(5) of the Act requires, in relevant part, that, in the case of a plan other than an individual account plan, in order for stock to constitute ''qualifying employer securities,'' it must satisfy the requirements of section 407(f)(1) of the Act. Section 407(f)(1) provides that, immediately after its acquisition, qualifying stock must constitute (A) no more than 25 percent of the aggregate amount of the stock of the same class issued and outstanding at the time of acquisition is held by the plan, and (B) at least 50 percent of such aggregate amount is held by persons independent of the issuer. The Applicant represents that the Sweasy family will own in excess of 50% of the Shares through various family trusts and indirectly through its ownership of Red Wing, after the Contribution. Thus, the Shares will not satisfy the requirement under section 407(f)(1)(B) of the Act.

GFA's investment management and control until such time as GFA determines it is in the interests of the Plans' participants and beneficiaries to dispose of the Shares or the Plans are terminated.

47. The Applicant represents that GFA will continue to serve as Independent Fiduciary and discharge the functions assigned to it until all transactions related to the Shares are concluded or GFA has been replaced by another Independent Fiduciary or the Plans are terminated.

48. The Applicant represents that GFA is, and will continue to be during the term of its engagement, an ''investment manager'' within the meaning of section 3(38) of the Act and the Investment Advisers Act of 1940, and, with respect to its duties, GFA will be a fiduciary as defined in section 3(21)(A) of the Act. The Applicant represents that GFA will take whatever actions it deems necessary to protect the rights of the Plans with respect to the Shares, and will act prudently and for the exclusive benefit and in the sole interest of the Plans and their participants and beneficiaries.

Appraisal of the Shares

49. In its appraisal, dated September 4, 2012 (the Appraisal), Lincoln represents that it was retained by GFA to act as the independent appraiser of the Shares in connection with the Applicant's request for an exemption from the Department for the proposed transactions. Lincoln represents that its fees are not contingent on the conclusions provided within the Appraisal, and it had not provided previous services to Red Wing, GFA, or the Plans for which it received compensation. Red Wing represents that it is paying Lincoln for the entirety of its engagement with respect to the proposed transactions. Lincoln represents that its compensation for services related to the proposed transactions is less than 1% of its revenue.

50. Lincoln represents that Patricia Luscombe, the Managing Director of Lincoln's Valuations and Opinions Group responsible for the Appraisal, is a chartered financial analyst and has more than 20 years of experience in financial advisory and valuation. Lincoln represents that Ms. Luscombe has worked on valuations of closely held businesses, including for various transactions, tax, accounting, litigation and regulatory purposes. Lincoln further represents that Michael Fisch, the senior member of Lincoln's Valuations and Opinions Group assigned to the Appraisal, is a Certified Public Accountant, and has experience in managing or participating in valuation assignments.

51. Lincoln represents that it calculated the enterprise value of RWI, or the measure of a company's fair market value of the aggregate assets (both tangible and intangible) on a going concern basis. Lincoln explains that the enterprise value is normally calculated as the aggregate fair market value of equity plus debt, minority interests, and preferred shares. Lincoln notes that, as RWI has no debt, minority interests, or preferred shares, the enterprise value for RWI equals the aggregate fair market value of the Shares. Lincoln represents that it calculated the enterprise value of the Shares by employing the income approach valuation method (the Income Approach). Lincoln represents that the Income Approach estimates value based on projected future free cash flows and an estimated discount rate.

52. As RWI depends on Red Wing's commissions for international sales, Lincoln represents further that the enterprise value Lincoln derived from the Income Approach reflects the expectations of the business by senior management and the going concern value of Red Wing on a monthly basis. To arrive at RWI's fair market value, Lincoln applied a 10% discount to account for RWI's lack of marketability. Lincoln concluded that, as of April 30, 2012 the Shares could be valued between $1,920 to $2,177.[48]

53. In explaining its need for a discount in its valuation, Lincoln represents that the Shares have never been traded in any public market nor is there any prospect of the Shares being registered in the future. In the absence of a price set in a public market, widely circulated information about a company, a following of security analysts and investors, or an initial public offering in the near term, Lincoln states that it is difficult to find parties interested and willing to buy a minority interest investment in a privately owned company such as RWI. In recognition of this difficulty, Lincoln determines a discount for lack of marketability.

54. After reviewing the value protection provisions described herein, Lincoln concludes that the expected volatility associated with the Shares would be reduced given the guaranteed annual return of 7.5% provided through the Periodic Make-Whole Payments and the Terminal Make-Whole Payment. Furthermore, Lincoln represents that the Periodic Make-Whole Payment as well as the Terminal Make-Whole Payment provide RWI shareholders a floor on value that is linked to the Applicant's overall creditworthiness.

55. Lincoln represents that the holding period risk is significant with respect to the Shares because of the uncertainty surrounding the long-term outlook of RWI's tax treatment as well as potential volatility of international sales. With only the Applicant's international business contributing to RWI's net sales, net sales could be highly volatile and thus commission income would also be highly volatile, in turn leading to volatility in the value of the Shares. However, Lincoln asserts that this uncertainly would be offset by the value protection provisions.

56. In its report, Lincoln states that the market of interested buyers for the Shares is quite limited. Red Wing management has stated it intends to remain an independent family owned business, so an investor in the Shares would not likely receive liquidity based upon a sale of Red Wing overall. Furthermore, because of RWI's dependence upon the Applicant's international sales, Lincoln concludes that it is unlikely that there would be willing buyers of Shares beyond the Red Wing shareholders.

57. The Applicant represents that Duff & Phelps performed the most recent valuation of the Shares, as part of Red Wing's annual valuation of RWI. The Applicant represents that the Duff & Phelps valuation for fiscal year 2013, using the discounted flow valuation method, valued the Shares at $2,050, a 10.6% increase over the 2012 value. GFA represents that, in connection with the proposed exemption, it will obtain an updated appraisal report from Lincoln, the independent appraiser, in accordance with the terms of the proposed exemption.

The Independent Fiduciary's Opinion

58. In its capacity as Independent Fiduciary with respect to the proposed transactions, GFA submitted to the Department its report entitled ''Statement by GFA as the Independent Fiduciary in Support of the Application,'' dated November 16, 2012 (the GFA Report). In the GFA Report, GFA represents that it reviewed relevant documents concerning the Applicant, RWI and the proposed transactions. Such documents include: The Plan documents and related amendments; the Plans' trust agreements; the Plans' investment policy statement, most recent audited financial statements, statements of assets, and actuarial funding reports; copies of the most recent appraisals of the Shares; schedules of the appraised value per

[48] GFA represents that it will obtain an updated appraisal report prior to the Contributions.

Share and dividends paid per Share during the prior five years; copies of RWI's organizing documents; the most recent audited financial statements for Red Wing; and the Commission Agreement. GFA represents that it conducted research into DISCs to understand their purpose, legal structure, and the tax consequences of the commission arrangement for both the sponsoring companies and DISC shareholders. GFA also met with the Applicant to learn more about its history, business model and financial performance, the history, structure and status of and outlook for RWI and its relationship to the Applicant, and the status of the Plans and the purpose and expected effect of the proposed transactions.

59. According to the GFA Report, GFA proposed and negotiated the value protection features included as a condition of the Contribution Agreement. GFA represents further that it proposed and designed the Liquidity Put Option to address concerns with respect to the liquidity of the Shares and negotiated with Red Wing to further develop its terms.

60. As provided in the GFA Report, after reviewing the documents as well as the independent valuation performed by Lincoln, GFA believes that the proposed transactions are in the interest of the Plans and their participants and beneficiaries, and protective of the rights of the participants and beneficiaries. GFA also believes the Shares represent a sound investment for the Plans. In this regard, the GFA Report provides that the Applicant's international sales have been the fastest growing segment for the Applicant, having grown at a compound annual growth rate of 12% from 2008 to 2011, with sales increasing 11% from 2012 to 2013. Between 2008 and 2011, GFA notes in the GFA report that the percentage of international sales relative to the Applicant's total sales increased from 19% to 23%. In 2013, international revenues represented 24% of the Applicant's total sales. As a result of the strong pace of international sales growth, RWI's qualifying DISC revenues, income and dividends to shareholders grew at compound annual growth rates of 14%, 13%, and 13%, respectively, from 2008 to 2011.[49] Furthermore, GFA states in the GFA Report that from 2008 through 2011, the average dividend yield on the Shares was almost 12%. Over a broader period, the Applicant represents that the average dividend yield on the Shares has been approximately 11% from 2006 through 2013.

61. In addition, the GFA Report emphasizes that the appraised value of the Shares has appreciated over time, growing at a compound annual growth rate of 22% between 2006 until 2011. The Applicant represents that the appraised value of the Shares grew approximately 11% between 2012 and 2013. The GFA Report provides that continued future growth in the Applicant's international sales and DISC-qualified sales and income should have a positive effect on future appraised values.

62. As provided in the GFA report, GFA believes that the Applicant has a strong financial standing. The GFA Report provides that the Applicant's debt-to-capital ratio stood at 36% as of November 30, 2011. GFA represents that, as of August 2014, Red Wing's debt-to-equity ratio stood at 31% while the times-interest-earned ratio is 49,000. GFA explains that a times-interest-earned ratio of 49,000 is very high and a favorable statistic from the perspective of the Plans, as it means Red Wing is able to pay its interest expenses 49 times over, based on its level of operating earnings. Furthermore, according to the Applicant, Red Wing's cash flow generation has recently been strong, providing it with necessary liquidity to fund its obligations and growth initiatives.

63. GFA represents that the value of the Shares and expected cash flows from dividends on the Shares will improve the Plans' funded status over time and provide additional liquidity for the Plans each year, given that the Contributions will be in addition to and in excess of the mandatory minimum funding requirements required for each of the Plans. In addition, GFA represents that the proposed transactions will reduce the Plans' dependence on the Applicant's ability to pay future minimum required cash contributions.

64. The GFA Report suggests that the value protection measures resemble features of other in-kind contribution transactions previously approved by the Department. Additionally, the Contribution Agreements limit the transactions' scope to a number of Shares equal in value to not more than 10% of Plan assets for each respective Plan. The GFA Report also notes that the terms of the Contribution Agreements provide for a term certain of ten years for the Commission Agreement, thereby providing for the payment of commissions to RWI on account of the Applicant's foreign sales for a set period. Finally, the Periodic Make-Whole Payment and the Terminal Make-Whole Payment provisions guarantee a minimum return on the Shares of 7.5% per year.

65. As detailed in the GFA Report, GFA will: Negotiate on behalf of the Plans the definitive documentation to memorialize the Contribution Agreements and the value protection provisions featured therein and/or described in this proposed exemption; enforce all of the Plans' rights under the Contribution Agreements; enforce the Plans' rights as shareholders of RWI, including obtaining reports confirming that the Applicant is adhering to the terms of the Commission Agreement; obtain regular valuations of the Shares, vote the Plans' Shares, respond to any corporate actions, and monitor tax and regulatory developments that can affect RWI; and have authority to sell the Shares if and when it determines it to be in the Plans' interest to do so.

Statutory Findings

66. The Applicant represents that the proposed exemption is administratively feasible because the Applicant has retained GFA to represent the Plans' interests with respect to the proposed transactions. As such, the transactions will require no ongoing monitoring by the Department.

67. The Applicant represents that the proposed transactions are in the interests of the Plans and their participants and beneficiaries because the value of the Shares and the expected cash flows from their dividends will substantially improve the Plans' funded status over time and provide additional liquidity each year. The Applicant represents that this liquidity will enhance the Plans' ability to satisfy benefit obligations as they become due. The Applicant represents further that, based on comparative funding projections prepared by Mercer, each Plan's funded status following the Contributions will increase at a faster rate than it would otherwise without the Contributions.

68. The Applicant represents that the Plans will generally continue to receive cash contributions notwithstanding the Contribution of Shares. In this regard, the Applicant explains that for each Plan year in which the Plan holds Shares at the end of the Plan year, Red Wing will make a contribution to such Plan that is the greater of: (1) The minimum required contribution, as determined by section 430 of the Code, or (2) the lesser of: (i) The minimum required contribution, as determined by section 430 of the Code, as of the Plan's valuation date, except that the value of

[49] The Applicant represents that RWI's qualifying DISC revenues decreased 7% to $63 million in 2013.

the assets will be reduced by an amount equal to the value of a Share, multiplied by the number of Shares in the Plan at the end of the Plan year, and (ii) the contribution that would result in the respective Plan attaining a 100% FTAP funded status (reflecting assets reduced by the credit balance) at the valuation date determining the contributions based on the value of all Plan assets, including the Shares. The Applicant represents that any cash contributions in excess of the minimum required contribution described above will not be used to create additional prefunding credit balance.

69. The Applicant represents that the proposed transactions are protective of the rights of the participants and beneficiaries of the Plans. The Applicant represents that the Plans will incur no fees, costs or other charges as a result of their participation in any of the proposed transactions. Furthermore, the Applicant represents that, after each Contribution, the Shares will represent no more than 10% of the value of each Plan's assets.

70. The Applicant represents that GFA will monitor and make all decisions with respect to the Plans' investment in the Shares, including making determinations of their value and monitoring their performance and the applicability of the value protection features. Further, GFA have discretion to negotiate the final terms and conditions of the Contributions, consistent with the conditions and the facts and representations contained in this proposed exemption, and will continue to serve as the Independent Fiduciary and discharge the functions assigned to it until all transactions related to the Shares are concluded, GFA has been replaced by another Independent Fiduciary, or the Plans are terminated.

71. Finally, the Applicant represents that the proposed transactions will also be structured to ensure continued protection of the Plans against the risks of illiquidity of the Shares and adverse business conditions that could impair their value. The value protection features, which GFA negotiated with the Applicant, include a binding long-term Commission Agreement to provide for a continuing stream of commission payments to RWI; Periodic Make-Whole Payments by the Applicant to the Plans for as long as the Plans hold the Shares; a Liquidity Put Option exercisable by GFA in lieu of accepting the Periodic Make-Whole Payment, after a Change of Control, after 10 years, or upon termination of a Plan; and a Terminal Make-Whole Payment from the Applicant to the Plans in the event of the termination of the Commission Agreement.

Summary

72. In summary, the Applicant represents that the proposed exemption, if granted, satisfies the statutory criteria of section 408 of the Act for the following reasons:

(a) The Plans acquire the Shares solely through one or more Contributions by Red Wing;

(b) GFA, will act on behalf of the Plans with respect to the acquisition, management and disposition of the Shares;

(c) An Independent Appraiser selected by GFA will determine the fair market value of the Shares contributed to each Plan for all purposes under the proposed exemption;

(d) Immediately after any Contribution, the aggregate fair market value of the Shares held by any Plan will represent no more than 10% of the fair market value of such Plan's assets.

(e) The Plans incur no fees, costs or other charges in connection with any of the transactions described herein;

(f) For as long as the Plans hold the Shares, Red Wing makes the Periodic Make-Whole Payments and Terminal Make-Whole Payment to the Plans in accordance with the terms thereof;

(g) The Liquidity Put Option and the Terminal Put Option will be exercisable by the Independent Fiduciary in its sole discretion in accordance with the terms thereof; and

(h) Each year, Red Wing will make a cash contribution to each Plan that is the greater of: (1) The minimum required contribution, or (2) the lesser of: (i) The minimum required contribution (without taking into account the value of the Shares in the Plan at the end of the respective Plan year), and (ii) the contribution that would result in the respective Plan attaining a 100% FTAP funded status (reflecting assets reduced by the credit balance) at the valuation date determining the contributions based on the value of all Plan assets, including the Shares.

Notice to Interested Persons

Notice of the proposed exemption will be given to all Interested Persons in the manner agreed to with the Department within 20 days of the publication of the notice of proposed exemption in the **Federal Register**, by first class U.S. mail to the last known address of all such individuals. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 50 days of the publication of the notice of proposed exemption in the **Federal Register**. All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Frank Russell Company and Affiliates (Russell), Located in Seattle, WA

[Application No. D–11781]

Proposed Exemption

The Department is considering granting an exemption under the authority of 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 46637, 66644, October 27, 2011).

Section I. Transactions

If the exemption is granted, the restrictions of sections 406(a)(1)(D) and 406(b) of the Act and the taxes resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(D) through (F) of the Code,[50] shall not apply, effective June 1, 2014, to:

(a) The receipt of a fee by Russell, as Russell is defined below in Section IV(a), from an open-end investment company or open-end investment companies (Affiliated Fund(s)), as defined below in Section IV(e), in connection with the direct investment in shares of any such Affiliated Fund, by an employee benefit plan or by employee benefit plans (Client Plan(s)) as defined below in Section IV(b), where Russell serves as a fiduciary with respect to such Client Plan, and where Russell:

(1) Provides investment advisory services, or similar services to any such Affiliated Fund; and

[50] For purposes of this proposed exemption reference to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(2) Provides to any such Affiliated Fund other services (Secondary Service(s)), as defined below in Section IV(i); and

(b) In connection with the indirect investment by a Client Plan in shares of an Affiliated Fund through investment in a pooled investment vehicle or pooled investment vehicles (Collective Fund(s)),[51] as defined below in Section IV(j), where Russell serves as a fiduciary with respect to such Client Plan, the receipt of fees by Russell from:

(1) An Affiliated Fund for the provision of investment advisory services, or similar services by Russell to any such Affiliated Fund; and

(2) An Affiliated Fund for the provision of Secondary Services by Russell to any such Affiliated Fund; provided that the conditions, as set forth below in Section II and Section III, are satisfied, as of June 1, 2014 and thereafter.

Section II. Specific Conditions

(a)(1) Each Client Plan which is invested directly in shares of an Affiliated Fund *either:*

(i) Does not pay to Russell for the entire period of such investment any investment management fee, or any investment advisory fee, or any similar fee at the plan-level (the Plan-Level Management Fee), as defined below in Section IV(m), with respect to any of the assets of such Client Plan which are invested directly in shares of such Affiliated Fund; *or*

(ii) Pays to Russell a Plan-Level Management Fee, based on total assets of such Client Plan under management by Russell at the plan-level, from which a credit has been subtracted from such Plan-Level Management Fee, where the amount subtracted represents such Client Plan's *pro rata share* of any investment advisory fee and any similar fee (the Affiliated Fund Level Advisory Fee), as defined below in Section IV(o), paid by such Affiliated Fund to Russell.

If, during any fee period, in the case of a Client Plan invested directly in shares of an Affiliated Fund, such Client Plan has prepaid its Plan Level Management Fee, and such Client Plan purchases shares of an Affiliated Fund directly, the requirement of this Section II(a)(1)(ii) shall be deemed met with respect to such prepaid Plan-Level Management Fee, if, by a method reasonably designed to accomplish the same, the amount of the prepaid Plan-Level Management Fee that constitutes the fee with respect to the assets of such Client Plan invested directly in shares of an Affiliated Fund:

(A) Is anticipated and subtracted from the prepaid Plan-Level Management Fee at the time of the payment of such fee; *or*

(B) Is returned to such Client Plan, no later than during the immediately following fee period; *or*

(C) Is offset against the Plan-Level Management Fee for the immediately following fee period or for the fee period immediately following thereafter.

For purposes of Section II(a)(1)(ii), a Plan-Level Management Fee shall be deemed to be prepaid for any fee period, if the amount of such Plan-Level Management Fee is calculated as of a date not later than the first day of such period.

(2) Each Client Plan invested in a Collective Fund the assets of which are not invested in shares of an Affiliated Fund:

(i) Does not pay to Russell for the entire period of such investment any Plan-Level Management Fee with respect to any assets of such Client Plan invested in such Collective Fund.

The requirements of this Section II(a)(2)(i) do not preclude the payment of a Collective Fund-Level Management Fee by such Collective Fund to Russell, based on the assets of such Client Plan invested in such Collective Fund; *or*

(ii) Does not pay to Russell for the entire period of such investment any Collective Fund-Level Management Fee with respect to any assets of such Client Plan invested in such Collective Fund.

The requirements of this Section II(a)(2)(ii) do not preclude the payment of a Plan-Level Management Fee by such Client Plan to Russell, based on total assets of such Client Plan under management by Russell at the plan-level; *or*

(iii) Such Client Plan pays to Russell a Plan-Level Management Fee, based on total assets of such Client Plan under management by Russell at the plan-level, from which a credit has been subtracted from such Plan-Level Management Fee (the ''Net'' Plan-Level Management Fee), where the amount subtracted represents such Client Plan's *pro rata share* of any Collective Fund-Level Management Fee paid by such Collective Fund to Russell.

The requirements of this Section II(a)(2)(iii) do not preclude the payment of a Collective Fund-Level Management Fee by such Collective Fund to Russell, based on the assets of such Client Plan invested in such Collective Fund.

(3) Each Client Plan invested in a Collective Fund, the assets of which are invested in shares of an Affiliated Fund:

(i) Does not pay to Russell for the entire period of such investment any Plan-Level Management Fee (including any ''Net'' Plan-Level Management Fee, as described, above, in Section II(a)(2)(ii)), and does not pay directly to Russell or indirectly to Russell through the Collective Fund for the entire period of such investment any Collective Fund-Level Management Fee with respect to the assets of such Client Plan which are invested in such Affiliated Fund; *or*

(ii) Pays indirectly to Russell a Collective Fund-Level Management Fee, in accordance with Section II(a)(2)(i) above, based on the total assets of such Client Plan invested in such Collective Fund, from which a credit has been subtracted from such Collective Fund-Level Management Fee, where the amount subtracted represents such Client Plan's *pro rata share* of any Affiliated Fund-Level Advisory Fee paid to Russell by such Affiliated Fund; and does not pay to Russell for the entire period of such investment any Plan-Level Management Fee with respect to any assets of such Client Plan invested in such Collective Fund; *or*

(iii) Pays to Russell a Plan-Level Management Fee, in accordance with Section II(a)(2)(ii) above, based on the total assets of such Client Plan under management by Russell at the plan-level, from which a credit has been subtracted from such Plan-Level Management Fee, where the amount subtracted represents such Client Plan's *pro rata share* of any Affiliated Fund-Level Advisory Fee paid to Russell by such Affiliated Fund; and does not pay directly to Russell or indirectly to Russell through the Collective Fund for the entire period of such investment any Collective Fund-Level Management Fee with respect to any assets of such Client Plan invested in such Collective Fund; *or*

(iv) Pays to Russell a ''Net'' Plan-Level Management Fee, in accordance with Section II(a)(2)(iii) above, from which a *further credit* has been subtracted from such ''Net'' Plan-Level Management Fee, where the amount of such *further credit* which is subtracted represents such Client Plan's *pro rata share* of any Affiliated Fund-Level Advisory Fee paid to Russell by such Affiliated Fund.

[51] The Department, herein, is expressing no opinion in this proposed exemption regarding the reliance of the Applicants on the relief provided by section 408(b)(8) of the Act with regard to the purchase and with regard to the sale by a Client Plan of an interest in a Collective Fund and the receipt by Russell, thereby, of any investment management fee, any investment advisory fee, and any similar fee (a Collective Fund-Level Management Fee), as defined below in Section IV(n)), where Russell serves as an investment manager or investment adviser with respect to such Collective Fund and also serves as a fiduciary with respect to such Client Plan, nor is the Department offering any view as to whether the Applicants satisfy the conditions, as set forth in section 408(b)(8) of the Act.

Provided that the conditions of this proposed exemption are satisfied, the requirements of Section II(a)(1)(i)–(ii) and Section II(a)(3)(i)–(iv) do not preclude the payment of an Affiliated Fund-Level Advisory Fee by an Affiliated Fund to Russell under the terms of an investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940 (the Investment Company Act). Further, the requirements of Section II(a)(1)(i)–(ii) and Section II(a)(3)(i)–(iv) do not preclude the payment of a fee by an Affiliated Fund to Russell for the provision by Russell of Secondary Services to such Affiliated Fund under the terms of a duly adopted agreement between Russell and such Affiliated Fund.

For the purpose of Section II(a)(1)(ii) and Section II(a)(3)(ii)–(iv), in calculating a Client Plan's *pro rata share* of an Affiliated Fund-Level Advisory Fee, Russell must use an amount representing the ''gross'' advisory fee paid to Russell by such Affiliated Fund. For purposes of this paragraph, the ''gross'' advisory fee is the amount paid to Russell by such Affiliated Fund, including the amount paid by such Affiliated Fund to sub-advisers.

(b) The purchase price paid and the sales price received by a Client Plan for shares in an Affiliated Fund purchased or sold directly, and the purchase price paid and the sales price received by a Client Plan for shares in an Affiliated Fund purchased or sold indirectly through a Collective Fund, is the net asset value per share (NAV), as defined below in Section IV(f), at the time of the transaction, and is the same purchase price that would have been paid and the same sales price that would have been received for such shares by any other shareholder of the same class of shares in such Affiliated Fund at that time.[52]

(c) Russell, including any officer and any director of Russell, does not purchase any shares of an Affiliated Fund from, and does not sell any shares of an Affiliated Fund to, any Client Plan which invests directly in such Affiliated Fund, and Russell, including any officer and director of Russell, does not purchase any shares of any Affiliated Fund from, and does not sell any shares of an Affiliated Fund to, any Collective Fund in which a Client Plan invests indirectly in shares of such Affiliated Fund.

(d) No sales commissions, no redemption fees, and no other similar fees are paid in connection with any purchase and in connection with any sale by a Client Plan directly in shares of an Affiliated Fund, and no sales commissions, no redemption fees, and no other similar fees are paid by a Collective Fund in connection with any purchase, and in connection with any sale, of shares in an Affiliated Fund by a Client Plan indirectly through such Collective Fund. However, this Section II(d) does not prohibit the payment of a redemption fee, if:

(1) Such redemption fee is paid only to an Affiliated Fund; and

(2) The existence of such redemption fee is disclosed in the summary prospectus for such Affiliated Fund in effect both at the time of any purchase of shares in such Affiliated Fund and at the time of any sale of such shares.

(e) The combined total of all fees received by Russell is not in excess of reasonable compensation within the meaning of section 408(b)(2) of the Act, for services provided:

(1) By Russell to each Client Plan;

(2) By Russell to each Collective Fund in which a Client Plan invests;

(3) By Russell to each Affiliated Fund in which a Client Plan invests directly in shares of such Affiliated Fund; and

(4) By Russell to each Affiliated Fund in which a Client Plan invests indirectly in shares of such Affiliated Fund through a Collective Fund.

(f) Russell does not receive any fees payable pursuant to Rule 12b–1 under the Investment Company Act in connection with the transactions covered by this proposed exemption;

(g) No Client Plan is an employee benefit plan sponsored or maintained by Russell.

(h)(1) In the case of a Client Plan investing directly in shares of an Affiliated Fund, a second fiduciary (the Second Fiduciary), as defined below in Section IV(h), acting on behalf of such Client Plan, receives, in writing, in advance of any investment by such Client Plan directly in shares of such Affiliated Fund, a full and detailed disclosure via first class mail or via personal delivery of (or, if the Second Fiduciary consents to such means of delivery, through electronic email, in accordance with Section II(q), as set forth below) information concerning such Affiliated Fund, including but not limited to the items listed below:

(i) A current summary prospectus issued by each such Affiliated Fund;

(ii) A statement describing the fees, including the nature and extent of any differential between the rates of such fees for:

(A) Investment advisory and similar services to be paid to Russell by each Affiliated Fund;

(B) Secondary Services to be paid to Russell by each such Affiliated Fund; and

(C) All other fees to be charged by Russell to such Client Plan and to each such Affiliated Fund and all other fees to be paid to Russell by each such Client Plan and by each such Affiliated Fund;

(iii) The reasons why Russell may consider investment directly in shares of such Affiliated Fund by such Client Plan to be appropriate for such Client Plan;

(iv) A statement describing whether there are any limitations applicable to Russell with respect to which assets of such Client Plan may be invested directly in shares of such Affiliated Fund, and if so, the nature of such limitations; and

(v) Upon the request of the Second Fiduciary acting on behalf of such Client Plan, a copy of the Notice of Proposed Exemption (the Notice), a copy of the final exemption, if granted, and any other reasonably available information regarding the transactions which are the subject of this proposed exemption.

(2) In the case of a Client Plan whose assets are proposed to be invested in a Collective Fund *after* such Collective Fund has begun investing in shares of an Affiliated Fund, a Second Fiduciary, acting on behalf of such Client Plan, receives, in writing, in advance of any investment by such Client Plan in such Collective Fund, a full and detailed disclosure via first class mail or via personal delivery (or, if the Second Fiduciary consents to such means of delivery, through electronic email, in accordance with Section II(q), as set forth below) of information concerning such Collective Fund and information concerning each such Affiliated Fund in which such Collective Fund is invested, including but not limited to the items listed, below:

(i) A current summary prospectus issued by each such Affiliated Fund;

(ii) A statement describing the fees, including the nature and extent of any differential between the rates of such fees for:

(A) Investment advisory and similar services to be paid to Russell by each Affiliated Fund;

(B) Secondary Services to be paid to Russell by each such Affiliated Fund; and

(C) All other fees to be charged by Russell to such Client Plan, to such Collective Fund, and to each such Affiliated Fund and all other fees to be paid to Russell by such Client Plan, by

[52] The selection of a particular class of shares of an Affiliated Fund as an investment for a Client Plan indirectly through a Collective Fund is a fiduciary decision that must be made in accordance with the provisions of section 404(a) of the Act.

such Collective Fund, and by each such Affiliated Fund;

(iii) The reasons why Russell may consider investment by such Client Plan in shares of each such Affiliated Fund indirectly through such Collective Fund to be appropriate for such Client Plan;

(iv) A statement describing whether there are any limitations applicable to Russell with respect to which assets of such Client Plan may be invested indirectly in shares of each such Affiliated Fund through such Collective Fund, and if so, the nature of such limitations;

(v) Upon the request of the Second Fiduciary, acting on behalf of such Client Plan, a copy of the Notice, a copy of the final exemption, if granted, and any other reasonably available information regarding the transactions which are the subject of this proposed exemption; and

(vi) A copy of the organizational documents of such Collective Fund which expressly provide for the addition of one or more Affiliated Funds to the portfolio of such Collective Fund.

(3) In the case of a Client Plan whose assets are proposed to be invested in a Collective Fund *before* such Collective Fund has begun investing in shares of any Affiliated Fund, a Second Fiduciary, acting on behalf of such Client Plan, receives, in writing, in advance of any investment by such Client Plan in such Collective Fund, a full and detailed disclosure via first class mail or via personal delivery (or, if the Second Fiduciary consents to such means of delivery through electronic email, in accordance with Section II(q), as set forth below) of information, concerning such Collective Fund, including but not limited to, the items listed below:

(i) A statement describing the fees, including the nature and extent of any differential between the rates of such fees for all fees to be charged by Russell to such Client Plan and to such Collective Fund and all other fees to be paid to Russell by such Client Plan, and by such Collective Fund;

(ii) Upon the request of the Second Fiduciary, acting on behalf of such Client Plan, a copy of the Notice, a copy of the final exemption, if granted, and any other reasonably available information regarding the transactions which are the subject of this proposed exemption; and

(iii) A copy of the organizational documents of such Collective Fund which expressly provide for the addition of one or more Affiliated Funds to the portfolio of such Collective Fund.

(i) On the basis of the information, described above in Section II(h), a Second Fiduciary, acting on behalf of a Client Plan:

(1) Authorizes in writing the investment of the assets of such Client Plan, as applicable:

(i) Directly in shares of an Affiliated Fund;

(ii) Indirectly in shares of an Affiliated Fund through a Collective Fund where such Collective Fund has already invested in shares of an Affiliated Fund; and

(iii) In a Collective Fund which is not yet invested in shares of an Affiliated Fund but whose organizational document expressly provides for the addition of one or more Affiliated Funds to the portfolio of such Collective Fund; and

(2) Authorizes in writing, as applicable:

(i) The Affiliated Fund-Level Advisory Fee received by Russell for investment advisory services and similar services provided by Russell to such Affiliated Fund;

(ii) The fee received by Russell for Secondary Services provided by Russell to such Affiliated Fund;

(iii) The Collective Fund-Level Management Fee received by Russell for investment management, investment advisory, and similar services provided by Russell to such Collective Fund in which such Client Plan invests;

(iv) The Plan-Level Management Fee received by Russell for investment management and similar services provided by Russell to such Client Plan at the plan-level; and

(v) The selection by Russell of the applicable fee method, as described, above, in Section II(a)(1)–(3).

All authorizations made by a Second Fiduciary pursuant to this Section II(i) must be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act;

(j)(1) Any authorization, described above in Section II(i), and any authorization made pursuant to negative consent, as described below in Section II(k) and in Section II(l), made by a Second Fiduciary, acting on behalf of a Client Plan, shall be terminable at will by such Second Fiduciary, without penalty to such Client Plan (including any fee or charge related to such penalty), upon receipt by Russell via first class mail, via personal delivery, or via electronic email of a written notification of the intent of such Second Fiduciary to terminate any such authorization.

(2) A form (the Termination Form), expressly providing an election to terminate any authorization, described above in Section II(i), or to terminate any authorization made pursuant to negative consent, as described below in Section II(k) and in Section II(l), with instructions on the use of such Termination Form, must be provided to such Second Fiduciary at least annually, either in writing via first class mail or via personal delivery (or if such Second Fiduciary consents to such means of delivery through electronic email, in accordance with Section II(q), as set forth below). However, if a Termination Form has been provided to such Second Fiduciary pursuant to Section II(k) or pursuant to Section II(l) below, then a Termination Form need not be provided pursuant to this Section II(j), until at least six (6) months, but no more than twelve (12) months, have elapsed, since the prior Termination Form was provided;

(3) The instructions for the Termination Form must include the following statements:

(i) Any authorization, described above in Section II(i), and any authorization made pursuant to negative consent, as described below in Section II(k) or in Section II(l), is terminable at will by a Second Fiduciary, acting on behalf of a Client Plan, without penalty to such Client Plan, upon receipt by Russell via first class mail or via personal delivery or via electronic email of the Termination Form, or some other written notification of the intent of such Second Fiduciary to terminate such authorization;

(ii) Within 30 days from the date the Termination Form is sent to such Second Fiduciary by Russell, the failure by such Second Fiduciary to return such Termination Form or the failure by such Second Fiduciary to provide some other written notification of the Client Plan's intent to terminate any authorization, described in Section II(i), or intent to terminate any authorization made pursuant to negative consent, as described below in Section II(k) or in Section II(l), will be deemed to be an approval by such Second Fiduciary;

(4) In the event that a Second Fiduciary, acting on behalf of a Client Plan, at any time returns a Termination Form or returns some other written notification of intent to terminate any authorization, as described above in Section II(i), or intent to terminate any authorization made pursuant to negative consent, as described below in Section II(k) or in Section II(l);

(i)(A) In the case of a Client Plan which invests directly in shares of an Affiliated Fund, the termination will be implemented by the withdrawal of all investments made by such Client Plan in the affected Affiliated Fund, and such withdrawal will be effected by Russell

within one (1) business day of the date that Russell receives such Termination Form or receives from the Second Fiduciary, acting on behalf of such Client Plan, some other written notification of intent to terminate any such authorization;

(B) From the date a Second Fiduciary, acting on behalf of a Client Plan that invests directly in shares of an Affiliated Fund, returns a Termination Form or returns some other written notification of intent to terminate such Client Plan's investment in such Affiliated Fund, such Client Plan will not be subject to pay a *pro rata share* of any Affiliated Fund-Level Advisory Fee and will not be subject to pay any fees for Secondary Services paid to Russell by such Affiliated Fund, or any other fees or charges;

(ii)(A) In the case of a Client Plan which invests in a Collective Fund, the termination will be implemented by the withdrawal of such Client Plan from all investments in such affected Collective, and such withdrawal will be implemented by Russell within such time as may be necessary for withdrawal in an orderly manner that is equitable to the affected withdrawing Client Plan and to all non-withdrawing Client Plans, but in no event shall such withdrawal be implemented by Russell more than five business (5) days after the day Russell receives from the Second Fiduciary, acting on behalf of such withdrawing Client Plan, a Termination Form or receives some other written notification of intent to terminate the investment of such Client Plan in such Collective Fund, unless such withdrawal is otherwise prohibited by a governmental entity with jurisdiction over the Collective Fund, or the Second Fiduciary fails to instruct Russell as to where to reinvest or send the withdrawal proceeds; and

(B) From the date Russell receives from a Second Fiduciary, acting on behalf of a Client Plan, that invests in a Collective Fund, a Termination Form or receives some other written notification of intent to terminate such Client Plan's investment in such Collective Fund, such Client Plan will not be subject to pay a *pro rata share* of any fees arising from the investment by such Client Plan in such Collective Fund, including any Collective Fund-Level Management Fee, nor will such Client Plan be subject to any other charges to the portfolio of such Collective Fund, including a *pro rata share* of any Affiliated Fund-Level Advisory Fee and any fee for Secondary Services arising from the investment by such Collective Fund in an Affiliated Fund.

(k)(1) Russell, at least thirty (30) days in advance of the implementation of each fee increase (Fee Increase(s)), as defined below in Section IV(l), must provide in writing via first class mail or via personal delivery (or if the Second Fiduciary consents to such means of delivery through electronic email, in accordance with Section II(q), as set forth below), a notice of change in fees (the Notice of Change in Fees) (which may take the form of a proxy statement, letter, or similar communication which is separate from the summary prospectus of such Affiliated Fund) and which explains the nature and the amount of such Fee Increase to the Second Fiduciary of each affected Client Plan. Such Notice of Change in Fees shall be accompanied by a Termination Form and by instructions on the use of such Termination Form, as described above in Section II(j)(3);

(2) Subject to the crediting, interest-payback, and other requirements below, for each Client Plan affected by a Fee Increase, Russell may implement such Fee Increase without waiting for the expiration of the 30-day period, described above in Section II(k)(1), provided Russell does not begin implementation of such Fee Increase before the first day of the 30-day period, described above in Section II(k)(1), and provided further that the following conditions are satisfied:

(i) Russell delivers, in the manner described in Section II(k)(1), to the Second Fiduciary for each affected Client Plan, the Notice of Change of Fees, as described in Section II(k)(1), accompanied by the Termination Form and by instructions on the use of such Termination Form, as described above in Section II(j)(3);

(ii) Each affected Client Plan receives from Russell a credit in cash equal to each such Client Plan's *pro rata* share of such Fee Increase to be received by Russell for the period from the date of the implementation of such Fee Increase to the *earlier of:*

(A) The date when an affected Client Plan, pursuant to Section II(j), terminates any authorization, as described above in Section II(i), or, terminates any negative consent authorization, as described in Section II(k) or in Section II(l); or

(B) The 30th day after the day that Russell delivers to the Second Fiduciary of each affected Client Plan the Notice of Change of Fees, described in Section II(k)(1), accompanied by the Termination Form and by the instructions on the use of such Termination Form, as described above in Section II(j)(3).

(iii) Russell pays to each affected Client Plan the cash credit, described above in Section II(k)(2)(ii), with interest thereon, no later than five (5) business days following the *earlier of:*

(A) The date such affected Client Plan, pursuant to Section II(j), terminates any authorization, as described above in Section II(i), or terminates, any negative consent authorization, as described in Section II(k) or in Section II(l); or

(B) The 30th day after the day that Russell delivers to the Second Fiduciary of each affected Client Plan, the Notice of Change of Fees, described in Section II(k)(1), accompanied by the Termination Form and instructions on the use of such Termination Form, as described above in Section II(j)(3);

(iv) Interest on the credit in cash is calculated at the prevailing Federal funds rate plus two percent (2%) for the period from the day Russell first implements the Fee Increase to the date Russell pays such credit in cash, with interest thereon, to each affected Client Plan;

(v) An independent accounting firm (the Auditor) at least annually audits the payments made by Russell to each affected Client Plan, audits the amount of each cash credit, plus the interest thereon, paid to each affected Client Plan, and verifies that each affected Client Plan received the correct amount of cash credit and the correct amount of interest thereon;

(vi) Such Auditor issues an audit report of its findings no later than six (6) months after the period to which such audit report relates, and provides a copy of such audit report to the Second Fiduciary of each affected Client Plan; and

(3) Within 30 days from the date Russell sends to the Second Fiduciary of each affected Client Plan, the Notice of Change of Fees and the Termination Form, the failure by such Second Fiduciary to return such Termination Form and the failure by such Second Fiduciary to provide some other written notification of the Client Plan's intent to terminate the authorization, described in Section II(i), or to terminate the negative consent authorization, as described in Section II(k) or in Section II(l), will be deemed to be an approval by such Second Fiduciary of such Fee Increase.

(l) Effective upon the date that the final exemption is granted, in the case of (a) a Client Plan which has received the disclosures detailed in Section II(h)(2)(i), II(h)(2)(ii)(A), II(h)(2)(ii)(B), II(h)(2)(ii)(C), II(h)(2)(iii), II(h)(2)(iv), II(h)(2)(v), and II(h)(2)(vi), and which has authorized the investment by such Client Plan in a Collective Fund in

accordance with Section II(i)(1)(ii) above, and (b) a Client Plan which has received the disclosures detailed in Section II(h)(3)(i), II(h)(3)(ii), and II(h)(3)(iii), and which has authorized investment by such Client Plan in a Collective Fund, in accordance with Section II(i)(1)(iii) above, the authorization pursuant to negative consent in accordance with this Section II(l), applies to:

(1) The purchase, as an addition to the portfolio of such Collective Fund, of shares of an Affiliated Fund (a New Affiliated Fund) where such New Affiliated Fund has not been previously authorized pursuant to Section II(i)(1)(ii), or, as applicable, Section II(i)(1)(iii), and such Collective Fund may commence investing in such New Affiliated Fund without further written authorization from the Second Fiduciary of each Client Plan invested in such Collective Fund, provided that:

(i) The organizational documents of such Collective Fund expressly provide for the addition of one or more Affiliated Funds to the portfolio of such Collective Fund, and such documents were disclosed in writing via first class mail or via personal delivery (or, if the Second Fiduciary consents to such means of delivery, through electronic email, in accordance with Section II(q)) to the Second Fiduciary of each such Client Plan invested in such Collective Fund, in advance of any investment by such Client Plan in such Collective Fund;

(ii) At least thirty (30) days in advance of the purchase by a Client Plan of shares of such New Affiliated Fund indirectly through a Collective Fund, Russell provides, either in writing via first class or via personal delivery (or if the Second Fiduciary consents to such means of delivery through electronic email, in accordance with Section II(q)) to the Second Fiduciary of each Client Plan having an interest in such Collective Fund, full and detailed disclosures about such New Affiliated Fund, including but not limited to:

(A) A notice of Russell's intent to add a New Affiliated Fund to the portfolio of such Collective Fund. Such notice may take the form of a proxy statement, letter, or similar communication that is separate from the summary prospectus of such New Affiliated Fund to the Second Fiduciary of each affected Client Plan;

(B) Such notice of Russell's intent to add a New Affiliated Fund to the portfolio of such Collective Fund shall be accompanied by the information described in Section II(h)(2)(i), II(h)(2)(ii)(A), II(h)(2)(ii)(B), II(h)(2)(ii)(C), II(h)(2)(iii), II(h)(2)(iv), and II(2)(v) with respect to each such New Affiliated Fund proposed to be added to the portfolio of such Collective Fund; and

(C) A Termination Form and instructions on the use of such Termination Form, as described in Section II(j)(3); and

(2) Within 30 days from the date Russell sends to the Second Fiduciary of each affected Client Plan, the information described above in Section II(l)(1)(ii), the failure by such Second Fiduciary to return the Termination Form or to provide some other written notification of the Client Plan's intent to terminate the authorization described in Section II(i)(1)(ii), or, as appropriate, to terminate the authorization, described in Section II(i)(1)(iii), or to terminate any authorization, pursuant to negative consent, as described in this Section II(l), will be deemed to be an approval by such Second Fiduciary of the addition of a New Affiliated Fund to the portfolio of such Collective Fund in which such Client Plan invests, and will result in the continuation of the authorization of Russell to engage in the transactions which are the subject of this proposed exemption with respect to such New Affiliated Fund.

(m) Russell is subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Second Fiduciary of such Client Plan requests Russell to provide.

(n) All dealings between a Client Plan and an Affiliated Fund, including all such dealings when such Client Plan is invested directly in shares of such Affiliated Fund and when such Client Plan is invested indirectly in such shares of such Affiliated Fund through a Collective Fund, are on a basis no less favorable to such Client Plan, than dealings between such Affiliated Fund and other shareholders of the same class of shares in such Affiliated Fund.

(o) In the event a Client Plan invests directly in shares of an Affiliated Fund, and, as applicable, in the event a Client Plan invests indirectly in shares of an Affiliated Fund through a Collective Fund, if such Affiliated Fund places brokerage transactions with Russell, Russell will provide to the Second Fiduciary of each such Client Plan, so invested, at least annually a statement specifying:

(1) The total, expressed in dollars of brokerage commissions that are paid to Russell by each such Affiliated Fund;

(2) The total, expressed in dollars, of brokerage commissions that are paid by each such Affiliated Fund to brokerage firms unrelated to Russell;

(3) The average brokerage commissions per share, expressed as cents per share, paid to Russell by each such Affiliated Fund; and

(4) The average brokerage commissions per share, expressed as cents per share, paid by each such Affiliated Fund to brokerage firms unrelated to Russell.

(p)(1) Russell provides to the Second Fiduciary of each Client Plan invested directly in shares of an Affiliated Fund with the disclosures, as set forth below, and at the times set forth below in Section II(p)(1)(i), II(p)(1)(ii), II(p)(1)(iii), II(p)(1)(iv), and II(p)(1)(v), either in writing via first class mail or via personal delivery (or if the Second Fiduciary consents to such means of delivery, through electronic email, in accordance with Section II(q) as set forth below);

(i) Annually, with a copy of the current summary prospectus for each Affiliated Fund in which such Client Plan invests directly in shares of such Affiliated Fund;

(ii) Upon the request of such Second Fiduciary, a copy of the statement of additional information for each Affiliated Fund in which such Client Plan invests directly in shares of such Affiliated Fund which contains a description of all fees paid by such Affiliated Fund to Russell;

(iii) With regard to any Fee Increase received by Russell pursuant to Section II(k)(2), a copy of the audit report referred to in Section II(k)(2)(v) within sixty (60) days of the completion of such audit report;

(iv) Oral or written responses to the inquiries posed by the Second Fiduciary of such Client Plan, as such inquiries arise; and

(v) Annually, with a Termination form, as described in Section II(j)(1), and instructions on the use of such form, as described in Section II(j)(3), except that if a Termination Form has been provided to such Second Fiduciary, pursuant to Section II(k) or pursuant to Section II(l), then a Termination Form need not be provided again pursuant to this Section II(p)(1)(v) until at least six (6) months but no more than twelve (12) months have elapsed since a Termination Form was provided.

(2) Russell provides to the Second Fiduciary of each Client Plan invested in a Collective Fund, with the disclosures, as set forth below, and at the times set forth below in Section II(p)(2)(i), II(p)(2)(ii), II(p)(2)(iii), II(p)(2)(iv), II(p)(2)(v), II(p)(2)(vi), II(p)(2)(vii), and II(p)(2)(viii), either in writing via first class mail or via personal delivery (or if the Second Fiduciary consents to such means of

delivery, through electronic email, in accordance with Section II(q);

(i) Annually, with a copy of the current summary prospectus for each Affiliated Fund in which such Client Plan invests indirectly in shares of such Affiliated Fund through each such Collective Fund;

(ii) Upon the request of such Second Fiduciary, a copy of the statement of additional information for each Affiliated Fund in which such Client Plan invests indirectly in shares of such Affiliated Fund through each such Collective Fund which contains a description of all fees paid by such Affiliated Fund to Russell;

(iii) Annually, with a statement of the Collective Fund-Level Management Fee for investment management, investment advisory or similar services paid to Russell by each such Collective Fund, regardless of whether such Client Plan invests in shares of an Affiliated Fund through such Collective Fund;

(iv) A copy of the annual financial statement of each such Collective Fund in which such Client Plan invests, regardless of whether such Client Plan invests in shares of an Affiliated Fund through such Collective Fund, within sixty (60) days of the completion of such financial statement;

(v) With regard to any Fee Increase received by Russell pursuant to Section II(k)(2), a copy of the audit report referred to in Section II(k)(2)(v) within sixty (60) days of the completion of such audit report;

(vi) Oral or written responses to the inquiries posed by the Second Fiduciary of such Client Plan as such inquiries arise;

(vii) For each Client Plan invested indirectly in shares of an Affiliated Fund through a Collective Fund, a statement of the approximate percentage (which may be in the form of a range) on an annual basis of the assets of such Collective Fund that was invested in Affiliated Funds during the applicable year; and

(viii) Annually, with a Termination Form, as described in Section II(j)(1), and instructions on the use of such form, as described in Section II(j)(3), except that if a Termination Form has been provided to such Second Fiduciary, pursuant to Section II(k) or pursuant to Section II(l), then a Termination Form need not be provided again pursuant to this Section II(p)(2)(viii) until at least six (6) months but no more than twelve (12) months have elapsed since a Termination Form was provided.

(q) Any disclosure required herein to be made by Russell to a Second Fiduciary may be delivered by electronic email containing direct hyperlinks to the location of each such document required to be disclosed, which are maintained on a Web site by Russell, provided:

(1) Russell obtains from such Second Fiduciary prior consent in writing to the receipt by such Second Fiduciary of such disclosure via electronic email;

(2) Such Second Fiduciary has provided to Russell a valid email address; and

(3) The delivery of such electronic email to such Second Fiduciary is provided by Russell in a manner consistent with the relevant provisions of the Department's regulations at 29 CFR 2520.104b–1(c) (substituting the word ''Russell'' for the word ''administrator'' as set forth therein, and substituting the phrase ''Second Fiduciary'' for the phrase ''the participant, beneficiary or other individual'' as set forth therein).

(r) The authorizations described in paragraphs II(k) or II(l) may be made affirmatively, in writing, by a Second Fiduciary, in a manner that is otherwise consistent with the requirements of those paragraphs.

(s) All of the conditions of PTE 77–4, as amended and/or restated, are met. Notwithstanding this, if PTE 77–4 is amended and/or restated, the requirements of paragraph (e) therein will be deemed to be met with respect to authorizations described in section II(l) above, but only to the extent the requirements of section II(l) are met. Similarly, if PTE 77–4 is amended and/or restated, the requirements of paragraph (f) therein will be deemed to be met with respect to authorizations described in section II(k) above, if the requirements of section II(k) are met.

(t) *Standards of Impartial Conduct.* If Russell is a fiduciary within the meaning of section 3(21)(A)(i) or (ii) of the Act, or section 4975(e)(3)(A) or (B) of the Code, with respect to the assets of a Client Plan involved in the transaction, Russell must comply with the following conditions with respect to the transaction: (1) Russell acts in the Best Interest of the Client Plan; (2) all compensation received by Russell in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the Client Plan; and (3) Russell's statements about recommended investments, fees, material conflicts of interest,[53] and any other matters relevant to a Client Plan's investment decisions are not misleading.

For purposes of this section, Russell acts in the ''Best Interest'' of the Client Plan when Frank Russell acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.

Section III. General Conditions

(a) Russell maintains for a period of six (6) years the records necessary to enable the persons, described below in Section III(b), to determine whether the conditions of this proposed exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred, if solely because of circumstances beyond the control of Russell, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than Russell shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained or are not available for examination, as required below by Section III(b).

(b)(1) Except as provided in Section III(b)(2) and notwithstanding any provisions of section 504(a)(2) of the Act, the records referred to in Section III(a) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service, or the Securities & Exchange Commission;

(ii) Any fiduciary of a Client Plan invested directly in shares of an Affiliated Fund, any fiduciary of a Client Plan who has the authority to acquire or to dispose of the interest in a Collective Fund in which a Client Plan invests, any fiduciary of a Client Plan invested indirectly in an Affiliated Fund through a Collective Fund where such fiduciary has the authority to acquire or to dispose of the interest in such Collective Fund, and any duly authorized employee or representative of such fiduciary; and

(iii) Any participant or beneficiary of a Client Plan invested directly in shares of an Affiliated Fund or invested in a

[53] A ''material conflict of interest'' exists when a *fiduciary has a financial interest that could affect the* exercise of its best judgment as a fiduciary in rendering advice to a Client Plan. For this purpose, Russell's failure to disclose a material conflict of interest relevant to the services it is providing to a Client Plan Plan, or other actions it is taking in relation to a Client Plan's investment decisions, is deemed to be a misleading statement.

Collective Fund, and any participant or beneficiary of a Client Plan invested indirectly in shares of an Affiliated Fund through a Collective Fund, and any representative of such participant or beneficiary; and

(2) None of the persons described in Section III(b)(1)(ii) and (iii) shall be authorized to examine trade secrets of Russell, or commercial or financial information which is privileged or confidential.

Section IV. Definitions

For purposes of this proposed exemption:

(a) The term ''Russell'' means Frank Russell Company and any affiliate thereof, as defined below in Section IV(c).

(b) The term ''Client Plan(s)'' means a 401(k) plan(s), an individual retirement account(s), other tax-qualified plan(s), and other plan(s) as defined in the Act and Code, but does not include any employee benefit plan sponsored or maintained by Russell.

(c) An ''affiliate'' of a person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(d) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) The term ''Affiliated Fund(s)'' means any diversified open-end investment company or companies registered with the Securities and Exchange Commission under the Investment Company Act, as amended, established and maintained by Russell now or in the future for which Russell serves as an investment adviser.

(f) The term ''net asset value per share'' and the term ''NAV'' mean the amount for purposes of pricing all purchases and sales of shares of an Affiliated Fund, calculated by dividing the value of all securities, determined by a method as set forth in the summary prospectus for such Affiliated Fund and in the statement of additional information, and other assets belonging to such Affiliated Fund or portfolio of such Affiliated Fund, less the liabilities charged to each such portfolio or each such Affiliated Fund, by the number of outstanding shares.

(g) The term ''relative'' means a relative as that term is defined in section 3(15) of the Act (or a member of the family as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(h) The term ''Second Fiduciary'' means the fiduciary of a Client Plan who is independent of and unrelated to Russell. For purposes of this proposed exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Russell if:

(1) Such Second Fiduciary, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Russell;

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary, is an officer, director, partner, or employee of Russell (or is a relative of such person); or

(3) Such Second Fiduciary, directly or indirectly, receives any compensation or other consideration for his or her personal account in connection with any transaction described in this proposed exemption.

If an officer, director, partner, or employee of Russell (or relative of such person) is a director of such Second Fiduciary, and if he or she abstains from participation in:

(i) The decision of a Client Plan to invest in and to remain invested in shares of an Affiliated Fund directly, the decision of a Client Plan to invest in shares of an Affiliated Fund indirectly through a Collective Fund, and the decision of a Client Plan to invest in a Collective Fund that may in the future invest in shares of an Affiliated Fund;

(ii) Any authorization in accordance with Section II(i), and any authorization, pursuant to negative consent, as described in Section II(k) or in Section II(l); and

(iii) The choice of such Client Plan's investment adviser, then Section IV(h)(2) above shall not apply.

(i) The term ''Secondary Service(s)'' means a service or services other than an investment management service, investment advisory service, and any similar service which is provided by Russell to an Affiliated Fund, including but not limited to custodial, accounting, administrative services, and brokerage services. Russell may also serve as a dividend disbursing agent, shareholder servicing agent, transfer agent, fund accountant, or provider of some other Secondary Service, as defined in this Section IV(i).

(j) The term ''Collective Fund(s)'' means a separate account of an insurance company, as defined in section 2510.3–101(h)(1)(iii) of the Department's plan assets regulations,[54] maintained by Russell, and a bank-maintained common or collective investment trust maintained by Russell.

(k) The term ''business day'' means any day that

(1) Russell is open for conducting all or substantially all of its business; and

(2) The New York Stock Exchange (or any successor exchange) is open for trading.

(l) The term ''Fee Increase(s)'' includes any increase by Russell in a rate of a fee previously authorized in writing by the Second Fiduciary of each affected Client Plan pursuant to Section II(i)(2)(i)–(iv) above, and in addition includes, but is not limited to:

(1) Any increase in any fee that results from the addition of a service for which a fee is charged;

(2) Any increase in any fee that results from a decrease in the number of services and any increase in any fee that results from a decrease in the kind of service(s) performed by Russell for such fee over an existing rate of fee for each such service previously authorized by the Second Fiduciary, in accordance with Section II(i)(2)(i)–(iv) above; and

(3) Any increase in any fee that results from Russell changing from one of the fee methods, as described above in Section II(a)(1)–(3), to using another of the fee methods, as described above in Section II(a)(1)–(3).

(m) The term ''Plan-Level Management Fee'' includes any investment management fee, investment advisory fee, and any similar fee paid by a Client Plan to Russell for any investment management services, investment advisory services, and similar services provided by Russell to such Client Plan at the plan-level. The term ''Plan-Level Management Fee'' does not include a separate fee paid by a Client Plan to Russell for asset allocation service(s) (Asset Allocation Service(s)), as defined below in Section IV(p), provided by Russell to such Client Plan at the plan-level.

(n) The term ''Collective Fund-Level Management Fee'' includes any investment management fee, investment advisory fee, and any similar fee paid by a Collective Fund to Russell for any investment management services, investment advisory services, and any similar services provided by Russell to such Collective Fund at the collective fund level.

(o) The term ''Affiliated Fund-Level Advisory Fee'' includes any investment advisory fee and any similar fee paid by an Affiliated Fund to Russell under the terms of an investment advisory

[54] 51 FR 41262 (November 13, 1986).

agreement adopted in accordance with section 15 of the Investment Company Act.

(p) The term ''Asset Allocation Service(s)'' means a service or services to a Client Plan relating to the selection of appropriate asset classes or target-date ''glidepath'' and the allocation or reallocation (including rebalancing) of the assets of a Client Plan among the selected asset classes. Such services do not include the management of the underlying assets of a Client Plan, the selection of specific funds or manager, and the management of the selected Affiliated Funds or Collective Funds.

Effective Date: If granted, this proposed exemption will be effective as of June 1, 2014.

Summary of Facts and Representations

The Parties

1. Russell is a global asset management firm providing investment management products and services to individuals and institutions in 47 different countries. Frank Russell and its U.S. affiliates offer a broad range of financial products and services to businesses, individuals, and institutional clients, including portfolio management, transition strategies and cash management. As of March 31, 2014, Russell had approximately $259.7 billion in assets under management. In addition, Russell is the creator of a family of global equity indices that allow investors to track the performance of distinct market segments. These include the broad market Russell 3000 Index, the small cap Russell 2000 Index and the global equity Russell Global Index.

2. Russell has numerous direct or indirect subsidiaries, including Russell Investment Management Company (RIMCo); Russell Implementation Services, Inc.; Russell Capital, Inc.; Russell Real Estate Advisors, Inc.; Russell Institutional Funds Management, LLC; Russell Institutional Funds, LLC; Russell Trust Company (Russell Trust), and many other entities. Several of these entities operate under the trade name/registered trademark ''Russell Investments.'' Russell and the various other affiliates controlled or under common control with Russell (the ''Affiliates'') are collectively referred to herein as ''Russell.''

3. Russell makes investments available to Client Plans, either directly or indirectly through Collective Funds. Russell has requested that the proposed exemption apply to any Client Plan for which Russell serves as investment fiduciary and for which Russell causes such Client Plan to invest in shares of Affiliated Funds, either directly or indirectly through a Collective Fund. It is represented that Russell places no limits on the minimum or maximum portion of the total assets of each Client Plan that may be invested directly in shares of an Affiliated Fund or invested indirectly in an Affiliated Fund through a Collective Fund.

4. Section 3(14)(A) and (B) of the Act defines the term ''party in interest'' to include, respectively, any fiduciary of a plan and any person providing services to a plan. Section 3(21)(A) of the Act provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent that the person (i) exercises any discretionary authority or control respecting management of the Plan or any authority or control respecting management or disposition of its assets, or (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of a plan or has any authority or responsibility to do so.

Russell entities may currently serve, and may in the future serve, as investment advisers, investment managers, trustees, or other fiduciaries with respect to Client Plans. Accordingly, pursuant to section 3(21)(A)(i) and (ii) of the Act, Russell and various other Russell affiliates may currently be, or may in the future be, fiduciaries with respect to Client Plans which engage in the proposed transactions. As fiduciaries, Russell and various other Russell affiliates may currently be, or may in the future be parties in interest with respect to Client Plans which engage in the transactions described in Section I of this proposed exemption.

Section 406(a)(l)(D) of the Act prohibits a fiduciary with respect to a plan from causing such plan to engage in a transaction, if such fiduciary knows or should know, that such transaction constitutes a transfer to, or use by or for the benefit of, a party in interest, of any assets of such plan. Where Russell or its affiliates, as investment adviser or manager to a Client Plan, recommends the investment of plan assets, directly or indirectly, in shares of a collective fund or a mutual fund that is managed or advised by Russell or its affiliates, the investment purchase transaction by a Client Plan could be viewed as a transfer to, or use by or for the benefit of, the assets of such Client Plan by Russell or its affiliates in violation of section 406(a)(1)(D) of the Act.

Under section 406(b) of the Act, a fiduciary with respect to a plan may not: (a) deal with the assets of a plan in his own interest or for his own account, (b) act, in his individual or in any other capacity in any transaction involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of such plan or the interests of its participants or beneficiaries, or (c) receive any consideration for his own personal account from any party dealing with a plan in connection with a transaction involving the assets of such plan.

Under section 406(b)(1) of the Act, Russell or its affiliates, as investment manager or investment adviser to a Client Plan, may recommend the investment of plan assets, or cause the investment of plan assets, directly or indirectly, in shares of a collective fund or mutual fund, from which Russell or its affiliates receive compensation. Under such circumstances, due to the fact that the investment of plan assets in such collective fund or mutual fund may increase Russell's or its affiliates' compensation in connection with services provided to such fund, Russell, directly or indirectly through its affiliates, would be dealing with the assets of such Client Plan for its own interest or personal account in violation of section 406(b)(1) of the Act.

With respect to section 406(b)(2) of the Act, Russell, acting in its capacity as investment manager or investment adviser, could cause a Client Plan to invest in, or could recommend that a Client Plan invest in, directly or indirectly, shares of a collective fund or a mutual fund that is managed or advised by Russell or its affiliates. In effect, Russell or its affiliates may be increasing their own compensation with respect to such collective fund or mutual fund. As such, at the Plan-level, Russell or its affiliates may be acting with interests that are divergent from those of the Plan, thus potentially violating section 406(b)(2) of the Act.

With respect to section 406(b)(3) of the Act, Russell or its affiliates, as investment manager or investment adviser to a Client Plan, may receive investment advisory fees and ''secondary services'' fees from one or more collective funds or mutual funds in connection with a Client Plan's investment in such funds, subject to the terms and conditions of this proposed exemption, if granted. The Applicant notes that the fund is a third party and such payments may implicate 406(b)(3) of ERISA.

Thus, in the absence of an administrative exemption, the covered transactions described in Section I of this proposed exemption would violate sections 406(a)(1)(D) and (b) of the Act. If granted, this exemption would be effective as of June 1, 2014.

The Collective Funds and the Affiliated Funds

5. Russell's Collective Funds currently include various bank-maintained collective investment trusts and insurance company pooled separate accounts. Currently, to the extent that the investment of Client Plan assets into Russell Collective Funds may involve one or more prohibited transactions, Russell believes that the exemption afforded by section 408(b)(8) of the Act should apply.[55]

6. The Affiliated Funds are a series of mutual funds managed by RIMCo, and may include other Affiliated Funds to be established in the future by Russell. The Affiliated Funds are open-end investment companies registered with the Securities and Exchange Commission under the Investment Company Act of 1940, as amended. Russell may also serve as dividend disbursing agent, shareholder servicing agent, transfer agent, fund accountant, or provider of some other Secondary Services, including brokerage services, to an Affiliated Fund.

Prohibited Transaction Exemption 77–4 (PTE 77–4)

7. It is represented that all of the Russell entities to which the proposed exemption, if granted, would apply are currently part of the same controlled group. In this regard, Russell maintains that—if and to the extent that Russell invests Client Plan assets (directly or indirectly via Collective Funds) in Affiliated Funds, such Russell entities can rely on the relief provided pursuant to PTE 77–4 (42 FR 18732 (April 8, 1977))3.[56]

PTE 77–4 provides an exemption from section 406 of the Act and section 4975 of the Code for the purchase and for the sale by a plan of shares of a registered, open-ended investment company where the investment adviser of such fund: (a) Is a plan fiduciary or affiliated with a plan fiduciary; and (b) is not an employer of employees covered by the plan. The conditions of PTE 77–4 do not permit the payment by a plan of commissions, 12b–1 fees, redemption fees, and similar fees. PTE 77–4 also requires the provision of prior disclosures (*e.g.,* fee information and a current prospectus) to a second fiduciary, as well as written authorization from such second fiduciary for any changes in the fund fee rates. Finally, PTE 77–4 prohibits the payment of double investment advisory fees and similar fees with respect to plan assets invested in such shares for the entire period of such investment.

8. Russell represents that the requested relief is essentially the same as that afforded by PTE 77–4, with the exception of the use of a ''negative consent'' procedure, as discussed below for: (1) Approving Fee Increases with respect to Affiliated Funds, and (2) approving in advance the addition of Affiliated Funds (not previously authorized) as investments ''inside'' a Russell Collective Fund, subject to notice and a right to terminate the original approval at the time a new Affiliated Fund is proposed to be added.

With respect to the PTE 77–4 requirement of ''affirmative'' consent, Russell maintains that obtaining advance written approval from a Second Fiduciary can be difficult, particularly in the case of a Collective Fund, where a Second Fiduciary from every investing Client Plan must provide written approval before fees payable to Russell by an Affiliated Fund in which such Client Plans invest indirectly via a Collective Fund can be increased, or before a new investment in an Affiliated Fund that was not previously authorized can be made. Affirmative consent may also be difficult to obtain in a timely fashion in the context of smaller Client Plans. If advance written approval is not obtained from the Second Fiduciary of each affected Client Plan, then PTE 77–4 may not apply and Russell may violate the restrictions of section 406(a) and 406(b) of the Act.

Negative Consent for Fee Increases

9. With respect to fee increases, in order to avoid the delays associated with obtaining advance written approval from the Second Fiduciary of each affected Client Plan, Russell requests an individual administrative exemption which would allow for a negative consent procedure. Fee Increases are defined in Section IV(l) and include: (a) Any increase in the rate of a fee previously authorized in writing by the Second Fiduciary of an affected Client Plan, (b) any increase in any fee that results from an addition of services for which a fee is charged, (c) any increase in any fee that results from a decrease in the number or kind of services performed for such fee over an existing rate for such service previously authorized by the Second Fiduciary, and (d) any increase in a fee that results from Russell changing from one of the fee methods to another of the fee methods.

To obtain negative consent authorization with regard to a Fee Increase, Russell will have to provide to the Second Fiduciary of any Client Plan invested directly or indirectly in shares of an Affiliated Fund certain disclosures, in writing, thirty (30) days in advance of any proposed Fee Increase, including but not limited to any Fee Increase for Secondary Services, as such services are described below. Such disclosures are to be delivered by regular mail or personal delivery (or if the Second Fiduciary consents by electronic means), and are to be accompanied by a Termination Form and instructions on the use of such form.

Notwithstanding the requirement for thirty (30) days advance notice of a Fee Increase, the proposed exemption would permit Russell to implement a Fee Increase, without waiting until the expiration of the 30 day period, provided that implementation of such Fee Increase does not start before Russell delivers to each affected Client Plan the Notice of Intent of Change of Fees, as described in Section II(k), and provided further that any affected Client Plan receives a cash credit equal to its pro rata share of such Fee Increase, for the period from the date of the implementation of such Fee Increase to the earlier of the date of the termination of the investment or the thirtieth (30th) day after the date Russell delivers the Notice of Change of Fee to the Second Fiduciary of each affected Client Plan. In addition, Russell must pay to each affected Client Plan interest on such cash credit. An independent auditor, on at least an annual basis, will verify the proper crediting of the pro rata share of each such Fee Increase and interest.

An audit report shall be completed by such auditor no later than six (6) months after the period to which it relates.

Failure of the Second Fiduciary to return the Termination Form or to provide some other written notification of the intent to terminate within a certain period of time will be deemed to be approval of the proposed Fee Increase, including but not limited to an increase in the fee for Secondary Services.

Negative Consent for New Affiliated Funds

10. Russell further requests that the proposed exemption permit a Russell Collective Fund holding the assets of a Client Plan, such us a Target Date Fund, to purchase shares of an Affiliated Fund

[55] The Department, herein, is expressing no opinion in this proposed exemption regarding the reliance of Russell on the relief provided in section 408(b)(8) of the Act, nor is the Department offering any view as to whether Russell satisfies the conditions, as set forth in 408(b)(8).

[56] The Department, herein, is expressing no opinion in this proposed exemption regarding the reliance of Russell on the relief provided by PTE 77–4, nor is the Department offering any view as to whether Russell satisfies the conditions, as set forth in PTE 77–4.

not previously affirmatively authorized by the Second Fiduciary of such Client Plan, provided: (a) The organizational document of such Collective Fund expressly provides for the addition of one or more Affiliated Funds to the portfolio of such Collective Fund and such organizational document is disclosed initially to such Client Plan; and (b) Russell satisfies the requirements of the negative consent procedure for obtaining the approval of the Second Fiduciary for each Client Plan invested in such Collective Fund at the time Russell proposes to add an Affiliated Fund to such Collective Fund's portfolio.

Specifically, the negative consent procedure would entail that the Second Fiduciary of each Client Plan invested in such Collective Fund receives in advance: (a) a notice of Russell's intent to add an Affiliated Fund to the portfolio of such Collective Fund; and (b) certain disclosures in writing, including a summary prospectus of such Affiliated Fund. The disclosures are delivered by regular mail or personal delivery (or if the Second Fiduciary consents, by electronic means), and are accompanied by a Termination Form and instructions on the use of such form.

Failure of the Second Fiduciary to return the Termination Form or to provide some other written notification of the intent to terminate within a certain period of time will be deemed to be approval of the investment by such Collective Fund in such Affiliated Fund.

Authorizations for fee increases and new affiliated funds may also be made affirmatively, in writing, by a Second Fiduciary, in a manner that is otherwise consistent with the requirements of the exemption.

11. Russell represents that the negative consent procedures, described in the paragraphs above, are more efficient, cost effective, and administratively feasible than the advance written approval from the Second Fiduciary, as described in PTE 77–4. It is represented that the negative consent procedure avoids the administrative delays that would result if advance written approval from the Second Fiduciary were required.

It is further represented that because the Second Fiduciary of each Client Plan will receive all of the necessary disclosures and will have an opportunity to terminate the investment in any Affiliated fund without penalty, such Client Plan and its participants and beneficiaries are adequately protected. Further, to the extent that Russell may find it desirable from time to time to create an Affiliated Fund with new investment goals, the negative consent procedure will facilitate the addition of an Affiliated Fund into the portfolios of Russell's Collective Funds.

Electronic Disclosures

12. Russell intends that it may utilize electronic mail with hyperlinks to documents required to be disclosed by this proposed exemption. Russell agrees that it will ''actively'' satisfy the various disclosure requirements of this proposed exemption by transmitting emails, rather than relying on ''passive'' postings on a Web site. It is represented that this method of disclosure will be consistent with the Department's regulations at 29 CPR section 2520.104b–l. Client Plans which do not authorize electronic delivery will receive in advance hard copies of the documents required to be disclosed, and hard copies of documents will also be available on request.

Termination

13. A Client Plan invested directly in shares of an Affiliated Fund or invested indirectly through a Collective Fund will have an opportunity to terminate and withdraw from investment in such Affiliated Fund, and, as applicable, to terminate and withdraw from investment in such Collective Fund in the event of a Fee Increase and in the event of the addition of an Affiliated Fund to the portfolio of a Collective Fund.

In this regard, a Second Fiduciary will be provided with a Termination Form at least annually and may terminate the authorization to invest directly in shares of an Affiliated Fund or indirectly through a Collective Fund, at will, without penalty to a Client Plan. Termination of the authorization by the Second Fiduciary of a Client Plan investing directly in shares of an Affiliated Fund will result in such Client Plan withdrawing from such Affiliated Fund. Termination of the authorization by the Second Fiduciary of a Client Plan investing indirectly in shares of an Affiliated Fund through a Collective Fund will result in such Client Plan withdrawing from such Collective Fund.

Generally, Russell will process timely requests for withdrawal from an Affiliated Fund within one (1) Business day. Withdrawal from a Collective Fund will generally be processed within the same time frame, subject to rules designed to ensure orderly withdrawals and fairness for the withdrawing Client Plans and non-withdrawing Client Plans, but in no event shall such withdrawal be implemented by Russell more than five business (5) days after receipt by Russell of a Termination Form or other written notification of intent to terminate investment in such Collective Fund from the Second Fiduciary acting on behalf of the withdrawing Client Plan. Russell will pay interest on the settlement amount for the period from receipt by Russell of a Termination Form or other written notification of intent to terminate from the Second Fiduciary, acting on behalf of the withdrawing Client Plan, to the date Russell pays the settlement amount, plus interest thereon.

From the date a Client Plan terminates its investment in an Affiliated Fund, such Client Plan will not be subject to pay a pro rata share of the fees received by Russell from such Affiliated Fund. Likewise, from the date a Client Plan terminates its investment in a Collective Fund, such Client Plan will not be subject to pay a pro rata share of the fees received by Russell from such Collective Fund, nor will such Client Plan be subject to changes in the portfolio of such Collective Fund, including a pro rata share of any Affiliated Fund-Level Advisory Fee arising from the investment by such Collective Fund in an Affiliated Fund.

Receipt of Fees Pursuant to the Fee Methods

14. The exemption, if granted, includes conditions which detail various methods which ensure that Russell complies with the prohibition against a Client Plan paying double investment management fees, investment advisory, and similar fees for the assets of Client Plans invested directly in shares of an Affiliated Fund or invested indirectly in shares of an Affiliated Fund though a Collective Fund. These methods are described in Section II(a)(l)–(3) of this proposed exemption.

Plan-Level Fees

15. It is represented that currently to the extent that Russell provides discretionary investment management services [57] to any Client Plan that invests directly in shares of an Affiliated Fund or indirectly through a Collective Fund, Russell does not charge any investment management fee, any investment advisory fee, or any similar fee directly to such Client Plan.[58] If, in the future, Russell were to do so, this

[57] Investment management services do not include Asset Allocation Services, as defined above in Section IV(p).

[58] The Department, herein, is not providing relief for the receipt by Russell of a Plan-Level Management Fee for investment management services provided at the plan-level by Russell to a Client Plan.

proposed exemption would require Russell to use the methods, as described in Section II(a) of this exemption, as applicable, so as to avoid receiving ''double'' investment management, investment advisory, and similar fees.

The Collective Fund-Level Management Fee

16. With respect to Collective Funds that are collective investment trusts, Russell Trust currently charges a Trustee Fee that would cover non-fiduciary administrative, custody and record keeping services and may also cover fiduciary investment advisory/management services. If and to the extent that, in the future, Russell causes its Collective Funds to invest in Affiliated Funds, Russell will utilize the methods, described in Section II(a)(2) and in Section II(a)(3), as applicable, so as to avoid charging ''double'' investment advisory and similar fees.

The Affiliated Fund-Level Advisory Fee

17. The Affiliated Fund-Level Advisory Fees are described in the summary prospectus for an Affiliated Fund and include fees for investment advisory services and fees for similar services which Russell receives as compensation for the provision of such services to such Affiliated Fund.

Russell may also charge Plan-Level Management Fees and Collective Fund-Level Management Fees with respect to a Client Plan. Where a Client Plan invests in an Affiliated Fund through a Plan-Level and/or a Collective Fund-Level investment management arrangement, in order to avoid receiving double investment management fees with respect to the Client Plan's investment in an Affiliated Fund, Russell must comply with the conditions, as set forth in Section II(a) of this exemption, as applicable.

Receipt of Fees for Secondary Services

18. Russell also receives from an Affiliated Fund various fees and expenses for dividend disbursing agency, transfer agency, and similar services, including brokerage services. It is represented that all such services are treated as ''Secondary Services.'' The term ''Secondary Services'' is defined above in Section IV(i), to mean a service other than an investment management service, an investment advisory service, and any similar service, which is provided by Russell to an Affiliated Fund, including but not limited to, accounting, administrative, brokerage, and other services. It is represented that all fees for Secondary Services received by Russell at this time are paid to Russell directly by the Affiliated Funds. The negative consent procedure applicable for a Fee Increase for Secondary Services is discussed above in Representation 9.

Russell affiliates may receive commissions for the performance of brokerage services for the mutual funds. Under the conditions of this proposed exemption, if an Affiliated Fund places brokerage transactions with Russell, Russell will provide the Second Fiduciary of each such Client Plan, at least annually, the disclosure described in Section II(o) of this proposed exemption.

19. It is represented that the proposed exemption is in the interest of Client Plans, because it will allow Russell to manage or advise with respect to the assets of such Client Plans invested in shares of an Affiliated Fund, either directly or indirectly through a Collective Fund, in an efficient or timely manner and on terms that might not otherwise be available without exemptive relief.

20. It is represented that the proposed exemption contains sufficient safeguards for the protection of the Client Plans invested in shares of an Affiliated Fund, either directly or indirectly, through a Collective Fund. Prior to any investment by a Client Plan directly or indirectly in shares of an Affiliated Fund, such investment must be authorized by the Second Fiduciary of such Client Plan, based on full and detailed written disclosure concerning such Affiliated Fund.

It is further represented that the proposed exemption is protective of the rights of Client Plans, because any Fee Increase or the addition of an Affiliated Fund to the portfolio of a Collective Fund will be on terms monitored and approved by the Second Fiduciary, who will have the ability to avoid the effect of such Fee Increase and the effect of the addition of an Affiliated Fund to the portfolio of a Collective Fund. Additionally, each investment of the assets of a Client Plan in shares of an Affiliated Fund, either directly or indirectly, will be subject to the ongoing ability of the Second Fiduciary of such Client Plan to terminate the investment in such Affiliated Fund and to terminate the investment in such Collective Fund, without penalty to such Client Plan at any time upon written notice of termination to Russell.

It is also represented that the proposed exemption is protective of the rights of Client Plans, because any Fee Increase or the addition of an Affiliated Fund to the portfolio of a Collective Fund will be on terms monitored and approved by the Second Fiduciary who will have the ability to avoid the effect of such Fee Increase and the effect of the addition of an Affiliated Fund to the portfolio of a Collective Fund. Furthermore, each investment of the assets of a Client Plan in shares of an Affiliated Fund, either directly or indirectly through a Collective Fund, will be subject to the ongoing ability of the Second Fiduciary of such Client Plan to terminate the investment in such Affiliated Fund and to terminate the investment in such Collective Fund, without penalty to such Client Plan (including any fee or charge related to such penalty) at any time upon written notice of termination to Russell.

In addition to the initial disclosures, Russell will provide to such Second Fiduciary ongoing disclosures regarding such Affiliated Funds. Moreover, Russell will respond to inquiries from a Second Fiduciary and will provide any other reasonably available information to a Second Fiduciary upon request.

Finally, Russell, in its fiduciary capacity, will:

(a) Act in the Best Interest of the Client Plans; (b) charge fees which are reasonable in relation to the total services it provides to Client Plans; and (c) not make misleading statements to Client Plans regarding recommended investments, fees, material conflicts of interest, and any other matters relevant to a Client Plan's investment decisions.

21. It is represented that the proposed exemption is administratively feasible because the subject transactions will not require continued monitoring or other involvement on behalf of the Department or the Internal Revenue Service. The use of a Termination Form will provide both a record and a regular reminder to the Second Fiduciary of a Client Plan of such plan's rights vis-à-vis investing in Affiliated Funds, either directly or indirectly through a Collective Fund.

22. Importantly, with very narrow exceptions relating to the negative consent authorizations described above, all of the conditions of PTE 77–4, as amended and/or restated, must be met.

23. In summary, Russell represents that the proposed transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) The Affiliated Funds will provide Client Plans with effective investment vehicles;

(b) The receipt by Russell of an Affiliated Fund-Level Advisory Fee, and the receipt of a fee by Russell for Secondary Services will require authorization in writing in advance by a Second Fiduciary for each such Client Plan after receipt of full written disclosure;

(c) Any authorization made by a Second Fiduciary, acting on behalf of a Client Plan will be terminable at will by such Second Fiduciary, without penalty to such Client Plan (including any fee or charge related to such penalty), following receipt by Russell of a Termination Form or any other written notice of termination from such Second Fiduciary of a Client Plan invested directly in shares of an Affiliated Fund or indirectly through a Collective Fund;

(d) The Termination Form will be supplied to such Second Fiduciary at least annually;

(e) No sales commissions will be paid by Client Plans in connection with the acquisition or in connection with the sale of shares of the Affiliated Funds either directly or through a Collective Fund, and only redemption fees disclosed in the summary prospectus of an Affiliated Fund will be paid by a Client Plan;

(f) All dealings among a Client Plan, any Affiliated Fund, and Russell will be on a basis no less favorable to such Client Plan than such dealings with the other shareholders of such Affiliated Fund;

(g) The purchase price paid and the sales price received by a Client Plan for shares in an Affiliated Fund purchased or sold directly, and the purchase price paid and the sales price received by a Client Plan for shares in an Affiliated Fund purchased or sold indirectly through a Collective Fund, will be the NAV at the time of the transaction, and will be the same purchase price paid and the same sales price received for such shares by any other shareholder of the same class of shares in such Affiliated Fund at that time;

(h) A Client Plan investing in shares of an Affiliated Fund, either directly or indirectly, through a Collective Fund, will not pay ''double fees'' for investment management, investment advisory, and similar fees with respect to the assets of such Client Plan so invested; and

(i) An Auditor on at least an annual basis will verify the proper crediting of any Fee Increase and interest, received by a Client Plan, pursuant to Section II(k)(2), and an audit report shall be completed by such Auditor no later than six (6) months after the period to which it relates.

Notice to Interested Persons

Those persons who may be interested in the publication in the **Federal Register** of the Notice include each Client Plan invested directly in shares of an Affiliated Fund, each Client Plan invested indirectly in shares of an Affiliated Fund through a Collective Fund, and each plan for which Russell provides discretionary management services at the time the proposed exemption is published in the **Federal Register**.

It is represented that notification will be provided to each of these interested persons by first class mail, within fifteen (15) calendar days of the date of the publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing.

The Department must receive all written comments and requests for a hearing no later than forty-five (45) days from the date of the publication of the Notice in the **Federal Register**.

All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department, telephone (202) 693–8456 (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 20th day of July, 2015.

Lyssa E. Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department Of Labor.

[FR Doc. 2015–18144 Filed 7–24–15; 8:45 am]

BILLING CODE 4510–29–P

FEDERAL REGISTER

Vol. 80 Monday,

No. 143 July 27, 2015

Part V

Department of Labor

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions; Notices

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2015–07, Rock Wool Manufacturing Company Salaried Retirement Plan, D–11786; 2015–08, Wells Fargo Company, D–11752; 2015–09, Robert W. Baird & Co. Incorporated, D–11782; 2015–10, Eli Lilly and Company and Elco Insurance Company Limited, L–11784; 2015–11, Robert A. Handelman Roth IRA No. 2, D–11798; 2015–12, Roofers Local 195 Pension Fund and Roofers Local 195 Joint Apprenticeship Training Fund, D–11809 and L–11810; and, 2015–13, First Security Group, Inc. 401(k) and Employee Stock Ownership Plan, D–11826.

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011) [1] and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Rock Wool Manufacturing Company Salaried Retirement Plan (the Plan), Located in Leeds, AL

[Prohibited Transaction Exemption 2015–07; Exemption Application No. D–11726]

Exemption

Section I: Transaction

The restrictions of sections 406(a)(1)(A), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (E) of the Code,[2] shall not apply to the proposed in-kind contribution (the Contribution) to the Plan of a parcel of unimproved real property located at 8200 Thorton Avenue, Leeds, AL (the Property) by Rock Wool Manufacturing Company (Rock Wool), the Plan sponsor and a party in interest with respect to the Plan.

Section II: Conditions

(a) A qualified independent fiduciary (the Independent Fiduciary), acting on behalf of the Plan:

(1) Determines that the Contribution is in the interests of the Plan and protective of the Plan's participants and beneficiaries; and

(2) Determines that the Property is valued for purposes of the Contribution at the Property's fair market value as of the date of the Contribution, as determined by a qualified independent appraiser (the Independent Appraiser);

(b) The Independent Fiduciary performs the following steps in order to make the determinations described above in paragraph (a):

(1) Reviews, negotiates, and approves the specific terms of the Contribution; and

(2) Ensures, for the purposes of the Contribution, that the appraisal report rendered by the Independent Appraiser is consistent with sound principles of valuation;

(c) As of the date of the Contribution, the Independent Fiduciary monitors compliance by Rock Wool with respect to the terms of the Contribution and with respect to the conditions of this exemption, if granted, to ensure that such terms and conditions are satisfied at all times;

(d) The Plan does not pay any commissions, costs or other expenses, including any fees that are currently charged or accrued in the future by the Independent Fiduciary and the Independent Appraiser, in connection with the Contribution;

(e) The terms and conditions of the Contribution are no less favorable to the Plan than the terms and conditions that would be negotiated at arm's length between unrelated third parties under similar circumstances; and

(f) The contributed value of the Property is equal to the Property's fair market value, as determined by the Independent Appraiser on the transaction date, less a 35 percent discount to account for certain marketability limitations.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published on April 15, 2015, at 80 FR 20246. All comments and requests for hearing were due by May 31, 2015. During the comment period, the Department received no comments and no requests for a hearing from interested persons. Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application No. D–11726), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on April 15, 2015, at 80 FR 20246.

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

[2] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

Wells Fargo Company (WFC), Located in San Francisco, California

[Prohibited Transaction Exemption 2015–08; Application No. D–11752]

Exemption

Section I. Covered Transactions

The restrictions of section 406(a)(1)(A) and 406(a)(1)(D), and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), (E), and (F) of the Code,[3] shall not apply to the purchase of certain securities (the Securities), as defined in Section V(j), during the existence of an underwriting or selling syndicate with respect to such Securities by an asset management affiliate of WFC (the Asset Manager(s)), as defined in Section V(f), from any person other than such Asset Manager, where the Asset Manager purchases such Securities, as a fiduciary: (1) On behalf of an employee benefit plan or employee benefit plans (Client Plan(s)), as defined in Section V(g); or (2) on behalf of Client Plans and/or In-House Plan(s), as defined in Section V(m), which are invested in a pooled fund or in pooled funds (Pooled Fund(s)), as defined in Section V(h), under the following circumstances:

(a) Where a broker-dealer affiliated with WFC (an Affiliated Broker-Dealer), as defined in Section V(d), is a manager or member of such syndicate (an affiliated underwriter transaction (AUT)); or

(b) Where an Affiliated Broker-Dealer is a manager or member of such syndicate and a servicer affiliated with WFC (an Affiliated Servicer), as defined in Section V(n), serves as servicer of a trust that issues commercial mortgage backed securities (CMBS), as defined in Section V(r), including servicing one or more of the commercial mortgage backed loans in such trust (an affiliated underwriter and affiliated servicer transaction (AUT and AST)); or

(c) Where an Affiliated Servicer serves as servicer of a trust that issues CMBS, including servicing one or more of the commercial mortgage backed loans in such trust (AST); or

(d) Where a trustee affiliated with WFC (an Affiliated Trustee), as defined in Section V(o), serves as trustee of a trust that issues the Securities (whether or not debt securities) or serves as indenture trustee of Securities that are debt securities (an affiliated trustee transaction (ATT)); or

(e) Where an Affiliated Broker-Dealer is a manager or member of such syndicate and where an Affiliated Trustee serves as trustee of a trust that issues the Securities (whether or not debt securities) or serves as an indenture trustee of Securities that are debt Securities (an affiliated underwriter and affiliated trustee transaction (AUT and ATT).

Section II. Conditions for Transactions Described in Section I(A), (B), (D) and (E)

The transactions described in Section I(a), (b), (d), and (e) are conditioned upon satisfaction of the general conditions, as set forth in Section IV, and upon satisfaction of the following requirements:

(a)(1) In the case of a transaction described in Section I(b), the Securities to be purchased are CMBS, as defined in Section V(r). In the case of transactions described in Section I(a), (d), and (e) the Securities to be purchased are either—

(i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a *et seq.*). If the Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities:

(A) Are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States;

(B) Are issued by a bank;

(C) Are exempt from such registration requirement pursuant to a federal statute other than the 1933 Act; or

(D) Are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (the 1934 Act) (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding twelve (12) months; or

(ii) Part of an issue that is an eligible Rule 144A offering (Eligible Rule 144A Offering), as defined in SEC Rule 10f–3 (17 CFR 270.10f–3(a)(4)).[4] Where the Eligible Rule 144A Offering of the Securities is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosures in the offering memorandum;

(2) The Securities to be purchased are purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that —

(i) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such Securities are debt securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased; and

(3) The Securities to be purchased are offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if —-

(i) Such Securities are purchased by others pursuant to a rights offering; or

(ii) Such Securities are offered pursuant to an over-allotment option.

(b) The issuer of the Securities to be purchased must have been in continuous operation for not less than three (3) years, including the operation of any predecessors, unless the Securities to be purchased—

[3] For purposes of this exemption references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[4] SEC Rule 10f–3(a)(4), 17 CFR 270.10f–3(a)(4), states that the term, ''Eligible Rule 144A Offering'' means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the 1933 Act [15 U.S.C. 77d(d)], Rule 144A thereunder [§ 230.144A of this chapter], or Rules 501–508 thereunder [§§ 230.501–230–508 of this chapter];

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

(1) Are non-convertible debt securities rated in one of the four highest rating categories by a rating agency (a Rating Agency or collectively, Rating Agencies), as defined in Section V(q); provided that none of the Rating Agencies rates such securities in a category lower than the fourth highest rating category; or

(2) Are debt securities issued or fully guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Are debt securities which are fully guaranteed by a person (the Guarantor) that has been in continuous operation for not less than three (3) years, including the operation of any predecessors, provided that such Guarantor has issued other securities registered under the 1933 Act; or if such Guarantor has issued other securities which are exempt from such registration requirement, such Guarantor has been in continuous operation for not less than three (3) years, including the operation of any predecessors, and such Guarantor:

(i) Is a bank; or

(ii) Is an issuer of securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(iii) Is an issuer of securities that are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such securities and that has filed all reports required to be filed hereunder with the SEC during the preceding twelve (12) months.

(c) The aggregate amount of Securities of an issue purchased by the Asset Manager with the assets of all Client Plans, and the assets, calculated on a pro rata basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the Asset Manager, and the assets of plans to which the Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c) does not exceed:

(1) 10 percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities; or

(2) 35 percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in one of the four highest rating categories by at least one of the Rating Agencies; provided that none of the Rating Agencies rates such Securities in a category lower than the fourth highest rating category; and

(3) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) may not be used to purchase any Securities being offered, if such Securities are debt securities rated lower than the fourth highest rating category by any of the Rating Agencies; and

(4) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Section II(c)(1), and (2), the amount of Securities in any issue (whether equity or debt securities) purchased pursuant to transactions described in Section I(a), (b), (d), and (e) by the Asset Manager on behalf of any single Client Plan, either individually or through investment, calculated on a pro rata basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue, and;

(5) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages described in Section II(c)(1), (2) and (4) is the total of:

(i) The principal amount of the offering of such class of Securities sold by underwriters or members of the selling syndicate to ''qualified institutional buyers'' (QIBs), as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)); plus

(ii) The principal amount of the offering of such class of Securities in any concurrent public offering.

(d) The aggregate amount to be paid by any single Client Plan in purchasing any Securities described in Section I(a), (b), (d), and (e), including any amounts paid by any Client Plan or In-House Plan in purchasing such Securities through a Pooled Fund, calculated on a pro rata basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan or In-House Plan, as of the last day of the most recent fiscal quarter of such Client Plan or In-House Plan prior to such transaction.

(e) If the transaction is an AUT, as described in Section I(a), (b), and (e), the Affiliated Broker-Dealer does not receive, either directly, indirectly, or through designation, any selling concession, or other compensation or consideration that is based upon the amount of Securities purchased by any single Client Plan, or that is based upon the amount of Securities purchased by Client Plans or In-House Plans through Pooled Funds, pursuant to this exemption. In this regard, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designations generated by purchases of the Securities by the Asset Manager on behalf of any single Client Plan or on behalf of any Client Plan or In-House Plan in Pooled Funds.

(f)(1) If the transaction is an AUT as described in Section I(a), (b), and (e), the amount the Affiliated Broker-Dealer receives in management, underwriting, or other compensation or consideration is not increased through an agreement, arrangement, or understanding for the purpose of compensating such Affiliated Broker-Dealer for foregoing any selling concessions for those Securities sold. Except as described above, nothing in this Section II(f)(1) shall be construed as precluding an Affiliated Broker-Dealer from receiving management fees for serving as manager of an underwriting or selling syndicate, underwriting fees for assuming the responsibilities of an underwriter in the underwriting or selling syndicate, or other compensation or consideration that is not based upon the amount of Securities purchased by the Asset Manager on behalf of any single Client Plan, or on behalf of any Client Plan or In-House Plan participating in Pooled Funds; and

(2) Each Affiliated Broker-Dealer shall provide, on a quarterly basis, to the Asset Manager a written certification, signed and dated by an officer, as defined in Section V(s), of such Affiliated Broker-Dealer, stating that the amount that each such Affiliated Broker-Dealer received in compensation or consideration during the past quarter, in connection with any transactions described in Section I(a), (b), (d), and (e) was not adjusted in a manner inconsistent with Section II(e), (f), or Section IV(d).

(g)(1) The transactions described in Section I(a), (b), (d), and (e), are performed under a written authorization executed in advance by an Independent Fiduciary of each single Client Plan (the Independent Fiduciary), as defined in Section V(i); and

(2) The authorization described in Section II(g)(1), to engage in the transactions described in Section I(a), (b), (d), and (e) may be terminated at will by the Independent Fiduciary of a single Client Plan, without penalty to such single Client Plan, within five (5) days after receipt by the Asset Manager of a written notification from such Independent Fiduciary that the authorization to engage, on behalf of such single Client Plan, in such transactions is terminated.

(h) Prior to the execution by an Independent Fiduciary of a single Client Plan of the written authorization described in Section II(g)(1), the following information and materials (which may be provided electronically) must be provided by the Asset Manager to such Independent Fiduciary:

(1) A copy of the Notice of Proposed Exemption (the Notice) and, if granted, a copy of the final exemption (the Grant) as published in the **Federal Register**, provided that the Notice and the Grant are supplied simultaneously; and

(2) Any other reasonably available information regarding the transactions described in Section I(a), (b), (d), and (e) that such Independent Fiduciary requests the Asset Manager to provide.

(i)(1) In the case of an existing employee benefit plan investor (or existing In-House Plan investor, as the case may be) in a Pooled Fund, such Pooled Fund may not engage in any transactions described in Section I(a), (b), (d), and (e), unless the Asset Manager provides the written information, as described below, and within the time period described below in this Section II(i)(2), to the Independent Fiduciary of each such plan participating in such Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund);

(2) The following information and materials (which may be provided electronically) shall be provided by the Asset Manager not less than 45 days prior to such Asset Manager engaging in the transactions described in Section I(a), (b), (d), and (e) on behalf of a Pooled Fund, and provided further that the information described in this Section II(i)(2)(i) and (iii) is supplied simultaneously:

(i) A notice of the intent of such Pooled Fund to purchase Securities, pursuant to this exemption for the transactions described in Section I(a), (b), (d), and (e), a copy of this Notice, and if granted, a copy of the Grant, as published in the **Federal Register**;

(ii) Any other reasonably available information regarding the transactions described in Section I(a), (b), (d), and (e) that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the Asset Manager to provide; and

(iii) A termination form (the Termination Form), as defined in Section V(p); and

(3) The Independent Fiduciary of an existing employee benefit plan investor (or fiduciary of an In-House Plan) participating in a Pooled Fund has an opportunity to withdraw the assets of such plan (or such In-House Plan) from a Pooled Fund for a period of no more than thirty (30) days after such plan's (or such In-House Plan's) receipt of the initial notice of intent described in Section II(i)(2)(i) and to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Failure of the Independent Fiduciary of an existing employee benefit plan investor (or fiduciary of such In-House Plan) to return the Termination Form to the Asset Manager in the case of such plan (or In-House Plan) participating in a Pooled Fund within the time period specified in Section V(p), shall be deemed to be an approval by such plan (or such In-House Plan) of its participation in the transactions described in Section I(a), (b), (d), and (e), as an investor in such Pooled Fund.

(j) In the case of each plan (and in the case of each In-House Plan) whose assets are proposed to be invested in a Pooled Fund after such Pooled Fund has satisfied the conditions set forth in this exemption to engage in the transactions described in Section I(a), (b), (d), and (e), the investment by such plan (or by such In-House Plan) in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary representing such plan (or the prior written authorization by the fiduciary of such In-House Plan, as the case may be), following the receipt by such Independent Fiduciary of such plan (or by the fiduciary of such In-House Plan, as the case may be) of the written information described in Section II(i)(2)(i) and (ii), provided that the Notice and the Grant described in Section II(i)(2)(i) are provided simultaneously.

(k) At least once every three months, and not later than 45 days following the period to which such information relates the Asset Manager shall furnish:

(1) In the case of each single Client Plan that engages in the transactions described in Section I(a), (b), (d), and (e), the information described in this Section II(k)(3)–(7) to the Independent Fiduciary of each such single Client Plan;

(2) In the case of each Pooled Fund in which a Client Plan (or in which an In-House Plan) invests, the information described in this Section II(k)(3)–(6) and (8) to the Independent Fiduciary of each such Client Plan (and to the fiduciary of each such In-House Plan) invested in such Pooled Fund;

(3) A quarterly report (the Quarterly Report) (which may be provided electronically) which discloses all the Securities purchased during the period to which such report relates, on behalf of the Client Plan, In-House Plan, or Pooled Fund to which such report relates, and which discloses the terms of each of the transactions described in such report, including:

(i) The type of Securities (including the rating of any Securities which are debt securities) involved in each of the transactions;

(ii) The price at which the Securities were purchased in each of the transactions;

(iii) The first day on which any sale was made during the offering of the Securities;

(iv) The size of the issue of the Securities involved in each of the transactions;

(v) The number of Securities purchased by the Asset Manager for the Client Plan, In-House Plan, or Pooled Fund to which each of the transactions relates;

(vi) The identity of the underwriter from whom the Securities were purchased for each of the transactions;

(vii) In the case of AUTs as described in Section I(a), (b), and (e), the underwriting spread in each of the transactions (*i.e.,* the difference, between the price at which the underwriter purchases the Securities from the issuer and the price at which the Securities are sold to the public);

(viii) In the case of ATTs as described in Section I(d), and (e), the basis upon which the Affiliated Trustee is compensated in each of the transactions;

(ix) The price at which any of the Securities purchased during the period to which such report relates were sold;

(x) The market value at the end of the period to which such report relates of the Securities purchased during such period and not sold; and

(xi) In the case of an AST as described in Section I(b), the basis upon which the Affiliated Servicer is compensated;

(4) The Quarterly Report contains:

(i) In the case of AUTs, as described in Section I(a), (b), and (e), a representation that the Asset Manager has received a written certification signed by an officer, as defined in Section V(s), of the Affiliated Broker-Dealer as described in Section II(f)(2), affirming that, as to each such AUT during the past quarter, such Affiliated Broker-Dealer acted in compliance with Section II(e), (f), and Section IV(d);

(ii) In the case of ATTs as described in Section I(d) and (e), a representation by the Asset Manager affirming that, as to each such ATT, the transaction was not part of an agreement, arrangement, or understanding designed to benefit the Affiliated Trustee;

(iii) In the case of an AST as described in Section I(b), a representation of the Asset Manager affirming that, as to each

such AST, the transaction was not part of an agreement, arrangement, or understanding designed to benefit the Affiliated Servicer; and

(iv) A representation that copies of such certifications will be provided upon request;

(5) A disclosure in the Quarterly Report that states that any other reasonably available information regarding the transactions described in Section I(a), (b), (d), and (e), that an Independent Fiduciary (or fiduciary of an In-House Plan) requests will be provided, including, but not limited to:

(i) The date on which the Securities were purchased on behalf of the Client Plan (or the In-House Plan) to which the disclosure relates (including Securities purchased by Pooled Funds in which such Client Plan (or such In-House Plan) invests;

(ii) The percentage of the offering purchased on behalf of all Client Plans (and the pro rata percentage purchased on behalf of Client Plans and In-House Plans investing in Pooled Funds); and

(iii) The identity of all members of the underwriting syndicate;

(6) The Quarterly Report discloses any instance during the past quarter where the Asset Manager was precluded for any period of time from selling Securities purchased for the transactions described in Section I(a), (b), (d), and (e), in that quarter because of its status as an affiliate of an Affiliated Broker-Dealer and, as applicable, as an affiliate of an Affiliated Trustee, or as an affiliate of an Affiliated Servicer and the reason for this restriction;

(7) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each single Client Plan that engages in any of the transactions described in Section I(a), (b), (d), and (e) that the authorization to engage in such covered transactions may be terminated, without penalty to such single Client Plan, within five (5) days after the date that the Independent Fiduciary of such single Client Plan informs the person identified in such notification that the authorization to engage in such transactions is terminated; and

(8) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each Client Plan (and to the fiduciary of each In-House Plan) that engages in any of the transactions described in Section I(a), (b), (d), and (e) through a Pooled Fund, that the investment in such Pooled Fund may be terminated, without penalty to such Client Plan (or such In-House Plan), within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans, after the date that the Independent Fiduciary of such Client Plan (or the fiduciary of such In-House Plan, as the case may be) informs the person identified in such notification that the investment in such Pooled Fund is terminated.

(l) The Asset Manager, the Affiliated Broker-Dealer, the Affiliated Trustee, and the Affiliated Servicer, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any of the transactions described in Section I(a), (b), (d), and (e), such records as are necessary to enable the persons described in Section II(m) to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a plan which engages in any of the transactions described in Section I(a), (b), (d), and (e), other than WFC, the Asset Manager, the Affiliated Broker-Dealer, the Affiliated Trustee, and the Affiliated Servicer, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination, as required by Section II(m); and

(2) A separate prohibited transaction shall not be considered to have occurred if, due to circumstances beyond the control of WFC, the Asset Manager, the Affiliated Broker-Dealer, and the Affiliated Trustee, or the Affiliated Servicer, as applicable, such records are lost or destroyed prior to the end of the six (6) year period.

(m)(1) Except as provided in Section II(m)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section II(l) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the SEC; or

(ii) Any fiduciary of any plan that engages in any of the transactions described in Section I(a), (b), (d), and (e), or any duly authorized employee or representative of such fiduciary; or

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by a plan that engages in any of the transactions described in Section I(a), (b), (d), and (e), or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a plan that engages in any of the transactions described in Section I(a), (b), (d), and (e), or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in Section II(m)(1)(ii)—(iv) shall be authorized to examine trade secrets of WFC, the Asset Manager, the Affiliated Broker-Dealer, the Affiliated Trustee, or the Affiliated Servicer, or commercial or financial information which is privileged or confidential; and

(3) Should WFC, the Asset Manager, the Affiliated Broker-Dealer, the Affiliated Trustee, or the Affiliated Servicer refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(m)(2), the Asset Manager shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising the person who requested such information of the reasons for the refusal and that the Department may request such information.

(n) An indenture trustee whose affiliate has, within the prior 12 months, underwritten any Securities for an obligor of the indenture Securities must resign as indenture trustee, if a default occurs upon the indenture Securities, within a reasonable amount of time of such default.

Section III. Conditions for Transactions Described in Section I(C)

The transaction described in Section I(c) is conditioned upon satisfaction of the general conditions, as set forth in Section IV and upon satisfaction of the following requirements:

(a) The Securities to be purchased are CMBS, as defined in Section V(r).

(b) The purchase of the CMBS meets the conditions of an applicable underwriter exemption (the Underwriter Exemption(s)).[5] (c)(1) The aggregate amount of CMBS of an issue purchased by the Asset Manager with:

(i) The assets of all Client Plans;

(ii) The assets, calculated on a pro rata basis, of all Client Plans and In-House

[5] The Underwriter Exemptions are a group of individual exemptions granted by the Department to provide relief for the origination and operation of certain asset pool investment trusts and the acquisition, holding, and disposition by plans of certain asset-backed pass-through certificates representing undivided interests in those investment trusts. The most recent amendment to the Underwriter Exemptions is the Amendment to Prohibited Transaction Exemption 2007–05, 72 FR 13130 (March 20, 2007), Involving Prudential Securities Incorporated, et al., To Amend the Definition of ''Rating Agency,'' [Prohibited Transaction Exemption 2013–08, 78 FR 41090 (July 9, 2013); Exemption Application No. D–11718.]

Plans investing in Pooled Funds managed by the Asset Manager; and

(iii) The assets of plans to which the Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c) does not exceed 35 percent (35%) of the total amount of the CMBS being offered in an issue;

(2) Notwithstanding the percentage of CMBS of an issue permitted to be acquired, as set forth in Section III(c)(1), the amount of CMBS in any issue purchased by the Asset Manager on behalf of any single Client Plan, either individually or through investment, calculated on a pro rata basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such CMBS being offered in such issue; and

(3) If purchased in an Eligible Rule 144A Offering, the total amount of the CMBS being offered for purposes of determining the percentages described in this Section III(c) is the total of:

(i) The principal amount of the offering of such class of CMBS sold by underwriters or members of the selling syndicate to QIBs; plus

(ii) The principal amount of the offering of such class of CMBS in any concurrent public offering.

(d) The aggregate amount to be paid by any single Client Plan in purchasing any CMBS, including any amounts paid by any Client Plan or In-House Plan in purchasing such CMBS through a Pooled Fund, calculated on a pro rata basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan or In-House Plan, as of the last day of the most recent fiscal quarter of such Client Plan or In-House Plan prior to such transaction.

(e)(1) The transaction described in Section I(c) is performed under a written authorization executed in advance by an Independent Fiduciary of each single Client Plan, as defined in Section V(i); and

(2) The authorization described in Section III(e)(1) to engage in the transaction described in Section I(c) may be terminated at will by the Independent Fiduciary of a single Client Plan, without penalty to such single Client Plan within five (5) days after receipt by the Asset Manager of a written notification from such Independent Fiduciary that the authorization to engage, on behalf of such single Client Plan, in such transactions is terminated.

(f) The following information and materials (which may be provided electronically) must be provided by the Asset Manager to the Independent Fiduciary of a single Client Plan not less than 45 days prior to such Asset Manager engaging in the transaction described in Section I(c), pursuant to this exemption:

(1) A notice of the intent of the Asset Manager to purchase CMBS, pursuant to Section I(c), a copy of the Notice, and, if granted, a copy of the Grant, as published in the **Federal Register**, provided that the Notice and the Grant are supplied simultaneously;

(2) A notice describing the relationship of the Affiliated Servicer to the Asset Manager;

(3) The basis upon which the Affiliated Servicer is compensated and a representation by the Asset Manager affirming that, the transaction described in Section I(c) was not part of an agreement, arrangement, or understanding designed to benefit the Affiliated Servicer; and

(4) Any other reasonably available information regarding the transaction described in Section I(c) that the Independent Fiduciary of such single Client Plan requests the Asset Manager to provide.

(g)(1) In the case of an existing employee benefit plan investor (or existing In-House Plan investor, as the case may be) in a Pooled Fund, such Pooled Fund may not engage in a transaction, pursuant to Section I(c), unless the Asset Manager provides the written information, as described below and within the time period described below in this Section III(g)(2), to the Independent Fiduciary of each such plan participating in such Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund);

(2) The following information and materials, (which may be provided electronically) shall be provided by the Asset Manager not less than 45 days prior to such Asset Manager engaging in a transaction described in Section I(c) on behalf of a Pooled Fund, pursuant to this exemption; and provided further that the information described in this Section III(g)(2)(i), (ii), (iii), and (v) is supplied simultaneously:

(i) A notice of the intent of such Pooled Fund to purchase CMBS, pursuant to this exemption for a transaction described in Section I(c), a copy of this Notice, and a copy of the Grant, as published in the **Federal Register**;

(ii) A notice describing the relationship of the Affiliated Servicer to the Asset Manager;

(iii) Information on the basis upon which the Affiliated Servicer is compensated and a representation by the Asset Manager affirming that, such transaction, as described in Section I(c), was not part of an agreement, arrangement, or understanding designed to benefit the Affiliated Servicer;

(iv) Any other reasonably available information regarding such transaction described in Section I(c) that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the Asset Manager to provide; and

(v) A Termination Form, as defined in Section V(p); and

(3) The Independent Fiduciary of an existing employee benefit plan investor (or fiduciary of an In-House Plan) participating in a Pooled Fund has an opportunity to withdraw the assets of such plan (or such In-House Plan) from a Pooled Fund for a period of no more than thirty (30) days after such plan's (or such In-House Plan's) receipt of the initial notice of intent described in Section III(g)(2)(i) and to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Failure of the Independent Fiduciary of an existing employee benefit plan investor (or fiduciary of such In-House Plan) to return the Termination Form to the Asset Manager in the case of such plan (or In-House Plan) participating in a Pooled Fund within the time period specified in Section V(p), shall be deemed to be an approval by such plan (or such In-House Plan) of its participation in a transaction described in Section I(c), as an investor in such Pooled Fund.

(h)(1) In the case of each plan (and in the case of each In-House Plan) whose assets are proposed to be invested in a Pooled Fund after such Pooled Fund has satisfied the conditions set forth in this exemption for a transaction described in Section I(c), the investment by such plan (or by such In-House Plan) in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary representing such plan (or the prior written authorization by the fiduciary of such In-House Plan, as the case may be), following the receipt by such Independent Fiduciary of the plan (or by the fiduciary of the In-House Plan, as the case may be) of the written information described in Section III(g)(2); provided that the Notice and, if granted, the Grant described in Section III(g)(2)(i) are provided simultaneously.

(i) The requirements of Section IV are met.

Section IV. General Conditions for Transactions Described in Section I

(a) For purposes of engaging in the transactions described in Section I, each Client Plan (and each In-House Plan) shall have total net assets with a value of at least $50 million (the $50 Million

Net Asset Requirement). For purposes of engaging in the transactions described in Section I, involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be) (the $100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in the transactions described in Section I, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets with a value of at least $50 million. Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets with a value of at least $50 million, the $50 Million Net Asset Requirement will be met, if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (and by In-House Plans) each of which has total net assets with a value of at least $50 million.

For purposes of a Pooled Fund engaging in the transactions described in Section I involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be). Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or In-House Plan, as the case may be), the $100 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (and by In-House Plans) each of which have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be), and the Pooled Fund itself qualifies as a QIB, as determined pursuant to SEC Rule 144A (17 CFR 230.144A(a)(F)).

For purposes of the net asset requirements described in Section IV(a), where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $50 Million Net Asset Requirement (or in the case of an Eligible Rule 144A Offering, the $100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

(b) The Asset Manager is a ''qualified professional asset manager'' (QPAM), as that term is defined under Section V(a) of Prohibited Transaction Exemption (PTE 84–14),[6] as amended from time to time, or any successor exemption thereto. In addition to satisfying the requirements for a QPAM under Section V(a) of PTE 84–14, the Asset Manager also must have total client assets under its management and control in excess of $5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of $1 million.

(c) At the time a transaction described in Section I is entered into, no more than 20 percent of the assets of a Pooled Fund are comprised of assets of In-House Plans for which WFC, the Asset Manager, the Affiliated Broker-Dealer, the Affiliated Trustee, the Affiliated Servicer, or any affiliate thereof exercises investment discretion.

(d) The transactions described in Section I are not part of an agreement, arrangement, or understanding designed to benefit the Asset Manager or any affiliate.

(e) For purposes of Section II(i), Section II(j), Section III(g) and Section III(h), the requirement that the fiduciary responsible for the decision to authorize the transactions described in Section I, as applicable, for each plan proposing to invest in a Pooled Fund be independent of WFC and its affiliates shall not apply in the case of an In-House Plan.

(f) Subsequent to the initial authorization, pursuant to Section II(g) and Section III(e), by an Independent Fiduciary of a single Client Plan permitting the Asset Manager to engage in transactions described in Section I, as applicable, and subsequent to the initial authorization, pursuant to Section II(i), Section II(j), Section III(g), and Section III(h), by an Independent Fiduciary of a plan (or by a fiduciary of an In-House Plan) to invest in a Pooled Fund that engages in the transactions described in Section I, as applicable, the Asset Manager will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding such transactions that the Independent Fiduciary of such plan, such Client Plan (or of such In-House Plan, as the case may be) requests the Asset Manager to provide.

(g) The Independent Fiduciary of each Client Plan (and the fiduciary of each In-House Plan) that engages in the transactions described in Section I through a Pooled Fund may terminate the investment in such Pooled Fund, without penalty to such Client Plan (or such In-House Plan), within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans, after the date that the Independent Fiduciary of such Client Plan (or the fiduciary of such In-House Plan, as the case may be) informs the Asset Manager that the investment in such Pooled Fund is terminated.

(h) The Applicant establishes internal policies that restrict the contact and the flow of information between investment management personnel and non-investment management personnel in the same or affiliated financial service firms.

(i) The Applicant establishes business separation policies and procedures for WFC and its affiliates which are also structured to restrict the flow of any information to or from the Asset Manager that could limit its flexibility in managing client assets, and of information obtained or developed by the Asset Manager that can be used by other parts of the organization, to the detriment of the Asset Manager's clients.

Section V. Definitions

(a) The term ''the Applicant'' means WFC.

(b) The term ''affiliate'' of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term ''Affiliated Broker-Dealer'' means any broker-dealer affiliate, as the term ''affiliate'' is defined in Section V(b)(1), of the Applicant, as the term ''Applicant'' is defined in Section V(a), that meets the requirements of this exemption. Such Affiliated Broker-Dealer may participate in an underwriting or selling syndicate as a manager or member.

(e) The term ''manager'' used in Section V(d) above and Section V(f) below, means any member of an underwriting or selling syndicate who,

[6] 49 FR 9494 (March 13, 1984), as amended, 70 FR 49305 (August 23, 2005).

either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the Securities, as defined in Section V(j), being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(f) The term ''Asset Manager(s)'' means WFC or an affiliate of WFC, as the term ''affiliate'' is defined in Section V(b)(1), which entity acts as the fiduciary with respect to Client Plan(s), as the term ''Client Plan(s)'' is defined in Section V(g), or as the fiduciary with respect to Pooled Fund(s), as the term ''Pooled Fund(s)'' is defined in Section V(h). For purposes of this exemption, the Asset Manager must qualify as a QPAM, as that term is defined under Section V(a) of PTE 84–14, 49 FR 9494, March 13, 1984, *as amended at,* 75 FR 38837, (July 6, 2010). In addition to satisfying the requirements for a QPAM under Section V(a) of PTE 84–14, the Asset Manager must also have total client assets under its management and control in excess of $5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of $1 million.

(g) The term ''Client Plan(s)'' means an employee benefit plan or employee benefit plans that are subject to the Act and/or the Code, and for which plan(s) an Asset Manager exercises discretionary authority or discretionary control respecting management or disposition of some or all of the assets of such plan(s). The term ''Client Plan(s)'' excludes In-House Plans, as defined in Section V(m).

(h) The term ''Pooled Fund(s)'' means a common or collective trust fund(s) or a pooled investment fund(s):

(1) In which employee benefit plan(s) subject to the Act and/or Code invest;

(2) Which is maintained by an Asset Manager, as defined in Section V(f); and

(3) For which such Asset Manager exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s).

(i)(1) The term ''Independent Fiduciary'' means a fiduciary of a plan who is unrelated to, and independent of WFC, and is unrelated to, and independent of any affiliate of WFC. For purposes of this exemption, a fiduciary of a plan will be deemed to be unrelated to, and independent of WFC, and unrelated to, and independent of any affiliate of WFC, if such fiduciary represents in writing that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for the transactions described in Section I is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of WFC, or of any affiliate of WFC, and represents that such fiduciary shall advise the Asset Manager within a reasonable period of time after any change in such facts occur;

(2) Notwithstanding anything to the contrary in this Section V(i), a fiduciary of a plan is not independent:

(i) If such fiduciary, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with WFC, or any affiliate of WFC;

(ii) If such fiduciary directly or indirectly receives any compensation or other consideration from WFC, or from any affiliate of WFC for his or her own personal account in connection with any transaction described in this exemption; and

(iii) If any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager responsible for the transactions described in Section I is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the sponsor of a plan or of the fiduciary responsible for the decision to authorize or terminate authorization for the transactions described in Section I. However, if such individual is a director of the sponsor of a plan or of the responsible fiduciary, and if he or she abstains from participation in: (A) The choice of such plan's investment manager/adviser; and (B) the decision to authorize or terminate authorization for the transactions described in Section I, then Section V(i)(2)(iii) shall not apply.

(j) The term ''Securities'' shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a 2(36) (1996)). For purposes of this exemption, mortgage-backed or other asset backed securities rated by one of the Rating Agencies, as defined in Section V(q), will be treated as debt securities.

(k) The term ''Eligible Rule 144A Offering'' shall have the same meaning as defined in SEC Rule 10f–3(a)(4)

(17 CFR 270.10f–3(a)(4))under the 1940 Act.

(l) The term ''qualified institutional buyer'' or the term, ''QIB,'' shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(m) The term ''In-House Plan(s)'' means an employee benefit plan or employee benefit plans that is/are subject to the Act and/or the Code, and that is/are sponsored by WFC or by an affiliate of WFC, as the term, affiliate is defined in Section V(b)(1), for its own employees.

(n) The term ''Affiliated Servicer'' means any affiliate of WFC, as defined in Section V(b)(1), that serves as a servicer of a trust that issues CMBS (including servicing one or more of the commercial mortgage loans in such trust).

(o) The term ''Affiliated Trustee'' means any affiliate of WFC, as affiliate is defined in Section V(b)(1), which is a bank or trust company that serves as trustee of a trust that issues Securities which are asset-backed securities or as indenture trustee of Securities which are either asset-backed securities or other debt securities that meet the requirements of Section II of this exemption. For purposes of this exemption, other than Section II(o), performing services as custodian, paying agent, registrar, or similar ministerial capacities is, in each case, also considered as serving as trustee or indenture trustee.

(p) The term ''Termination Form'' is a form provided by the Asset Manager to the Independent Fiduciary of each such plan participating in a Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund) which expressly provides an election for the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Such form shall include instructions specifying how to use the form. Specifically, the instructions must explain that such plan (or such In-House Plan) has an opportunity to withdraw its assets from a Pooled Fund for a period of no more than thirty (30) days after such plan's (or such In-House Plan's) receipt of the initial notice of intent described in Section II(i)(2)(i) or in Section III(g)(2)(i), as applicable, and that the failure of the Independent Fiduciary of such plan (or fiduciary of such In-House Plan) to return the Termination Form to the Asset Manager in the case of a plan (or In-House Plan) participating in a Pooled Fund within the time period, specified in Section II(i)(2)(iii) or in Section III(g)(2)(iii), as applicable, shall be deemed to be an approval by such plan (or such In-House Plan) of its participation in the transactions described in Section I, as applicable, as an investor in such Pooled Fund.

Further, the instructions will identify WFC, the Asset Manager, the Affiliated Broker-Dealer, and as applicable, the

Affiliated Trustee, or the Affiliated Servicer, and will provide the address of the Asset Manager. The instructions will state that this exemption will not be available, unless the fiduciary of each plan participating in any of the transactions described in Section I, as applicable, as an investor in a Pooled Fund is, in fact, independent of WFC, the Asset Manager, the Affiliated Broker-Dealer, and, as applicable, the Affiliated Trustee or the Affiliated Servicer. The instructions will also state that the fiduciary of each such plan must advise the Asset Manager, in writing, if it is not an ''Independent Fiduciary,'' as that term is defined in Section V(i).

(q) The term ''Rating Agency'' or collectively, ''Rating Agencies'' means a credit rating agency that:

(1) Is currently recognized by the SEC as a nationally recognized statistical ratings organization (NRSRO);

(2) Has indicated on its most recently filed SEC Form NRSRO that it rates ''issuers of asset-backed securities;'' and

(3) Has had, within a period not exceeding twelve (12) months prior to the initial issuance of the securities, at least three (3) ''qualified ratings engagements.'' A ''qualified ratings engagement'' is one:

(i) Requested by an issuer or underwriter of securities in connection with the initial offering of the securities;

(ii) For which the credit rating agency is compensated for providing ratings;

(iii) Which is made public to investors generally; and

(iv) Which involves the offering of securities of the type that would be granted relief by the Underwriter Exemptions.

(r) The term ''CMBS'' means pass-through certificates or trust certificates that represent a beneficial ownership interest in the assets of an issuer which is a trust and which entitle the holder to payments of principal, interest, and/or other payments made with respect to the assets of such trust and the corpus or assets of which consist solely of obligations that bear interest or are purchased at a discount and which are secured by commercial real property (including obligations secured by leasehold interests on commercial real property) that are rated in one of the four highest rating categories by the Rating Agencies; provided that none of the Rating Agencies rates such securities in a category lower than the fourth highest rating category.

(s) The term ''officer'' means a president, any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance), or any other officer who performs a policy-making function for WFC or any affiliate thereof.

Effective Date: This exemption will be effective as of the date the Grant is published in the **Federal Register**.

Written Comments/Notice of Technical Correction

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption (the Notice), published in the **Federal Register** on November 26, 2014 at 79 FR 70631. All comments and requests for hearing were due by January 10, 2015. During the comment period, the Department received no comments and no requests for a hearing from interested persons with respect to the Notice. However, upon careful review of the Notice, the Department observed that Section II(o) had been misalphabetized and the reference should have been to Section II(n) instead. The Department has corrected the error in this grant notice.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application No. D–11752), including all supplemental submissions received by the Department, is available for public inspection at the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. For a more complete statement of facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published in the **Federal Register** on November 26, 2014, at 79 FR 70631.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

Robert W. Baird & Co. Incorporated (Baird), Located in Milwaukee, Wisconsin

[Prohibited Transaction Exemption 2015–09; Application No. D–11782]

Exemption

Section I. Transactions

The restrictions of sections 406(a)(1)(D) and 406(b) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986, as amended (the Code) by reason of sections 4975(c)(1)(D), (E), and (F) of the Code, shall not apply to:

(a) The acquisition, sale or exchange by an Account of shares of an open-end investment company (the Fund) registered under the Investment Company Act of 1940 (the 1940 Act), the investment adviser for which is also a fiduciary with respect to the Account (or an affiliate of such fiduciary) (hereinafter, Baird and all its affiliates will be referred to as Investment Adviser) in connection with the Investment Adviser's discretionary management of the Account,

(b) the in-kind redemptions of shares or acquisitions of shares of the Fund in exchange for Account assets transferred in-kind from an Account in connection with the Investment Adviser's discretionary management of the Account,

(c) the receipt of fees for acting as an investment adviser for such Funds, in connection with the investment by the Accounts in shares of the Funds, and

(d) the receipt of fees for providing Secondary Services to the Funds in connection with the investment by the Accounts in shares of the Funds, provided that the applicable conditions set forth in Sections II and III are met.

Section II. General Conditions

(a) The Account does not pay a sales commission or other similar fees to the Investment Adviser or its affiliates in connection with such acquisition, sale, or exchange;

(b) The Account does not pay a purchase, redemption or similar fee to the Investment Adviser in connection with the acquisition of shares by the Account or the sale by the Account to the Fund of such shares;

(c) The Account may pay a purchase or redemption fee to the Fund in connection with an acquisition or sale of shares by the Account, that is fully disclosed in the Fund's prospectus in effect at all times. Furthermore, any purchase fee paid by the Account to the Fund: (1) Is intended to approximate the difference between ''bid'' and ''asked'' prices on the fixed income securities that the Fund will purchase using the proceeds from the sale of Fund shares to the Account; and (2) is not charged on any assets transferred in-kind to the Fund;

(d) The Account does not pay an investment management, investment advisory or similar fee with respect to Account assets invested in Fund shares for the entire period of such investment. This condition does not preclude the payment of investment advisory fees by the Fund under the terms of its investment advisory agreement adopted in accordance with section 15 of the 1940 Act. This condition also does not preclude payment of an investment

advisory fee by the Account under the following circumstances:

(1) For Accounts billed in arrears, an investment advisory fee may be paid based on total Account assets from which a credit has been subtracted representing the Account's pro rata share of investment advisory fees paid by the Fund;

(2) For Accounts billed in advance, the Investment Adviser must employ a reasonably designed method to ensure that the amount of the prepaid fee that constitutes the fee with respect to the Account assets invested in the Fund shares:

(A) Is anticipated and subtracted from the prepaid fee at the time of payment of such fee, and

(B) Is returned to the Account no later than during the immediately following fee period, or

(C) Is offset against the prepaid fee for the immediately following fee period or for the fee period immediately following thereafter. For purposes of this paragraph, a fee shall be deemed to be prepaid for any fee period if the amount of such fee is calculated as of a date not later than the first day of such period; or

(3) An investment advisory fee may be paid by an Account based on the total assets of the Account, if the Account will receive a cash rebate of such Account's proportionate share of all fees charged to the Fund by the Investment Adviser for investment management, investment advisory or similar services no later than one business day after the receipt of such fees by the Investment Adviser;

(e) The crediting, offsetting or rebating of any fees in Section II(d) is audited at least annually by the Investment Adviser through a system of internal controls to verify the accuracy of the fee mechanism adopted by the Investment Adviser under Section II(d). Instances of non-compliance must be corrected and identified, in writing, in a separate disclosure to affected Accounts within 30 days of such audit;

(f) The combined total of all fees received by the Investment Adviser for the provision of services to an Account, and for the provision of any services to a Fund in which an Account may invest, is not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act;

(g) The Investment Adviser and its affiliates do not receive any fees payable pursuant to Rule 12b–1 under the 1940 Act in connection with the transactions covered by this exemption;

(h) In advance of any initial investment by a Separately Managed Account in a Fund or by a new Plan investor in a Pooled Fund, a Second Fiduciary with respect to that Plan, who is independent of and unrelated to the Investment Adviser or any affiliate thereof, receives in written or in electronic form, full and detailed written disclosure of information concerning such Fund(s). The disclosure described in this Section II(h) includes, but is not limited to:

(1) A current prospectus issued by each of the Fund(s);

(2) A statement describing the fees for investment advisory or similar services, any Secondary Services, and all other fees to be charged to or paid by the Account and by the Fund(s), including the nature and extent of any differential between the rates of such fees;

(3) The reasons why the Investment Adviser may consider such investment to be appropriate for the Account;

(4) A statement describing whether there are any limitations applicable to the Investment Adviser with respect to which Account assets may be invested in shares of the Fund(s) and, if so, the nature of such limitations; and

(5) A copy of the proposed exemption and final exemption, and any other reasonably available information regarding the transaction described herein that the Second Fiduciary requests, provided that the notice of proposed exemption and notice of grant of exemption may be given within 15 calendar days after the date that the final exemption is published in the **Federal Register**, in the event that the initial investment in a Fund by a Separately Managed Account or by a new Plan investor in a Pooled Fund has occurred prior to such date;

(i) After receipt and consideration of the information referenced in Section II(h), the Second Fiduciary of the Separately Managed Account or the new Plan investing in a Pooled Fund approves in writing the investment of Plan assets in each particular Fund and the fees to be paid by a Fund to the Investment Adviser.

(j)(1) In the case of existing Plan investors in a Pooled Fund, such Pooled Fund may not engage in any covered transactions pursuant to this exemption, unless the Second Fiduciary receives in written or in electronic form, the information described in subparagraph (2) of this Section II(j), not less than 30 days prior to the Investment Adviser's engaging in the covered transactions on behalf of the Pooled Fund pursuant to this exemption;

(2) The information referred to in subparagraph (1) of this Section II(j) includes:

(A) A notice of the Pooled Fund's intent to engage in the covered transactions described herein, and a copy of the notice of proposed exemption, and a copy of the final exemption, provided that the notice of the proposed exemption and notice of grant of exemption may be given within 15 calendar days after the date that the final exemption is granted and published in the **Federal Register**, in the event that the Investment Advisor engaged in the covered transactions on behalf of the Pooled Fund prior to such date,

(B) Any other reasonably available information regarding the covered transactions that a Second Fiduciary requests, and

(C) A ''Termination Form,'' within the meaning of Section II(k). Approval to engage in any covered transactions pursuant to this exemption may be presumed notwithstanding that the Investment Adviser does not receive any response from a Second Fiduciary;

(k) All authorizations made by a Second Fiduciary regarding investments in a Fund and the fees paid to the Investment Adviser will be subject to an annual reauthorization wherein any such prior authorization shall be terminable at will by an Account, without penalty to the Account, upon receipt by the Investment Adviser of written notice of termination. A form expressly providing an election to terminate the authorization (the Termination Form) with instructions on the use of the form will be supplied to the Second Fiduciary no less than annually, in written or in electronic form. The instructions for the Termination Form will include the following information:

(1) The authorization is terminable at will by the Account, without penalty to the Account, upon receipt by the Investment Adviser of written notice from the Second Fiduciary. Such termination will be effected by the Investment Adviser by selling the shares of the Fund held by the affected Account within one business day following receipt by the Investment Adviser of the Termination Form or any other written notice of termination; provided that if, due to circumstances beyond the control of the Investment Adviser, the sale cannot be executed within one business day, the Investment Adviser shall have one additional business day to complete such sale; and provided further that, where a Plan's interest in a Pooled Fund cannot be sold within this timeframe, the Plan's interest will be sold as soon as administratively practicable;

(2) Failure of the Second Fiduciary to return the Termination Form or provide any other written notice of termination

will result in continued authorization of the Investment Adviser to engage in the covered transactions on behalf of an Account; and

(3) The identity of Baird, the asset management affiliate of Baird, the affiliated investment advisers, and the address of the asset management affiliate of Baird. The instructions will state that the exemption is not available, unless the fiduciary of each Plan participating in the covered transactions as an investor in a Pooled Fund is, in fact, independent of the Investment Adviser. The instructions will also state that the fiduciary of each such Plan must advise the asset management affiliate of Baird, in writing, if it is not a ''Second Fiduciary,'' as that term is defined, below, in Section IV(h).

However, if the Termination Form has been provided to the Second Fiduciary pursuant to this Section II(k) or Sections II(j), (l), or (m), the Termination Form need not be provided again for an annual reauthorization pursuant to this paragraph unless at least six months has elapsed since the form was previously provided;

(l) In situations where the Fund-level fee is neither rebated nor credited against the Account-level fee, the Second Fiduciary of each Account invested in a particular Fund will receive full disclosure, in written or in electronic form, in a statement, which is separate from the Fund prospectus, of any proposed increases in the rates of fees for investment advisory or similar services, and any Secondary Services, at least 30 days prior to the implementation of such increase in fees, accompanied by a Termination Form. In situations where the Fund-level fee is rebated or credited against the Account-level fee, the Second Fiduciary will receive full disclosure, in a Fund prospectus or otherwise, in the same time and manner set forth above, of any increases in the rates of fees to be charged by the Investment Adviser to the Fund for investment advisory services. Failure to return the Termination Form will be deemed an approval of the increase and will result in the continued authorization of the Investment Adviser to engage in the covered transactions on behalf of an Account;

(m) In the event that the Investment Adviser provides an additional Secondary Service to a Fund for which a fee is charged or there is an increase in the rate of any fees paid by the Funds to the Investment Adviser for any Secondary Services resulting from either an increase in the rate of such fee or from a decrease in the number or kind of services provided by the Investment Adviser for such fees over an existing rate for such Secondary Service in connection with a previously authorized Secondary Service, the Second Fiduciary will receive notice, at least 30 days in advance of the implementation of such additional service or fee increase, in written or in electronic form, explaining the nature and the amount of such services or of the effective increase in fees of the affected Fund. Such notice shall be accompanied by a Termination Form. Failure to return the Termination Form will be deemed an approval of the Secondary Service and will result in continued authorization of the Investment Adviser to engage in the covered transactions on behalf of the Account;

(n) On an annual basis, the Second Fiduciary of an Account investing in a Fund, will receive, in written or in electronic form:

(1) A copy of the current prospectus for the Fund and, upon such fiduciary's request, a copy of the Statement of Additional Information for such Fund, which contains a description of all fees paid by the Fund to the Investment Adviser;

(2) A copy of the annual financial disclosure report of the Fund in which such Account is invested, which includes information about the Fund portfolios as well as audit findings of an independent auditor of the Fund, within 60 days of the preparation of the report; and

(3) With respect to each of the Funds in which an Account invests, in the event such Fund places brokerage transactions with the Investment Adviser, the Investment Adviser will provide the Second Fiduciary of such Account, in the same manner described above, at least annually with a statement specifying the following (and responses to oral or written inquiries of the Second Fiduciary as they arise):

(A) The total, expressed in dollars, brokerage commissions of each Fund's investment portfolio that are paid to the Investment Adviser by such Fund,

(B) The total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to the Investment Adviser;

(C) The average brokerage commissions per share, expressed as cents per share, paid to the Investment Adviser by each portfolio of a Fund, and

(D) The average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to the Investment Adviser;

(o) In all instances in which the Investment Adviser provides electronic distribution of information to Second Fiduciaries who have provided electronic mail addresses, such electronic disclosure will be provided in a manner similar to the procedures described in 29 CFR 2520.104b–1(c);

(p) No Separately Managed Account holds assets of a Plan sponsored by the Investment Adviser or an affiliate. If a Pooled Fund holds assets of a Plan or Plans sponsored by the Investment Adviser or an affiliate, the total assets of all such Plans shall not exceed 15% of the total assets of such Pooled Fund;

(q) All of the Accounts' other dealings with the Funds, the Investment Adviser, or any person affiliated thereto, are on terms that are no less favorable to the Account than such dealings are with other shareholders of the Funds;

(r) Baird and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons, described, below, in Section II(s), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a Plan which engages in the covered transactions, other than Baird, and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by Section II(s); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Baird or its affiliate, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(s)(1) Except as provided, below, in Section II(s)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in Section II(r) are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the SEC, or

(B) Any fiduciary of any Plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary, or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the covered transactions, or any authorized employee or representative of these entities, or

(D) Any participant or beneficiary of a Plan that engages in the covered transactions, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described, above, in Section II(s)(1)(B)–(D) shall be authorized to examine trade secrets of the Investment Adviser, or commercial or financial information which is privileged or confidential; and

(3) Should the Investment Adviser refuse to disclose information on the basis that such information is exempt from disclosure, the Investment Adviser shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III. Additional Conditions for In-Kind Transactions

(a) In-kind transactions with an Account shall only involve: (1) Publically-traded securities for which market quotations are readily available, as determined pursuant to procedures established by the Funds under Rule 2a–4 of the 1940 Act; (2) securities that are deemed to be liquid and that are valued based upon prices obtained from a reliable well-established third-party pricing service that is independent of the Investment Adviser (*e.g.,* Interactive Data Pricing and Reference Data, LLC) pursuant to then-existing procedures established by the Board of Directors or Trustees of the Funds under the 1940 Act and applicable Securities and Exchange Commission (SEC) rules, regulations and guidance thereunder (SEC Guidance); and (3) cash in the event that the aforementioned securities are odd lot securities, fractional shares, accruals on such securities, securities which have transfer restrictions, or securities which cannot be readily divided. Securities for which prices cannot be obtained from third-party pricing services will not be transferred in-kind. Furthermore, in-kind transfers of securities will not include:

(1) Securities that, if publicly offered or sold, would require registration under the Securities Act of 1933, as amended (the 1933 Act), other than securities issued under Rule 144A of the 1933 Act;

(2) Securities issued by entities in countries that (A) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (B) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange;

(3) Certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements), that, although liquid and marketable, involve the assumption of contractual obligations, require special trading facilities, or can be traded only with the counter-party to the transaction to effect a change in beneficial ownership;

(4) Cash equivalents (such as certificates of deposit, commercial paper, and repurchase agreements);

(5) Other assets that are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and

(6) Securities subject to ''stop transfer'' instructions or similar contractual restrictions on transfer; provided however that the foregoing restrictions shall not apply to securities eligible for resale pursuant to Rule 144A under the 1933 Act, or commercial paper or other short-term instruments issued pursuant to Section 4(2) of the 1933 Act so long as such securities are deemed to be liquid and are valued based upon prices obtained from a reliable, well-established third-party pricing service that is independent of the Investment Adviser pursuant to then-existing procedures established by the Board of Directors or Trustees of the Funds under the 1940 Act and applicable SEC Guidance.

(b) Subject to the exceptions described in Section III(a) above, in the case of an in-kind exchange of assets (in-kind redemptions and in-kind transfers of Plan assets) between an Account and a Fund, the Account will receive its pro rata portion of the securities of the Fund equal in value to that of the number of shares redeemed, or the Fund shares having a total net asset value (NAV) equal to the value of the assets transferred on the date of the transfer, as determined in a single valuation, using sources independent of the Investment Adviser, performed in the same manner as it would for any other person or entity at the close of the same business day in accordance with the procedures established by the Fund pursuant to Rule2a–4 under the 1940 Act, and the then-existing valuation procedures established by its Board of Directors or Trustees, as applicable for the valuation of such assets, that are in compliance with the rules administered by the SEC. In connection with a redemption of Fund shares, the value of the securities and any cash received by the Account for each redeemed Fund share equals the NAV of such shares at the time of the transaction. In the case of any other in-kind exchange, the value of the Fund shares received by the Account equals the NAV of the transferred securities and any cash on the date of the transfer;

(c) The Investment Adviser shall provide the Second Fiduciary with a written confirmation containing information necessary to perform a post-transaction review of any in-kind transaction so that the material aspects of such transaction, including pricing, can be reviewed. Such information must be furnished no later than thirty (30) business days after the completion of the in-kind transaction. In the case of a Pooled Fund, the Investment Adviser can satisfy the requirement with a single aggregate report furnished to the Second Fiduciary containing the required information for each in-kind transaction taking place during a month. This aggregate report must be furnished to the Second Fiduciary no later than thirty (30) business days after the end of that month. The information to be provided pursuant to this Section III(c) shall include:

(1) With respect to securities either transferred or received by an Account in-kind in exchange for Fund shares,

(A) the identity of each security either received by the Account pursuant to the redemption, or transferred to the Fund by the Account, and the related aggregate dollar value of all such securities determined in accordance with Rule 2a–4 under the 1940 Act and the then-existing procedures established by the Board of Directors or Trustees of the Fund (using sources independent of the Investment Adviser), and

(B) The value of each security transferred or received in-kind by the Account as of the date of the in-kind transfer, as determined by a third party pricing service that is independent of the Investment Adviser pursuant to the then-existing procedures established by the Board of Directors or Trustees of the Funds under the 1940 Act and applicable SEC Guidance;

(2) With respect to Fund shares either transferred or received by an Account in-kind in exchange for securities,

(A) the number of Fund shares held by the Account immediately before the redemption and the related per share net asset value and the total dollar value of such Fund shares, determined in accordance with Rule 2a–4 under the 1940 Act, using sources independent of the Investment Adviser, or

(B) the number of Fund shares held by the Account immediately after the in-kind transfer and the related per share net asset value of the Fund shares received and the total dollar value of such Fund shares, determined in accordance with Rule 2a–4 under the

1940 Act using sources independent of the Investment Adviser; and

(3) The identity of each pricing service or market-maker consulted in determining the value of the securities; and

(d) Prior to the consummation of an in-kind exchange, the Investment Adviser must document in writing and determine that such transaction is fair to the Account and comparable to, and no less favorable than, terms obtainable at arm's-length between unaffiliated parties, and that the in-kind transaction is in the best interests of the Account and the participants and beneficiaries of the participating Plans.

Section IV. Definitions

(a) The term ''Account'' means either a Separately Managed Account or a Pooled Fund in which investments are made by Plans, which is managed on a discretionary basis by the Investment Adviser.

(b) An ''affiliate'' of a person includes any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person; any officer of, director of, highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of, or partner in any such person; and any corporation or partnership of which such person is an officer, director, partner or owner, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code).

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term ''Fund'' means any open end investment company registered under the 1940 Act.

(e) The term ''Investment Adviser'' means Robert W. Baird or any of its current or future affiliates.

(f) The term ''Plan'' means a defined benefit pension plan described in section 3(3) of the Act and section 4975(e)(1)(A) of the Code. For purposes of this exemption, a Plan shall not include any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(g) The term ''Pooled Fund'' means any commingled fund sponsored, maintained, advised or trusteed by the Investment Adviser, which fund holds Plan assets.

(h) The term ''Second Fiduciary'' means a fiduciary of a Plan who is independent of and unrelated to the Investment Adviser. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to the Investment Adviser if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Investment Adviser;

(2) Such fiduciary, or any officer, director, partner, or employee of the fiduciary is an officer, director, partner, employee or affiliate of the Investment Adviser; or

(3) Such fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this exemption. If an officer, director, partner, affiliate or employee of the Investment Adviser is a director of such Second Fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment adviser, (B) the approval for the acquisition, sale, holding, and/or exchange of Fund shares by such Plan, and (C) the approval of any increase in fees charged to or paid by the Plan in connection with any of the transactions described herein, then subparagraph (2) above shall not apply.

(i) The term ''Secondary Service'' means a service other than an investment management, investment advisory or similar service which is provided by the Investment Adviser to the Funds, including but not limited to custodial, accounting, brokerage, administrative or any other similar service.

(j) The term ''Separately Managed Account'' means any Account other than a Pooled Fund.

Effective Date: This exemption is effective as of April 1, 2014.

Written Comment

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption (the Notice) on or before January 10, 2015. During the comment period, the Department received one written comment from Robert W. Baird & Co. Incorporated (Baird or the Applicant) and no other written comments. Baird's comment generally requested minor clarifying modifications to the operative language of the exemption and suggested clarifications to several statements in the Summary of Facts and Representations (the Summary). Baird's comment and the Department's responses thereto are described as follows.[7]

Clarifications to the Operative Language

Relief was proposed in Section I for, among other things, ''(a) the acquisition, sale or exchange by an Account of shares of an open-end investment company . . . the investment adviser for which is also a fiduciary with respect to the Account . . .;'' and ''(b) the in-kind redemptions of shares or acquisitions of shares of the Fund in exchange for Account assets transferred in-kind from an Account.'' Furthermore, Section IV(a) of the proposal defined ''Account'' to mean ''either a Separately Managed Account or a Pooled Fund in which investments are made by Plans,'' and Section IV(f) defined ''Plan'' to mean ''a plan described in section 3(3) of the Act and a plan described in section 4975(e)(1) of the Code.''

The Applicant represents that the exemption will only be used by defined benefit pension plans managed on a discretionary basis by the Investment Adviser, and will not include any plans described in Code section 4975(e)(1)(B)–(F). Therefore, in order to more accurately describe the scope of the exemption, Sections I(a) and I(b) of the proposed exemption have been modified in this final exemption by adding the phrase ''in connection with the Investment Adviser's discretionary management of the Account'' to the end of such sections; the definition of ''Account'' in Section IV(a) has been modified to mean ''either a Separately Managed Account or a Pooled Fund in which investments are made by Plans, which is managed on a discretionary basis by the Investment Adviser;'' and the definition of ''Plan'' in Section IV(f) has been modified to mean ''a defined benefit pension plan described in section 3(3) of the Act and section 4975(e)(1)(A) of the Code. For purposes of this exemption, a Plan shall not include any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.''

Section III(a)(3) of the proposed exemption provides, in relevant part, that ''In-kind transactions with an Account shall only involve: . . . (3) cash in the event that the aforementioned securities are odd lot securities, fractional shares, or accruals

[7] Capitalized terms not defined herein have the meanings ascribed to them in the Summary of Facts and Representations in the Proposed Exemption.

on such securities. Securities for which prices cannot be obtained from a third-party pricing service will not be transferred in-kind.'' Baird requests a modification to Section III(a)(3) to clarify that, in addition to the foregoing, securities will not be transferred or redeemed in-kind for the shares of the Fund if such securities have transfer restrictions or cannot be readily divided. The Department concurs with Baird's request, and has modified Section III(a)(3) in the final exemption to read, ''In-kind transactions with an Account shall only involve: . . . (3) cash in the event that the aforementioned securities are odd lot securities, fractional shares, accruals on such securities, securities which have transfer restrictions, or securities which cannot be readily divided. Securities for which prices cannot be obtained from third-party pricing services will not be transferred in-kind.''

Section III(a)(3)(6) of the proposed exemption provides that in-kind securities will not include securities subject to ''stop transfer'' instructions, including commercial paper or other short-term instruments issued pursuant to Section 4(2) of the 1933 Act. Baird notes that the proper cite in Section III(a)(3)(6) of the proposed exemption is Section 4(a)(2) of the 1933 Act, as opposed to Section 4(2). The Department concurs and Section III(a)(3)(6) of the final exemption has been modified accordingly.

Section III(c)(1) of the proposed exemption provides that the Investment Adviser shall provide the Second Fiduciary with a written confirmation containing information necessary to perform a post-transaction review of any in-kind transaction so that the material aspects of the transaction can be reviewed, including, in Subparagraph (B), ''the current market price of each security transferred or received in-kind by the Account as of the date of the in-kind transfer.'' Baird now believes that the term ''current market price'' is not accurate, and suggests that the language in Section III(c)(1)(B) be changed to ''the value of each security transferred or received in-kind by the Account as of the date of the in-kind transfer, as determined by a third party pricing service that is independent of the Investment Adviser pursuant to the then-existing procedures established by the Board of Directors or Trustees of the Funds under the 1940 Act and applicable SEC guidance thereunder.'' The Department concurs and Section III(c)(1)(B) of the final exemption has been modified accordingly.

Section IV(j) of the proposed exemption provides that ''the term 'Separately Managed Account' means any Account other than a Pooled Fund, and includes single-employer plans.'' Baird now believes that the language ''and includes single-employer Plans'' should be stricken from the definition of ''Separately Managed Account'' because any ERISA plan could be a separately managed account, including multiple and multi-employer plans. The Department concurs and Section IV(j) of the final exemption has been modified accordingly.

Clarification to the Summary of Facts and Representations

Paragraph eight of the Summary provides that ''. . . the Fund will value its Portfolio of fixed income securities at their closing bid prices each day . . . .'' Baird now states that the description of the Fund's valuation methodology is not accurate. Baird's comment explains that because fixed income securities are generally not listed and do not trade on a national securities exchange, the term ''closing bid price'' would not apply. Accordingly, a fund will use a third-party pricing service to provide an ''evaluated bid price'' for each fixed income security, which may, but need not be that security's closing bid price. Furthermore, under the 1940 Act and applicable SEC guidance, Baird is required to value fixed income securities at evaluated bid prices, as determined by a third party pricing service that is independent of Baird or its affiliates pursuant to the then-existing procedures established by the Board of Directors or Trustees of the Funds. In arriving at an evaluated price for fixed income securities, the third-party pricing service will take into account factors including recent trade activity, bid and ask prices and the market. The Department takes note of the Baird's clarification to the Summary.

After giving full consideration to the entire record, including the Applicant's comment, the Department has decided to grant the exemption, as described above. The complete application file is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the proposed exemption published in the **Federal Register** on November 26, 2014, at 79 FR 70648.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Erin Brown of the Department at (202) 693–8352. (This is not a toll-free number.)

Eli Lilly and Company (Lilly) and Elco Insurance Company Limited (Elco) (together, the Applicants), Located in Indianapolis, IN and North Charleston, SC

[Prohibited Transaction Exemption 2015–10; Application No. L–11784]

Exemption

Section I. Transactions

The restrictions of sections 406(a)(1)(D) and 406(b) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) shall not apply to the reinsurance of risks and the receipt of premiums therefrom by Elco, an affiliate of Lilly, as the term ''affiliate'' is defined in Section III(a)(1) below, in connection with insurance contracts sold by American United Life Insurance Company (AUL) or any successor insurance company (a Fronting Insurer) to provide optional group term life insurance benefits (Optional Group Life) to participants in the Eli Lilly and Company Life Insurance and Death Benefit Plan (the Life Insurance Plan), a component of the Eli Lilly and Company Employee Welfare Plan (the Plan), provided the conditions set forth in Section II, below, are satisfied.

Section II. Conditions

(a) Elco—

(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with Lilly that is described in section 3(14)(G) of the Act;

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one state as defined in section 3(10) of the Act;

(3) Has obtained a Certificate of Authority from the Director of the Department of Insurance of its domiciliary state (South Carolina), which has neither been revoked nor suspended;

(4)(A) Has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction covered by this exemption; or

(B) Has undergone a financial examination (within the meaning of the law of South Carolina) by the Director of the South Carolina Department of Insurance (SCDI) within five (5) years prior to the end of the year preceding the year in which such reinsurance transaction has occurred; and

(5) Is licensed to conduct reinsurance transactions by South Carolina, whose

law requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority;

(b) The Life Insurance Plan pays no more than adequate consideration for the insurance contracts;

(c) No commissions are paid by the Life Insurance Plan with respect to the direct sale of such contracts or the reinsurance thereof;

(d) Effective January 1, 2012, there was an immediate and objectively determined benefit to Plan participants and beneficiaries in the form of increased benefits. Any modification to such benefits will at least approximate the increase in benefits that are effective January 1, 2012, as described in the Notice of Proposed Exemption (the Notice) published in the **Federal Register** on April 15, 2015 at 80 FR 20249 and will continue in all subsequent years of each contract of reinsurance involving Elco and a Fronting Insurer and in every renewal of each contract of reinsurance involving Elco and a Fronting Insurer;

(e) In the initial year and in subsequent years of coverage provided by a Fronting Insurer, the formulae used by the Fronting Insurer to calculate premiums will be similar to formulae used by other insurers providing comparable optional life insurance coverage under similar programs. Furthermore, the premium charge calculated in accordance with the formulae will be reasonable and will be comparable to the premiums charged by the Fronting Insurer and its competitors with the same or a better rating providing the same coverage under comparable programs;

(f) The Fronting Insurer has a financial strength rating of ''A'' or better from A.M. Best Company (A.M. Best). The reinsurance arrangement between the Fronting Insurer and Elco will be indemnity insurance only (*i.e.,* the Fronting Insurer will not be relieved of liability to the Life Insurance Plan should Elco be unable or unwilling to cover any liability arising from the reinsurance arrangement);

(g) The Life Insurance Plan retains an independent, qualified fiduciary, as defined in Section III(c) (the Independent Fiduciary) to analyze the transactions and to render an opinion that the requirements of Section II(a) through (f) and (h) of this exemption have been satisfied;

(h) Participants and beneficiaries in the Plan will receive in subsequent years of every contract of reinsurance involving Elco and the Fronting Insurer the benefit increases effective January 1, 2012, as described in the Notice, or benefit increases no less in value, as determined by the Independent Fiduciary, than the objectively determined increased benefits such participants and beneficiaries received effective January 1, 2012;

(i) The Independent Fiduciary will monitor the transactions herein on behalf of the Plan on a continuing basis to ensure such transactions remain in the interest of the Plan; take all appropriate actions to safeguard the interests of the Plan; and enforce compliance with all conditions and obligations imposed on any party dealing with the Plan; and

(j) In connection with the provision to participants in the Life Insurance Plan of the Optional Group Life which is reinsured by Elco, the Independent Fiduciary will review all contracts (and any renewal of such contracts) of the reinsurance of risks and the receipt of premiums therefrom by Elco and must determine that the requirements of this exemption and the terms of the benefit enhancements continue to be satisfied.

Section III. Definitions

(a) The term ''affiliate'' includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term ''Independent Fiduciary'' means a person who:

(1) Is not an affiliate of Lilly or Elco and does not hold an ownership interest in Lilly, Elco, or affiliate of Lilly or Elco;

(2) is not a fiduciary with respect to the Plan prior to its appointment to serve as the Independent Fiduciary;

(3) has acknowledged in writing that:

(i) It is a fiduciary and has agreed not to participate in any decision with respect to any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) it has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year in which the gross income received by such organization or individual (or partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder) from Lilly, Elco, or affiliates of Lilly or Elco, (including amounts received for services as an independent fiduciary under any prohibited transaction exemption granted by the Department) for that fiscal year exceeds two percent (2%) of such organization's or individual's gross income from all sources for the prior fiscal year;

(5) No organization or individual which is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director or ten percent (10%) or more partner or shareholder may acquire any property from, sell any property to, or borrow any funds from Lilly, Elco, or affiliates of Lilly or Elco during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of six months after such organization or individual ceases to be an Independent Fiduciary or negotiates any such transaction during the period that such organization or individual serves as an Independent Fiduciary; and

(6) In the event a successor Independent Fiduciary is appointed to represent the interests of the Plan with respect to the subject transaction, there should be no lapse in time between the resignation or termination of the former Independent Fiduciary and the appointment of the successor Independent Fiduciary.

Effective Date: This exemption is effective as of its date of publication in the **Federal Register**.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption (the Notice), published in the **Federal Register** on April 15, 2015, at 80 FR 20249. All comments and requests for a hearing were due on or before May 29, 2015. During the comment period, the Department received multiple telephone inquiries which concerned matters outside the scope of this exemption, and one comment, which requested that the exemption not be granted but provided no explanation or other detail as to the reason why. The Department received no hearing requests. Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application No. L–11784) is available for public inspection in the Public Disclosure Room of the

Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published in the **Federal Register** on April 15, 2015, at 80 FR 20249.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Erin Brown of the Department at (202) 693–8352. (This is not a toll-free number.)

Robert A. Handelman Roth IRA No. 2 (the New IRA), Located in Akron, Ohio

[Prohibited Transaction Exemption 2015–11; Exemption Application No. D–11798]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D) and (E) of the Code, shall not apply to the purchase by the New IRA of a 100% ownership interest (the Interest) in RAH Properties Mill Street, Ltd. (the Company) from Robert A. Handelman (Mr. Handelman), the New IRA owner and a disqualified person with respect to the New IRA.[8]

This exemption is subject to the following conditions:

(a) The purchase is a one-time transaction for cash;

(b) At the time of the purchase, the price paid by the New IRA for the Interest is based on the fair market value of such Interest, without any discount, as established by a qualified independent appraiser in an updated appraisal report as of the date of the purchase;

(c) The terms and conditions of the purchase are at least as favorable to the New IRA as those available in a comparable arm's length transaction with an unrelated third party;

(d) The New IRA does not pay any commissions or other expenses in connection with the purchase or in connection with the rollover of the cash distribution from the Robert A. Handelman Roth IRA No. 1 (the Existing IRA) to the New IRA;

(e) Mr. Handelman pays all appropriate taxes that are associated with the transfer of any assets from the Existing IRA to the New IRA in connection with the purchase; and

(f) Mr. Handelman receives no compensation from the New IRA or the Existing IRA for his role as manager of the Company.

Written Comments

As Mr. Handelman is the sole participant of the New IRA, the Department determined that there was no need to distribute the Notice of Proposed Exemption (the Notice) to interested persons. Therefore, comments and requests for a hearing were due within thirty (30) days of the date of publication of the Notice in the **Federal Register** on April 15, 2015 at 80 FR 20255. All comments and requests for a hearing were due by May 15, 2015. During the comment period, the Department received no comments and no requests for a hearing.

Technical Correction of Notice

The Department has decided, on its own motion, to modify the meaning of ''fair market value'' in Condition (b) of the Notice and in Representations 11 and 13(b) of the Summary of Facts and Representations (the Summary). Condition (b) of the Notice and Representation 13(b) of the Summary state that ''At the time of the purchase, the Price paid by the New IRA for the Interest is [or will be] equal to the fair market value of such Interest as determined by a qualified independent appraiser in an updated appraisal report as of the date of the purchase.'' Representation 11 of the Summary describes the appraisal of the Interest by Jason Bogniard, the qualified independent appraiser, and states that the fair market value of the Interest, as determined by Mr. Bogniard, was $580,000, as of November 17, 2014. In valuing the Interest, Mr. Bogniard applied a 5% discount from the Interest's equity value of $610,000 due to the Interest's lack of marketability.

The Department is concerned that if the new IRA purchases the Interest from Mr. Handelman at the discounted value of $580,000, the $30,000 excess over the equity value of such Interest could violate the contribution limits under the Code for the New IRA. To avoid the possibility of an adverse consequence for the New IRA, the Department has decided that the term ''fair market value,'' as used herein, should reflect the $610,000 equity value of the Interest rather than the $580,000 discounted value for such Interest. For emphasis, the Department has added the parenthetical ''(without any discount)'' to Condition (b), and it notes this corresponding revision to Representation 13(b) of the Summary.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application No. D–11798), and all supplemental submissions received by the Department, are available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published in the **Federal Register** on April 15, 2015, at 80 FR 20255.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

Roofers Local 195 Pension Fund (the Pension Fund) and Roofers Local 195 Joint Apprenticeship Training Fund (the Training Fund), Located in Cicero, NY

[Prohibited Transaction Exemption 2015–12; Exemption Application Nos. D–11809 and L–11810]

Exemption

The restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (the Act), shall not apply to the sale (the Sale) of a building located at 6200 NYS Route 31, Cicero, New York (the Building) by the Pension Fund to the Training Fund, provided that the following conditions are satisfied:[9]

(a) At the time of the Sale, the Pension Fund receives a one-time cash payment in exchange for the Building, equal to the fair market value of the Building as established in an appraisal (the Appraisal) by a qualified, independent appraiser, updated on the date of the Sale, and provided to the Department no later than 60 days from the date of the Sale;

(b) The Training Fund does not finance more than 80% of the cost of its purchase of the Building, and any financing must be with an independent, third-party bank (the Bank);

(c) The Training Fund pays no fees, commissions or other expenses associated with the Sale, and no brokerage commissions associated with the Sale may be paid by either the Training Fund or the Pension Fund;

(d) A qualified, independent fiduciary (the Independent Fiduciary), acting on behalf of the Training Fund, represents

[8] Pursuant to 29 CFR 2510.3–2(d), the New IRA is not within the jurisdiction of Title I of the Employee Retirement Income Security Act of 1974 (the Act). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

[9] For purposes of this exemption, references to Section 406 of the Act should be read to refer as well to the corresponding provisions of Section 4975 of the Internal Revenue Code of 1986, as amended.

the Training Fund's interests for all purposes with respect to the Sale, including the financing of the Building, and must: Determine that it is in the best interest of the Training Fund to proceed with the Sale; review and approve the methodology used in the Appraisal; and ensure that such methodology is properly applied by the qualified, independent appraiser in determining the fair market value of the Building on the date of the Sale;

(e) The Board of Trustees of the Pension Fund, prior to entering the Sale, must determine that the Sale is feasible, in the interest of the Pension Fund, and protective of the rights of participants and beneficiaries of the Pension Fund;

(f) The Pension Fund is not a party to the commercial mortgage between the Training Fund and the Bank;

(g) Under the terms of the loan agreement between the Bank and the Training Fund, in the event of a default by the Training Fund, the Bank has recourse only against the Training Fund's interest in the Building and not against the general assets of the Training Fund; and

(h) The terms and conditions of the Sale are at least as favorable to each Fund as those obtainable in an arms-length transaction with an unrelated third party.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published on April 15, 2015, at 80 FR 20257. All comments and requests for a hearing were due by May 30, 2015. During the comment period, the Department received no comments and no requests for a hearing from interested persons. Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application Nos. D–11809 and L–11810), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on April 15, 2015 in the **Federal Register** at 80 FR 20257.

FOR FURTHER INFORMATION CONTACT: Ms. Erica R. Knox of the Department, telephone (202) 693–8644. (This is not a toll-free number.)

First Security Group, Inc. 401(k) and Employee Stock Ownership Plan (the Plan), Located in Chattanooga, TN

[Prohibited Transaction 2015–13; Exemption Application No. D–11826]

Exemption

Section I: Transactions

Effective for the period beginning August 21, 2013, and ending on September 20, 2013, the restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code,[10] shall not apply:

(a) To the acquisition of certain subscription right(s) (the Right or Rights) by the individually-directed account(s) (the Account or Accounts) of certain participant(s), beneficiaries, and alternate payees in the Plan (the Invested Participant(s)) in connection with an offering (the Offering) by First Security Group, Inc. (FSG), of shares of common stock (the Common Stock) of FSG, the sponsor of the Plan and a party in interest with respect to the Plan; and

(b) To the holding of the Rights received by the Invested Participants during the subscription period (the Subscription Period) of the Offering; provided that the conditions set forth in Section II of this exemption were satisfied for the duration of the acquisition and holding.

Section II: Conditions

(a) The receipt of the Rights by the Accounts of the Invested Participants occurred in connection with the Offering, and the Rights were made available by FSG on the same material terms to all shareholders of record of the Common Stock of FSG, including the Plan;

(b) The acquisition of the Rights by the Accounts of the Invested Participants resulted from an independent corporate act of FSG;

(c) Each shareholder of the Common Stock, including the Plan, received the same proportionate number of Rights, and this proportionate number of Rights was based on the number of shares of Common Stock held by each such shareholder;

(d) The Rights were acquired pursuant to, and in accordance with, provisions under the Plan for individually-directed investment of the Accounts by the Invested Participants, all or a portion of whose Accounts in the Plan held the Common Stock;

(e) The decision with regard to the holding and the exercise of the Rights by an Account was made by the Invested Participant whose Account received the Rights;

(f) No commissions, no fees and no expenses were paid by the Plan or by the Accounts of Invested Participants to any related broker in connection with the exercise of any of the Rights or with regard to the acquisition of the Common Stock through the exercise of such Rights, and no brokerage fees, no commissions, no subscription fees, and no other charges were paid by the Plan or by the Accounts of Invested Participants with respect to the acquisition and holding of the Rights;

(g) FSG did not influence any Invested Participant's decision to exercise the Rights or influence an Invested Participant's decision to allow such Rights to expire; and

(h) The terms of the Offering were described to the Invested Participants in clearly written communications, including but not limited to the prospectus for the Rights Offering.

Effective Date: This exemption is effective for the period beginning on August 21, 2013, the commencement date of the Offering, and ending on September 20, 2013, the closing date of the Offering.

Written Comments

In the Notice of Proposed Exemption (the Notice), published in the **Federal Register** on November 26, 2014 at 79 FR 70658, the Department invited all interested persons to submit written comments and requests for a hearing within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on November 26, 2014. All comments and requests for a hearing were due by January 10, 2015.

During the comment period, the Department received one comment letter, dated January 9, 2015, and no requests for a public hearing. The comment letter, which was submitted by FSG (the Applicant), requests certain clarifications and corrections to the operative language and the Summary of Facts and Representations (the Summary) of the Notice, as discussed below.

1. *Reference to Invested Participants.* Section I(a) of the operative language defines the term ''Invested Participants'' as ''certain participants in the Plan.'' The Applicant believes that this phrase should have read ''certain participants,

[10] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

beneficiaries, and alternate payees in the Plan.''

The Department concurs and has revised Section I(a) of the grant notice.

2. *Plan as Recordholder of Common Stock.* Section II(a) of the operative language states, in part, that ''the Rights were made available by FSG on the same material terms to all shareholders of record of Common Stock of FSG, including the Accounts of Invested Participants.'' In addition, Section II(c) of the proposed exemption provides that ''Each shareholder of the Common Stock, including each of the Accounts of Invested Participants, receiving the same proportionate number of Rights, and this proportionate number of Rights was based on the number of shares of Common Stock held by each such shareholder.'' The Applicant notes that the Plan was treated as a single shareholder for purposes of determining the number of Rights that it would receive, as required by the Stock Purchase Agreement. The Rights were then allocated, by Federated Retirement Plan Services, the Recordkeeper, to the Plan Accounts of the Invested Participants so the Rights could be exercised, not exercised, or held by such participants until the Rights expired. Therefore, according to the Applicant, the phrase ''each of the Accounts of the Invested Participants'' should have said ''the Plan.''

The Department concurs and has modified Sections II(a) and II(c) of the grant notice to reflect these changes. The Department also notes the requested modification for purposes of the Summary.

3. *Reference to Institutional Investors.* Representation 4 of the Summary lists, in the second sentence of the first paragraph, certain institutional investors who entered into the Stock Purchase Agreement described therein. The Applicant suggests the following revision: ''[. . .] including affiliates of EJF Capital LLC, GP Financial II, LLC, MFP Partners, L.P., and Ulysses Partners, LP.''

In response to this comment, the Department notes this modification to the Summary.

4. *Issuance of Common Stock during the Rights Offering.* The second paragraph of Representation 7 of the Summary states that ''The Plan was issued 138,200 shares of Common Stock under the Basic Subscription Privilege and 205,008 shares of Common Stock under the Over-Subscription Privilege . . .'' The Applicant explains that while this information generally reflects the information contained in the exemption application, due to a scrivener's error these numbers were reversed. Accordingly,the Applicant suggests that the statement be revised to read as follows:

> The Plan was issued 205,008 shares of Common Stock under the Basic Subscription Privilege and 138,260 shares of Common Stock under the Over-Subscription Privilege, for a total of 343,268 shares of Common Stock. As noted in the special notice to Invested Participants, the Plan held approximately 102,502 shares of Common Stock on the Record Date. Due to an error on the part of the Tabulator, the Plan elected and was issued four more shares than it should have been able to receive under the Basic Subscription Privilege. Those four shares should have been elected as part of the Over-Subscription Privilege. Had the proper election been made and processed, the Plan would still have received a total of 343,268 shares and each of the Invested Participants would still have received the amount he or she elected.

In response to this comment, the Department notes the foregoing revisions to the Summary.

5. *Insertion of Clarifying Language.* In Representation 13 of the Summary, the Applicant wishes to clarify that the phrase ''as of the Record Date'' should have been inserted after the phrase ''all shareholders of Common Stock of FSG.'' The Applicant explains that the prospectus for the Rights Offering, specified that the Rights were issued to holders of record as of the applicable record date.''

In response to this comment, the Department notes these clarifications to the Summary.

Accordingly, after full consideration and review of the entire record, including the comment letter filed by the Applicant, the Department has determined to grant the exemption, as set forth above. The Applicant's comment letter has been included as part of the public record of the exemption application. The complete application file (D–11826) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published on November 26, 2014 at 79 FR 70658.

FOR FURTHER INFORMATION CONTACT: Ms. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 20th day of July, 2015.

Lyssa E. Hall,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2015–18139 Filed 7–24–15; 8:45 am]

BILLING CODE 4510–29–P

FEDERAL REGISTER

Vol. 80 Monday,

No. 143 July 27, 2015

Part VI

Environmental Protection Agency

40 CFR Part 60 and 63

National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60 and 63

[EPA–HQ–OAR–2011–0817; FRL–9927–62–OAR]

RIN 2060–AQ93

National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final amendments.

SUMMARY: This action finalizes amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants. On February 12, 2013, the Environmental Protection Agency (EPA) finalized amendments to the NESHAP and the new source performance standards (NSPS) for the Portland cement industry. Subsequently, the EPA became aware of certain minor technical errors in those amendments, and thus issued a proposal to correct these errors on November 19, 2014 (79 FR 68821). The EPA received 3 comments on the proposal. In response to the comments received and to complete technical corrections, the EPA is now issuing final amendments. In addition, consistent with the U.S. Court of Appeals to the DC Circuit's vacatur of the affirmative defense provisions in the final rule, this action removes those provisions. These amendments do not affect the pollution reduction or costs associated with these standards.

DATES: This final rule is effective on July 27, 2015.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2011–0817. 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 (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA's Docket Center, Public Reading Room, EPA WJC West Building, Room Number 3334, 1301 Constitution Avenue NW., Washington, DC 20004. This docket facility 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: Ms. Sharon Nizich, Sector Policies and Programs Division (D243–04), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–2825; facsimile number: (919) 541–5450; email address: *nizich.sharon@epa.gov.* For information about the applicability of the NESHAP or NSPS, contact Mr. Patrick Yellin, Monitoring, Assistance and Media Programs Division (2227A), Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; telephone number (202) 564–2970; email address *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION:

Organization of This Document. The information presented in this preamble is organized as follows:

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I. Preamble Acronyms and Abbreviations

Several acronyms and terms are included in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

APCD air pollution control devices
CAA Clean Air Act
CEMS continuous emission monitoring systems
CFR Code of Federal Regulations
EPA Environmental Protection Agency
FR Federal Register
Hg mercury
HCl hydrogen chloride
NAICS North American Industry Classification System
NESHAP National Emissions Standards for Hazardous Air Pollutants
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
oHAP Non-dioxin organic hazardous air pollutants
OMB Office of Management and Budget
PM particulate matter
ppm(v)(d,w) parts per million (by volume) (dry,wet)
SO_2 Sulfur Dioxide
THC total hydrocarbons
TTN Technology Transfer Network
UMRA Unfunded Mandates Reform Act
WWW World Wide Web

II. General Information

A. Executive Summary

1. Purpose of This Regulatory Action

The purpose of this action is to finalize amendments to the 40 CFR part 60, and part 63, subparts F and LLL, respectively. In 2010, the EPA established the NESHAP for the Portland Cement source category. (75 FR 54970, September 9, 2010). Specifically, the EPA established emission standards for mercury (Hg), hydrogen chloride (HCl), total hydrocarbons (THC) (or in the alternative, organic hazardous air pollutants (oHAP)), and particulate matter (PM). These standards, established pursuant to section 112(d) of the Clean Air Act (CAA), reflected performance of maximum available control technology. Following court remand, *Portland Cement Ass'n* v. *EPA,* 665 F. 3d 177 (D.C. Cir. 2011), the EPA amended some of these standards in 2013, and established a new compliance date of September 9, 2015, for the

amended standards. (78 FR 10006, Feb. 12, 2013). All of these actions were upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *Natural Resources Defense Council* v. *EPA,* 749 F. 3d 1055 (D.C. Cir. 2014). The Court, however, vacated a provision of the rule establishing an affirmative defense when violations of the standards occurred because of malfunctions. 749 F. 3d at 1063–64. In light of the Court's vacatur, the regulatory provisions establishing the affirmative defense are null and void. Thus, the EPA is removing the affirmative defense regulatory text (40 CFR 63.1344) as part of this final technical corrections rule.

The EPA also adopted standards of performance for new Portland cement sources as part of the same regulatory action establishing the 2010 NESHAP. (75 FR 54970, Sept. 9, 2010) and amended those standards at the same time of the NESHAP amendments (see 78 FR 10006) (see also *Portland Cement Ass'n* v. *EPA,* 665 F. 3d at 190–92 (upholding these standards)). The EPA is finalizing certain technical changes to these NSPS as part of this action.

B. Does this reconsideration action apply to me?

Categories and entities potentially regulated by this final rule include:

TABLE 1—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS NESHAP AND NSPS FINAL ACTION

Category	NAICS code [a]	Examples of regulated entities
Industry	327310	Portland cement manufacturing plants.
Federal government		Not affected.
State/local/tribal government		Portland cement manufacturing plants.

[a] North American Industry Classification System.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility will be regulated by this action, you should examine the applicability criteria in 40 CFR 60.60 (subpart F) or in 40 CFR 63.1340 (subpart LLL). If you have any questions regarding the applicability of this final action to a particular entity, contact the appropriate person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the Internet through the EPA's Technology Transfer Network (TTN) Web site, a forum for information and technology exchange in various areas of air pollution control. Following signature by the EPA Administrator, the EPA will post a copy of this final action at *http://www.epa.gov/airquality/cement.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same Web site.

D. Judicial Review

Under section 307(b)(1) of the CAA, judicial review of this final action is available only by filing a petition for review in the court by September 25, 2015. Under section 307(b)(2) of the CAA, the requirements established by the final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the 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 the rule.'' Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, WJC Building, 1200 Pennsylvania Ave. NW., Mail Code 1101A, Washington, DC 20460, with a copy to both the person(s) 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), U.S. EPA, 1200 Pennsylvania Ave. NW., Mail Code 2344A, Washington, DC 20460.

III. Summary of Final Amendments

A. Corrections and Clarifications

The EPA is finalizing certain clarifying changes and corrections to the 2013 final rule. Specifically, these amendments will: (1) Clarify the definition of rolling average, operating day and run average; (2) restore the table of emission limits which apply until the September 9, 2015, compliance date; (3) correct equation 8 regarding sources with an alkali bypass or inline coal mill that include a separate stack; (4) provide a scaling alternative for sources that have a wet scrubber, tray tower or dry scrubber relative to the HCl compliance demonstration; (5) add a temperature parameter to the startup and shutdown requirements; (6) clarify language related to span values for both Hg and HCl measurements; and (7) correct inadvertent typographical errors. The EPA is also finalizing corrections to certain inadvertent inconsistencies in the final rule regulatory text, such as correction of the compliance date for new sources and correction to the compliance date regarding monitoring and recordkeeping requirements.

In both the NSPS and the NESHAP, we are finalizing language to clarify the existing definitions of Operating Day, Rolling Average and Run Average to promote consistent and clear monitoring data recording and emissions reporting. The clarifications below are in response to industry questions and are not intended to change the meaning of the final rule. In the final amendments, we clarify that ''Operating Day'' is any 24-hour period where clinker is produced. This clarification is necessary to specify that during any day with both operations and emissions, an emissions value or an average of emissions values representing those operations is included in the 30-day rolling average calculation. We also clarify that ''Rolling Average'' means a weighted average of all monitoring data collected during a specified time period divided by all production of clinker during those same hours of operation, and, where applicable, a 30-day rolling average is comprised of the average of all the hourly average concentrations over the previous 30 operating days. This clarification is necessary to specify the

way a long-term rolling average value is calculated such that different facilities are not using different approaches to demonstrate compliance with the rule. In addition, we clarify that ''Run Average'' means the average of the recorded parameter values, not the 1-minute parameter values, for a run.

We are amending 40 CFR 63.1349(b)(8)(vii) to include a provision describing performance testing requirements when a source demonstrates compliance with the emissions standard using a continuous emissions monitoring system (CEMS) for sulfur dioxide (SO_2) measurement and reporting.

We are adding a scaling alternative whereby if a source uses a wet scrubber, tray tower or dry scrubber, and where the test run average of the three HCl compliance tests demonstrates compliance below 2.25 parts per million by volume (ppmv) (which is 75 percent of the HCl emission limit), the source may calculate an operating limit by establishing a relationship of the average SO_2 CEMS signal to the HCl concentration (corrected to 7 percent oxygen). The operating limit would be established at a point where the SO_2 CEMS indicates the source would be at 2.25 ppmv. Since the 2.25 ppmv is below the actual limit of 3.0 ppmv, the source will continue to demonstrate compliance with the HCl standard. Given the fact that SO_2 controls preferentially remove HCl, an increase in SO_2 emissions would not indicate an increase in HCl emissions as long as some SO_2 emissions reductions are occurring. Adding this compliance flexibility should not result in any increase in HCl emissions.

We are also amending, under 40 CFR 63.1346(g)(3), language related to the use of air pollution control devices (APCD). We had proposed that all hazardous APCD be operating by the time the temperature to the APCD reaches 300 °F. However, during the comment period, the EPA received further clarification on the temperature parameter. Commenters noted that the temperature threshold during startup need only apply to injection systems and not all APCD, and that the temperature reading should occur at the PM control device inlet. Commenters also noted that as soon as fuel is shut off during shutdown, gas flows can decrease to the point where activated carbon and hydrated lime being injected can fall out of the stream and accumulate in the duct work due to reduced gas flows. In addition, lime affected by water vapor condensation present during startup and shutdown conditions will cause the lime to harden and reduce the efficiency for dust removal.[1] Because of the injection system operating restrictions with startup and shutdown, revision of the startup and shutdown work practice is amended in the final rule to clarify that the injection system may be shut off when kiln feed is shut off. In addition to this revision regarding injection systems, clarification that all control devices for HAP must be operating during startup and shutdown has been included in the regulatory text.

We are also finalizing measurement span criteria for HCl CEMS to include better quality assurance/quality control (QA/QC) for measurements of elevated HCl emissions that may result from ''mill off'' operations. This slight increase in measurement span (from 5 parts per million (ppm) to 10 ppm) provides for an improved balance between accurately quantifying measurements at low emissions levels (the majority of operating time) and improving QA/QC for brief periods of elevated emissions observed during ''mill off'' operation (the majority of HCl mass emissions).

In these final amendments, we remove 40 CFR 60.64(c)(2), which applied when sources did not have valid 15-minute CEMS data. This provision allowed for inclusion of the average emission rate from the previous hour for which data were available. This provision was inadvertently added to the final rule, but this substitution is not an allowable action.

We are also revising 40 CFR 63.1350(o) (Alternative Monitoring Requirements Approval), because language in this section, which does not allow an operator to apply for alternative THC monitoring, is now obsolete. There is now alternative monitoring allowed in 40 CFR 63.1350(j) due to the 2013 final rule (see 78 FR 10015). A source that emits a high amount of THC due to methane emissions, for example, can follow the alternative oHAP monitoring requirements. For any other reason that an alternative THC monitoring protocol is warranted, we allow the source to submit an application to the Administrator subject to the provisions of 40 CFR 63.1350(o)(1) through (6).

B. Affirmative Defense

The EPA is removing a regulatory affirmative defense provision from the rule. As explained above, removal of the affirmative defense merely corrects the regulation to reflect that the provisions have no legal effect in light of the court vacatur of the affirmative defense provisions in the Portland Cement NESHAP rule. *NRDC* v. *EPA,* 749 F. 3d at 1063–64 (D.C. Cir. 2014).

IV. Summary of Changes Since Proposal

Section III summarized the amendments to the 2013 NSPS and NESHAP rules that the EPA is finalizing in this rule. Due to public comments, minor changes to the proposed regulatory text have been included in the final rule. These minor changes are discussed in the response to comment document that can be found in the docket. We believe that these minor changes sufficiently address concerns expressed by commenters and improve the clarity of the rule while improving or preserving public health and environmental protection required under the CAA.

V. Summary of Comments and Responses

We proposed amendments to the 2013 NSPS and NESHAP rules on November 19, 2014 (see 79 FR 68821). We received 3 comment letters, and consequently made some additional corrections in response to these comments. Comments and responses on these amendments are summarized in the response to comments document found in the docket. There were no significant comments received on the proposed technical amendments. A list of typographical errors we proposed to correct, and are now finalizing, can be found in the proposed rule at 79 FR 68824. For clarity, we are including a table of additional typographical corrections found by the commenters on the proposed rule.

[1] These issues are further discussed in the docket, via communication with John Holmes dated September 24, 2014.

TABLE 2—MISCELLANEOUS FINAL TECHNICAL CORRECTIONS TO 40 CFR PART 63, SUBPART LLL

Section of subpart LLL	Description of correction
40 CFR 63.1347(a)(1)	Referred rule numbers have been changed from Section 63.1343 through 63.1348, to Sections 63.1343, 1345 and 1346.
40 CFR 63.1349(b)(1)(iii)	Reference to procedures in (a)(1)(iii)(A) through (D) is changed to (b)1(iii)(A) through (D).
40 CFR 63.1349(b)(1)(iii)(A)(4)	Reference in this section is changed from (a)(1)(iii)(A)(1) through (3) to (b)(1)(iii)(A)(1) through (3).
40 CFR 63.1349(b)(3)(iv)	Reference in this section is changed from 63.1344(b) to 63.1346(b).
40 CFR 63.1349(b)(7)(ii)	Reference in this section is changed from (a)(7)(vii) and (viii)) to (b)(7)(viii) through (ix).
40 CFR 63.1349(b)(7)(vii)	Reference in this section is changed from (a)(7)(vii) and (viii) to (b)(7)(viii) through (ix).
40 CFR 63.1349(b)(7)(viii)	Reference in this section is changed from (a)(7)(vii)(A) and (B) to (b)(7)(viii)(A) and (B).
Equation 13	The variable Y listed in units of ppmv is changed to ppmvd.
Equation 14	Variable Y_1 is listed but is not in equation and has been removed.
40 CFR 63.1349(b)(8)(viii)	Reference to Equation 18 has been changed to reference to Equation 21.
40 CFR 63.1349(c)	A range for performance testing from 29–31 months for 30 month tests and 11–13 months for annual tests has been added.
40 CFR 63.1350(k) and (l)	Clarifications on calibration and span checks have been added. Reference to Performance Specification 18 added.
40 CFR 63.1350(n)(4)	Reference in this section is changed from (n)(1) to (n)(2).
40 CFR 63.1355(d)	A requirement to keep annual records of cement kiln dust is obsolete due to the 2013 final amendment requirements of continuous monitoring, so this provision has been removed.
Table 1 to Subpart LLL of Part 63—Applicability of General Provisions	Remove reference to 63.10(e)(3)(vii) and (viii) since they were superseded by 63.1354(b)(10).

The EPA is also finalizing corrections and clarifications to the 2013 NESHAP and NSPS rules, including typographical and grammatical errors, as well as incorrect dates and cross-references. Details of the specific changes we are finalizing to the regulatory text may be found above in the table of corrections, and also in the response to comment document found in the docket for this action.

VI. Impacts of These Final Amendments

The EPA has determined that owners and operators of affected facilities would choose to install and operate the same or similar air pollution control technologies under this action as they would have installed to comply with the previously finalized standards. We project that these amendments will result in no significant change in costs, emission reductions or benefits. Even if there were changes in costs for the affected facilities, such changes would likely be small relative to both the overall costs of the individual projects and the overall costs and benefits of the final rule. Since we believe that owners and operators would put on the same controls for this revised final rule that they would have for the 2013 rule, there should not be any incremental costs related to this final rule.

A. What are the air impacts?

We believe that owners and operators of affected facilities will not revise their control technology implementation plans as a result of these final technical corrections. Accordingly, we believe that this final rule will not result in significant changes in emissions of any regulated pollutants.

B. What are the energy impacts?

This final rule is not anticipated to have an effect on the supply, distribution or use of energy. As previously stated, we believe that owners and operators of affected facilities would install the same or similar control technologies as they would have installed to comply with the previously finalized standards.

C. What are the compliance costs?

We believe there will be no significant change in compliance costs as a result of this final rule because owners and operators of affected facilities would install the same or similar control technologies as they would have installed to comply with the previously finalized standards.

D. What are the economic and employment impacts?

Because we expect that owners and operators of affected facilities would install the same or similar control technologies under this action as they would have installed to comply with the previously finalized standards, we do not anticipate that this final rule will result in significant changes in emissions, energy impacts, costs, benefits or economic impacts. Likewise, we believe this rule will not have any impacts on the price of electricity, employment or labor markets, or the U.S. economy.

E. What are the benefits of the final standards?

As previously stated, the EPA anticipates the Portland cement industry will not incur significant compliance costs or savings as a result of this action and we do not anticipate any significant emission changes resulting from these amendments to the rule. Therefore, there are no direct monetized benefits or disbenefits associated with this final rule.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. The OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0416 for the NESHAP; there are no additional recordkeeping and reporting requirements for the NSPS. This action does not change the information collection requirements previously finalized and, as a result, does not impose any additional information collection burden on industry. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. The EPA has determined that none of the small entities subject to this rule will experience a significant impact because this action imposes no additional compliance costs on owners or operators of affected sources. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments or the private sector.

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.

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

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

This action does not add to or relieve affected sources from any requirements, and therefore has no impacts; thus, health and risk assessments were not conducted.

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

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment. The basis for this determination is that this action is a reconsideration of existing requirements and imposes no new impacts or costs.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 60

Administrative practice and procedure, Air pollution control, Environmental protection, Intergovernmental relations, Reporting and recordkeeping.

40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: July 1, 2015.

Gina McCarthy,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7411.

Subpart F—[Amended]

■ 2. Section 60.61 is amended by revising paragraph (f) and adding paragraphs (g) and (h) to read as follows:

§ 60.61 Definitions.

* * * * *

(f) *Operating day* means a 24-hour period beginning at 12:00 midnight during which the kiln produces clinker at any time. For calculating 30 day rolling average emissions, an *operating day* does not include the hours of operation during startup or shutdown.

(g) *Rolling average* means the weighted average of all data, meeting QA/QC requirements or otherwise normalized, collected during the applicable averaging period. The period of a rolling average stipulates the frequency of data averaging and reporting. To demonstrate compliance with an operating parameter a 30-day rolling average period requires calculation of a new average value each operating day and shall include the average of all the hourly averages of the specific operating parameter. For demonstration of compliance with an emissions limit based on pollutant concentration, a 30-day rolling average is comprised of the average of all the hourly average concentrations over the previous 30 operating days. For demonstration of compliance with an emissions limit based on lbs-pollutant

per production unit, the 30-day rolling average is calculated by summing the hourly mass emissions over the previous 30 operating days, then dividing that sum by the total production during the same period.

(h) *Run average* means the average of the recorded parameter values for a run.

■ 3. Section 60.62 is amended by adding paragraphs (a)(1)(i), (a)(2), (b)(1)(iii) and (iv), revising paragraph (d), and adding paragraph (e) to read as follows:

§ 60.62 Standards.

(a) * * *

(1) * * *

(i) 0.30 pounds per ton of feed (dry basis) to the kiln for kilns constructed, reconstructed, or modified after August 17, 1971 but on or before June 16, 2008.

* * * * *

(2) Exhibit greater than 20 percent opacity for kilns constructed, reconstructed, or modified after August 17, 1971 but on or before June 16, 2008, except that this opacity limit does not apply to any kiln subject to a PM limit in paragraph (a)(1) of this section that uses a PM continuous parametric monitoring system (CPMS).

* * * * *

(b) * * *

(1) * * *

(iii) 0.10 lb per ton of feed (dry basis) for clinker coolers constructed, reconstructed, or modified after August 17, 1971, but on or before June 16, 2008.

(iv) 10 percent opacity for clinker coolers constructed, reconstructed, or modified after August 17, 1971, but on or before June 16, 2008, except that this opacity limit does not apply to any clinker cooler subject to a PM limit in paragraph (b)(1) of this section that uses a PM continuous parametric monitoring system (CPMS).

* * * * *

(d) If you have an affected source subject to this subpart with a different emissions limit or requirement for the same pollutant under another regulation in title 40 of this chapter, once you are in compliance with the most stringent emissions limit or requirement, you are not subject to the less stringent requirement. Until you are in compliance with the more stringent limit, the less stringent limit continues to apply.

(e) The compliance date for all revised monitoring and recordkeeping requirements contained in this rule will be the same as listed in 63.1351(c) unless you commenced construction as of June 16, 2008, at which time the compliance date is November 8, 2010 or upon startup, whichever is later.

■ 4. Section 60.63 is amended by revising paragraphs (c)(1), (c)(2)(i) and (iii), (c)(3), (c)(4)(ii) through (iv), and (c)(5) through (8) to read as follows:

§ 60.63 Monitoring of operations.

* * * * *

(c) * * *

(1) For each kiln or clinker cooler subject to a PM emissions limit in §§ 60.62(a)1(ii) and 60.62(a)1(iii) or 60.62(b)(1)(i) and 60.62(b)(1)(ii), you must demonstrate compliance through an initial performance test. You will conduct your performance test using Method 5 or Method 5I at appendix A–3 to part 60 of this chapter. You must also monitor continuous performance through use of a PM CPMS.

(2) * * *

(i) Your PM CPMS must provide a 4–20 milliamp or digital signal output and the establishment of its relationship to manual reference method measurements must be determined in units of milliamps or the monitors digital equivalent.

(ii) * * *

(iii) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, record and average all milliamp or digital 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).

(3) Determine your operating limit as specified in paragraphs (c)(4)(i) through (c)(5) of this section. If your PM performance test demonstrates your PM emission levels to be below 75 percent of your emission limit, you will use the average PM CPMS value recorded during the PM compliance test, the milliamp or digital equivalent of zero output from your PM CPMS, and the average PM result of your compliance test to establish your operating limit. If your PM compliance test demonstrates your PM emission levels to be at or above 75 percent of your emission limit, you will use the average PM CPMS value recorded during the PM compliance test to establish your operating limit. You must verify an existing or establish a new operating limit after each repeated performance test. You must repeat the performance test at least annually and reassess and adjust the site-specific operating limit in accordance with the results of the performance test.

(4) * * *

(ii) Determine your PM CPMS instrument average in milliamps or digital equivalent 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 PM CPMS instrument zero expressed in milliamps or a digital value, your three run average PM CPMS milliamp or digital signal value, and your three run average PM concentration from your three PM performance test runs, determine a relationship of lb/ton-clinker per milliamp or digital signal with equation 2.

$$R = \frac{Y_1}{(X_1 - z)} \qquad \text{(Eq. 2)}$$

Where:

R = The relative lb/ton clinker per milliamp or digital equivalent for your PM CPMS.

Y_1 = The three run average PM lb/ton clinker.

X_1 = The three run average milliamp or digital signal output from your PM CPMS.
z = The milliamp or digital equivalent of your instrument zero determined from (c)(4)(i) of this section.

(iv) Determine your source specific 30-day rolling average operating limit using the lb/ton-clinker per milliamp or digital signal value from Equation 2 above in Equation 3, below. This sets your operating limit at the PM CPMS output value corresponding to 75 percent of your emission limit.

$$O_l = z + (0.75(L)) / R \qquad \text{(Eq. 3)}$$

Where:

O_l = The operating limit for your PM CPMS on a 30-day rolling average, in milliamps or the digital equivalent.
L = Your source emission limit expressed in lb/ton clinker.
z = Your instrument zero in milliamps or a digital equivalent, determined from (1)(i).
R = The relative lb/ton-clinker per milliamp or digital equivalent, for your PM CPMS, from Equation 2.

(5) If the average of your three PM compliance test runs is at or above 75 percent of your PM emission limit, you must determine your operating limit by averaging the PM CPMS milliamp or digital equivalent output corresponding to your three PM performance test runs that demonstrate compliance with the emission limit using Equation 4.

$$O_h = \frac{1}{n}\sum_{i=1}^{n} X_i \qquad \text{(Eq. 4)}$$

Where:

X_i = The PM CPMS data points for all runs i.
n = The number of data points.
O_h = Your site specific operating limit, in milliamps or digital equivalent.

(6) To determine continuous compliance, you must record the PM CPMS output data for all periods when the process is operating, and use all the PM CPMS data for calculations when the source 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 (milliamps or the digital equivalent) on a 30 operating day rolling average basis, updated at the end of each new kiln operating day. Use Equation 5 to determine the 30 kiln operating day average.

$$\text{30kiln operating day average} = \frac{\sum_{i=1}^{n} Hpvi}{n} \qquad \text{(Eq. 5)}$$

Where:

Hpvi = The hourly parameter value for hour i.
n = The number of valid hourly parameter values collected over the previous 30 kiln operating days.

(7) Use EPA Method 5 or Method 5I of appendix A to part 60 of this chapter to determine PM emissions. For each performance test, conduct at least three separate runs each while the mill is on and the mill is off under the conditions that exist when the affected source is operating at the level reasonably expected to occur. Conduct each test run to collect a minimum sample volume of 2 dscm for determining compliance with a new source limit and 1 dscm for determining compliance with an existing source limit. Calculate the time weighted average of the results from three consecutive runs to determine compliance. You need not determine the particulate matter collected in the impingers (''back half'') of the Method 5 or Method 5I particulate sampling train to demonstrate compliance with the PM standards of this subpart. This shall not preclude the permitting authority from requiring a determination of the ''back half'' for other purposes.

(8) 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 or digital signal value equivalent to the instrument zero output, technique by which this zero value was determined, and the average milliamp or digital equivalent signals corresponding to each PM compliance test run.

* * * * *

■ 5. Section 60.64 is amended by revising paragraph (c) introductory text and removing and reserving paragraph (c)(2).

The revision reads as follows:

§ 60.64 Test methods and procedures.

* * * * *

(c) Calculate and record the rolling 30 kiln operating day average emission rate daily of NO_X and SO_2 according to the procedures in paragraph (c)(1) of this section.

* * * * *

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 6. The authority citation for part 63 continues to read as follows:

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

Subpart LLL—[Amended]

■ 7. Section 63.1341 is amended by revising the definitions for ''Operating day'', ''Rolling average'', and ''Run average'' to read as follows:

§ 63.1341 Definitions.

* * * * *

Operating day means any 24-hour period beginning at 12:00 midnight during which the kiln produces any amount of clinker. For calculating the 30-day rolling average emissions, kiln operating days do not include the hours of operation during startup or shutdown.

* * * * *

Rolling average means the weighted average of all data, meeting QA/QC requirements or otherwise normalized, collected during the applicable averaging period. The period of a rolling average stipulates the frequency of data averaging and reporting. To demonstrate compliance with an operating parameter a 30-day rolling average period requires calculation of a new average value each operating day and shall include the average of all the hourly averages of the specific operating parameter. For demonstration of compliance with an emissions limit based on pollutant concentration a 30-day rolling average is comprised of the average of all the hourly average concentrations over the previous 30 operating days. For demonstration of compliance with an emissions limit based on lbs-pollutant per production unit the 30-day rolling average is calculated by summing the hourly mass emissions over the previous 30 operating days, then dividing that sum by the total production during the same period.

Run average means the average of the recorded parameter values for a run.

* * * * *

■ 8. Section 63.1343 is amended by revising paragraphs (a), (b)(1) and (2), and (d) to read as follows:

§ 63.1343 What standards apply to my kilns, clinker coolers, raw material dryers, and open clinker storage piles?

(a) *General.* The provisions in this section apply to each kiln and any alkali bypass associated with that kiln, clinker cooler, raw material dryer, and open clinker storage pile. All D/F, HCl, and total hydrocarbon (THC) emissions limit are on a dry basis. The D/F, HCl, and THC limits for kilns are corrected to 7 percent oxygen. All THC emissions limits are measured as propane. Standards for mercury and THC are based on a rolling 30-day average. If using a CEMS to determine compliance with the HCl standard, this standard is based on a rolling 30-day average. You must ensure appropriate corrections for moisture are made when measuring flow rates used to calculate mercury emissions. The 30-day period means all operating hours within 30 consecutive kiln operating days excluding periods of startup and shutdown. All emissions limits for kilns, clinker coolers, and raw material dryers currently in effect that are superseded by the limits below continue to apply until the compliance date of the limits below, or until the source certifies compliance with the limits below, whichever is earlier.

(b) *Kilns, clinker coolers, raw material dryers, raw mills, and finish mills.* (1) The emissions limits for these sources are shown in Table 1.

TABLE 1—EMISSIONS LIMITS FOR KILNS, CLINKER COOLERS, RAW MATERIAL DRYERS, RAW AND FINISH MILLS

If your source is a (an):	And the operating mode is:	And if is located at a:	Your emissions limits are:	And the units of the emissions limit are:	The oxygen correction factor is:
1. Existing kiln	Normal operation	Major or area source	PM [1] 0.07	lb/ton clinker	NA.
			D/F [2] 0.2	ng/dscm (TEQ)	7 percent.
			Mercury 55	lb/MM tons clinker	NA.
			THC [3 4] 24	ppmvd	7 percent.
2. Existing kiln	Normal operation	Major source	HCl 3	ppmvd	7 percent.
3. Existing kiln	Startup and shutdown	Major or area source	Work practices (63.1346(g)).	NA	NA.
4. New kiln	Normal operation	Major or area source	PM [1] 0.02	lb/ton clinker	NA.
			D/F [2] 0.2	ng/dscm (TEQ)	7 percent.
			Mercury 21	lb/MM tons clinker	NA.
			THC [3 4] 24	ppmvd	7 percent.
5. New kiln	Normal operation	Major source	HCl 3	ppmvd	7 percent.
6. New kiln	Startup and shutdown	Major or area source	Work practices (63.1346(g)).	NA	NA.
7. Existing clinker cooler.	Normal operation	Major or area source	PM 0.07	lb/ton clinker	NA.
8. Existing clinker cooler.	Startup and shutdown	Major or area source	Work practices (63.1348(b)(9)).	NA	NA.
9. New clinker cooler	Normal operation	Major or area source	PM 0.02	lb/ton clinker	NA.
10. New clinker cooler	Startup and shutdown	Major or area source	Work practices (63.1348(b)(9)).	NA	NA.
11. Existing or new raw material dryer.	Normal operation	Major or area source	THC [3 4] 24	ppmvd	NA.
12. Existing or new raw material dryer.	Startup and shutdown	Major or area source	Work practices (63.1348(b)(9)).	NA	NA.
13. Existing or new raw or finish mill.	All operating modes	Major source	Opacity 10	percent	NA.

[1] The initial and subsequent PM performance tests are performed using Method 5 or 5I and consist of three test runs.
[2] If the average temperature at the inlet to the first PM control device (fabric filter or electrostatic precipitator) during the D/F performance test is 400 °F or less, this limit is changed to 0.40 ng/dscm (TEQ).
[3] Measured as propane.
[4] Any source subject to the 24 ppmvd THC limit may elect to meet an alternative limit of 12 ppmvd for total organic HAP.

(2) When there is an alkali bypass and/or an inline coal mill with a separate stack associated with a kiln, the combined PM emissions from the kiln and the alkali bypass stack and/or the inline coal mill stack are subject to the PM emissions limit. Existing kilns that combine the clinker cooler exhaust and/or alkali bypass and/or coal mill exhaust with the kiln exhaust and send the combined exhaust to the PM control device as a single stream may meet an alternative PM emissions limit. This limit is calculated using Equation 1 of this section:

$$PM_{alt} = (0.0060 \times 1.65)(Q_k + Q_c + Q_{ab} + Q_{cm})/(7000) \quad \text{(Eq. 1)}$$

Where:

PM_{alt} = Alternative PM emission limit for commingled sources.

0.006 = The PM exhaust concentration (gr/dscf) equivalent to 0.070 lb per ton clinker where clinker cooler and kiln exhaust gas are not combined.

1.65 = The conversion factor of ton feed per ton clinker.

Q_k = The exhaust flow of the kiln (dscf/ton feed).

Q_c = The exhaust flow of the clinker cooler (dscf/ton feed).

Q_{ab} = The exhaust flow of the alkali bypass (dscf/ton feed).

Q_{cm} = The exhaust flow of the coal mill (dscf/ton feed).

7000 = The conversion factor for grains (gr) per lb.

For new kilns that combine kiln exhaust, clinker cooler gas and/or coal mill and alkali bypass exhaust, the limit is calculated using Equation 2 of this section:

$$PM_{alt} = (0.0020 \times 1.65)(Q_k + Q_c + Q_{ab} + Q_{cm})/(7000) \quad \text{(Eq. 2)}$$

Where:

PM_{alt} = Alternative PM emission limit for commingled sources.

0.002 = The PM exhaust concentration (gr/dscf) equivalent to 0.020 lb per ton clinker where clinker cooler and kiln exhaust gas are not combined.

1.65 = The conversion factor of ton feed per ton clinker.

Q_k = The exhaust flow of the kiln (dscf/ton feed).

Q_c = The exhaust flow of the clinker cooler (dscf/ton feed).

Q_{ab} = The exhaust flow of the alkali bypass (dscf/ton feed).

Q_{cm} = The exhaust flow of the coal mill (dscf/ton feed).

7000 = The conversion factor for gr per lb.

* * * * *

(d) Emission limits in effect prior to September 9, 2010. Any source defined as an existing source in § 63.1351, and that was subject to a PM, mercury, THC, D/F, or opacity emissions limit prior to September 9, 2010, must continue to meet the limits as shown in Table 2 until September 9, 2015.

TABLE 2—EMISSIONS LIMITS IN EFFECT PRIOR TO SEPTEMBER 9, 2010, FOR KILNS (ROWS 1–4), CLINKER COOLERS (ROW 5), AND RAW MATERIAL DRYERS (ROWS 6–9)

If your source is	and	And if it is located at	Your emissions limits are: [1]	And the units of the emissions limit are:
1. An existing kiln	it commenced construction or reconstruction on or prior to December 2, 2005.	A major source	PM–0.3 Opacity–20 D/F–0.2 [2] THC–50 [3 4]	lb/ton feed percent ng/dscm (TEQ) ppmvd.
2. An existing kiln	it commenced construction or reconstruction after December 2, 2005.	A major source	PM–0.3 Opacity–20 D/F–0.2 [2] THC–20 [3 5] Mercury–41 [6]	lb/ton feed percent ng/dscm (TEQ) ppmvd ug/dscm.
3. An existing kiln	it commenced construction or reconstruction on or prior to December 2, 2005.	An area source	D/F–0.2 [2] THC–50 [3 4]	ng/dscm (TEQ) ppmvd.
4. An existing kiln	it commenced construction or reconstruction after December 2, 2005.	An area source	D/F–0.2 [2] THC–20 [3 5] Mercury–41 [6]	ng/dscm (TEQ) ppmvd ug/dscm.
5. An existing clinker cooler.	NA	A major source	PM–0.1 Opacity–10	lb/ton feed percent.
6. An Existing raw material dryer.	it commenced construction or reconstruction on or prior to December 2, 2005.	A major source	THC–50 [3 4] Opacity–10	ppmvd Percent.
7. An Existing raw material dryer.	it commenced construction or reconstruction after December 2, 2005.	A major source	THC–20 [3 5] Opacity–10	ppmvd percent.
8. An Existing raw material dryer.	it commenced construction or reconstruction on or prior to December 2, 2005.	An area source	THC–50 [3 4]	ppmvd.
9. An Existing raw material dryer.	it commenced construction or reconstruction after December 2, 2005.	An area source	THC–20 [3 5]	ppmvd.

[1] All emission limits expressed as a concentration basis (ppmvd, ng/dscm) are corrected to seven percent oxygen.

[2] If the average temperature at the inlet to the first particulate matter control device (fabric filter or electrostatic precipitator) during the D/F performance test is 400 °F or less, this limit is changed to 0.4 ng/dscm (TEQ).

[3] Measured as propane.

[4] Only applies to Greenfield kilns or raw material dryers.

[5] As an alternative, a source may demonstrate a 98 percent reduction in THC emissions from the exit of the kiln or raw material dryer to discharge to the atmosphere. Inline raw mills are considered to be an integral part of the kiln.

[6] As an alternative, a source may route the emissions through a packed bed or spray tower wet scrubber with a liquid-to-gas ratio of 30 gallons per 1000 actual cubic feet per minute or more and meet a site-specific emission limit based on the measured performance of the wet scrubber.

§ 63.1344 [Removed and Reserved]

■ 9. Section 63.1344 is removed and reserved.

■ 10. Section 63.1346 is amended by revising paragraph (g)(3)to read as follows:

§ 63.1346 Operating limits for kilns.

* * * * *

(g) * * *

(3) All dry sorbent and activated carbon systems that control hazardous air pollutants must be turned on and operating at the time the gas stream at the inlet to the baghouse or ESP reaches 300 degrees Fahrenheit (five minute average) during startup. Temperature of the gas stream is to be measured at the inlet of the baghouse or ESP every minute. Such injection systems can be turned off during shutdown. Particulate control and all remaining devices that control hazardous air pollutants should be operational during startup and shutdown.

* * * * *

■ 11. Section 63.1347 is amended by revising paragraph (a)(1) to read as follows:

§ 63.1347 Operation and maintenance plan requirements.

(a) * * *

(1) Procedures for proper operation and maintenance of the affected source and air pollution control devices in order to meet the emissions limits and operating limits, including fugitive dust control measures for open clinker piles of §§ 63.1343, 63.1345, and 63.1346. Your operations and maintenance plan must address periods of startup and shutdown.

* * * * *

■ 12. Section 63.1348 is amended by revising paragraphs (a)(4)(iv) and (v), (b)(1)(iii), and (b)(9) to read as follows:

§ 63.1348 Compliance requirements.

(a) * * *

(4) * * *

(iv) The time weighted average total organic HAP concentration measured during the separate initial performance test specified by § 63.1349(b)(7) must be used to determine initial compliance.

(v) The time weighted average THC concentration measured during the initial performance test specified by § 63.1349(b)(4) must be used to determine the site-specific THC limit. Using the fraction of time the inline kiln/raw mill is on and the fraction of time that the inline kiln/raw mill is off, calculate this limit as a time weighted average of the THC levels measured during raw mill on and raw mill off testing using one of the two approaches in § 63.1349(b)(7)(vii) or (viii) depending on the level of organic HAP measured during the compliance test.

* * * * *

(b) * * *

(1) * * *

(iii) You may not use data recorded during monitoring system startup, shutdown or malfunctions or repairs associated with monitoring system malfunctions in calculations used to report emissions or operating levels. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

* * * * *

(9) *Startup and Shutdown Compliance.* All dry sorbent and activated carbon systems that control hazardous air pollutants must be turned on and operating at the time the gas stream at the inlet to the baghouse or ESP reaches 300 degrees Fahrenheit (five minute average) during startup. Temperature of the gas stream is to be measured at the inlet of the baghouse or ESP every minute. Such injection systems can be turned off during shutdown. Particulate control and all remaining devices that control hazardous air pollutants should be operational during startup and shutdown.

* * * * *

■ 13. Section 63.1349 is amended by revising paragraphs (b), (c), and (d)(1)(ii) to read as follows:

§ 63.1349 Performance testing requirements.

* * * * *

(b)(1) *PM emissions tests.* The owner or operator of a kiln and clinker cooler subject to limitations on PM emissions shall demonstrate initial compliance by conducting a performance test using Method 5 or Method 5I at appendix A–3 to part 60 of this chapter. You must also monitor continuous performance through use of a PM continuous parametric monitoring system (PM CPMS).

(i) For your PM CPMS, you will establish a site-specific operating limit. If your PM performance test demonstrates your PM emission levels to be below 75 percent of your emission limit you will use the average PM CPMS value recorded during the PM compliance test, the milliamp or digital equivalent of zero output from your PM CPMS, and the average PM result of your compliance test to establish your operating limit. If your PM compliance test demonstrates your PM emission levels to be at or above 75 percent of your emission limit you will use the average PM CPMS value recorded during the PM compliance test to establish your operating limit. You will use the PM CPMS to demonstrate continuous compliance with your operating limit. 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 or digital signal output and the establishment of its relationship to manual reference method measurements must be determined in units of milliamps or the monitors digital equivalent.

(B) Your PM CPMS operating range must be capable of reading PM concentrations from zero to a level equivalent to three 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 three 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 or digital 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 Method 5I test runs).

(ii) Determine your operating limit as specified in paragraphs (b)(1)(iii) through (iv) of this section. If your PM performance test demonstrates your PM emission levels to be below 75 percent of your emission limit you will use the average PM CPMS value recorded during the PM compliance test, the milliamp or digital equivalent of zero output from your PM CPMS, and the average PM result of your compliance test to establish your operating limit. If your PM compliance test demonstrates your PM emission levels to be at or above 75 percent of your emission limit you will use the average PM CPMS value recorded during the PM compliance test to establish your operating limit. You must verify an existing or establish a new operating limit after each repeated performance test. You must repeat the performance test at least annually and reassess and adjust the site-specific operating limit in

accordance with the results of the performance test.

(iii) If the average of your three Method 5 or 5I compliance test runs is below 75 percent 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 5I compliance test with the procedures in (b)(1)(iii)(A) through (D) of this section.

(A) Determine your PM CPMS instrument zero output with one of the following procedures:

(*1*) 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.

(*2*) Zero point data for extractive instruments should be obtained by removing the extractive probe from the stack and drawing in clean ambient air.

(*3*) The zero point may also be established 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.

(*4*) If none of the steps in paragraphs (b)(1)(iii)(A)(*1*) through (*3*) of this section are possible, you must use a zero output value provided by the manufacturer.

(B) Determine your PM CPMS instrument average in milliamps or digital equivalent, and the average of your corresponding three PM compliance test runs, using equation 3.

$$\overline{x} = \frac{1}{n}\sum_{i=1}^{n} X_1 \ , \overline{y} = \frac{1}{n}\sum_{i=1}^{n} Y_1 \qquad \text{(Eq. 3)}$$

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.

n = The number of data points.

(C) With your instrument zero expressed in milliamps or a digital value, your three run average PM CPMS milliamp or digital signal value, and your three run PM compliance test average, determine a relationship of lb/ton-clinker per milliamp or digital signal value with Equation 4.

$$\mathbf{R} = \frac{Y_1}{(X_1 - z)} \qquad \text{(Eq. 4)}$$

Where:

R = The relative lb/ton-clinker per milliamp or digital equivalent for your PM CPMS.

Y_1 = The three run average lb/ton-clinker PM concentration.

X_1 = The three run average milliamp or digital equivalent output from your PM CPMS.

z = The milliamp or digital equivalent of your instrument zero determined from (b)(1)(iii)(A).

* * * * *

(D) Determine your source specific 30-day rolling average operating limit using the lb/ton-clinker per milliamp or digital signal value from Equation 4 in Equation 5, below. This sets your operating limit at the PM CPMS output value corresponding to 75 percent of your emission limit.

$$O_1 = z + \frac{0.75(L)}{R} \qquad \text{(Eq. 5)}$$

Where:

* * * * *

O_l = The operating limit for your PM CPMS on a 30-day rolling average, in milliamps or the digital equivalent.

L = Your source emission limit expressed in lb/ton clinker.

z = Your instrument zero in milliamps, or digital equivalent, determined from (b)(1)(iii)(A).

R = The relative lb/ton-clinker per milliamp, or digital equivalent, for your PM CPMS, from Equation 4.

* * * * *

(iv) If the average of your three PM compliance test runs is at or above 75 percent of your PM emission limit you must determine your operating limit by averaging the PM CPMS milliamp or digital equivalent output corresponding to your three PM performance test runs that demonstrate compliance with the emission limit using Equation 6.

$$O_h = \frac{1}{n}\sum_{i=1}^{n} X_1 \qquad \text{(Eq. 6)}$$

Where:

* * * * *

X_1 = The PM CPMS data points for all runs i.

n = The number of data points.

O_h = Your site specific operating limit, in milliamps or the digital equivalent.

* * * * *

(v) To determine continuous operating compliance, you must record the PM CPMS output data for all periods when the process is operating, and use all the PM CPMS data for calculations when the source 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 (milliamps or the digital equivalent) on a 30 operating day rolling average basis, updated at the end of each new kiln operating day. Use Equation 7 to determine the 30 kiln operating day average.

$$30\text{kiln operating day} = \frac{\sum_{i=1}^{n} Hpvi}{n} \quad \text{(Eq. 7)}$$

Where:

Hpvi = The hourly parameter value for hour i.

n = The number of valid hourly parameter values collected over 30 kiln operating days.

* * * * *

(vi) For each performance test, conduct at least three separate test runs each while the mill is on and the mill is off, under the conditions that exist when the affected source is operating at the level reasonably expected to occur. Conduct each test run to collect a minimum sample volume of 2 dscm for determining compliance with a new source limit and 1 dscm for determining compliance with an existing source limit. Calculate the time weighted average of the results from three consecutive runs, including applicable sources as required by (b)(1)(viii), to determine compliance. You need not determine the particulate matter collected in the impingers (''back half'') of the Method 5 or Method 5I particulate sampling train to demonstrate compliance with the PM standards of this subpart. This shall not preclude the permitting authority from requiring a determination of the ''back half'' for other purposes.

(vii) 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 or digital equivalent to the instrument zero output, technique by which this zero value was determined, and the average milliamp or digital equivalent signals corresponding to each PM compliance test run.

(viii) When there is an alkali bypass and/or an inline coal mill with a separate stack associated with a kiln, the main exhaust and alkali bypass and/or inline coal mill must be tested simultaneously and the combined emission rate of PM from the kiln and alkali bypass and/or inline coal mill must be computed for each run using Equation 8 of this section.

$$E_{Cm} = \frac{E_K + E_B + E_C}{P} \quad \text{(Eq. 8)}$$

Where:

E_{Cm} = Combined hourly emission rate of PM from the kiln and bypass stack and/or inline coal mill, lb/ton of kiln clinker production.

E_K = Hourly emissions of PM emissions from the kiln, lb.

E_B = Hourly PM emissions from the alkali bypass stack, lb.

E_C = Hourly PM emissions from the inline coal mill stack, lb.

P = Hourly clinker production, tons.

(ix) The owner or operator of a kiln with an in-line raw mill and subject to limitations on PM emissions shall demonstrate initial compliance by conducting separate performance tests while the raw mill is under normal operating conditions and while the raw mill is not operating, and calculate the time weighted average emissions. The operating limit will then be determined using 63.1349(b)(1)(i) of this section.

(2) *Opacity tests.* If you are subject to limitations on opacity under this subpart, you must conduct opacity tests in accordance with Method 9 of appendix A–4 to part 60 of this chapter. The duration of the Method 9 performance test must be 3 hours (30 6-minute averages), except that the duration of the Method 9 performance test may be reduced to 1 hour if the conditions of paragraphs (b)(2)(i) and (ii) of this section apply. For batch processes that are not run for 3-hour periods or longer, compile observations totaling 3 hours when the unit is operating.

(i) There are no individual readings greater than 10 percent opacity;

(ii) There are no more than three readings of 10 percent for the first 1-hour period.

(3) *D/F Emissions Tests.* If you are subject to limitations on D/F emissions under this subpart, you must conduct a performance test using Method 23 of appendix A–7 to part 60 of this chapter. If your kiln or in-line kiln/raw mill is equipped with an alkali bypass, you must conduct simultaneous performance tests of the kiln or in-line kiln/raw mill exhaust and the alkali bypass. You may conduct a performance test of the alkali bypass exhaust when the raw mill of the in-line kiln/raw mill is operating or not operating.

(i) Each performance test must consist of three separate runs conducted under representative conditions. The duration of each run must be at least 3 hours, and the sample volume for each run must be at least 2.5 dscm (90 dscf).

(ii) The temperature at the inlet to the kiln or in-line kiln/raw mill PMCD, and, where applicable, the temperature at the inlet to the alkali bypass PMCD must be continuously recorded during the period of the Method 23 test, and the continuous temperature record(s) must be included in the performance test report.

(iii) Average temperatures must be calculated for each run of the performance test.

(iv) The run average temperature must be calculated for each run, and the average of the run average temperatures must be determined and included in the performance test report and will determine the applicable temperature limit in accordance with § 63.1346(b), footnote 2.

(v)(A) If sorbent injection is used for D/F control, you must record the rate of sorbent injection to the kiln exhaust, and where applicable, the rate of sorbent injection to the alkali bypass exhaust, continuously during the period of the Method 23 test in accordance with the conditions in § 63.1350(m)(9), and include the continuous injection rate record(s) in the performance test report. Determine the sorbent injection rate parameters in accordance with paragraph (b)(3)(vi) of this section.

(B) Include the brand and type of sorbent used during the performance test in the performance test report.

(C) Maintain a continuous record of either the carrier gas flow rate or the carrier gas pressure drop for the duration of the performance test. If the carrier gas flow rate is used, determine,

record, and maintain a record of the accuracy of the carrier gas flow rate monitoring system according to the procedures in appendix A to part 75 of this chapter. If the carrier gas pressure drop is used, determine, record, and maintain a record of the accuracy of the carrier gas pressure drop monitoring system according to the procedures in § 63.1350(m)(6).

(vi) Calculate the run average sorbent injection rate for each run and determine and include the average of the run average injection rates in the performance test report and determine the applicable injection rate limit in accordance with § 63.1346(c)(1).

(4) *THC emissions test.* (i) If you are subject to limitations on THC emissions, you must operate a CEMS in accordance with the requirements in § 63.1350(i). For the purposes of conducting the accuracy and quality assurance evaluations for CEMS, the THC span value (as propane) is 50 ppmvd and the reference method (RM) is Method 25A of appendix A to part 60 of this chapter.

(ii) Use the THC CEMS to conduct the initial compliance test for the first 30 kiln operating days of kiln operation after the compliance date of the rule. See § 63.1348(a).

(iii) If kiln gases are diverted through an alkali bypass or to a coal mill and exhausted through a separate stack, you must calculate a kiln-specific THC limit using Equation 9:

$$Cks = \frac{(MACT\ Limit\ x\ (Qab+Qcm+Qks)) - (Qab\ x\ Cab) - (Qcm\ x\ Ccm)}{Qks} \quad \text{(Eq. 9)}$$

Where:

Cks = Kiln stack concentration (ppmvd).
Qab = Alkali bypass flow rate (volume/hr).
Cab = Alkali bypass concentration (ppmvd).
Qcm = Coal mill flow rate (volume/hr).
Ccm = Coal mill concentration (ppmvd).
Qks = Kiln stack flow rate (volume/hr).

(iv) THC must be measured either upstream of the coal mill or the coal mill stack.

(v) Instead of conducting the performance test specified in paragraph (b)(4)of this section, you may conduct a performance test to determine emissions of total organic HAP by following the procedures in paragraph (b)(7) of this section.

(5) *Mercury Emissions Tests.* If you are subject to limitations on mercury emissions, you must operate a mercury CEMS or a sorbent trap monitoring system in accordance with the requirements of § 63.1350(k). The initial compliance test must be based on the first 30 kiln operating days in which the affected source operates using a mercury CEMS or a sorbent trap monitoring system after the compliance date of the rule. See § 63.1348(a).

(i) If you are using a mercury CEMS or a sorbent trap monitoring system, you must install, operate, calibrate, and maintain an instrument for continuously measuring and recording the exhaust gas flow rate to the atmosphere according to the requirements in § 63.1350(k)(5).

(ii) Calculate the emission rate using Equation 10 of this section:

$$E_{30D} = k\,\frac{\sum_{i=1}^{n} C_i Q_i}{P} \quad \text{(Eq. 10)}$$

Where:

E_{30D} = 30-day rolling emission rate of mercury, lb/MM tons clinker.
C_i = Concentration of mercury for operating hour i, µg/scm.
Q_i = Volumetric flow rate of effluent gas for operating hour i, where C_i and Q_i are on the same basis (either wet or dry), scm/hr.
k = Conversion factor, 1 lb/454,000,000 µg.
n = Number of kiln operating hours in the previous 30 kiln operating day period where both C and Qi qualified data are available.
P = Total runs from the previous 30 days of clinker production during the same time period as the mercury emissions measured, million tons.

(6) *HCl emissions tests.* For a source subject to limitations on HCl emissions you must conduct performance testing by one of the following methods:

(i)(A) If the source is equipped with a wet scrubber, tray tower or dry scrubber, you must conduct performance testing using Method 321 of appendix A to this part unless you have installed a CEMS that meets the requirements § 63.1350(l)(1). For kilns with inline raw mills, testing should be conducted for the raw mill on and raw mill off conditions.

(B) You must establish site specific parameter limits by using the CPMS required in § 63.1350(l)(1). For a wet scrubber or tray tower, measure and record the pressure drop across the scrubber and/or liquid flow rate and pH in intervals of no more than 15 minutes during the HCl test. Compute and record the 24-hour average pressure drop, pH, and average scrubber water flow rate for each sampling run in which the applicable emissions limit is met. For a dry scrubber, measure and record the sorbent injection rate in intervals of no more than 15 minutes during the HCl test. Compute and record the 24-hour average sorbent injection rate and average sorbent injection rate for each sampling run in which the applicable emissions limit is met.

(ii)(A) If the source is not controlled by a wet scrubber, tray tower or dry sorbent injection system, you must operate a CEMS in accordance with the requirements of § 63.1350(l)(1). See § 63.1348(a).

(B) The initial compliance test must be based on the 30 kiln operating days that occur after the compliance date of this rule in which the affected source operates using an HCl CEMS. Hourly HCl concentration data must be obtained according to § 63.1350(l).

(iii) As an alternative to paragraph (b)(6)(i)(B) of this section, you may choose to monitor SO_2 emissions using a CEMS in accordance with the requirements of § 63.1350(l)(3). You must establish an SO_2 operating limit equal to the average recorded during the HCl stack test where the HCl stack test run result demonstrates compliance with the emission limit. This operating limit will apply only for demonstrating HCl compliance.

(iv) If kiln gases are diverted through an alkali bypass or to a coal mill and exhausted through a separate stack, you must calculate a kiln-specific HCl limit using Equation 11:

$$Cks = \frac{(MACT\ Limit\ x\ (Qab+Qcm+Qks)) - (Qab\ x\ Cab) - (Qcm\ x\ Ccm)}{Qks} \quad \text{(Eq. 11)}$$

Where:

Cks = Kiln stack concentration (ppmvd).
Qab = Alkali bypass flow rate (volume/hr).

Cab = Alkali bypass concentration (ppmvd).
Qcm = Coal mill flow rate (volume/hr).
Ccm = Coal mill concentration (ppmvd).
Qks = Kiln stack flow rate (volume/hr).

(7) *Total Organic HAP Emissions Tests.* Instead of conducting the performance test specified in paragraph (b)(4) of this section, you may conduct a performance test to determine emissions of total organic HAP by following the procedures in paragraphs (b)(7)(i) through (v) of this section.

(i) Use Method 320 of appendix A to this part, Method 18 of Appendix A of part 60, ASTM D6348–03 or a combination to determine emissions of total organic HAP. Each performance test must consist of three separate runs under the conditions that exist when the affected source is operating at the representative performance conditions in accordance with § 63.7(e). Each run must be conducted for at least 1 hour.

(ii) At the same time that you are conducting the performance test for total organic HAP, you must also determine a site-specific THC emissions limit by operating a THC CEMS in accordance with the requirements of § 63.1350(j). The duration of the performance test must be at least 3 hours and the average THC concentration (as calculated from the recorded output) during the 3-hour test must be calculated. You must establish your THC operating limit and determine compliance with it according to paragraphs (b)(7)(vii) and (viii) of this section. It is permissible to extend the testing time of the organic HAP performance test if you believe extended testing is required to adequately capture organic HAP and/or THC variability over time.

(iii) If your source has an in-line kiln/raw mill you must use the fraction of time the raw mill is on and the fraction of time that the raw mill is off and calculate this limit as a weighted average of the THC levels measured during three raw mill on and three raw mill off tests.

(iv) If your organic HAP emissions are below 75 percent of the organic HAP standard and you determine your operating limit with paragraph (b)(7)(vii) of this section your THC CEMS must be calibrated and operated on a measurement scale no greater than 180 ppmvw, as carbon, or 60 ppmvw as propane.

(v) If your kiln has an inline coal mill and/or an alkali bypass with separate stacks, you are required to measure and account for oHAP emissions from their separate stacks. You are required to measure oHAP at the coal mill inlet, and you must also measure oHAP at the alkali bypass outlet. You must then calculate a flow weighted average oHAP concentration for all emission sources including the inline coal mill and the alkali bypass.

(vi) Your THC CEMS measurement scale must be capable of reading THC concentrations from zero to a level equivalent to two times your highest THC emissions average determined during your performance test, including mill on or mill off operation. **NOTE:** This may require the use of a dual range instrument to meet this requirement and paragraph (b)(7)(iv) of this section.

(vii) Determine your operating limit as specified in paragraphs (b)(7)(viii) and (ix) of this section. If your organic HAP performance test demonstrates your average organic HAP emission levels are below 75 percent of your emission limit (9 ppmv) you will use the average THC value recorded during the organic HAP performance test, and the average total organic HAP result of your performance test to establish your operating limit. If your organic HAP compliance test results demonstrate that your average organic HAP emission levels are at or above 75 percent of your emission limit, your operating limit is established as the average THC value recorded during the organic HAP performance test. You must establish a new operating limit after each performance test. You must repeat the performance test no later than 30 months following your last performance test and reassess and adjust the site-specific operating limit in accordance with the results of the performance test.

(viii) If the average organic HAP results for your three Method 18 and/or Method 320 performance test runs are below 75 percent of your organic HAP emission limit, you must calculate an operating limit by establishing a relationship of THC CEMS signal to the organic HAP concentration using the average THC CEMS value corresponding to the three organic HAP compliance test runs and the average organic HAP total concentration from the Method 18 and/or Method 320 performance test runs with the procedures in (b)(7)(viii)(A) and (B) of this section.

(A) Determine the THC CEMS average values in ppmvw, and the average of your corresponding three total organic HAP compliance test runs, using Equation 12.

$$\overline{x} = \frac{1}{n}\sum_{i=1}^{n} X_1 \,, \overline{y} = \frac{1}{n}\sum_{i=1}^{n} Y_1 \qquad \text{(Eq. 12)}$$

Where:
$\bar{x}$ = The THC CEMS average values in ppmvw.
X_i = The THC CEMS data points for all three runs i.
Y_i = The sum of organic HAP concentrations for test runs i. and
n = The number of data points.

(B) You must use your three run average THC CEMS value and your three run average organic HAP concentration from your three Method 18 and/or Method 320 compliance tests to determine the operating limit. Use equation 13 to determine your operating limit in units of ppmvw THC, as propane.

$$T_l = \left(\frac{9}{Y_1}\right) * X_1 \qquad \text{(Eq. 13)}$$

Where:
T_l = The 30-day operating limit for your THC CEMS, ppmvw.
Y_1 = The average organic HAP concentration from Eq. 12, ppmvd.
X_1 = The average THC CEMS concentration from Eq. 12, ppmvw.

(ix) If the average of your three organic HAP performance test runs is at or above 75 percent of your organic HAP emission limit, you must determine your operating limit using Equation 14 by averaging the THC CEMS output values corresponding to your three organic HAP performance test runs that demonstrate compliance with the emission limit. If your new THC CEMS value is below your current operating limit, you may opt to retain your current operating limit, but you must still submit all performance test and THC CEMS data according to the reporting requirements in paragraph (d)(1) of this section.

$$T_h = \frac{1}{n}\sum_{i=1}^{n} X_i \qquad \text{(Eq. 14)}$$

Where:

X_i = The THC CEMS data points for all runs i.

n = The number of data points.

T_h = Your site specific operating limit, in ppmvw THC.

(x) If your kiln has an inline kiln/raw mill, you must conduct separate performance tests while the raw mill is operating (''mill on'') and while the raw mill is not operating (''mill off''). Using the fraction of time the raw mill is on and the fraction of time that the raw mill is off, calculate this limit as a weighted average of the THC levels measured during raw mill on and raw mill off compliance testing with Equation 15.

$$R=(y*t)+(x*(1-t)) \qquad \text{(Eq.15)}$$

Where:

R = Operating limit as THC, ppmvw.

y = Average THC CEMS value during mill on operations, ppmvw.

t = Percentage of operating time with mill on.

x = Average THC CEMS value during mill off operations, ppmvw.

(1-t) = Percentage of operating time with mill off.

(xi) To determine continuous compliance with the THC operating limit, you must record the THC CEMS output data for all periods when the process is operating and the THC CEMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average data collected by the THC CEMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (ppmvw) on a 30 operating day rolling average basis, updated at the end of each new kiln operating day. Use Equation 16 to determine the 30 kiln operating day average.

$$30\text{kiln operating day} = \frac{\sum_{i=1}^{n} Hpvi}{n} \qquad \text{(Eq. 16)}$$

Where:

Hpvi = The hourly parameter value for hour i, ppmvw.

n = The number of valid hourly parameter values collected over 30 kiln operating days.

(xii) Use EPA Method 18 or Method 320 of appendix A to part 60 of this chapter to determine organic HAP emissions. For each performance test, conduct at least three separate runs under the conditions that exist when the affected source is operating at the level reasonably expected to occur. If your source has an in-line kiln/raw mill you must conduct three separate test runs with the raw mill on, and three separate runs under the conditions that exist when the affected source is operating at the level reasonably expected to occur with the mill off. Conduct each Method 18 test run to collect a minimum target sample equivalent to three times the method detection limit. Calculate the average of the results from three runs to determine compliance.

(xiii) If the THC level exceeds by 10 percent or more your site-specific THC emissions limit, you must

(A) As soon as possible but no later than 30 days after the exceedance, conduct an inspection and take corrective action to return the THC CEMS measurements to within the established value; and

(B) Within 90 days of the exceedance or at the time of the 30 month compliance test, whichever comes first, conduct another performance test to determine compliance with the organic HAP limit and to verify or re-establish your site-specific THC emissions limit.

(8) HCl Emissions Tests with SO_2 Monitoring. If you choose to monitor SO_2 emissions using a CEMS to demonstrate HCl compliance, follow the procedures in (b)(8)(i) through (ix) of this section and in accordance with the requirements of § 63.1350(l)(3). You must establish an SO_2 operating limit equal to the average recorded during the HCl stack test. This operating limit will apply only for demonstrating HCl compliance.

(i) Use Method 321 of appendix A to this part to determine emissions of HCl. Each performance test must consist of three separate runs under the conditions that exist when the affected source is operating at the representative performance conditions in accordance with § 63.7(e). Each run must be conducted for at least one hour.

(ii) At the same time that you are conducting the performance test for HCl, you must also determine a site-specific SO_2 emissions limit by operating an SO_2 CEMS in accordance with the requirements of § 63.1350(l). The duration of the performance test must be three hours and the average SO_2 concentration (as calculated from the average output) during the 3-hour test must be calculated. You must establish your SO_2 operating limit and determine compliance with it according to paragraphs (b)(8)(vii) and (viii) of this section.

(iii) If your source has an in-line kiln/raw mill you must use the fraction of time the raw mill is on and the fraction of time that the raw mill is off and calculate this limit as a weighted average of the SO_2 levels measured during raw mill on and raw mill off testing.

(iv) Your SO_2 CEMS must be calibrated and operated according to the requirements of § 60.63(f).

(v) Your SO_2 CEMS measurement scale must be capable of reading SO_2 concentrations consistent with the requirements of § 60.63(f), including mill on or mill off operation.

(vi) If your kiln has an inline kiln/raw mill, you must conduct separate performance tests while the raw mill is operating (''mill on'') and while the raw mill is not operating (''mill off''). Using the fraction of time the raw mill is on and the fraction of time that the raw mill is off, calculate this limit as a weighted average of the HCl levels measured during raw mill on and raw mill off compliance testing with Equation 17.

$$R=(y*t)+x*(L-1) \qquad \text{(Eq. 17)}$$

Where:

R = Operating limit as SO_2, ppmvw.

y = Average SO_2 CEMS value during mill on operations, ppmvw.

t = Percentage of operating time with mill on, expressed as a decimal.

x = Average SO_2 CEMS value during mill off operations, ppmvw.

t − 1 = Percentage of operating time with mill off, expressed as a decimal.

(vii) If the average of your three HCl compliance test runs is below 75 percent of your HCl emission limit, you may as a compliance alternative, calculate an operating limit by establishing a relationship of SO_2 CEMS signal to your HCl concentration corrected to 7 percent O_2 by using the SO_2 CEMS instrument zero, the average SO_2 CEMS values corresponding to the three compliance test runs, and the average HCl concentration from the HCl compliance test with the procedures in (b)(8)(vii)(A) through (D) of this section.

(A) Determine your SO_2 CEMS instrument zero output with one of the following procedures:

(*1*) 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.

(*2*) Zero point data for extractive instruments may be obtained by removing the extractive probe from the stack and drawing in clean ambient air.

(*3*) The zero point may also be established by performing probe-flood introduction of high purity nitrogen or certified zero air free of SO_2.

(*4*) If none of the steps in paragraphs (b)(8)(vii)(A)(*1*) through (*3*) of this section are possible, you must use a zero output value provided by the manufacturer.

(B) Determine your SO_2 CEMS instrument average ppm, and the average of your corresponding three HCl compliance test runs, using equation 18.

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} X_1 \ , \bar{y} = \frac{1}{n}\sum_{i=1}^{n} Y_1 \qquad \text{(Eq. 18)}$$

Where:

X_1 = The SO_2 CEMS data points for the three runs constituting the performance test.

Y_1 = The HCl emission concentration expressed as ppmv corrected to 7 percent O_2 for the three runs constituting the performance test.

n = The number of data points.

(C) With your instrument zero expressed in ppmv, your three run average SO_2 CEMS expressed in ppmv, and your three run HCl compliance test average in ppm corrected to 7 percent O_2, determine a relationship of ppm HCl corrected to 7 percent O_2 per ppm SO_2 with Equation 19.

$$R = \frac{Y_1}{(X_1 - z)} \qquad \text{(Eq. 19)}$$

Where:

R = The relative HCl ppmv corrected to 7 percent O_2 per ppm SO_2 for your SO_2 CEMS.

Y_1 = The three run average HCl concentration corrected to 7 percent O_2.

X_1 = The three run average ppm recorded by your SO_2 CEMS.

z = The instrument zero output ppm value.

(D) Determine your source specific 30-day rolling average operating limit using ppm HCl corrected to 7 percent O_2 per ppm SO_2 value from Equation 19 in Equation 20, below. This sets your operating limit at the SO_2 CEMS ppm value corresponding to 75 percent of your emission limit.

$$O_1 = z + \frac{0.75(L)}{R} \qquad \text{(Eq. 20)}$$

Where:

O_l = The operating limit for your SO_2 CEMS on a 30-day rolling average, in ppmv.

L = Your source HCl emission limit expressed in ppmv corrected to 7 percent O_2.

z = Your instrument zero in ppmv, determined from (1)(i).

R = The relative oxygen corrected ppmv HCl per ppmv SO_2, for your SO_2 CEMS, from Equation 19.

(viii) To determine continuous compliance with the SO_2 operating limit, you must record the SO_2 CEMS output data for all periods when the process is operating and the SO_2 CEMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average data collected by the SO_2 CEMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (ppmvw) on a 30 operating day rolling average basis, updated at the end of each new kiln operating day. Use Equation 21 to determine the 30 kiln operating day average.

$$30 kiln\ operating\ day = \frac{\sum_{i=1}^{n} Hpvi}{n} \qquad \text{(Eq. 21)}$$

Where:

Hpvi = The hourly parameter value for hour i, ppmvw.

n = The number of valid hourly parameter values collected over 30 kiln operating days.

(ix) Use EPA Method 321 of appendix A to part 60 of this chapter to determine HCl emissions. For each performance test, conduct at least three separate runs under the conditions that exist when the affected source is operating at the level reasonably expected to occur. If your source has an in-line kiln/raw mill you must conduct three separate test runs with the raw mill on, and three separate runs under the conditions that exist when the affected source is operating at the level reasonably expected to occur with the mill off.

(x) If the SO_2 level exceeds by 10 percent or more your site-specific SO_2 emissions limit, you must:

(A) As soon as possible but no later than 30 days after the exceedance, conduct an inspection and take corrective action to return the SO_2 CEMS measurements to within the established value;

(B) Within 90 days of the exceedance or at the time of the periodic compliance test, whichever comes first, conduct another performance test to determine compliance with the HCl limit and to verify or re-establish your site-specific SO_2 emissions limit.

(c) *Performance test frequency.* Except as provided in § 63.1348(b), performance tests are required at regular intervals for affected sources that are subject to a dioxin, organic HAP or HCl emissions limit. Performance tests required every 30 months must be completed between 29 and 31 calendar months after the previous performance test except where that specific pollutant is monitored using CEMS; performance tests required every 12 months must be completed within 11 to 13 calendar months after the previous performance test.

* * * * *

(d) * * *

(1) * * *

(ii) The values for the site-specific operating limits or parameters established pursuant to paragraphs (b)(1), (3), (6), (7), and (8) of this section, as applicable, and a description, including sample calculations, of how the operating parameters were established during the initial performance test.

* * * * *

■ 14. Section 63.1350 is amended by:

■ a. Removing and reserving paragraph (a)(2).

■ b. Revising paragraphs (i)(1) and (2), (j), (k)(2) introductory text, and (k)(2)(ii).

■ c. Adding paragraph (k)(2)(iii).

■ d. Revising paragraphs (k)(5)(i) and (iv), (l), (n) introductory text, (n)(1) and (4), (o) introductory text, and (o)(3) introductory text.

The revisions and additions read as follows:

§ 63.1350 Monitoring requirements.

* * * * *

(i) * * *

(1) You must install, operate, and maintain a THC continuous emission monitoring system in accordance with Performance Specification 8 or Performance Specification 8A of appendix B to part 60 of this chapter and comply with all of the requirements for continuous monitoring systems found in the general provisions, subpart A of this part. The owner or operator must operate and maintain each CEMS according to the quality assurance requirements in Procedure 1 of appendix F in part 60 of this chapter. For THC continuous emission monitoring systems certified under Performance Specification 8A, conduct the relative accuracy test audits required under Procedure 1 in accordance with Performance Specification 8, Sections 8 and 11 using Method 25A in appendix A to 40 CFR part 60 as the reference method; the relative accuracy must meet the criteria of Performance Specification 8, Section 13.2.

(2) Performance tests on alkali bypass and coal mill stacks must be conducted using Method 25A in appendix A to 40 CFR part 60 and repeated every 30 months.

(j) *Total organic HAP monitoring requirements.* If you are complying with the total organic HAP emissions limits, you must continuously monitor THC according to paragraph (i)(1) and (2) of this section or in accordance with Performance Specification 8 or Performance Specification 8A of appendix B to part 60 of this chapter and comply with all of the requirements for continuous monitoring systems found in the general provisions, subpart A of this part. You must operate and maintain each CEMS according to the quality assurance requirements in Procedure 1 of appendix F in part 60 of this chapter. In addition, your must follow the monitoring requirements in paragraphs (m)(1) through (4) of this section. You must also develop an emissions monitoring plan in accordance with paragraphs (p)(1) through (4) of this section.

(k) * * *

(2) In order to quality assure data measured above the span value, you must use one of the three options in paragraphs (k)(2)(i) through (iii) of this section. Where the options in paragraphs (k)(2)(i) through (iii) are employed while the kiln is operating in a mill-off mode, the ''above span'' described in paragraph (k)(2)(iii) may substitute for the daily upscale calibration provided the data normalization process in paragraph (k)(2)(iii) are not required. If data normalization is required, the normal daily upscale calibration check must be performed to quality assure the operation of the CEMS for that day. In this particular case, adjustments to CEMS normally required by Procedure 5 when a daily upscale does not meet the 5 percent criterion are not required, unless paragraph (k)(2)(iii) of this section data normalization is necessary and a subsequent normal daily calibration check demonstrates the need for such adjustment.

* * * * *

(ii) Quality assure any data above the span value by proving instrument linearity beyond the span value established in paragraph (k)(1) of this section using the following procedure. Conduct a weekly ''above span linearity'' calibration challenge of the monitoring system using a reference gas with a certified value greater than your highest expected hourly concentration or greater than 75 percent of the highest measured hourly concentration. The ''above span'' reference gas must meet the requirements of PS 12A, Section 7.1 and must be introduced to the measurement system at the probe. Record and report the results of this procedure as you would for a daily calibration. The ''above span linearity'' challenge is successful if the value measured by the Hg CEMS falls within 10 percent of the certified value of the reference gas. If the value measured by the Hg CEMS during the above span linearity challenge exceeds +/−10 percent of the certified value of the reference gas, the monitoring system must be evaluated and repaired and a new ''above span linearity'' challenge met before returning the Hg CEMS to service, or data above span from the Hg CEMS must be subject to the quality assurance procedures established in paragraph (k)(2)(iii) of this section. In this manner values measured by the Hg CEMS during the above span linearity challenge exceeding +/−20 percent of the certified value of the reference gas must be normalized using Equation 22.

(iii) Quality assure any data above the span value established in paragraph (k)(1) of this section using the following procedure. Any time two consecutive one-hour average measured concentrations of Hg exceeds the span

value you must, within 24 hours before or after, introduce a higher, ''above span'' Hg reference gas standard to the Hg CEMS. The ''above span'' reference gas must meet the requirements of PS 12A, Section 7.1, must target a concentration level between 50 and 150 percent of the highest expected hourly concentration measured during the period of measurements above span, and must be introduced at the probe. While this target represents a desired concentration range that is not always achievable in practice, it is expected that the intent to meet this range is demonstrated by the value of the reference gas. Expected values may include ''above span'' calibrations done before or after the above span measurement period. Record and report the results of this procedure as you would for a daily calibration. The ''above span'' calibration is successful if the value measured by the Hg CEMS is within 20 percent of the certified value of the reference gas. If the value measured by the Hg CEMS exceeds 20 percent of the certified value of the reference gas, then you must normalize the one-hour average stack gas values measured above the span during the 24-hour period preceding or following the ''above span'' calibration for reporting based on the Hg CEMS response to the reference gas as shown in equation 22:

$$\frac{\textit{Certified reference gas value}}{\textit{Measured value of reference gas}} \textit{x Measured stack gas result} = \textit{Normalized stack gas result} \qquad (\textit{Eq.}\ 22)$$

Only one ''above span'' calibration is needed per 24 hour period. If the ''above span'' calibration is conducted during the period when measured emissions are above span and there is a failure to collect at least one valid data point in an hour due to the calibration duration, then you must determine the emissions average for that missed hour as the average of hourly averages for the hour preceding the missed hour and the hour following the missed hour. In an hour where an ''above span'' calibration is being conducted and one or more data points are collected, the emissions average is represented by the average of all valid data points collected in that hour.

* * * * *

(5) * * *

(i) Develop a mercury hourly mass emissions rate by conducting performance tests annually, within 11 to 13 calendar months after the previous performance test, using Method 29, or Method 30B, to measure the concentration of mercury in the gases exhausted from the alkali bypass and coal mill.

* * * * *

(iv) If mercury emissions from the coal mill and alkali bypass are below the method detection limit for two consecutive annual performance tests, you may reduce the frequency of the performance tests of coal mills and alkali bypasses to once every 30 months. If the measured mercury concentration exceeds the method detection limit, you must revert to testing annually until two consecutive annual tests are below the method detection limit.

* * * * *

(l) *HCl Monitoring Requirements.* If you are subject to an emissions limitation on HCl emissions in § 63.1343, you must monitor HCl emissions continuously according to paragraph (l)(1) or (2) and paragraphs (m)(1) through (4) of this section or, if your kiln is controlled using a wet or dry scrubber or tray tower, you alternatively may parametrically monitor SO_2 emissions continuously according to paragraph (l)(3) of this section. You must also develop an emissions monitoring plan in accordance with paragraphs (p)(1) through (4) of this section.

(1) If you monitor compliance with the HCl emissions limit by operating an HCl CEMS, you must do so in accordance with Performance Specification 15 (PS 15) of appendix B to part 60 of this chapter, or, upon promulgation, in accordance with any other performance specification for HCl CEMS in appendix B to part 60 of this chapter. You must operate, maintain, and quality assure a HCl CEMS installed and certified under PS 15 according to the quality assurance requirements in Procedure 1 of appendix F to part 60 of this chapter except that the Relative Accuracy Test Audit requirements of Procedure 1 must be replaced with the validation requirements and criteria of sections 11.1.1 and 12.0 of PS 15. When promulgated, if you choose to install and operate an HCl CEMS in accordance with PS 18 of appendix B to part 60 of this chapter, you must operate, maintain and quality assure the HCl CEMS using the associated Procedure 6 of appendix F to part 60 of this chapter. For any performance specification that you use, you must use Method 321 of appendix A to part 63 of this chapter as the reference test method for conducting relative accuracy testing. The span value and calibration requirements in paragraphs (l)(1)(i) and (ii) of this section apply to all HCl CEMS used under this subpart.

(i) You must use a measurement span value for any HCl CEMS of 0–10 ppmvw unless the monitor is installed on a kiln without an inline raw mill. Kilns without an inline raw mill may use a higher span value sufficient to quantify all expected emissions concentrations. The HCl CEMS data recorder output range must include the full range of expected HCl concentration values which would include those expected during ''mill off'' conditions. The corresponding data recorder range shall be documented in the site-specific monitoring plan and associated records.

(ii) In order to quality assure data measured above the span value, you must use one of the three options in paragraphs (l)(1)(ii)(A) through (C) of this section.

(A) Include a second span that encompasses the HCl emission concentrations expected to be encountered during ''mill off'' conditions. This second span may be rounded to a multiple of 5 ppm of total HCl. The requirements of the appropriate HCl monitor performance specification shall be followed for this second span with the exception that a RATA with the mill off is not required.

(B) Quality assure any data above the span value by proving instrument linearity beyond the span value established in paragraph (l)(1)(i) of this section using the following procedure. Conduct a weekly ''above span linearity'' calibration challenge of the monitoring system using a reference gas with a certified value greater than your highest expected hourly concentration or greater than 75 percent of the highest measured hourly concentration. The ''above span'' reference gas must meet the requirements of the applicable performance specification and must be introduced to the measurement system at the probe. Record and report the results of this procedure as you would for a daily calibration. The ''above span

linearity'' challenge is successful if the value measured by the HCl CEMS falls within 10 percent of the certified value of the reference gas. If the value measured by the HCl CEMS during the above span linearity challenge exceeds 10 percent of the certified value of the reference gas, the monitoring system must be evaluated and repaired and a new ''above span linearity'' challenge met before returning the HCl CEMS to service, or data above span from the HCl CEMS must be subject to the quality assurance procedures established in paragraph (l)(1)(ii)(D) of this section. Any HCl CEMS above span linearity challenge exceeding +/-20 percent of the certified value of the reference gas requires that all above span data must be normalized using Equation 23.

(C) Quality assure any data above the span value established in paragraph (l)(1)(i) of this section using the following procedure. Any time two consecutive one-hour average measured concentration of HCl exceeds the span value you must, within 24 hours before or after, introduce a higher, ''above span'' HCl reference gas standard to the HCl CEMS. The ''above span'' reference gas must meet the requirements of the applicable performance specification and target a concentration level between 50 and 150 percent of the highest expected hourly concentration measured during the period of measurements above span, and must be introduced at the probe. While this target represents a desired concentration range that is not always achievable in practice, it is expected that the intent to meet this range is demonstrated by the value of the reference gas. Expected values may include above span calibrations done before or after the above-span measurement period. Record and report the results of this procedure as you would for a daily calibration. The ''above span'' calibration is successful if the value measured by the HCl CEMS is within 20 percent of the certified value of the reference gas. If the value measured by the HCl CEMS is not within 20 percent of the certified value of the reference gas, then you must normalize the stack gas values measured above span as described in paragraph (l)(1)(ii)(D) of this section. If the ''above span'' calibration is conducted during the period when measured emissions are above span and there is a failure to collect at least one valid data point in an hour due to the calibration duration, then you must determine the emissions average for that missed hour as the average of hourly averages for the hour preceding the missed hour and the hour following the missed hour. In an hour where an ''above span'' calibration is being conducted and one or more data points are collected, the emissions average is represented by the average of all valid data points collected in that hour.

(D) In the event that the ''above span'' calibration is not successful (*i.e.,* the HCl CEMS measured value is not within 20 percent of the certified value of the reference gas), then you must normalize the one-hour average stack gas values measured above the span during the 24-hour period preceding or following the 'above span' calibration for reporting based on the HCl CEMS response to the reference gas as shown in Equation 23:

$$\frac{\textbf{Certified reference gas value}}{\text{Measured value of reference gas}} \text{ x Measured stack gas result}$$

$$= \text{Normalized stack gas result} \qquad (Eq.\ 23)$$

Only one ''above span'' calibration is needed per 24-hour period.

(2) Install, operate, and maintain a CMS to monitor wet scrubber or tray tower parameters, as specified in paragraphs (m)(5) and (7) of this section, and dry scrubber, as specified in paragraph (m)(9) of this section.

(3) If the source is equipped with a wet or dry scrubber or tray tower, and you choose to monitor SO_2 emissions, monitor SO_2 emissions continuously according to the requirements of § 60.63(e) and (f) of part 60 subpart F of this chapter. If SO_2 levels increase above the 30-day rolling average SO_2 operating limit established during your performance test, you must:

(i) As soon as possible but no later than 48 hours after you exceed the established SO_2 value conduct an inspection and take corrective action to return the SO_2 emissions to within the operating limit; and

(ii) Within 60 days of the exceedance or at the time of the next compliance test, whichever comes first, conduct an HCl emissions compliance test to determine compliance with the HCl emissions limit and to verify or re-establish the SO_2 CEMS operating limit.

* * * * *

(n) *Continuous Flow Rate Monitoring System.* You must install, operate, calibrate, and maintain instruments, according to the requirements in paragraphs (n)(1) through (10) of this section, for continuously measuring and recording the stack gas flow rate to allow determination of the pollutant mass emissions rate to the atmosphere from sources subject to an emissions limitation that has a pounds per ton of clinker unit and that is required to be monitored by a CEMS.

(1) You must install each sensor of the flow rate monitoring system in a location that provides representative measurement of the exhaust gas flow rate at the sampling location of the mercury CEMS, taking into account the manufacturer's recommendations. The flow rate sensor is that portion of the system that senses the volumetric flow rate and generates an output proportional to that flow rate.

* * * * *

(4) The flow rate monitoring system must be equipped with a data acquisition and recording system that is capable of recording values over the entire range specified in paragraph (n)(2) of this section.

* * * * *

(o) *Alternate monitoring requirements approval.* You may submit an application to the Administrator for approval of alternate monitoring requirements to demonstrate compliance with the emission standards of this subpart subject to the provisions of paragraphs (o)(1) through (6) of this section.

* * * * *

(3) You must submit the application for approval of alternate monitoring requirements no later than the notification of performance test. The application must contain the information specified in paragraphs (o)(3)(i) through (iii) of this section:

* * * * *

■ 15. 63.1354 is amended by revising paragraphs (b)(9) introductory text through (b)(9)(vi) and adding paragraphs (b)(9)(viii) through (x) to read as follows:

§ 63.1354 Reporting requirements.

* * * * *

(b) * * *

(9) The owner or operator shall submit a summary report semiannually to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI). (CEDRI can be accessed through the EPA's Central Data Exchange (CDX) (*www.epa.gov/cdx*).) You must use the appropriate electronic report in CEDRI for this subpart. Instead of using the electronic report in CEDRI for this subpart, you may submit an alternate electronic file consistent with the extensible markup language (XML) schema listed on the CEDRI Web site (*http://www.epa.gov/ttn/chief/cedri/index.html*), once the XML schema is available. If the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, you must submit the report the Administrator at the appropriate address listed in § 63.13. You must begin submitting reports via CEDRI no later than 90 days after the form becomes available in CEDRI. The reports must be submitted by the deadline specified in this subpart, regardless of the method in which the reports are submitted. The report must contain the information specified in § 63.10(e)(3)(vi). In addition, the summary report shall include:

(i) All exceedances of maximum control device inlet gas temperature limits specified in § 63.1346(a) and (b);

(ii) Notification of any failure to calibrate thermocouples and other temperature sensors as required under § 63.1350(g)(1)(iii) of this subpart; and

(iii) Notification of any failure to maintain the activated carbon injection rate, and the activated carbon injection carrier gas flow rate or pressure drop, as applicable, as required under § 63.1346(c)(2).

(iv) Notification of failure to conduct any combustion system component inspections conducted within the reporting period as required under § 63.1347(a)(3).

(v) Any and all failures to comply with any provision of the operation and maintenance plan developed in accordance with § 63.1347(a).

(vi) For each PM CPMS, HCl, Hg, and THC CEMS, D/F temperature monitoring system, or Hg sorbent trap monitoring system, within 60 days after the reporting periods, you must report all of the calculated 30-operating day rolling average values derived from the CPMS, CEMS, CMS, or Hg sorbent trap monitoring systems.

* * * * *

(viii) Within 60 days after the date of completing each CEMS performance evaluation test as defined in § 63.2, you must submit relative accuracy test audit (RATA) data to the EPA's CDX by using CEDRI in accordance with paragraph (b)(9) 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, you must submit the results of the performance evaluation to the Administrator at the appropriate address listed in § 63.13.

(ix) 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.

(x) All reports required by this subpart not subject to the requirements in paragraphs (b)(9) introductory text and (b)(9)(viii) of this section must be sent to the Administrator at the appropriate address listed in § 63.13. The Administrator or the delegated authority may request a report in any form suitable for the specific case (*e.g.,* by commonly used electronic media such as Excel spreadsheet, on CD or hard copy). The Administrator retains the right to require submittal of reports subject to paragraph (b)(9) introductory text and (b)(9)(viii) of this section in paper format.

* * * * *

§ 63.1355 [Amended]

■ 16. Amend § 63.1355 by removing and reserving paragraph (d).

■ 17. Revise § 63.1356 to read as follows:

§ 63.1356 Sources with multiple emissions limit or monitoring requirements.

If you have an affected source subject to this subpart with a different emissions limit or requirement for the same pollutant under another regulation in title 40 of this chapter, once you are in compliance with the most stringent emissions limit or requirement, you are not subject to the less stringent requirement. Until you are in compliance with the more stringent limit, the less stringent limit continues to apply.

§ 63.1357 [Removed and Reserved]

■ 18. Remove and reserve § 63.1357.

■ 19. Revise Table 1 to Subpart LLL of Part 63 to read as follows:

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Requirement	Applies to subpart LLL	Explanation
63.1(a)(1)–(4)	Applicability	Yes.	
63.1(a)(5)		No	[Reserved].
63.1(a)(6)–(8)	Applicability	Yes.	
63.1(a)(9)		No	[Reserved].
63.1(a)(10)–(14)	Applicability	Yes.	
63.1(b)(1)	Initial Applicability Determination	No	§ 63.1340 specifies applicability.
63.1(b)(2)–(3)	Initial Applicability Determination	Yes.	
63.1(c)(1)	Applicability After Standard Established	Yes.	
63.1(c)(2)	Permit Requirements	Yes	Area sources must obtain Title V permits.
63.1(c)(3)		No	[Reserved].
63.1(c)(4)–(5)	Extensions, Notifications	Yes.	
63.1(d)		No	[Reserved].
63.1(e)	Applicability of Permit Program	Yes.	
63.2	Definitions	Yes	Additional definitions in § 63.1341.
63.3(a)–(c)	Units and Abbreviations	Yes.	
63.4(a)(1)–(3)	Prohibited Activities	Yes.	
63.4(a)(4)		No	[Reserved].
63.4(a)(5)	Compliance date	Yes.	

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Requirement	Applies to subpart LLL	Explanation
63.4(b)–(c)	Circumvention, Severability	Yes.	
63.5(a)(1)–(2)	Construction/Reconstruction	Yes.	
63.5(b)(1)	Compliance Dates	Yes.	
63.5(b)(2)		No	[Reserved].
63.5(b)(3)–(6)	Construction Approval, Applicability	Yes.	
63.5(c)		No	[Reserved].
63.5(d)(1)–(4)	Approval of Construction/Reconstruction	Yes.	
63.5(e)	Approval of Construction/Reconstruction	Yes.	
63.5(f)(1)–(2)	Approval of Construction/Reconstruction	Yes.	
63.6(a)	Compliance for Standards and Maintenance.	Yes.	
63.6(b)(1)–(5)	Compliance Dates	Yes.	
63.6(b)(6)		No	[Reserved].
63.6(b)(7)	Compliance Dates	Yes.	
63.6(c)(1)–(2)	Compliance Dates	Yes.	
63.6(c)(3)–(4)		No	[Reserved].
63.6(c)(5)	Compliance Dates	Yes.	
63.6(d)		No	[Reserved].
63.6(e)(1)–(2)	Operation & Maintenance	No	See § 63.1348(d) for general duty requirement. Any reference to § 63.6(e)(1)(i) in other General Provisions or in this subpart is to be treated as a cross-reference to § 63.1348(d).
63.6(e)(3)	Startup, Shutdown Malfunction Plan	No	Your operations and maintenance plan must address periods of startup and shutdown. See § 63.1347(a)(1).
63.6(f)(1)	Compliance with Emission Standards	No	Compliance obligations specified in subpart LLL.
63.6(f)(2)–(3)	Compliance with Emission Standards	Yes.	
63.6(g)(1)–(3)	Alternative Standard	Yes.	
63.6(h)(1)	Opacity/VE Standards	No	Compliance obligations specified in subpart LLL.
63.6(h)(2)	Opacity/VE Standards	Yes.	
63.6(h)(3)		No	[Reserved].
63.6(h)(4)–(h)(5)(i)	Opacity/VE Standards	Yes.	
63.6(h)(5)(ii)–(iv)	Opacity/VE Standards	No	Test duration specified in subpart LLL.
63.6(h)(6)	Opacity/VE Standards	Yes.	
63.6(h)(7)	Opacity/VE Standards	Yes.	
63.6(i)(1)–(14)	Extension of Compliance	Yes.	
63.6(i)(15)		No	[Reserved].
63.6(i)(16)	Extension of Compliance	Yes.	
63.6(j)	Exemption from Compliance	Yes.	
63.7(a)(1)–(3)	Performance Testing Requirements	Yes	§ 63.1349 has specific requirements.
63.7(b)	Notification period	Yes	Except for repeat performance test caused by an exceedance. See § 63.1353(b)(6).
63.7(c)	Quality Assurance/Test Plan	Yes.	
63.7(d)	Testing Facilities	Yes.	
63.7(e)(1)	Conduct of Tests	No	See § 63.1349(e). Any reference to 63.7(e)(1) in other General Provisions or in this subpart is to be treated as a cross-reference to § 63.1349(e).
63.7(e)(2)–(4)	Conduct of tests	Yes.	
63.7(f)	Alternative Test Method	Yes.	
63.7(g)	Data Analysis	Yes.	
63.7(h)	Waiver of Tests	Yes.	
63.8(a)(1)	Monitoring Requirements	Yes.	
63.8(a)(2)	Monitoring	No	§ 63.1350 includes CEMS requirements.
63.8(a)(3)		No	[Reserved].
63.8(a)(4)	Monitoring	No	Flares not applicable.
63.8(b)(1)–(3)	Conduct of Monitoring	Yes.	
63.8(c)(1)–(8)	CMS Operation/Maintenance	Yes	Temperature and activated carbon injection monitoring data reduction requirements given in subpart LLL.
63.8(d)	Quality Control	Yes, except for the reference to the SSM Plan in the last sentence.	
63.8(e)	Performance Evaluation for CMS	Yes.	
63.8(f)(1)–(5)	Alternative Monitoring Method	Yes	Additional requirements in § 63.1350(l).
63.8(f)(6)	Alternative to RATA Test	Yes.	
63.8(g)	Data Reduction	Yes.	

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Requirement	Applies to subpart LLL	Explanation
63.9(a)	Notification Requirements	Yes.	
63.9(b)(1)–(5)	Initial Notifications	Yes.	
63.9(c)	Request for Compliance Extension	Yes.	
63.9(d)	New Source Notification for Special Compliance Requirements.	Yes.	
63.9(e)	Notification of performance test	Yes	Except for repeat performance test caused by an exceedance. See § 63.1353(b)(6).
63.9(f)	Notification of VE/Opacity Test	Yes	Notification not required for VE/opacity test under § 63.1350(e) and (j).
63.9(g)	Additional CMS Notifications	Yes.	
63.9(h)(1)–(3)	Notification of Compliance Status	Yes.	
63.9(h)(4)		No	[Reserved].
63.9(h)(5)–(6)	Notification of Compliance Status	Yes.	
63.9(i)	Adjustment of Deadlines	Yes.	
63.9(j)	Change in Previous Information	Yes.	
63.10(a)	Recordkeeping/Reporting	Yes.	
63.10(b)(1)	General Recordkeeping Requirements	Yes.	
63.10(b)(2)(i)–(ii)	General Recordkeeping Requirements	No	See § 63.1355(g) and (h).
63.10(b)(2)(iii)	General Recordkeeping Requirements	Yes.	
63.10(b)(2)(iv)–(v)	General Recordkeeping Requirements	No.	
63.10(b)(2)(vi)–(ix)	General Recordkeeping Requirements	Yes.	
63.10(c)(1)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(c)(1)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(c)(2)–(4)		No	[Reserved].
63.10(c)(5)–(8)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(c)(9)		No	[Reserved].
63.10(c)(10)–(15)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(d)(1)	General Reporting Requirements	Yes.	
63.10(d)(2)	Performance Test Results	Yes.	
63.10(d)(3)	Opacity or VE Observations	Yes.	
63.10(d)(4)	Progress Reports	Yes.	
63.10(d)(5)	Startup, Shutdown, Malfunction Reports	No	See § 63.1354(c) for reporting requirements. Any reference to § 63.10(d)(5) in other General Provisions or in this subpart is to be treated as a cross-reference to § 63.1354(c).
63.10(e)(1)–(2)	Additional CMS Reports	Yes.	
63.10(e)(3)	Excess Emissions and CMS Performance Reports.	Yes	Exceedances are defined in subpart LLL.
63.10(e)(3)(vii) and (viii)	Excess Emissions and CMS Performance Reports.	No	Superseded by 63.1354(b)(10).
63.10(f)	Waiver for Recordkeeping/Reporting	Yes.	
63.11(a)–(b)	Control Device Requirements	No	Flares not applicable.
63.12(a)–(c)	State Authority and Delegations	Yes.	
63.13(a)–(c)	State/Regional Addresses	Yes.	
63.14(a)–(b)	Incorporation by Reference	Yes.	
63.15(a)–(b)	Availability of Information	Yes.	

[FR Doc. 2015–16811 Filed 7–24–15; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 80 Monday,

No. 143 July 27, 2015

Part VII

Department of Health and Human Services

45 CFR Parts 1385, 1386, 1387, et al.
Developmental Disabilities Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 1385, 1386, 1387, and 1388

RIN 0970–AB11

Developmental Disabilities Program

AGENCY: Administration on Intellectual and Developmental Disabilities (AIDD), Administration for Community Living, HHS.

ACTION: Final rule.

SUMMARY: This rule implements the Developmental Disabilities Assistance and Bill of Rights Act of 2000. The previous regulations were completed in 1997 before the current law was passed. The rule will align the regulations and current statute and will provide guidance to AIDD grantees.

DATES: These final regulations are effective August 26, 2015.

FOR FURTHER INFORMATION CONTACT: Andrew Morris, Administration on Intellectual and Developmental Disabilities, telephone (202) 357–3424 (Voice). This is not a toll-free number. This document will be made available in alternative formats upon request. Written correspondence can be sent to Administration on Intellectual and Developmental Disabilities, U.S. Department of Health and Human Services, One Massachusetts Ave, Washington, DC 20201.

SUPPLEMENTARY INFORMATION:

I. Developmental Disabilities Assistance and Bill of Rights Act of 2000

In 1963, the President signed into law the Mental Retardation Facilities and Construction Act (Pub. L. 88–164). It gave the authority to plan activities and construct facilities to provide services to persons with ''mental retardation''.[1] This legislation was significantly amended a number of times since 1963 and most recently by the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106–402 (the DD Act of 2000).

Key changes in the DD Act of 2000 include:

- The DD Act of 2000 requires State Councils on Developmental Disabilities (''Councils'' or ''SCDDs'') to set-aside 70 percent of the Federal funds for activities tied to Council goals (section 124(c)(5)(B)(i)). The previous amount was 65 percent. Also, the DD Act of 2000 increases the percentage from 50 percent to 60 percent of representation by individuals with developmental disabilities on Councils (section 125(b)(3)).
- The DD Act of 2000 strengthens provisions regarding access to records of individuals with developmental disabilities that service providers hold, in order to investigate potential abuse and neglect. Also, the State must now provide information to a Protection and Advocacy (P&A) agency about the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities receive through home and community-based waivers. The DD Act of 2000 also defines the P&A governing board. The governing board is subject to section 144 of the Act.
- Additionally, under the Act, the University Affiliated Programs are renamed University Centers for Excellence in Developmental Disabilities Education, Research, and Service (referred to as UCEDDs). Each UCEDD receives a core award. When appropriations are sufficient to provide at least $500,000, as adjusted for inflation, in funding to each existing UCEDD, AIDD, subject to availability of appropriations, awards grants for national training initiatives and is authorized to create additional UCEDDs or to make additional grants to existing UCEDDs. New UCEDDS created under this authority or additional grants to existing UCEDDs must be targeted to states or populations that are unserved or underserved (section 152(d)).
- The DD Act of 2000 authorizes the Projects of National Significance (section 161) to carry out projects relating to the development of policies that reinforce and promote the self-determination, independence, productivity, and inclusion in community life of individuals with developmental disabilities.
- Finally, the DD Act of 2000 also established two additional program authorities, Title II—Families of Children with Disabilities Support Act of 2000, and Title III—Program for Direct Support Workers Who Assist Individuals with Developmental Disabilities. Titles II and III of the DD Act of 2000 have not had funds appropriated by Congress and are not addressed in this rule.

II. Grantees of the Administration on Intellectual and Developmental Disabilities (AIDD) Under the Act

A. Federal Assistance to State Councils on Developmental Disabilities

As stated in section 121 of the DD Act, formula grants are made to each State and other eligible jurisdictions to support a State Council on Developmental Disabilities (SCDD) to engage in advocacy, capacity building, and systemic change activities that assure that individuals with developmental disabilities and their families participate in service and program design, and have access to needed community services. These grants provide assistance that promotes self-determination, independence, productivity, and integration and inclusion in all facets of community living. Activities contribute to a coordinated, person and family-centered, person and family-directed, comprehensive system that includes needed community services, individualized supports, and other forms of assistance that promote self-determination for individuals with developmental disabilities and their families.

It is noted that section 143 of the Act requires that a state have a functioning P&A system in order for the SCDD to receive funds.

B. Protection and Advocacy for Individuals With Developmental Disabilities

Formula grants are made to each State and other eligible jurisdictions to support a P&A system to protect and advocate for the rights of individuals with developmental disabilities. The system must have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection, advocacy and rights of individuals with developmental disabilities who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangement. The system must provide information and referral for programs and services addressing the needs of individuals with developmental disabilities, and have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system, or if there is probable cause to believe that the incidents occurred.

C. Projects of National Significance

Under subtitle E of title I of the Act, AIDD may award grants, contracts or cooperative agreements for Projects of National Significance (PNS) to create opportunities for individuals with developmental disabilities to directly and fully contribute to, and participate in, all facets of community life. Generally, projects are to support the development of national and state policies that reinforce and promote self-

[1] While developmental disability is the preferred contemporary language, mental retardation was the term used in 1963.

determination, independence, productivity, integration, and inclusion in all facets of community living.

D. National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs)

Grants are awarded to entities designated as University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs) in the States and other eligible jurisdictions to provide leadership; advise federal, state, and community policymakers; and promote self-determination, independence, productivity, and full integration of individuals with developmental disabilities. The UCEDDs are interdisciplinary education, research, and public service units of universities, or public or not-for-profit entities associated with the universities that engage in the core functions of interdisciplinary pre-service preparation and continuing education of students and fellows, provision of community services, conduct of research, and dissemination of information related to activities undertaken to address the purpose of title I of the Act.

III. Discussion of Final Rule

A Notice of Proposed Rule Making (NPRM) to address the requirements of the DD Act of 2000 was published on April 10, 2008 (73 FR 19708) and a subsequent document published on July 29, 2008 (73 FR 43904) reopened the comment period through September 29, 2008. This rule finalizes many of the policies that were included in the NPRM, as well as reorganizes some provisions based on court rulings and to provide clarity.

The majority of comments received supported the focus on individuals with developmental disabilities living and participating in all aspects of community living. The following discusses issues raised in the NPRM:

a. The NPRM substantially reorganized the regulatory text of 45 CFR chapter XIII, subchapter I, the Administration on Developmental Disabilities, Developmental Disabilities Program in full. To this end we have revised citations and made technical changes as necessary. The Administration on Developmental Disabilities became the Administration on Intellectual and Developmental Disabilities (AIDD) (as published in the **Federal Register** on April 18, 2012 (77 FR 23250).

b. AIDD has made technical changes to make the rule consistent with the statute and related to the delegations of authorities published in the **Federal Register** on March 15, 2013 (78 FR 16511). These technical revisions further implement the Secretary's recent reorganization of the functions of the U.S. Department of Health and Human Services that created the Administration for Community Living (ACL). The new terminology ''Secretary, or his or her designee,'' is used to replace such terms as ''Assistant Secretary'' (referring to the Assistant Secretary of the Administration on Children and Families) and ''Commissioner'' (referring to the Administration on Disabilities Commissioner).

c. The NPRM requested comment on ''whether the current process involving class action lawsuits provides adequate protection for individuals with developmental disabilities,'' and specifically, ''on the procedures used to reach decisions on whether to pursue class action lawsuits and the method of informing/obtaining consent.'' AIDD received many comments, both raising concerns about the use of class actions by P&As and expressing support for the outcomes P&As have accomplished via their legal advocacy generally, and the use of class action lawsuits specifically. Many commenters suggested that request for such comments deals with issues beyond the scope of AIDD's authority. AIDD considered the comments received and has chosen not to adopt new rules specifically governing the process for P&A's pursuing class action lawsuits.

Some commenters recommended adding requirements for notification of ICF/IID [2] residents, families and legal guardians/representatives where applicable, as well as a specific ''opt out'' provision for this population. As explained above, we determined not to adopt new rules governing class action lawsuits. Class action lawsuits are governed by the Federal Rules of Civil Procedure, which already include notice provisions and we do not believe additional rules specific to P&A's pursuing class actions are required. The DD Act has as its mission protecting people with developmental disabilities from abuse and neglect, and class action lawsuits are an essential tool for such protection. Additional requirements creating procedural obstacles that do not exist for other civil rights enforcement actions may impede litigation that protects and enhances the rights of people with developmental disabilities. These suggested ''opt out'' and notice provisions singular to these types of cases may create additional hurdles and undermine the purposes of the DD Act, the Americans with Disabilities Act, and the Supreme Court decision in *Olmstead*.

In addition, as many commenters noted, P&As utilize the tool of class actions lawsuits judiciously. For example see the 2003 report from GAO, ''P&A Involvement in Deinstitutionalization Lawsuits on Behalf of Individuals with Development Disabilities,'' available at *http://www.gao.gov/new.items/d031044.pdf*.

The DD Act is clear in prioritizing full integration and inclusion of people with developmental disabilities, promoting self-determination, independence, productivity and integration and inclusion in all facets of community life. P&As have a central role in protecting the rights of individuals with developmental disabilities. Additional provisions beyond what is required in the Federal Rules of Civil Procedure could prevent P&As from fulfilling their mandate to enforce the rights of individuals with disabilities in the most effective manner.

d. Many of the comments asked AIDD to define what a UCEDD is. The previous term ''University Affiliated Program'' was defined in previous regulations, but the new term ''UCEDD'' was not defined in the 2008 NPRM. We reviewed the comments and concurred that a clear definition for the UCEDD is necessary. To that end, part 1388 has been reorganized from what was in the NPRM, and language for Governance and Administration (which defines the structure of a UCEDD) has been restored from the previously published regulations to reflect the change from University Affiliated Programs to University Centers of Excellence in Developmental Disabilities.

e. The NPRM invited comment on the question of activities to ''advise,'' ''inform,'' and/or ''educate'' federal, state, and local policymakers. The NPRM sought comment on the possible distinction between lobbying and the educational activities included in the statute. Sections 125(c)(5)(J), 143(a)(2)(L), and 153(a)(1), of the DD Act authorize the State Councils, P&As, and UCEDDS to engage in education, advising, and support of policymakers. Additionally, section 102(27)(E) defines the term ''self-determination activities,'' to envision self-advocacy, whereby individuals with developmental disabilities, themselves, educate

[2] In keeping with the rule from the Centers for Medicare and Medicaid Services, ''Medicare and Medicaid Program; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction CMS–9070–F,'' which took effect on July 12, 2012, this rule substitutes the term Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) for the former term Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR).

policymakers and play a role in the development of public policies that affect them. Section 161(2)(D)(iii) also states that one of the purposes of the Projects of National Significance is to support the development of national and State policies that reinforce and promote such self-determination and inclusion through projects that provide education for policymakers. The majority of commenters stated support for educational activities while recognizing the restrictions with federal funds.

AIDD issued guidance (ADD–01–1 dated September 20, 2001) on lobbying activities. AIDD grantees should continue to present information in a balanced and non-partisan manner that is consistent with the principles of the DD Act. Grantees may use non-federal funds for other policy related activities in accordance with relevant federal and state laws.

We understand that grantees may have questions regarding the practice of advocacy. Many provisions of the DD Act specifically require grantees to engage in such activities as advocacy, capacity building, and/or systems change activities (sections 101(b)(1); 104(a)(3)(D)(ii)(I–III); 121(1); 124(c)(4); 124(c)(4)(L); 125(c)(2); 143(a)(2)(A)(i); 161(2)). AIDD may work with stakeholders to issue new or revised guidance on the subject to address these issues.

Below is a section-by-section discussion of changes made between the NPRM and final rule:

Part 1385—Requirements Applicable to the Developmental Disabilities Programs

Section 1385.1 General

Commenters suggested that the term ''Protection and Advocacy of Individual Rights'' (PAIR) be changed to ''Protection and Advocacy for Individuals with Developmental Disabilities'' (PADD) throughout the regulation. Though the term ''Protection and Advocacy of Individual Rights'' is used in the DD Act, the name is identical to a similar program administered by the Department of Education. For the sake of clarity, and as the term ''Protection and Advocacy for Individuals with Developmental Disabilities'' (PADD) is already regularly used to refer to the P&A program under the DD Act, we have substituted this terminology throughout the regulations.

Section 1385.2 Purpose of the Regulation

No changes were made from the NPRM.

Section 1385.3 Definitions

This section of the final rule updates definitions from the NPRM. The definitions in § 1385.3 are applicable to the rule in its entirety. Some definitions have been changed because the NPRM definitions went beyond the scope of the law.

Accessibility

The definition of accessibility has been changed to reflect the most current and up to date laws and regulations regarding section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990, and the Americans with Disabilities Act Amendments Act of 2008 (Pub. L. 110–325).

AIDD

This definition was added to reflect the change in organizational names from the Administration on Developmental Disabilities to the Administration on Intellectual and Developmental Disabilities in the process of the creation of the Administration for Community Living.

Advocacy Activities

AIDD received comments asking for the inclusion of systems change in the definition of ''advocacy activities'' and we concurred with comments. A minority of comments suggested removing ''families'' from the definition. AIDD disagreed with removing families from the definition as they play a key role in the lives of people with developmental disabilities and are specifically referenced throughout the statute, including in the purpose of the law. AIDD concurred with requests for a broader definition of advocacy activities, and expanded Advocacy Activities to include all aspects of community living. AIDD has revised the term ''advocacy activities''.

Assistive Technology Device

AIDD received comments asking that the definition of ''assistive technology device'' be changed to the wording of the statute. AIDD concurred with the comments.

Assistive Technology Service

AIDD received comments asking that the definition of ''assistive technology service'' be changed to the wording of the statute. AIDD concurred with the comments.

Capacity Building Activities

AIDD received comments that the definition of ''capacity building activities'' did not include key processes and limited activities. Also, the NPRM changed the application of capacity building activities from the UCEDDs to all DD Act programs.. Based on comments received, the definition of capacity building activities has been clarified to include elements of community living, and made applicable to all the DD Act programs.

Developmental Disability

AIDD received multiple objections that the insertion of the term ''determined on a case by case basis'' regarding a developmental disability, with some commenting that it constituted an additional requirement not included in the statute.. AIDD concurred and removed it from the definition. The definition as passed in the 2000 reauthorization did not include such language requiring that each person with a developmental disability be determined on a case by case basis. Multiple commenters opined that that phrase excessively puts a medical diagnosis on developmental disabilities.

Inclusion

We received comments asking that the definition of ''inclusion'' be changed to the wording of the statute. We concurred with the comments.

State

We made a technical revision that was an error in the NPRM for the definition of ''State''. For the purposes of the UCEDD grants, American Samoa and the Commonwealth of the Northern Mariana Islands are not considered States. See section 155 of the DD Act, 42 U.S.C. 15065.

Supported Employment Services

We received comments asking that the definition for ''supported employment services'' be changed to the wording of the statute. We concurred with the comments.

Section 1385.4 Rights of Individuals With Developmental Disabilities

No changes were made from the NPRM.

Section 1385.5 Program Accountability and Indicators of Progress

This section of the NPRM is not being developed into a final rule. We generally received unfavorable comments from stakeholders that the requirements would place an administrative and cost burden on grantees. We concurred, as AIDD does not want to place undue hardships on grantees. We have concluded that additional guidance is unnecessary at this time. Since the law was passed

AIDD has issued OMB approved reporting requirements that are consistent with the Act. See OMB approved reporting in the Impact Statement of the Preamble.

Section 1385.6 Employment of Individuals With Disabilities

There were no changes made to this section in the final rule from the NPRM.

Section 1385.7 Reports of the Secretary

There were no changes made to this section in the final rule from the NPRM.

Section 1385.8 Formula for Determining Allotment

To reflect the accuracy of the allotment process as defined in the statute, the final rule has been amended to replicate sections 122 and 142 of the Act.

Section 1385.9 Grants Administration

There were no changes made to this section in the final rule from the NPRM.

Part 1386—Formula Grant Programs

Subpart A—Basic Requirements

Section 1386.1 General

The final rule makes technical changes to § 1386.1 to update the terminology.

Section 1386.2 Obligation of Funds

Similarly, the final rule revises § 1386.2 to update terminology.

Subpart B—Protection and Advocacy for Individuals with Developmental Disabilities (PADD).

We have revised the title of subpart B to read: Subpart B—Protection and Advocacy for Individuals with Developmental Disabilities (PADD).

Section 1386.19 Definitions

A number of comments were received on the definitions proposed in the NPRM with respect to subparts B, § 1386.19, requesting that modifications be made to the below definitions of ''Abuse,'' ''Complaint,'' ''Legal Guardian, Conservator and Legal Representative,'' ''Neglect,'' ''Probable Cause,'' and ''Service Provider.''

Abuse

AIDD received numerous comments on the definition of ''abuse.'' Commenters recommended including the language ''willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish'' in the definition. The DD Act authorizes P&As to investigate incidents of abuse and neglect, as in section 143(a)(2)(B), to protect individuals with developmental disabilities, regardless of the intent of the alleged abuser. Determining ''willful infliction'' may also require further information to establish such intent, which would, in turn, complicate and even potentially eliminate, a P&A's ability to conduct an appropriate investigation. After careful consideration, AIDD did not include this recommended change in the final rule.

Some commenters suggested removing the phrase ''repeated and/or egregious,'' from the definition of abuse. AIDD removed ''repeated and egregious,'' as suggested. This change is consistent with the language of the DD Act, which states that one of its purposes is to provide individuals with developmental disabilities the opportunity and support ''to live free of abuse, neglect, financial and sexual exploitation, and violations of their legal and human rights'' (section 101(a)(16)(F) of the DD Act, 42 U.S.C. 15001(a)(16)(F)). Even a single instance of the aforementioned treatment is should be sufficient to constitute the type of circumstance that would give a P&A authority to initiate an investigation.

Commenters also recommended substituting ''legal'' for ''statutory and constitutional'' in the definition. AIDD made the recommended change, as P&A authority must include the ability to investigate violations of regulations and judicial precedent; P&A investigatory authority is not limited only to violations of statutory or constitutional law.

Finally, some commenters suggested deleting the phrase ''which may prevent the individual from providing for his or her basic needs such as food and shelter'' from the definition with respect to financial exploitation. Financial exploitation is a type of abuse which falls within the investigatory authority of P&As, and individuals with developmental disabilities can be subject to this type of abuse even when the individual is able to take care of basic food and shelter needs.

AIDD adopted the recommendation and removed the phrase ''which may prevent the individual from providing for his or her basic needs such as food and shelter'' from the final rule.

Complaint

Commenters suggested that ''complaint'' be defined to include ''from any source relating to alleged abuse or neglect,'' rather than ''from any source relating to status or treatment,'' as ''status'' and ''treatment'' are not defined in the proposed regulations. The language ''from any source alleging abuse or neglect,'' was adopted into the final rule as it is consistent with the prior DD Act regulations, as well as with the Protection and Advocacy for Individuals with Mental Illness (PAIMI regulations, 42 CFR 51.2).

Another commenter recommended that the definition include a clarification that an individual's residential placement does not, alone, constitute a complaint issue. Related, other commenters expressed concern that residential status in the context of the definition would lead to potentially inappropriate investigations by the P&As, and recommended that the definition include specific language stating that an individual's residential placement, if not related to quality issues, does not constitute a complaint issue. AIDD has considered these suggestions and did not adopt the suggested change. Residential status may be a part of the determination of whether an investigation should be initiated by a P&A under the DD Act. The DD Act includes the authority to protect and advocate for the rights of individuals ''who . . . are being considered for a change in living arrangements'' in section 143(a)(2)(A)(i), and P&As must apply these principles in accordance with the intent of the law. An example of such principles can be found in section 109(a)(2), ''treatment, services, and habitation for an individual with developmental disabilities should be designed to maximize the potential of the individual and should be provided in the setting that is least restrictive of the individual's personal liberty.''

Commenters also suggested the term ''alleging'' be added to modify ''abuse or neglect.'' AIDD adopted this change, as the P&A may not yet have determined whether abuse or neglect has actually occurred at the complaint stage.

AIDD also included ''electronic communications,'' and other media to provide an additional, relevant and technologically up-to-date example of a type of communication that a P&A may receive that may fall under this definition.

Legal Guardian, Conservator and Legal Representative

Based on comments received, AIDD has modified the definition of ''legal guardian, conservator and legal representative,'' to include ''a parent of a minor, unless the State has appointed another legal guardian under applicable State law,'' to be consistent with the findings of the district court in *State of Connecticut Office of Protection and Advocacy for Persons with Disabilities*

v. *Hartford Bd. of Ed, 464 F.3d 229 (2d Cir. 2006)* (holding that P&A has access to names and contact information for parents and/or guardians of certain students). Commenters also recommended adding ''executors and administrators of estates,'' to the list of excluded categories, a change AIDD instituted for the sake of clarity. Finally, commenters recommended substituting ''services, supports and other assistance'' for ''treatment and habilitation services,'' and AIDD made that change, to be consistent with the principles of the DD Act and to explicitly express that the DD Act covers a broad range of services.

Neglect

Some commenters recommended the addition of ''failure to take appropriate steps to prevent harassment or assault by a peer or self-abuse'' to the term ''neglect.'' P&As need the authority to investigate acts or omissions leading to this type of situation, which can put the health, safety and life of an individual with a developmental disability at risk. AIDD accepted the proposed change.

Another commenter recommended alternative modifications, including concerns similar to the issue raised regarding the definition of abuse, suggesting that ''repeated'' be part of the definition. The DD Act seeks to ensure that people with developmental disabilities ''live free of . . . neglect'' in section 101(a)(16)(F). AIDD did not accept the proposed change, as the DD Act does not require ''repeated'' incidents to qualify under this definition.

One commenter objected to the continued inclusion of the existence of a discharge plan in the definition of ''neglect.'' AIDD considered this comment, and rejected it. Since at least 1996, the regulations have contained language about failing to establish or carry out a discharge plan.

Probable Cause

Commenters suggested adding language to the body of the rule to the effect that the definition is not intended to affect the authority of the courts to review the determinations of P&As as to whether probable cause exists. However, we did not accept this change, as AIDD does not have authority over court jurisdiction.

Commenters also suggested removing the phrase ''depending on the context,'' as ambiguous and unnecessary. AIDD agreed and removed the phrase accordingly.

Some commenters suggested that the definition in the NPRM failed to provide constitutionally mandated due process and was unclear. The NPRM stated that ''the P&A system is the final arbiter of probable cause between itself and the organization or individuals from whom it is seeking records.'' We agreed that the language is unnecessary and deleted it. Where a P&A determines it has reasonable belief that an individual with developmental disabilities has been, or may be, subject to abuse or neglect, it has a legally enforceable right to access the records or individuals sought, in compliance with relevant statutes and regulatory provisions.

A commenter suggested creating an alternative process to address circumstances when a service provider wants to withhold access and challenges the standard. AIDD believes that would be excessively burdensome and did not incorporate the suggestion. Where there is controversy between the P&A and service provider, the P&A makes the relevant determination, in the interest of providing strong protection of and advocacy for people with developmental disabilities in keeping with the purpose of the DD Act. In situations regarding abuse and neglect, the court remains the ''final arbiter'' with respect to determining whether an adequate basis for probable cause exists.

Service Provider

The NPRM proposed a new definition of ''Service Provider,'' but has chosen not to finalize it. This is due to the rapidly changing nature of who provides services, and the tremendous variation in the delivery of supports in a broad range of settings. To define an exemplary list of ''service providers'' in a regulation would not allow for the broad range of entities currently providing services to be inclusively represented. The DD Act is clear that P&As have access to people with developmental disabilities, ''in a location in which services, supports, and other assistance are provided . . .'' (section 143(a)(2)(H)). However the law is not explicit about who might be providing such services, intentionally leaving this flexibility to evolve with systems. Twenty years ago it was common for an individual to live in a large congregate setting. Now an individual is more likely to be living in a small group home, in an adult supported living (foster) home, with his or her own family or family member, or independently in his or her own home.

AIDD received comments asking for possible types of service providers to be listed, but determined that publishing a specific list might create a perception that any list is exhaustive or potentially over-inclusive.

Service Recipient

Commenters recommended replacing the term ''service recipient'' with ''individual with developmental disabilities,'' where appropriate, throughout the regulations. The term ''service recipient'' was not defined in the proposed regulation, and it also represents passive language not in alignment with the DD Act. To reflect the fact that service recipient is not a defined term, the final rule alters terminology was altered in §§ 1386.26, 1386.27, and 1386.28 and in relevant subject headings to refer to ''individuals with developmental disabilities''. This change is not intended to affect the scope of the P&A's legal authority as outlined in the regulations.

Section 1386.20 Agency Designated as the State Protection and Advocacy System

Similar to the proposed rule, the final rule revises the heading of § 1386.20 to Agency Designated as the State Protection and Advocacy System from Designated State Protection and Advocacy Agency. Commenters recommended that the redesignation process described in paragraph (d) include an opportunity for an oral administrative hearing before an independent authority. AIDD considered this comment, but declines to make that addition to the regulations as the requested change would necessitate an undue administrative burden on the agency.

AIDD made technical changes in § 1386.20(d)(2)(vi) and (d)(3) requiring accessible formats and access for individuals with limited English proficiency. AIDD removed examples of outdated technology in § 1386.20(d)(3).

Section 1386.21 Requirements and Authority of the State Protection and Advocacy System

AIDD revised the title to include a reference to ''State'' in relation to the Protection and Advocacy System and updated terminology and statutory cites.

Commenters expressed support for § 1386.21(c) as written in the NPRM, which revised the regulation to include additional language regarding prohibited State actions which would diminish or interfere with the exercise of the required authority of the P&As. No changes were made to the language in this section of the final rule.

In paragraph (g), we are adding a statement indicating governing boards are also required to have a majority of individuals with disabilities or their family members. This brings the rule in alignment with the statute.

Regarding § 1386.21(j), commenters recommended the inclusion of a new subsection to allow the P&As to enter into contracts for part of their programs. AIDD agreed that this option would allow greater flexibility for monitoring in remote areas, and for entering into special initiatives. P&As have explicit oversight responsibilities to ensure the contractor organizations meets all of the standards and requirements applicable to the P&As. The language in § 1386.21(j) reflects the field's evolving understanding of legal standing in the P&A context.

Section 1386.22 Periodic Reports: State Protection and Advocacy System

The P&A system shall continue to comply with the reporting requirements of the law and applicable regulations, in accordance with OMB approved reports.

Section 1386.23 Non-allowable costs for the State Protection and Advocacy System

No changes were made in this section.

Section 1386.24 Allowable litigation costs for the State Protection and Advocacy System

No substantive changes from the NPRM were made in this section.

Subpart C—Access to Records, Service Providers and Individuals With Developmental Disabilities

As noted above, the terminology in the title of subpart C of part 1386—Formula Grant Programs was changed from ''Service Recipients'' to ''Individuals with Developmental Disabilities,'' to be consistent with changes made in response to comments received, emphasizing clearer and more active language.

General Context—Subpart C

As explained in the NPRM, this rule addresses key provisions in Subtitle C of the Act (42 U.S.C. 15043)(a)(1); (2)(A), (H), (I), (J); and (c)) on Protection and Advocacy for Individuals with Developmental Disabilities. These provisions of the DD Act pertain to P&A access to service providers, access to individuals with developmental disabilities, and access to records. The rule also offers some examples of records to which a P&A shall have access. Given the obligation of P&As to conduct investigations of incidences of abuse and neglect, as well as the statutory authority under section 143(a)(2)(I) to, in certain circumstances, contact an individual's guardian, conservator or legal representative, AIDD has taken the position that a P&A shall have prompt access to contact information of such individuals. AIDD's determination also is supported by law by the Second Circuit Court decision in the case, *State of Conn. Office of Protection and Advocacy for Persons with Disabilities* v. *Hartford Board of Education, 464 F.3d 229 (2nd Cir. 2006)* (holding that the P&A had the right to access a learning academy to investigate complaints of abuse and neglect at the school and to obtain the directory of students with contact information for parents and guardians).

AIDD notes the importance of accessing records of individuals with developmental disabilities in order for the P&A system to investigate suspected cases of abuse and neglect. As discussed in the NPRM, many of the changes in this subpart reflect the access authority language contained in sections 143(a)(2)(I) and (J) of the Act (42 U.S.C. 15043(a)(2)(I) and (J)). Where we exercise discretion, we do so in the belief that the proposed provisions are necessary to meet Congress' underlying intent to ensure necessary access to records to promote the P&A's authority to investigate abuse and neglect and to ensure the protection of rights. This broad interpretation of available records and reports also is consistent with the requirements of the PAIMI regulations (42 CFR 51.41). Ensuring that interpretations of statutory authority are included in regulation also allows P&As to minimize the amount of resources spent on determining the standards for access, in service of protecting and advocating for the legal and human rights of individuals with developmental disabilities.

The DD Act and this rule are very specific in terms of when consent for records is required. In situations in which an individual's health and safety are in immediate jeopardy or a death has occurred, no consent is required and access to records must be provided no later than within 24 hours (42 U.S.C. 15043(a)(2)(J)(ii)).

AIDD recognizes that P&As are charged with engaging in a range of activities that necessitate access to people with developmental disabilities. Examples of such activities include but are not limited to protecting the legal and human rights of individuals with developmental disabilities, monitoring for incidents of abuse or neglect, and monitoring health and safety.

The DD Act requires that a P&A have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of Subtitle C (42 U.S.C. 15043)(a)(2)(H)). It is important to note that neither the DD Act, nor this rule, makes a distinction on the basis of age with regard to access of an individual with a developmental disability by the P&A.

Specific Changes/Additions to Subpart C

Section 1386.25 Access to Records

Regarding § 1386.25(a)(1), commenters recommended replacing the term ''client'' with ''individual with a developmental disability.'' AIDD considered that comment and rejected it. The term ''client'' connotes a specific relationship, which implies certain duties between the client and the P&A system. Though P&A access authority is not limited to clients, the term ''client,'' is not interchangeable with ''individual with a developmental disability.'' The term client is also used in the Act in section 143(a)(2)(I)(i).

Regarding § 1386.25(a)(2)(iii), commenters recommended removing ''about his or her status or treatment,'' as the term ''complaint'' is adequately defined in § 1386.19. For clarity, the phrase has been removed. Commenters also recommended removal of ''by any other individual or has subjected him or herself to self-abuse,'' to modify ''neglect.'' This language was removed, as it is now included in the definition of neglect in § 1386.19.

In § 1386.25(a)(3), AIDD removed ''by any other individual or has subjected him or herself to self-abuse,'' as this language has been added to the definition of neglect in § 1386.19.

Regarding § 1386.25(a)(3)(i), we added a requirement for disclosure of the name and address of a representative be given to the P&A promptly. In response to comments and to improve clarity, AIDD has added ''telephone number(s)'' of the legal guardian, conservator, or other legal representative, to be consistent with proposed § 1386.26, and ''within the timelines set forth in § 1386.25(c),'' to be consistent with the express time periods established in that section.

Regarding § 1386.25(a)(3)(iii), commenters suggested replacing ''act'' with ''provide consent'' and AIDD made this change to clarify the intent of the provision, in accordance with judicial interpretation and the intent of the law. AIDD finds the DD Act encourages the broad applicability of access authority to records when there is a complaint or probable cause of abuse and neglect. For example, a P&A may need to access records in a situation where the guardian is allegedly abusing or neglecting his/her ward. A majority of courts have recognized that P&As should be permitted to access records in

these situations when a guardian has refused to consent to their release.[3] AIDD had included this change in language to reflect an interpretation weighted toward the protection of individuals with developmental disabilities.

For the final rule, AIDD also added § 1386.25(a)(4) and (5) to include language from commenters, regarding P&A access authority to records without consent in cases where an individual with developmental disabilities has died, or if the P&A has probable cause to believe that the health or safety of an individual with developmental disabilities is in serious and immediate jeopardy, consistent with the DD Act, 42 U.S.C. 15043(a)(2)(J)(ii)(I) and (II).

Regarding § 1386.25(b)(1), commenters suggested adding language to include records that were not prepared by the service provider, but received by the service provider from other service providers. AIDD amended the section accordingly, per the authority of the DD Act, that a P&A be able to access ''all records'' of an individual with a developmental disability, 42 U.S.C. 15043(a)(2)(I), to the extent allowed by law. Such records may include information that is relevant to the P&A's work, and shall be accessible to P&A's.

A commenter recommended deleting § 1386.25(b)(1), describing this section as providing ''inappropriate access to records'' because it would give P&As too broad of access to records and be duplicative of existing requirements for providers with oversight by the Centers for Medicare and Medicaid Services. Congress intended to ensure access to records consistent with the P&A's authority to investigate abuse or neglect and ensure the protection of rights. AIDD did not accept the suggested change.

Regarding § 1386.25(b)(2), commenters suggested removing: ''The reports subject to this requirement include, but are not limited to, those prepared or maintained by agencies with responsibility for overseeing human services systems.'' AIDD eliminated the sentence, as ''human services system'' is undefined, potentially unclear, and this phrase may serve to unduly limit the types of reports P&As can receive.

Commenters also recommended numerous additions to this section regarding the organizations whose reports are subject to this requirement. AIDD included various additional examples that may be helpful for clarifying the types of facilities and organizations providing services, supports and other assistance to individuals with developmental disabilities from which P&As have access to records. These additions are clarifying examples and are not intended to limit the types of organizations whose reports are subject to this requirement.

With respect to the reports subject to this requirement, commenters recommended adding ''or by medical care evaluation or peer review committees, regardless of whether they are protected by federal or state law'' to § 1386.25(b)(2). AIDD has adopted the recommended change because this addition facilitates the P&As fulfilling their responsibilities under the DD Act, maximizes the most efficient use of resources, and is consistent with court decisions allowing P&As access to all records of an individual.[4] Peer review records shall be handled in accordance with the confidentiality requirements as described in § 1386.28 of this rule.

Regarding § 1386.25(b)(4), commenters recommended adding ''information in professional, performance building, or other safety standards, demographic and statistical information relating to a service provider.'' AIDD restored the language that the NPRM deleted, as found in § 1386.22(c)(2) of the 1997 regulations. This is consistent with the DD Act provision, 42 U.S.C. 15043(a)(2)(I), that a P&A be able to access ''all records'' of an individual with a developmental disability, 42 U.S.C 15043(a)(2)(J), and we have substituted ''service provider'' for ''facility,'' as discussed previously.

Commenters suggested reformulation of the NPRM § 1386.25(c) regarding time periods. AIDD added additional § 1386.25(a)(4) and (5), regarding access to records without consent when a P&A determines there is probable cause to believe the health and safety of an individual is in serious or immediate jeopardy, and in the case of death of an individual with a developmental disability. With the additions of § 1386.25(a)(4) and (5), AIDD has removed the NPRM language defining access to records in the case of death. AIDD has retained § 1386.25(c)(1) from the NPRM, to address circumstances where access to records must be provided within 24 hours of receipt of a written request from P&As. AIDD has also retained § 1386.25(c)(2), specifying access within three business days from receipt of written request in all other cases. AIDD considered recommended revisions, and determined that the current formulation best captures the specifics of section 143(a)(2)(J)(i) and (ii) of the DD Act.

Section 1386.25(d) addresses the remaining provisions regarding sharing and copying of records, consistent with the corresponding PAIMI regulation, (42 CFR 51.41) which states that the P&A system may not be charged for copies more than is ''reasonable'' according to prevailing local rates, certainly not a rate higher than that charged by any other service provider, and that nothing shall prevent a system from negotiating a lower fee or no fee. Regarding § 1386.25(d), commenters recommended adding a specific monetary cap to the amount charged by a service provider or its agents to copy records for the P&A system. AIDD added a provision linking the amount charged in these circumstances to the amount customarily charged other non-profit or State government agencies for reproducing documents, to avoid prohibitive charges as a barrier to accessing appropriate records. AIDD recognizes that many records are now being transitioned and maintained electronically. To that end, when records are kept or maintained electronically they shall be provided electronically to the P&A.

Regarding § 1386.25(e), commenters recommended adding a provision making explicit that the Health Insurance Portability and Accountability Act (HIPAA) permits the disclosure of protected health information (PHI) without the authorization of the individual to a P&A system to the extent that such disclosure is required by law and the disclosure complies with the requirements of that law. This provision accords with the

[3] *See, e.g., Pennsylvania Protection & Advocacy, Inc.* v. *Royer-Greaves Sch. for the Blind,* 1999 WL 179797, *8 (E.D. Pa., March 25, 1999)(permitting P&A to access records even when guardian expressly refused to consent to release of records); *Disability Law Center* v. *Reil,* 130 F. Supp. 2d 294 (D. Ma. 2001)(court ordered service provider to release records notwithstanding the guardian's good faith refusal to do so). *But see, Disability Law Center* v. *Millcreek Health Center,* 339 F.Supp.2d 1280 (D. Utah 2004), vacated, 428 F.3d 992 (10th Cir. 2005) (court denied P&A's access to records because an actively involved guardian refused to give consent).

[4] *See, e.g. Pennsylvania Protection and Advocacy, Inc.* v. *Houstoun,* 228 F.3d 423, 428 (3rd Cir. 2000); *Center for Legal Advocacy* v. *Hammons,* 323 F.3d 1262, 1270 (10th Cir. 2003); *Protection & Advocacy for Persons with Disabilities* v. *Mental Health & Addiction Services,* 448 F.3d 119 (2d Cir. 2006); *Missouri Prot. & Advocacy Servs.* v. *Missouri Dep't of Mental Health,* 447 F.3d 1021, 1023–1024 (8th Cir. 2006); *Protection & Advocacy for Persons with Disabilities, Conn.* v. *Mental Health & Addiction Servs.,* 448 F.3d 119, 128 (2d Cir. 2006); *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.,* 603 F.3d 365, 382–383 (7th Cir. 2010) (en banc), petition for cert. pending, No. 10–131(filed July 21, 2010); *Disability Law Center of Alaska* v. *North Star Behavioral Health,* 3:07-cv-00062 JWS, 2008 WL 853639 (D. Alaska, March 27, 2008).

HIPAA Privacy Rule,[5] and AIDD has included it in this rule. Readers may refer to sections 143(a)(2), (A)(i), (B), (I) and (J) of the DD Act for provisions governing disclosure required by law. We consider a disclosure to be required by law under the DD Act where the access is required under 45 CFR 1386.25 and the disclosure is in accordance with such regulation.

Regarding § 1386.25(f), commenters recommended the addition of a provision specifying the authority of P&As to access records of schools, educational agencies, etc. An amicus brief submitted by the Department of Justice (DOJ), on behalf of the Department of Education and the Department of Health and Human Services, took the position that a school must provide a P&A with the name and contact information for the parent or guardian of a student for whom the P&A has the requisite degree of probable cause to obtain records under the DD Act (*State of Connecticut Office of Protection and Advocacy for Persons with Disabilities* v. *Hartford Bd. of Ed, 464 F.3d 229 (2nd Cir. 2006)*). DOJ also asserted that a P&A may interview a minor student suspected of being subject to abuse or neglect without prior consent from a parent or guardian. In addition, ''[i]f the P&A has probable cause 'to believe that the health and safety of the individual is in serious and immediate jeopardy,' it shall have access to records immediately without notice to or consent from a parent or guardian.'' The Second Circuit adopted DOJ's position on both of these issues.

DOJ also asserted the government's position that the Court should ''construe the DD Act [and PAIMI Act] as an override of the Family Educational Rights and Privacy Act (FERPA) non-disclosure requirements, in the narrow context where those statutes require that a P&A have authority to obtain student records held by an institution servicing disabled and/or mentally ill students.'' However, after the government submitted its brief, Appellants abandoned their FERPA arguments. Consequently, the Court did not issue an opinion with respect to the interplay of FERPA and the PAIMI and DD Acts.

Additionally, in 2009 the Ninth Circuit Court ruled in *Disability Law Center of Alaska, Inc.* v. *Anchorage School District* that P&As have an override of FERPA to have access to contact information for parents, guardians, or representatives of student. 581 F. 3d 936 (9th Cir. 2009).

It remains AIDD's position that the role of P&As as established in the DD Act provides for an override of FERPA to permit a P&A to access names and contact information for the parents or guardians of students with developmental disabilities, where the P&A's determination of probable cause satisfies the substantive standards for record access.

Section 1386.26 Denial or Delay of Access to Records

P&As must be able to obtain the identities of individuals with developmental disabilities from service providers (who have control of this information). In emergency situations or in the case of the death of an individual with developmental disabilities receiving services, section 143(a)(2)(J)(ii) of the DD Act requires that P&As have access to records of individuals with developmental disabilities receiving services within 24 hours after written request is made and without consent. AIDD believes that establishing a deadline for providing the written justification denying access is necessary in recognition of the consequences of not accessing relevant information quickly. This is particularly necessary when there are allegations of abuse or neglect, probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death.

Some commenters expressed the need for a specific penalty in cases of denial or delay if a service provider fails to provide a written statement giving reason for denial of access to records. AIDD considered the comment, but is not attempting to impose penalties via these regulations, as AIDD does not have the authority to do so.

Commenters also recommended the inclusion of [individuals with] ''intellectual disabilities.'' That term is not included in the DD Act nor defined with respect to the scope of individuals included in that category for the purposes of these regulations; we have not included it in this section.

AIDD modified the section to clarify that § 1386.26 is applicable specifically to access to records, to effectuate the purposes of Sec. 143(a)(2)(J)(ii) of the DD Act and to address comments submitted regarding possible confusion of timing implications of these denial or delay of access provisions, and the provisions for access in § 1386.27.

Section 1386.27 Access to Service Providers and Individuals With Developmental Disabilities

AIDD again notes the change from the term ''service recipients'' to ''individuals with developmental disabilities'' in the heading and throughout the section, with the same justification as in § 1386.22. Under this section, the term ''service provider'' is substituted throughout for the term ''facility.'' The term ''programs'' is undefined in the regulations, and the final language more precisely expresses the parties and items with respect to whom the P&As seek access, with more active language than ''recipients.''

Section 143(a)(2)(H) of the DD Act (42 U.S.C. 15043) requires that P&As ''have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to an individual.'' P&A systems must not be required to provide advance notice to a service provider when investigating an allegation of abuse or neglect, when they have probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death. To serve the monitoring function described in section 143(a)(2)(I) of the Act, P&As must also have the ability to make unannounced visits to check for compliance regarding the health and safety of individuals with developmental disabilities. Immediate access may also be necessary, for example, to prevent interested parties from concealing situations involving abuse or neglect or taking actions that may compromise evidence related to such incidents (such as intimidating staff or individuals with developmental disabilities who are receiving services). Thus, AIDD added the following provision, in keeping with the recommendation from commenters: ''Service providers shall provide such access without advance notice from the P&A.''

Some commenters recommended creating separate sections for access to ''locations'' and access to ''individuals with developmental disabilities and other individuals.'' To minimize confusion, AIDD maintained the original structure from the proposed regulations, with modifications and reordering where needed for clarity.

Regarding § 1386.27(c) in the NPRM, commenters suggested adding the following language to the section on consent to attend treatment planning meetings, ''except that no consent is required if (1) the individual, due to his or her mental or physical condition, is

[5] *See* Dep't of Health and Human Services, Health Information Privacy, Frequently Asked Questions, *at http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_required_by_law/909.html* (last visited March 1, 2012) (''May a covered entity disclose protected health information to a Protection and Advocacy system where the disclosure is required by law? Answer: Yes.'').

unable to authorize the system to have access to a treatment planning meeting, and (2) the individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State (or one of its political subdivisions).'' The proposed language addresses potential conflicts of interest regarding consent to P&A access to attend a treatment planning meeting. AIDD adopted this change and included parallel language to the similar provisions regarding state guardians in records access provisions § 1386.25(a)(2)(i).

AIDD received a comment asking that a physician note be required if the service provider denies the P&A access to an individual. We concurred with the comment and added language setting forth the specific process to be followed in situations where access is denied based on the justification that it would interfere with an individual's treatment, this was done to minimize confusion and to underscore section 143(a)(2)(H) of the Act. Section 143(a)(2)(H) gives P&As access at reasonable times to any individual with a developmental disability in a location in which services, supports and other assistances are provided in order to carry out the purposes of P&As under the DD Act. AIDD included these changes to clarify that access be permitted to treatment planning meetings (with the consent of the individual or his or her guardian), as such access is needed to assure that service providers are protecting the health and safety of individuals with developmental disabilities receiving services.

AIDD also explained in the proposed rule that the regulations are supported by the legislative history of the PAIMI Act, which provides that P&As must be afforded ''access to meetings within the facility regarding investigations of abuse and neglect and to discharge planning sessions.'' S. Rep. 454, 100th Cong., 2d Sess. (1988). To assure consistency with the PAIMI program, P&As are authorized to attend treatment team meetings, which serve some of the same purposes as discharge planning sessions. The DD Act supports broad access to individuals to monitor conditions relating to safety and health.

With respect to § 1386.27(c)(3) in the NPRM, commenters suggested a number of modifications. In response to such comments, AIDD has specified that access is ''including but not limited to'' inspecting, viewing, and photographing all areas of a service provider's premises. We have also added the phrase ''or under the service provider's supervision or control,'' to more clearly specify the areas covered under this section. Commenters suggested including ''video recording'' to the list of access activities: inspecting, viewing, and photographing. AIDD adopted this change as a helpful clarification. AIDD also included the following carve out, to safeguard the privacy and preferences of individuals with developmental disabilities, in keeping with the values of choice and self-determination in the DD Act: ''but shall not include photographing or video recording individuals with developmental disabilities unless they consent or state laws allow such activities.''

Commenters suggested replacing the NPRM language, ''at reasonable times'' in the introductory portion of § 1386.27(c) with ''at all times.'' AIDD did not make the change, as the DD Act provision regarding access to an individual with a developmental disability states a P&A shall have access at ''reasonable times'' 42 U.S.C. 15043(a)(2)(H).

With respect to § 1386.27(d) in the NPRM, commenters recommended adding provisions on the specifics of the ability of P&As to access individuals with developmental disabilities. AIDD added language with specifics on the P&A's access authority for these individuals. This includes protection of P&As against compulsion to disclose the identity of such individuals to the service provider, except as required by law. The P&As were established under the DD Act to protect and advocate for the legal and human rights of people with developmental disabilities. That purpose would be defeated if individuals with developmental disabilities or their guardians, conservators, or other legal representatives become subject to retribution for reaching out to a P&A seeking information about a P&A and their services, or to report a suspected incident of abuse or neglect.

A few commenters recommended that § 1386.27 should clarify that P&A access to service providers and ''recipients'' must be based on substantial allegations of wrongdoing and should only involve individuals with developmental disabilities that are the subject of wrongdoing. AIDD carefully considered these comments and determined that the DD Act expresses a broader intent, that includes, *e.g.,* the authority to ''have access . . . to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual,'' section 143(a)(2)(H). This includes a P&A role of monitoring, as well as, ''providing information . . . and referral,'' as stated in section 143(a)(2)(A)(ii) which allows for access in circumstances beyond where there is a pre-existing substantial allegation of wrongdoing.

Commenters suggested adding a section on access to Individuals with Developmental Disabilities and Locations for the purpose of providing information, training, and referral for programs. The recommended language includes the following: ''P&As shall have access to individuals with disabilities and the locations in which they are receiving services, supports and other assistance for the purpose of providing information, training, and referral for programs addressing the needs of individuals with developmental disabilities, and information and training about individual rights, and the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A system. Service providers shall post, in an area which is used by individuals with developmental disabilities, a poster which states the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A system.'' AIDD agrees that for P&As to accomplish the goal of protecting the legal and human rights of individuals with developmental disabilities, the people who need these services should be aware that such services are available, as well as how to access this resource. AIDD has included a clarification that P&As may have access for purposes of providing such information at § 1327(c)(2)(i).

Finally, § 1386.27 has been reorganized and renumbered to clarify the access requirements and authorities when P&As investigate incidents of abuse and neglect of individuals with developmental disabilities, as well as in implementing their additional responsibilities under the DD Act. This addresses conflicting comments suggesting that the access authority as identified in this section is both overbroad and too limited. AIDD carefully considered the input, and revised the section to reflect the agency's understanding of P&A access authority to protect the legal and human rights of individuals with developmental disabilities under the DD Act.

Section 1386.28 Confidentiality of Protection and Advocacy System Records

Similar to the approach used in the PAIMI regulation at 42 CFR 51.45, AIDD, in the NPRM, incorporated a new section at § 1386.28, Confidentiality of

Protection and Advocacy Systems Records. This section will replace the current AIDD regulation in 45 CFR 1386.22(e), Access to Records, Facilities and Individuals that deals with P&A access authority.

Some commenters recommended an essential rewriting of § 1386.28, stating that some provisions of these regulations could be interpreted to ''thwart the fundamental P&A mandate of protecting individuals with [developmental] disabilities from abuse or neglect while maintaining appropriate confidentiality.'' However, the commenters were not specific with problems that an essential rewrite would resolve. AIDD did not accept wholesale language commenters proposed; however AIDD did make the following changes below.

Commenters recommended new language with respect to confidentiality provisions. AIDD included the following § 1386.28(a), as it explicitly articulates existing applicable duties: ''A P&A shall, at minimum, comply with the confidentiality provisions of all applicable Federal and State laws.''

Commenters also requested additions clarifying circumstances where information can be disclosed, citing shortcomings in the NPRM, but without offering specific examples of the problems raised by the proposed language. AIDD has maintained the language from the NPRM (renumbered where necessary), for the sake of consistency with the PAIMI confidentiality provisions, at 42 CFR 51.45, to ensure strong confidentiality protections and certainty of integrity are maintained.

In addition, one commenter suggested that the regulations must make clear that the DD Act funding shall not be used to advocate against and in any way undermine, downsize or close a Medicaid certified and licensed facility [ICF/IDD]. The purpose of the Act clearly articulated, in 42 U.S.C. 15001(b), ''to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this title . . .'' applies broadly. The law makes no provision to carve out a category of care facilities to which the provisions of the Act do not apply, and AIDD does not do so here.

A commenter also stated that ''the regulations must clearly state that a P&A is not permitted to access private homes, unless accompanied by the existing state authorities which evaluate accusations of abuse and neglect of children and vulnerable adults.'' AIDD considered this comment, but notes that other government oversight entities may not be able to investigate instances of abuse/neglect in a timely fashion as a result of limited resources. For example, Congress created the P&A system, to, among other responsibilities, investigate abuse and neglect and to take appropriate steps to protect and advocate for individuals with developmental disabilities, 42 U.S.C. 15043(a)(2)(A), (B) and (G). Congress has also explicitly recognized that P&As may learn of abuse and neglect by monitoring service providers, 42 U.S.C. 15043(a)(2)(L)(ii)(III). Again, the DD Act does not carve out exceptions for a category of care facilities or service providers, even in cases where services may be provided in a private home. P&As must not be constrained in carrying out their statutory mandate to protect individuals with developmental disabilities from abuse or neglect, and must not have their investigation and monitoring efforts hampered based on the responsiveness and timeliness of other government agencies or authorities.

With respect to § 1386.28(b)(2), AIDD added the term ''disposal'' to the list of required written policies regarding information from client records to help ensure the protection of confidentiality and help ensure the prevention of inappropriate or unintentional disclosure of such information. The addition of ''disposal'' conforms to prudent modern data management practices.

Subpart D—Federal Assistance to State Councils on Developmental Disabilities

The final rule redesignates subpart C as subpart D and revises the material to update statutory and U.S. Code citations to conform to the Developmental Disabilities Act of 2000 and update the wording of the State Councils on Developmental Disabilities.

Section 1386.30 State Plan Requirements

The NPRM placed a five year time limit on demonstration projects to coincide with the State Plan submission and approval process, as well as to ensure consistency with the Act (42 U.S.C. 125(c)(5)(K)(i) and (ii)). A number of commenters relayed concerns that a five year time limit on demonstration projects would have unintended consequences. For example, Web sites, employment activities, self-advocacy activities and programs such as Partners in Policymaking could be impacted. Therefore, AIDD has modified paragraphs (e) and (f) so that States desiring to receive assistance beyond five years, under this subtitle, shall include, in the State plan, the estimated period for the project's continued duration, justification of why the project cannot be funded by the State, other public or private sources of funding, justification as to why a project receive continued funding, and intention to provide data outcomes showing evidence of success. Councils must also develop and include strategies to locate on-going funding from other sources after five years. AIDD clarified in paragraphs (e) that it reserves the right as the overseeing agency to deny the continuation of demonstration projects past five years.

Although no adverse comments were received on paragraph (f), AIDD has amended this section to make it consistent with section 124(a)(5) of the Act (42 U.S.C. 15024).

Section 1386.31 State Plan Submittal and Approval

Although we received no adverse comments on paragraph (a), we are making technical changes to the proposed regulation to provide examples of formats accessible to individuals with developmental disabilities and the general public to reflect current technology.

AIDD chose not to finalize the requirement in § 1386.31(b) that, ''the State plan or amendment must be approved by the entity or individual authorized to do so under State law.'' We did not finalize this because it is not a requirement under the Act and could potentially create conflict with the law in section 124(c)(5)(L) that requires a State not interfere with the State plan development or implementation.

Section 1386.33 Protection of Employee Interests

Commenters requested clarification that the State would be responsible for the protection of employees who are displaced by institutional closures rather than the operator of the institution. AIDD has not made any changes to this section as the NPRM clearly states that specific arrangements for the protection of affected employees must be developed through negotiations between the State authorities and employees or their representatives.

Section 1386.34 Designated State Agency

No comments were received however technical changes we made to reflect the move of AIDD to ACL.

Section 1386.35 Allowable and Non-Allowable Costs for Federal Assistance to State Councils on Developmental Disabilities

Some respondents requested that § 1386.35 be revised to allow for State Councils on Developmental Disabilities' rapid response to the emergency needs of impacted citizens such as those affected by a national disaster or time of war. While we appreciate the comments received, AIDD does not find it necessary to make changes to this section. Under the existing law, the State Councils on Developmental Disabilities can use their funding to work with emergency responders to assist them with planning for the support needs of individuals with developmental disabilities in the event of a national disaster or time of war.

Section 1386.36 Final Disapproval of the State Plan or Plan Amendments

No comments were received however AIDD has made technical changes to reflect the move of AIDD to ACL.

Sections 1386.80 through 1386.112 Subpart E—Practice and Procedure for Hearings Pertaining to State's Conformity and Compliance With Developmental Disabilities State Plans, Reports and Federal Requirements, Formerly Subpart D

No comments were received; however, AIDD has made technical changes to reflect the move of AIDD to ACL and related delegations.

Part 1387—Projects of National Significance

Section 1387.1 General Requirements

No comments were received on this section of the NPRM. However, AIDD made an administrative change and removed § 1387.1(b) as PNS program announcements are not required by the Act to be published in the **Federal Register**.

Part 1388—National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDS)

Significant changes were made to part 1388 from the NPRM based on comments received. Section 153(a)(1) of the Act directed the Secretary to define the term ''UCEDD''. The NPRM removed language from previous regulations that defined the term University Affiliated Program, which was the previous name of the program.

Many of the comments asked AIDD to define what a UCEDD is. The previous term ''University Affiliated Program'' was defined in previous regulations, but the new term ''UCEDD'' was not defined in the 2008 NPRM. We reviewed the comments and concurred that a clear definition for the UCEDD is necessary. To that end, part 1388 has been reorganized, and language for Governance and Administration has been restored from the previously published regulations.

Section 1388.1 Definitions

As a technical correction AIDD added the definition of ''State'' to part 1388 so that it matches the statute. Under Subtitle D, section 155, the statutory definition of ''State'' that applies to UCEDDs differs from the definition of ''State'' in the rest of the Act.

Section 1388.2 Purpose

In paragraph (a)(2), the wording ''(as defined by the Secretary)'' was removed because AIDD has defined a UCEDD, in § 1388.6, in response to comments received.

Section 1388.3 Core Functions

This section was renumbered from § 1388.2 to § 1388.3. No other changes were made.

Section 1388.4 National Training Initiatives on Critical and Emerging Needs

This section was renumbered from § 1388.3 to § 1388.4. No other changes were made.

Section 1388.5 Applications

This section was renumbered from § 1388.4 to § 1388.5. Additional technical changes were made.

Section 1388.6 Governance and Administration

In the NPRM, this language had been deleted. Many commenters disagreed with the deletion, expressing concern that the elimination of this language would undermine the effectiveness of the UCEDD programs and allow for diversion of funds for inappropriate purposes.

AIDD concurred with the commenters and has restored the original regulatory language prescribing the governance and administration of UCEDDs.

Section 1388.7 Five-Year Plan and Annual Report

This section was renumbered from § 1388.5 to § 1388.7.

Amended regulations: 45 CFR parts 1385, 1386, 1387, and 1388.

In 2008, a Notice of Proposed Rulemaking was promulgated by the Administration on Intellectual and Developmental Disabilities. This final rule presents 45 CFR parts 1385, 1386, 1387, and 1388 as amended in their entirety.

IV. Impact Analysis

A. Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in Executive Order 12866. The Department has determined that this rule is consistent with these priorities and principles. Executive Order 12866 encourages agencies, as appropriate, to provide the public with meaningful participation in the regulatory process. The rule implements the Developmental Disabilities Act of 2000. In developing the final rule, we considered input we received from the public including stakeholders.

B. Regulatory Flexibility Analysis

The Secretary certifies under 5 U.S.C. 605(b), the Regulatory Flexibility Act (Pub. L. 96–354), that this regulation will not have a significant economic impact on a substantial number of small entities. The primary impact of this regulation is on State Councils on Developmental Disabilities (SCDDs), State Protection and Advocacy Systems (P&As), and University Centers of Excellence in Developmental Disabilities (UCEDDs). This final rule will support the work of the P&As in investigating potential abuse and neglect by providing guidance regarding access to service providers and records of individuals. Service providers will be impacted if a complaint is made against them. Similarly, this regulation will support the work of UCEDDs by providing guidance on the administration and operation standards of the programs. The regulation does not have a significant economic impact on these entities. AIDD estimates an impact of less than $100,000 across the DD entities.

C. Paperwork Reduction Act of 1995

Sections 1386.22, 1386.32, and 1388.5 contain information collection requirements. In part 1386 of the NPRM, the State Council on Developmental Disabilities Program Performance Report and the Protection and Advocacy Statement of Goals and Priorities required renewal from OMB.

REPORTING AND RECORDKEEPING REQUIREMENTS IN PART 1386 AND 1388 OF THE FINAL RULE

	Expires	Annual # of respondents	Ave. burden response	Annual burden hours
1386.23(a) SF–PPR 0980–0027	08/31/2017	57	44 hours	2,508
1386.23(c) P&A SGP Reinstatement 0980–0270	11/30/2015	57	44 hours	2,508
1386.30(c) Council State Plan 0980–0029	11/30/2017	56	367 hours	20,552
1386.32(b) Council PPR Reinstatement 0980–0172	08/31/2015	56	138 hours	7,728
1386 32(a) Council Financial Status Report (AIDD–02B). AIDD–02 Council 0985–0026	11/30/2015	56	8 hours	842
1388.5(b) UCEDD Annual Report 0970–0289	09/30/2016	67	1,412 hours	94,604

D. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in expenditures by State, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million, adjusted for inflation, or more in any one year.

If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternatives that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small government that may be significantly or uniquely impacted by a rule.

AIDD has determined that this rule does not result in the expenditure by State, local, and Tribal government in the aggregate, or by the private sector of more than $100 million in any one year.

E. Congressional Review

This rule is not a major rule as defined in 5 U.S.C. 804(2).

F. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may affect family well-being. If the agency's conclusion is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These regulations do not have an impact on family well-being as defined in the legislation.

G. Executive Order 13132

Executive Order 13132 on ''federalism'' was signed August 4, 1999. The purposes of the Order are: ''. . . to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution, to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act. . .''

The Department certifies that this rule does not have a substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government.

AIDD is not aware of any specific State laws that would be preempted by the adoption of the regulation in subpart C of 45 CFR part 1386.

This rule does contain regulatory policies with federalism implications that require specific consultation with State or local elected officials. However, prior to the development of the rule, the Administration on Intellectual and Developmental Disabilities consulted with SCDDs, P&As, and UCEDDs to minimize any substantial direct effect on them and indirectly on States.

List of Subjects

45 CFR Part 1385

Disabled, Grant programs—education, Grant program—social programs, Reporting and recordkeeping requirements

45 CFR Part 1386

Administrative practice and procedures, Grant programs—education, Grant programs—social programs, Individuals with disabilities, Reporting and recordkeeping requirements.

45 CFR Part 1387

Administration practice and procedures, Grant programs—education, Grant programs—social programs, Individuals with disabilities.

45 CFR Part 1388

Colleges and universities, Grant programs—education, Grant programs—social programs, Individuals with disabilities, Research.

Dated: July 16, 2015.

Kathy Greenlee,

Administrator, Administration for Community Living, Assistant Secretary for Aging, Administration on Aging.

Approved: July 17, 2015.

Sylvia M. Burwell,

Secretary.

Regulation Text

For reasons set forth in the preamble, under the authority of 42 U.S.C. 15001 *et seq.,* the Department of Health and Human Services revises subchapter I, chapter XIII, of title 45 of the Code of Federal Regulations to read as set forth below:

CHAPTER XIII—OFFICE OF HUMAN DEVELOPMENT SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Subchapter I—The Administration on Intellectual and Developmental Disabilities, Developmental Disabilities Program

PART 1385—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM
1386—FORMULA GRANT PROGRAMS
1387—PROJECTS OF NATIONAL SIGNIFICANCE
1388—THE NATIONAL NETWORK OF UNIVERSITY CENTERS FOR EXCELLENCE IN DEVELOPMENTAL DISABILITIES, EDUCATION, RESEARCH, AND SERVICE

Subchapter I—The Administration on Intellectual and Developmental Disabilities, Developmental Disabilities Program

PART 1385—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM

Sec.
1385.1 General.
1385.2 Purpose of the regulations.
1385.3 Definitions.
1385.4 Rights of individuals with developmental disabilities.
1385.5 [Reserved]
1385.6 Employment of individuals with disabilities.
1385.7 Reports to the Secretary.
1385.8 Formula for determining allotments.

1385.9 Grants administration requirements.

Authority: 42 U.S.C. 15001 *et seq.*

§ 1385.1 General.

Except as specified in § 1385.4, the requirements in this part are applicable to the following programs and projects:

(a) Federal Assistance to State Councils on Developmental Disabilities;

(b) Protection and Advocacy for Individuals with Developmental Disabilities;

(c) Projects of National Significance; and

(d) National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service.

§ 1385.2 Purpose of the regulations.

These regulations implement the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*).

§ 1385.3 Definitions.

For the purposes of parts 1385 through 1388 of this chapter, the following definitions apply:

ACL. The term ''ACL'' means the Administration for Community Living within the U.S. Department of Health and Human Services.

Act. The term ''Act'' means the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act of 2000) (42 U.S.C. 15001 *et seq.*).

Accessibility. The term ''Accessibility'' means that programs funded under the DD Act of 2000 and facilities which are used in those programs meet applicable requirements of section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112), its implementing regulation, 45 CFR part 84, the Americans with Disabilities Act of 1990, as amended , Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352), and its implementing regulation, 45 CFR part 80.

(1) For programs funded under the DD Act of 2000, information shall be provided to applicants and program participants in plain language and in a manner that is accessible and timely to:

(i) Individuals with disabilities, including accessible Web sites and the provision of auxiliary aids and services at no cost to the individual; and

(ii) Individuals who are limited English proficient through the provision of language services at no cost to the individual, including:

(A) Oral interpretation;

(B) Written translations; and

(C) Taglines in non-English languages indicating the availability of language services.

AIDD. The term ''AIDD'' means the Administration on Intellectual and Developmental Disabilities, within the Administration for Community Living at the U.S. Department of Health and Human Services.

Advocacy activities. The term ''advocacy activities'' means active support of policies and practices that promote systems change efforts and other activities that further advance self-determination and inclusion in all aspects of community living (including housing, education, employment, and other aspects) for individuals with developmental disabilities, and their families.

Areas of emphasis. The term ''areas of emphasis'' means the areas related to quality assurance activities, education activities and early intervention activities, child care-related activities, health-related activities, employment-related activities, housing-related activities, transportation-related activities, recreation-related activities, and other services available or offered to individuals in a community, including formal and informal community supports that affect their quality of life.

Assistive technology device. The term ''assistive technology device'' means any item, piece of equipment, or product system, whether acquired commercially, modified or customized, that is used to increase, maintain, or improve functional capabilities of individuals with developmental disabilities.

Assistive technology service. The term ''assistive technology service'' means any service that directly assists an individual with a developmental disability in the selection, acquisition, or use of an assistive technology device. Such term includes: Conducting an evaluation of the needs of an individual with a developmental disability, including a functional evaluation of the individual in the individual's customary environment; purchasing, leasing, or otherwise providing for the acquisition of an assistive technology device by an individual with a developmental disability; selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing or replacing an assistive technology device; coordinating and using another therapy, intervention, or service with an assistive technology device, such as a therapy, intervention, or service associated with an education or rehabilitation plan or program; providing training or technical assistance for an individual with a developmental disability, or, where appropriate, a family member, guardian, advocate, or authorized representative of an individual with a developmental disability; and providing training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of, an individual with developmental disabilities.

Capacity building activities. The term ''capacity building activities'' means activities (*e.g.* training and technical assistance) that expand and/or improve the ability of individuals with developmental disabilities, families, supports, services and/or systems to promote, support and enhance self-determination, independence, productivity and inclusion in community life.

Center. The term ''Center'' means a University Center for Excellence in Developmental Disabilities Education, Research, and Service (UCEDD) established under subtitle D of the Act.

Child care-related activities. The term ''child care-related activities'' means advocacy, capacity building, and systemic change activities that result in families of children with developmental disabilities having access to and use of child care services, including before-school, after-school, and out-of-school services, in their communities.

Culturally competent. The term ''culturally competent,'' used with respect to services, supports, and other assistance means that services, supports, or other assistance that are conducted or provided in a manner that is responsive to the beliefs, interpersonal styles, attitudes, language, and behaviors of individuals who are receiving the services, supports or other assistance, and in a manner that has the greatest likelihood of ensuring their maximum participation in the program involved.

Department. The term ''Department'' means the U.S. Department of Health and Human Services.

Developmental disability. The term ''developmental disability'' means a severe, chronic disability of an individual that:

(1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;

(2) Is manifested before the individual attains age 22;

(3) Is likely to continue indefinitely;

(4) Results in substantial functional limitations in three or more of the following areas of major life activity:

(i) Self-care;

(ii) Receptive and expressive language;

(iii) Learning;

(iv) Mobility;

(vi) Self-direction;

(vii) Capacity for independent living; and

(viii) Economic self-sufficiency.

(5) Reflects the individual's need for a combination and sequence of special, interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

(6) An individual from birth to age nine, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting three or more of the criteria described in paragraphs (1) through (5) of this definition, if the individual, without services and supports, has a high probability of meeting those criteria later in life.

Early intervention activities. The term ''early intervention activities'' means advocacy, capacity building, and systemic change activities provided to infants and young children described in the definition of ''developmental disability'' and their families to enhance the development of the individuals to maximize their potential, and the capacity of families to meet the special needs of the individuals.

Education activities. The term ''education activities'' means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities being able to access appropriate supports and modifications when necessary, to maximize their educational potential, to benefit from lifelong educational activities, and to be integrated and included in all facets of student life.

Employment-related activities. The term ''employment-related activities'' means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities acquiring, retaining, or advancing in paid employment, including supported employment or self-employment, in integrated settings in a community.

Family support services. The term ''family support services'' means services, supports, and other assistance, provided to families with a member or members who have developmental disabilities, that are designed to: Strengthen the family's role as primary caregiver; prevent inappropriate out-of-the-home placement of the members and maintain family unity; and reunite, whenever possible, families with members who have been placed out of the home. This term includes respite care, provision of rehabilitation technology and assistive technology, personal assistance services, parent training and counseling, support for families headed by aging caregivers, vehicular and home modifications, and assistance with extraordinary expenses associated with the needs of individuals with developmental disabilities.

Fiscal year. The term ''fiscal year'' means the Federal fiscal year unless otherwise specified.

Governor. The term ''Governor'' means the chief executive officer of a State, as that term is defined in the Act, or his or her designee who has been formally designated to act for the Governor in carrying out the requirements of the Act and the regulations.

Health-related activities. The term ''health-related activities'' means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of coordinated health, dental, mental health, and other human and social services, including prevention activities, in their communities.

Housing-related activities. The term ''housing-related activities'' means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of housing and housing supports and services in their communities, including assistance related to renting, owning, or modifying an apartment or home.

Inclusion. The term ''inclusion'', used with respect to individuals with developmental disabilities, means the acceptance and encouragement of the presence and participation of individuals with developmental disabilities, by individuals without disabilities, in social, educational, work, and community activities, that enable individuals with developmental disabilities to have friendships and relationships with individuals and families of their own choice; live in homes close to community resources, with regular contact with individuals without disabilities in their communities; enjoy full access to and active participation in the same community activities and types of employment as individuals without disabilities; and take full advantage of their integration into the same community resources as individuals without disabilities, living, learning, working, and enjoying life in regular contact with individuals without disabilities.

Individualized supports. The term ''individualized supports'' means supports that: Enable an individual with a developmental disability to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life; designed to enable such individual to control such individual's environment, permitting the most independent life possible; and prevent placement into a more restrictive living arrangement than is necessary and enable such individual to live, learn, work, and enjoy life in the community; and include early intervention services, respite care, personal assistance services, family support services, supported employment services support services for families headed by aging caregivers of individuals with developmental disabilities, and provision of rehabilitation technology and assistive technology, and assistive technology services.

Integration. The term ''integration,'' means exercising the equal rights of individuals with developmental disabilities to access and use the same community resources as are used by and available to other individuals.

Not-for-profit. The term ''not-for-profit,'' used with respect to an agency, institution or organization, means an agency, institution, or organization that is owned or operated by one or more corporations or associations, no part of the net earnings of which injures, or may lawfully inure, to the benefit of any private shareholder or individual.

Personal assistance services. The term ''personal assistance services'' means a range of services provided by one or more individuals designed to assist an individual with a disability to perform daily activities, including activities on or off a job, that such individual would typically perform if such individual did not have a disability. Such services shall be designed to increase such individual's control in life and ability to perform everyday activities, including activities on or off a job.

Prevention activities. The term ''prevention activities'' means activities that address the causes of developmental disabilities and the exacerbation of functional limitation, such as activities that: Eliminate or reduce the factors that cause or predispose individuals to developmental disabilities or that increase the prevalence of developmental disabilities; increase the early identification of problems to eliminate circumstances that create or increase functional limitations; and mitigate against the effects of developmental disabilities throughout the lifespan of an individual.

Productivity. The term ''productivity'' means engagement in income-producing work that is measured by increased income, improved employment status, or job advancement, or engagement in

work that contributes to a household or community.

Protection and Advocacy (P&A) Agency. The term ''Protection and Advocacy (P&A) Agency'' means a protection and advocacy system established in accordance with section 143 of the Act.

Quality assurance activities. The term ''quality assurance activities'' means advocacy, capacity building, and systemic change activities that result in improved consumer and family-centered quality assurance and that result in systems of quality assurance and consumer protection that include monitoring of services, supports, and assistance provided to an individual with developmental disabilities that ensures that the individual will not experience abuse, neglect, sexual or financial exploitation, or violation of legal or human rights; and will not be subject to the inappropriate use of restraints or seclusion; include training in leadership, self-advocacy, and self-determination for individuals with developmental disabilities, their families, and their guardians to ensure that those individuals will not experience abuse, neglect, sexual or financial exploitation, or violation of legal or human rights; and will not be subject to the inappropriate use of restraints or seclusion; or include activities related to interagency coordination and systems integration that result in improved and enhanced services, supports, and other assistance that contribute to and protect the self-determination, independence, productivity, and integration and inclusion in all facets of community life of individuals with developmental disabilities.

Rehabilitation technology. The term ''rehabilitation technology'' means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by individuals with developmental disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. Such term includes rehabilitation engineering, and the provision of assistive technology devices and assistive technology services.

Required planning documents. The term ''required planning documents'' means the State plans required by § 1386.30 of this chapter for the State Council on Developmental Disabilities, the Annual Statement of Goals and Priorities required by § 1386.22(c) of this chapter for P&As, and the five-year plan and annual report required by § 1388.7 of this chapter for UCEDDs.

Secretary. The term ''Secretary'' means the Secretary of the U.S. Department of Health and Human Services.

Self-determination activities. The term ''self-determination activities'' means activities that result in individuals with developmental disabilities, with appropriate assistance, having the ability and opportunity to communicate and make personal decisions; the ability and opportunity to communicate choices and exercise control over the type and intensity of services, supports, and other assistance the individuals receive; the authority to control resources to obtain needed services, supports, and other assistance; opportunities to participate in, and contribute to, their communities; and support, including financial support, to advocate for themselves and others to develop leadership skills through training in self-advocacy to participate in coalitions, to educate policymakers, and to play a role in the development of public policies that affect individuals with developmental disabilities.

State. The term ''State'':

(1) Except as applied to the University Centers of Excellence in Developmental Disabilities Education, Research and Service in section 155 of the Act, includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(2) For the purpose of UCEDDs in section 155 of the Act and part 1388 of this chapter, ''State'' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Guam.

State Council on Developmental Disabilities (SCDD). The term ''State Council on Developmental Disabilities (SCDD)'' means a Council established under section 125 of the DD Act.

Supported employment services. The term ''supported employment services'' means services that enable individuals with developmental disabilities to perform competitive work in integrated work settings, in the case of individuals with developmental disabilities for whom competitive employment has not traditionally occurred; or for whom competitive employment has been interrupted or intermittent as a result of significant disabilities; and who, because of the nature and severity of their disabilities, need intensive supported employment services or extended services in order to perform such work.

Systemic change activities. The term ''systemic change activities'' means a sustainable, transferable and replicable change in some aspect of service or support availability, design or delivery that promotes positive or meaningful outcomes for individuals with developmental disabilities and their families.

Transportation-related activities. The term ''transportation-related activities'' means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of transportation.

UCEDD. The term ''UCEDD'' means University Centers for Excellence in Developmental Disabilities Education, Research, and Service, also known by the term ''Center'' under section 102(5) of the Act.

Unserved and underserved. The term ''unserved and underserved'' includes populations such as individuals from racial and ethnic minority backgrounds, disadvantaged individuals, individuals with limited English proficiency, individuals from underserved geographic areas (rural or urban), and specific groups of individuals within the population of individuals with developmental disabilities, including individuals who require assistive technology in order to participate in community life.

§ 1385.4 Rights of individuals with developmental disabilities.

(a) Section 109 of the Act, Rights of Individuals with Developmental Disabilities (42 U.S.C. 15009), is applicable to the SCDD.

(b) In order to comply with section 124(c)(5)(H) of the Act (42 U.S.C. 15024(c)(5)(H)), regarding the rights of individuals with developmental disabilities, the State participating in the SCDD program must meet the requirements of 45 CFR 1386.30(f).

(c) Applications from UCEDDs also must contain an assurance that the human rights of individuals assisted by this program will be protected consistent with section 101(c) (see section 154(a)(3)(D) of the Act).

§ 1385.5 [Reserved]

§ 1385.6 Employment of individuals with disabilities.

Each grantee which receives Federal funding under the Act must meet the requirements of section 107 of the Act (42 U.S.C. 15007) regarding affirmative action. The grantee must take affirmative action to employ and advance in employment and otherwise

treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices such: Advertising, recruitment, employment, rates of pay or other forms of compensation, selection for training, including apprenticeship, upgrading, demotion or transfer, and layoff or termination. This obligation is in addition to the requirements of 45 CFR part 84, subpart B, prohibiting discrimination in employment practices on the basis of disability in programs receiving assistance from the Department. Recipients of funds under the Act also may be bound by the provisions of the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 42 U.S.C. 12101 *et seq.*) with respect to employment of individuals with disabilities. Failure to comply with section 107 of the Act may result in loss of Federal funds under the Act. If a compliance action is taken, the State will be given reasonable notice and an opportunity for a hearing as provided in subpart E of 45 CFR part 1386.

§ 1385.7 Reports to the Secretary.

All grantee submission of plans, applications and reports must label goals, activities and results clearly in terms of the following: Area of emphasis, type of activity (advocacy, capacity building, systemic change), and categories of measures of progress.

§ 1385.8 Formula for determining allotments.

The Secretary, or his or her designee, will allocate funds appropriated under the Act for the State Councils on Developmental Disabilities and the P&As as directed in sections 122 and 142 of the Act (42 U.S.C. 15022 and 15042).

§ 1385.9 Grants administration requirements.

(a) The following parts of this title and title 2 CFR apply to grants funded under parts 1386 and 1388 of this chapter, and to grants for Projects of National Significance under section 162 of the Act (42 U.S.C. 15082):

(1) 45 CFR part 16—Procedures of the Departmental Grant Appeals Board.

(2) 45 CFR part 46—Protection of Human Subjects.

(3) 45 CFR part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Award.

(4) 2 CFR part 376—Nonprocurement Debarment and Suspension.

(5) 45 CFR part 80—Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health and Human Services Effectuation of title VI of the Civil Rights Act of 1964.

(5) 45 CFR part 81—Practice and Procedure for Hearings under part 80 of this title.

(6) 45 CFR part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance.

(7) 45 CFR part 86—Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance.

(8) 45 CFR part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS.

(9) 45 CFR part 93—New Restrictions on Lobbying.

(b) The Departmental Appeals Board also has jurisdiction over appeals by any grantee that has received grants under the UCEDD programs or for Projects of National Significance. The scope of the Board's jurisdiction concerning these appeals is described in 45 CFR part 16.

(c) The Departmental Appeals Board also has jurisdiction to decide appeals brought by the States concerning any disallowances taken by the Secretary, or his or her designee, with respect to specific expenditures incurred by the States or by contractors or sub grantees of States. This jurisdiction relates to funds provided under the two formula programs—subtitle B of the Act—Federal Assistance to State Councils on Developmental Disabilities, and subtitle C of the Act—Protection and Advocacy for Individuals with Developmental Disabilities. Appeals filed by States shall be decided in accordance with 45 CFR part 16.

(d) In making audits and examination to any books, documents, papers, and transcripts of records of SCDDs, the P&As, the UCEDDs and the Projects of National Significance grantees and sub grantees, as provided for in 45 CFR part 75, the Department will keep information about individual clients confidential to the maximum extent permitted by law and regulations.

(e)(1) The Department or other authorized Federal officials may access client and case eligibility records or other records of a P&A system for audit purposes, and for purposes of monitoring system compliance pursuant to section 103(b) of the Act. However, such information will be limited pursuant to section 144(c) of the Act. No personal identifying information such as name, address, and social security number will be obtained. Only eligibility information will be obtained regarding the type and level of disability of individuals being served by the P&A and the nature of the issue concerning which the system represented an individual.

(2) Notwithstanding paragraph (e)(1) of this section, if an audit, monitoring review, evaluation, or other investigation by the Department produces evidence that the system has violated the Act or the regulations, the system will bear the burden of proving its compliance. The system's inability to establish compliance because of the confidentiality of records will not relieve it of this responsibility. The P&A may elect to obtain a release regarding personal information and privacy from all individuals requesting or receiving services at the time of intake or application. The release shall state that only information directly related to client and case eligibility will be subject to disclosure to officials of the Department.

PART 1386—FORMULA GRANT PROGRAMS

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Authority: 42 U.S.C. 15001 *et seq.*

Subpart A—Basic Requirements

§ 1386.1 General.

All rules under this subpart are applicable to both the State Councils on Developmental Disabilities and the agency designated as the State Protection and Advocacy (P&As) System.

§ 1386.2 Obligation of funds.

(a) Funds which the Federal Government allots under this part during a Federal fiscal year are available for obligation by States for a two-year period beginning with the first day of the Federal fiscal year in which the grant is awarded.

(b)(1) A State incurs an obligation for acquisition of personal property or for the performance of work on the date it makes a binding, legally enforceable, written commitment, or when the State Council on Developmental Disabilities enters into an Interagency Agreement with an agency of State government for acquisition of personal property or for the performance of work.

(2) A State incurs an obligation for personal services, for services performed by public utilities, for travel or for rental of real or personal property on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(c)(1) A Protection & Advocacy System may elect to treat entry of an appearance in judicial and administrative proceedings on behalf of an individual with a developmental disability as a basis for obligating funds for the litigation costs. The amount of the funds obligated must not exceed a reasonable estimate of the costs, and the way the estimate was calculated must be documented.

(2) For the purpose of this paragraph (c), *litigation costs* means expenses for court costs, depositions, expert witness fees, travel in connection with a case and similar costs, and costs resulting from litigation in which the agency has represented an individual with developmental disabilities (*e.g.,* monitoring court orders, consent decrees), but not for salaries of employees of the P&A. All funds made available for Federal assistance to State Councils on Developmental Disabilities and to the P&As obligated under this paragraph (c) are subject to the requirement of paragraph (a) of this section. These funds, if reobligated, may be reobligated only within a two-year period beginning with the first day of the Federal fiscal year in which the funds were originally awarded.

§ 1386.3 Liquidation of obligations.

(a) All obligations incurred pursuant to a grant made under the Act for a specific Federal fiscal year, must be liquidated within two years of the close of the Federal fiscal year in which the grant was awarded.

(b) The Secretary, or his or her designee, may waive the requirements of paragraph (a) of this section when State law impedes implementation or the amount of obligated funds to be liquidated is in dispute.

(c) Funds attributable to obligations which are not liquidated in accordance with the provisions of this section revert to the Federal Government.

§ 1386.4 [Reserved]

Subpart B—Protection and Advocacy for Individuals With Developmental Disabilities (PADD)

§ 1386.19 Definitions.

As used in this subpart and subpart C of this part, the following definitions apply:

Abuse. The term ''abuse'' means any act or failure to act which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with developmental disabilities, and includes but is not limited to such acts as: Verbal, nonverbal, mental and emotional harassment; rape or sexual assault; striking; the use of excessive force when placing such an individual in bodily restraints; the use of bodily or chemical restraints which is not in compliance with Federal and State laws and regulations, or any other practice which is likely to cause immediate physical or psychological harm or result in long term harm if such practices continue. In addition, the P&A may determine, in its discretion that a violation of an individual's legal rights amounts to abuse, such as if an individual is subject to significant financial exploitation.

American Indian Consortium. The term ''American Indian Consortium'' means any confederation of 2 or more recognized American Indian Tribes, created through the official resident population of 150,000 enrolled tribal members and a contiguous territory of Indian lands in two or more States.

Complaint. The term ''complaint'' includes, but is not limited to, any report or communication, whether formal or informal, written or oral, received by the P&A system, including media accounts, newspaper articles, electronic communications, telephone calls (including anonymous calls) from any source alleging abuse or neglect of an individual with a developmental disability.

Designating official. The term ''designating official'' means the Governor or other State official, who is empowered by the State legislature or Governor to designate the State official or public or private agency to be accountable for the proper use of funds by and conduct of the agency designated to administer the P&A system.

Full investigation. The term ''full investigation'' means access to service providers, individuals with developmental disabilities and records authorized under these regulations, that are necessary for a P&A system to make a determination about whether alleged or suspected instances of abuse and neglect are taking place or have taken place. Full investigations may be conducted independently or in cooperation with other agencies authorized to conduct similar investigations.

Legal guardian, Conservator, and Legal representative. The terms ''legal guardian,'' ''conservator,'' and ''legal representative'' all mean a parent of a minor, unless the State has appointed another legal guardian under applicable State law, or an individual appointed and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers, and having authority to make all decisions

on behalf of individuals with developmental disabilities. It does not include persons acting only as a representative payee, persons acting only to handle financial payments, executors and administrators of estates, attorneys or other persons acting on behalf of an individual with developmental disabilities only in individual legal matters, or officials or their designees responsible for the provision of services, supports, and other assistance to an individual with developmental disabilities.

Neglect. The term ''neglect'' means a negligent act or omission by an individual responsible for providing services, supports or other assistance which caused or may have caused injury or death to an individual with a developmental disability(ies) or which placed an individual with developmental disability(ies) at risk of injury or death, and includes acts or omissions such as failure to: establish or carry out an appropriate individual program plan or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care to an individual with developmental disabilities; or provide a safe environment which also includes failure to maintain adequate numbers of trained staff or failure to take appropriate steps to prevent self-abuse, harassment, or assault by a peer.

Probable cause. The term ''probable cause'' means a reasonable ground for belief that an individual with developmental disability(ies) has been, or may be, subject to abuse or neglect, or that the health or safety of the individual is in serious and immediate jeopardy. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.

State Protection and Advocacy System. The term ''State Protection and Advocacy System'' is synonymous with the term ''P&A'' used elsewhere in this regulation, and the terms ''System'' and ''Protection and Advocacy System'' used in this part and in subpart C of this part.

§ 1386.20 Agency designated as the State Protection and Advocacy System.

(a) The designating official must designate the State official or public or private agency to be accountable for proper use of funds and conduct of the Protection and Advocacy System.

(b) An agency of the State or private agency providing direct services, including guardianship services, may not be designated as the agency to administer the Protection and Advocacy System.

(c) In the event that an entity outside of the State government is designated to carry out the program, the designating official or entity must assign a responsible State official to receive, on behalf of the State, notices of disallowances and compliance actions as the State is accountable for the proper and appropriate expenditure of Federal funds.

(d)(1) Prior to any redesignation of the agency which administers and operates the State Protection and Advocacy System, the designating official must give written notice of the intention to make the redesignation to the agency currently administering and operating the State Protection and Advocacy System by registered or certified mail. The notice must indicate that the proposed redesignation is being made for good cause. The designating official also must publish a public notice of the proposed action. The agency and the public shall have a reasonable period of time, but not less than 45 days, to respond to the notice.

(2) The public notice must include:

(i) The Federal requirements for the State Protection and Advocacy System for individuals with developmental disabilities (section 143 of the Act); and where applicable, the requirements of other Federal advocacy programs administered by the State Protection and Advocacy System;

(ii) The goals and function of the State's Protection and Advocacy System including the current Statement of Goals and Priorities;

(iii) The name and address of the agency currently designated to administer and operate the State Protection and Advocacy System, and an indication of whether the agency also operates other Federal advocacy programs;

(iv) A description of the current agency operating and administering the Protection and Advocacy System including, as applicable, descriptions of other Federal advocacy programs it operates;

(v) A clear and detailed explanation of the good cause for the proposed redesignation;

(vi) A statement suggesting that interested persons may wish to write the current agency operating and administering the State Protection and Advocacy System at the address provided in paragraph (d)(2)(iii) of this section to obtain a copy of its response to the notice required by paragraph (d)(1) of this section. Copies must be in a format accessible to individuals with disabilities (including plain language), and language assistance services will be provided to individuals with limited English proficiency, such as translated materials or interpretation, upon request;

(vii) The name of the new agency proposed to administer and operate the State Protection and Advocacy System under the Developmental Disabilities Program. This agency will be eligible to administer other Federal advocacy programs;

(viii) A description of the system which the new agency would administer and operate, including a description of all other Federal advocacy programs the agency would operate;

(ix) The timetable for assumption of operations by the new agency and the estimated costs of any transfer and start-up operations; and

(x) A statement of assurance that the proposed new designated State Protection and Advocacy System will continue to serve existing clients and cases of the current P&A system or refer them to other sources of legal advocacy as appropriate, without disruption.

(3) The public notice as required by paragraph (d)(1) of this section, must be in a format accessible to individuals with disabilities, and language assistance services will be provided to individuals with limited English proficiency, such as translated materials or interpretation, upon request to individuals with developmental disabilities or their representatives. The designating official must provide for publication of the notice of the proposed redesignation using the State register, statewide newspapers, public service announcements on radio and television, or any other legally equivalent process. Copies of the notice must be made generally available to individuals with developmental disabilities and mental illness who live in residential facilities through posting or some other means.

(4) After the expiration of the public comment period required in paragraph (d)(1) of this section, the designating official must conduct a public hearing on the redesignation proposal. After consideration of all public and agency comments, the designating official must give notice of the final decision to the currently designated agency and the public through the same means used under paragraph (d)(3) of this section. This notice must include a clear and detailed explanation of the good cause finding. If the notice to the currently designated agency states that the redesignation will take place, it also must inform the agency of its right to

appeal this decision to the Secretary, or his or her designee, the authority to hear appeals by the Secretary, or his or her designee, and provide a summary of the public comments received in regard to the notice of intent to redesignate and the results of the public hearing and its responses to those comments. The redesignation shall not be effective until 10 working days after notifying the current agency that administers and operates the State Protection and Advocacy System or, if the agency appeals, until the Secretary, or his or her designee, has considered the appeal.

(e)(1) Following notification as indicated in paragraph (d)(4) of this section, the agency that administers and operates the State Protection and Advocacy System which is the subject of such action, may appeal the redesignation to the Secretary, or his or her designee. To do so, the agency that administers and operates the State Protection and Advocacy System must submit an appeal in writing to the Secretary, or his or her designee, within 20 days of receiving official notification under paragraph (d)(4) of this section, with a separate copy sent by registered of certified mail to the designating official who made the decision concerning redesignation.

(2) In the event that the agency subject to redesignation does exercise its right to appeal under paragraph (e)(1) of this section, the designating official must give public notice of the Secretary's, or his or her designated person's, final decision regarding the appeal through the same means utilized under paragraph (d)(3) of this section within 10 working days of receipt of the Secretary's, or his or her designee's, final decision under paragraph (e)(6) of this section.

(3) The designating official within 10 working days from the receipt of a copy of the appeal must provide written comments to the Secretary, or his or her designee, (with a copy sent by registered or certified mail to the Protection and Advocacy agency appealing under paragraph (e)(1) of this section), or withdraw the redesignation. The comments must include a summary of the public comments received in regard to the notice of intent to redesignate and the results of the public hearing and its responses to those comments.

(4) In the event that the designating official withdraws the redesignation while under appeal pursuant to paragraph (e)(1) of this section, the designating official must notify the Secretary, or his or her designee, and the current agency, and must give public notice of his or her decision through the same means utilized under paragraph (d)(3) of this section.

(5) As part of their submission under paragraph (e)(1) or (3) of this section, either party may request, and the Secretary, or his or her designee, may grant an opportunity for a meeting with the Secretary, or his or her designee, at which representatives of both parties will present their views on the issues in the appeal. The meeting will be held within 20 working days of the submission of written comments by the designating official under paragraph (e)(2) of this section. The Secretary, or his or her designee, will promptly notify the parties of the date and place of the meeting.

(6) Within 30 days of the informal meeting under paragraph (e)(5) of this section, or, if there is no informal meeting under paragraph (e)(5) of this section, within 30 days of the submission under paragraph (e)(3) of this section, the Secretary, or his or her designee, will issue to the parties a final written decision on whether the redesignation was for good cause as defined in paragraph (d)(1) of this section. The Secretary, or his or her designee, will receive comments on the record from agencies administering the Federal advocacy programs that will be directly affected by the proposed redesignation. The P&A and the designating official will have an opportunity to comment on the submissions of the Federal advocacy programs. The Secretary, or his or her designee, shall consider the comments of the Federal programs, the P&A and the designating official in making his final decision on the appeal.

(f)(1) Within 30 days after the redesignation becomes effective under paragraph (d)(4) of this section, the designating official must submit an assurance to the Secretary, or his or her designee, that the newly designated agency that will administer and operate the State Protection and Advocacy System meets the requirements of the statute and the regulations.

(2) In the event that the agency administering and operating the State Protection and Advocacy System subject to redesignation does not exercise its rights to appeal within the period provided under paragraph (e)(1) of this section, the designating official must provide to the Secretary, or his or her designee, documentation that the agency was redesignated for good cause. Such documentation must clearly demonstrate that the Protection and Advocacy agency subject to redesignation was not redesignated for any actions or activities which were carried out under section 143 of the Act, this regulation or any other Federal advocacy program's legislation or regulations.

§ 1386.21 Requirements and authority of the State Protection and Advocacy System.

(a) In order for a State to receive Federal funding for Protection and Advocacy activities under this subpart, as well as for the State Council on Developmental Disabilities activities (subpart D of this part), the Protection and Advocacy System must meet the requirements of section 143 and 144 of the Act (42 U.S.C. 15043 and 15044) and that system must be operational.

(b) Allotments must be used to supplement and not to supplant the level of non-Federal funds available in the State for activities under the Act, which shall include activities on behalf of individuals with developmental disabilities to remedy abuse, neglect, and violations of rights as well as information and referral activities.

(c) A P&A shall not implement a policy or practice restricting the remedies that may be sought on behalf of individuals with developmental disabilities or compromising the authority of the P&A to pursue such remedies through litigation, legal action or other forms of advocacy. Under this requirement, States may not establish a policy or practice, which requires the P&A to: Obtain the State's review or approval of the P&A's plans to undertake a particular advocacy initiative, including specific litigation (or to pursue litigation rather than some other remedy or approach); refrain from representing individuals with particular types of concerns or legal claims, or refrain from otherwise pursuing a particular course of action designed to remedy a violation of rights, such as educating policymakers about the need for modification or adoption of laws or policies affecting the rights of individuals with developmental disabilities; restrict the manner of the P&A's investigation in a way that is inconsistent with the System's required authority under the DD Act; or similarly interfere with the P&A's exercise of such authority. The requirements of this paragraph (c) shall not prevent P&As, including those functioning as agencies within State governments, from developing case or client acceptance criteria as part of the annual priorities identified by the P&A as described in § 1386.23(c). Clients must be informed at the time they apply for services of such criteria.

(d) A Protection and Advocacy System shall be free from hiring freezes, reductions in force, prohibitions on staff travel, or other policies, imposed by the

State, to the extent that such policies would impact system program staff or functions funded with Federal funds, and would prevent the system from carrying out its mandates under the Act.

(e) A Protection and Advocacy System shall have sufficient staff, qualified by training and experience, to carry out the responsibilities of the system in accordance with the priorities of the system and requirements of the Act. These responsibilities include the investigation of allegations of abuse, neglect and representations of individuals with developmental disabilities regarding rights violations.

(f) A Protection and Advocacy System may exercise its authority under State law where the State authority exceeds the authority required by the Developmental Disabilities Assistance and Bill of Rights Act of 2000. However, State law must not diminish the required authority of the Protection and Advocacy System as set by the Act.

(g) Each Protection and Advocacy System that is a public system without a multimember governing or advisory board must establish an advisory council in order to provide a voice for individuals with developmental disabilities. The Advisory Council shall advise the Protection and Advocacy System on program policies and priorities. The Advisory Council and Governing Board shall be comprised of a majority of individuals with disabilities who are eligible for services, have received or are receiving services, parents, family members, guardians, advocates, or authorized representatives of such individuals.

(h) Prior to any Federal review of the State program, a 30-day notice and an opportunity for public comment must be published in the **Federal Register**. Reasonable effort shall be made by AIDD to seek comments through notification to major disability advocacy groups, the State Bar, disability law resources, the State Councils on Developmental Disabilities, and the University Centers for Excellence in Developmental Disabilities Education, Research, and Service, for example, through newsletters and publication of those organizations. The findings of public comments may be consolidated if sufficiently similar issues are raised and they shall be included in the report of the onsite visit.

(i) Before the Protection and Advocacy System releases information to individuals not otherwise authorized to receive it, the Protection and Advocacy System must obtain written consent from the client requesting assistance or his or her guardian.

(j) *Contracts for program operations.* (1) An eligible P&A system may contract for the operation of part of its program with another public or private nonprofit organization with demonstrated experience working with individuals with developmental disabilities, provided that:

(i) The eligible P&A system institutes oversight and monitoring procedures which ensure that any and all subcontractors will be able to meet all applicable terms, conditions and obligations of the Federal grant, including but not limited to the ability to pursue all forms of litigation under the DD Act;

(ii) The P&A exercises appropriate oversight to ensure that the contracting organization meets all applicable responsibilities and standards which apply to P&As, including but not limited to, the confidentiality provisions in the DD Act and regulations, ethical responsibilities, program accountability and quality controls;

(2) Any eligible P&A system should work cooperatively with existing advocacy agencies and groups and, where appropriate, consider entering into contracts for protection and advocacy services with organizations already working on behalf of individuals with developmental disabilities.

§ 1386.22 Periodic reports: State Protection and Advocacy System.

(a) By January 1 of each year, each State Protection and Advocacy System shall submit to AIDD, an Annual Program Performance Report. In order to be accepted, the Report must meet the requirements of section 144(e) of the Act (42 U.S.C. 15044), the applicable regulation and include information on the System's program necessary for the Secretary, or his or her designee, to comply with section 105(1), (2), and (3) of the Act (42 U.S.C. 15005). The Report shall describe the activities, accomplishments, and expenditures of the system during the preceding fiscal year. Reports shall include a description of the system's goals and the extent to which the goals were achieved, barriers to their achievement; the process used to obtain public input, the nature of such input, and how such input was used; the extent to which unserved or underserved individuals or groups, particularly from ethnic or racial groups or geographic regions (*e.g.,* rural or urban areas) were the target of assistance or service; and other such information on the Protection and Advocacy System's activities requested by AIDD.

(b) Financial status reports (standard form 425) must be submitted by the agency administering and operating the State Protection and Advocacy System semiannually.

(c) By January 1 of each year, the State Protection and Advocacy System shall submit to AIDD, an Annual Statement of Goals and Priorities, (SGP), for the coming fiscal year as required under section 143(a)(2)(C) of the Act (42 U.S.C. 15043). In order to be accepted by AIDD, an SGP must meet the requirements of section 143 of the Act.

(1) The SGP is a description and explanation of the system's goals and priorities for its activities, selection criteria for its individual advocacy and training activities, and the outcomes it strives to accomplish. The SGP is developed through data driven strategic planning. If changes are made to the goals or the indicators of progress established for a year, the SGP must be amended to reflect those changes. The SGP must include a description of how the Protection and Advocacy System operates, and where applicable, how it coordinates the State Protection and Advocacy program for individuals with developmental disabilities with other Protection and Advocacy programs administered by the State Protection and Advocacy System. This description must include the System's processes for intake, internal and external referrals, and streamlining of advocacy services. If the System will be requesting or requiring fees or donations from clients as part of the intake process, the SGP must state that the system will be doing so. The description also must address collaboration, the reduction of duplication and overlap of services, the sharing of information on service needs, and the development of statements of goals and priorities for the various advocacy programs.

(2) Priorities as established through the SGP serve as the basis for the Protection and Advocacy System to determine which cases are selected in a given fiscal year. Protection and Advocacy Systems have the authority to turn down a request for assistance when it is outside the scope of the SGP, but they must inform individuals when this is the basis for turning them down.

(d) Each fiscal year, the Protection and Advocacy System shall:

(1) Obtain formal public input on its Statement of Goals and Priorities;

(2) At a minimum, provide for a broad distribution of the proposed Statement of Goals and Priorities for the next fiscal year in a manner accessible to individuals with developmental disabilities and their representatives,

allowing at least 45 days from the date of distribution for comment;

(3) Provide to the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities Education, Research and Service a copy of the proposed Statement of Goals and Priorities for comment concurrently with the public notice;

(4) Incorporate or address any comments received through public input and any input received from the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities Education, Research and Service in the final Statement submitted; and

(5) Address how the Protection and Advocacy System, State Councils on Developmental Disabilities, and University Centers for Excellence in Developmental Disabilities Education Research and Service will collaborate with each other and with other public and private entities.

§ 1386.23 Non-allowable costs for the State Protection and Advocacy System.

(a) Federal financial participation is not allowable for:

(1) Costs incurred for activities on behalf of individuals with developmental disabilities to solve problems not directly related to their disabilities and which are faced by the general populace. Such activities include but are not limited to: Preparation of wills, divorce decrees, and real estate proceedings. Allowable costs in such cases would include the Protection and Advocacy System providing disability-related technical assistance information and referral to appropriate programs and services; and

(2) Costs not allowed under other applicable statutes, Departmental regulations and issuances of the Office of Management and Budget.

(b) Attorneys' fees are considered program income pursuant to 45 CFR part 75 and must be added to the funds committed to the program and used to further the objectives of the program. This requirement shall apply to all attorneys' fees, including those earned by contractors and those received after the project period in which they were earned.

§ 1386.24 Allowable litigation costs.

Allotments may be used to pay the otherwise allowable costs incurred by a Protection and Advocacy System in bringing lawsuits in its own right to redress incidents of abuse or neglect, discrimination and other rights violations impacting the ability of individuals with developmental disabilities to obtain access to records and when it appears on behalf of named plaintiffs or a class of plaintiff for such purposes.

Subpart C—Access to Records, Service Providers, and Individuals With Developmental Disabilities

§ 1386.25 Access to records.

(a) Pursuant to sections 143(a)(2), (A)(i), (B), (I), and (J) of the Act, and subject to the provisions of this section, a Protection and Advocacy (P&A) System, and all of its authorized agents, shall have access to the records of individuals with developmental disabilities under the following circumstances:

(1) If authorized by an individual who is a client of the system, or who has requested assistance from the system, or by such individual's legal guardian, conservator or other legal representative.

(2) In the case of an individual to whom all of the following conditions apply:

(i) The individual, due to his or her mental or physical condition, is unable to authorize the system to have access;

(ii) The individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State (or one of its political subdivisions); and

(iii) The individual has been the subject of a complaint to the P&A system, or the P&A system has probable cause (which can be the result of monitoring or other activities including media reports and newspaper articles) to believe that such individual has been subject to abuse and neglect.

(3) In the case of an individual, who has a legal guardian, conservator, or other legal representative, about whom a complaint has been received by the system or, as a result of monitoring or other activities, the system has determined that there is probable cause to believe that the individual with developmental disability has been subject to abuse or neglect, whenever the following conditions exist:

(i) The P&A system has made a good faith effort to contact the legal guardian, conservator, or other legal representative upon prompt receipt (within the timelines set forth in paragraph (c) of this section) of the contact information (which is required to include but not limited to name, address, telephone numbers, and email address) of the legal guardian, conservator, or other legal representative;

(ii) The system has offered assistance to the legal guardian, conservator, or other legal representative to resolve the situation; and

(iii) The legal guardian, conservator, or other legal representative has failed or refused to provide consent on behalf of the individual.

(4) If the P&A determines there is probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy, no consent from another party is needed.

(5) In the case of death, no consent from another party is needed. Probable cause to believe that the death of an individual with a developmental disability resulted from abuse or neglect or any other specific cause is not required for the P&A system to obtain access to the records. Any individual who dies in a situation in which services, supports, or other assistance are, have been, or may customarily be provided to individuals with developmental disabilities shall, for the purposes of the P&A system obtaining access to the individual's records, be deemed an ''individual with a developmental disability.''

(b) Individual records to which P&A systems must have access under section 143(a)(2), (A)(i), (B), (I), and (J) of the Act (whether written or in another medium, draft, preliminary or final, including handwritten notes, electronic files, photographs or video or audiotape records) shall include, but shall not be limited to:

(1) Individual records prepared or received in the course of providing intake, assessment, evaluation, education, training and other services; supports or assistance, including medical records, financial records, and monitoring and other reports prepared or received by a service provider. This includes records stored or maintained at sites other than that of the service provider, as well as records that were not prepared by the service provider, but received by the service provider from other service providers.

(2) Reports prepared by a Federal, State or local governmental agency, or a private organization charged with investigating incidents of abuse or neglect, injury or death. The organizations whose reports are subject to this requirement include, but are not limited to, agencies in the foster care systems, developmental disabilities systems, prison and jail systems, public and private educational systems, emergency shelters, criminal and civil law enforcement agencies such as police departments, agencies overseeing juvenile justice facilities, juvenile detention facilities, all pre- and post-

adjudication juvenile facilities, State and Federal licensing and certification agencies, and private accreditation organizations such as the Joint Commission on the Accreditation of Health Care Organizations or by medical care evaluation or peer review committees, regardless of whether they are protected by federal or state law. The reports subject to this requirement describe any or all of the following:

(i) The incidents of abuse, neglect, injury, and/or death;

(ii) The steps taken to investigate the incidents;

(iii) Reports and records, including personnel records, prepared or maintained by the service provider in connection with such reports of incidents; or,

(iv) Supporting information that was relied upon in creating a report including all information and records that describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings;

(3) Discharge planning records; and

(4) Information in professional, performance, building or other safety standards, and demographic and statistical information relating to a service provider.

(c) The time period in which the P&A system must be given access to records of individuals with developmental disabilities under sections 143(a)(2)(A)(i), (B), (I), and (J) of the Act, and subject to the provisions of this section, varies depending on the following circumstances:

(1) If the P&A system determines that there is probable cause to believe that the health or safety of the individual with a developmental disability is in serious and immediate jeopardy, or in any case of the death of an individual with a developmental disability, access to the records of the individual with a developmental disability, as described in paragraph (b) of this section shall be provided (including the right to inspect and copy records as specified in paragraph (d) of this section) to the P&A system within 24 hours of receipt of the P&A system's written request for the records without the consent of another party.

(2) In all other cases, access to records of individuals with developmental disabilities shall be provided to the P&A system within three business days after the receipt of such a written request from the P&A system.

(d) A P&A shall be permitted to inspect and copy information and records, subject to a reasonable charge to offset duplicating costs. If the service provider or its agents copy the records for the P&A system, it may not charge the P&A system an amount that would exceed the amount customarily charged other non-profit or State government agencies for reproducing documents. At its option, the P&A may make written notes when inspecting information and records, and may use its own photocopying equipment to obtain copies. If a party other than the P&A system performs the photocopying or other reproduction of records, it shall provide the photocopies or reproductions to the P&A system within the time frames specified in paragraph (c) of this section. In addition, where records are kept or maintained electronically they shall be provided to the P&A electronically.

(e) The Health Insurance Portability and Accountability Act Privacy Rule permits the disclosure of protected health information (PHI) without the authorization of the individual to a P&A system to the extent that such disclosure is required by law and the disclosure complies with the requirements of that law.

(f) Educational agencies, including public, private, and charter schools, as well as, public and private residential and non-residential schools, must provide a P&A with the name of and contact information for the parent or guardian of a student for whom the P&A has probable cause to obtain records under the DD Act.

§ 1386.26 Denial or delay of access to records.

If a P&A system's access is denied or delayed beyond the deadlines specified in § 1386.25, the P&A system shall be provided, within one business day after the expiration of such deadline, with a written statement of reasons for the denial or delay. In the case of a denial for alleged lack of authorization, the name, address and telephone number of individuals with developmental disabilities and legal guardians, conservators, or other legal representative will be included in the aforementioned response. All of the above information shall be provided whether or not the P&A has probable cause to suspect abuse or neglect, or has received a complaint.

§ 1386.27 Access to service providers and individuals with developmental disabilities.

(a) Access to service providers and individuals with developmental disabilities shall be extended to all authorized agents of a P&A system.

(b) The P&A system shall have reasonable unaccompanied access to individuals with developmental disabilities at all times necessary to conduct a full investigation of an incident of abuse or neglect.

(1) Such access shall be afforded upon request, by the P&A system when:

(i) An incident is reported or a complaint is made to the P&A system;

(ii) The P&A system determines that there is probable cause to believe that an incident has or may have occurred; or

(iii) The P&A system determines that there is or may be imminent danger of serious abuse or neglect of an individual with a developmental disability.

(2) A P&A system shall have reasonable unaccompanied access to public and private service providers, programs in the State, and to all areas of the service provider's premises that are used by individuals with developmental disabilities or are accessible to them. Such access shall be provided without advance notice and made available immediately upon request. This authority shall include the opportunity to interview any individual with developmental disability, employee, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation. The P&A may not be required to provide the name or other identifying information regarding the individual with developmental disability or staff with whom it plans to meet; neither may the P&A be required to justify or explain its interaction with such persons.

(c) In addition to the access required under paragraph (b) of this section, a P&A system shall have reasonable unaccompanied access to service providers for routine circumstances. This includes areas which are used by individuals with developmental disabilities and are accessible to individuals with developmental disabilities at reasonable times, which at a minimum shall include normal working hours and visiting hours. A P&A also shall be permitted to attend treatment planning meetings concerning individuals with developmental disabilities with the consent of the individual or his or her guardian, conservator or other legal representative, except that no consent is required if the individual, due to his or mental or physical condition, is unable to authorize the system to have access to a treatment planning meeting; and the individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State (or one of its political subdivisions).

(1) Access to service providers shall be afforded immediately upon an oral or

written request by the P&A system. Except where complying with the P&A's request would interfere with treatment or therapy to be provided, service providers shall provide access to individuals for the purpose covered by this paragraph. If the P&As access to an individual must be delayed beyond 24 hours to allow for the provision of treatment or therapy, the P&A shall receive access as soon as possible thereafter. In cases where a service provider denies a P&A access to an individual with a developmental disability on the grounds that such access would interfere with the individual's treatment or therapy, the service provider shall, no later than 24 hours of the P&A's request, provide the P&A with a written statement from a physician stating that P&A access to the individual will interfere with the individual's treatment and therapy, and the time and circumstances under which the P&A can interview the individual. If the physician states that the individual cannot be interviewed in the next 24 hours, the P&A and the service provider shall engage in a good faith interactive process to determine when and under what circumstances the P&A can interview the individual. If the P&A and the service provider are unable to agree upon the time and circumstance, they shall select a mutually agreeable independent physician who will determine when and under what circumstances the individual may be interviewed. The expense of the independent physician's services shall be paid for by the service provider. Individuals with developmental disabilities subject to the requirements in this paragraph include adults and minors who have legal guardians or conservators.

(2) P&A activities shall be conducted so as to minimize interference with service provider programs, respect individuals with developmental disabilities' privacy interests, and honor a recipient's request to terminate an interview. This access is for the purpose of:

(i) Providing information, training, and referral for programs addressing the needs of individuals with developmental disabilities, information and training about individual rights, and the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A system. P&As shall be permitted to post, in an area which individuals with developmental disabilities receive services, a poster which states the protection and advocacy services available from the P&A system, including the name, address and telephone number of the P&A system.

(ii) Monitoring compliance with respect to the rights and safety of individuals with developmental disabilities; and

(iii) Access including, but is not limited to inspecting, viewing, photographing, and video recording all areas of a service provider's premises or under the service provider's supervision or control which are used by individuals with developmental disabilities or are accessible to them. This authority does not include photographing or video recording individuals with developmental disabilities unless they consent or State laws allow such activities.

(d) Unaccompanied access to individuals with developmental disabilities including, but not limited to, the opportunity to meet and communicate privately with individuals regularly, both formally and informally, by telephone, mail and in person. This authority shall also include the opportunity to meet, communicate with, or interview any individual with a developmental disability, including a person thought to be the subject of abuse, who might be reasonably believed by the P&A system to have knowledge of an incident under investigation or non-compliance with respect to the rights and safety of individuals with developmental disabilities. Except as otherwise required by law the P&A shall not be required to provide the name or other identifying information regarding the individual with a disability with whom it plans to meet; neither may the P&A be required to justify or explain its interaction with such persons.

§ 1386.28 Confidentiality of State Protection and Advocacy System records.

(a) A P&A shall, at minimum, comply with the confidentiality provisions of all applicable Federal and State laws.

(b) Records maintained by the P&A system are the property of the P&A system which must protect them from loss, damage, tampering, unauthorized use, or tampering. The P&A system must:

(1) Except as provided elsewhere in this section, keep confidential all records and information, including information contained in any automated electronic database pertaining to:

(i) Clients;

(ii) Individuals who have been provided general information or technical assistance on a particular matter;

(iii) The identity of individuals who report incidents of abuse or neglect, or who furnish information that forms the basis for a determination that probable cause exists; and

(iv) Names of individuals who have received services, supports or other assistance, and who provided information to the P&A for the record.

(v) Peer review records.

(2) Have written policies governing the access, storage, duplication and release of information from client records, including the release of information peer review records.

(3) Obtain written consent from the client, or from his or her legal representative; individuals who have been provided general information or technical assistance on a particular matter; and individuals who furnish reports or information that form the basis for a determination of probable cause, before releasing information concerning such individuals to those not otherwise authorized to receive it.

(c) Nothing in this subpart shall prevent the P&A system from issuing a public report of the results of an investigation which maintains the confidentiality of the individuals listed in paragraph (a)(1) of this section, or reporting the results of an investigation in a manner which maintains the confidentiality of such individuals, to responsible investigative or enforcement agencies should an investigation reveal information concerning the service provider, its staff, or employees warranting possible sanctions or corrective action. This information may be reported to agencies responsible for service provider licensing or accreditation, employee discipline, employee licensing or certification, or criminal investigation or prosecution.

(d) Notwithstanding the confidentiality requirements of this section, the P&A may make a report to investigative or enforcement agencies, as described in paragraph (b) of this section, which reveals the identity of an individual with developmental disability, and information relating to his or her status or treatment:

(1) When the system has received a complaint that the individual has been or may be subject to abuse and neglect, or has probable cause (which can be the result of monitoring or other activities including media reports and newspaper articles) to believe that such individual has been or may be subject to abuse or neglect;

(2) When the system determines that there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy; or

(3) In any case of the death of an individual whom the system believes

may have had a developmental disability.

Subpart D—Federal Assistance to State Councils on Developmental Disabilities

§ 1386.30 State plan requirements.

(a) In order to receive Federal funding under this subpart, each State Developmental Disabilities Council must prepare and submit a State plan which meets the requirements of sections 124 and 125 of the Act (42 U.S.C. 15024 and 15025), and the applicable regulation. Development of the State plan and its periodic updating are the responsibility of the State Council on Developmental Disabilities. As provided in section 124(d) of the Act, the Council shall provide opportunities for public input and review (in accessible formats and plain language requirements), and will consult with the Designated State Agency to determine that the plan is consistent with applicable State laws, and obtain appropriate State plan assurances.

(b) Failure to comply with the State plan requirements may result in the loss of Federal funds as described in section 127 of the Act (42 U.S.C. 15027). The Secretary, or his or her designee, must provide reasonable notice and an opportunity for a hearing to the Council and the Designated State Agency before withholding any payments for planning, administration, and services.

(c) The State plan must be submitted through the designated system by AIDD which is used to collect quantifiable and qualifiable information from the State Councils on Developmental Disabilities. The plan must:

(1) Identify the agency or office in the State designated to support the Council in accordance with section 124(c)(2) and 125(d) of the Act. The Designated State Agency shall provide required assurances and support services requested from and negotiated with the Council.

(2) For a year covered by the State plan, include for each area of emphasis under which a goal or goals have been identified, the measures of progress the Council has established or is required to apply in its progress in furthering the purpose of the Developmental Disabilities Assistance and Bill of Rights Act through advocacy, capacity building, and systemic change activities.

(3) Provide for the establishment and maintenance of a Council in accordance with section 125 of the Act and describe the membership of such Council. The non-State agency members of the Council shall be subject to term limits to ensure rotating membership.

(d) The State plan must be updated during the five-year period when substantive changes are contemplated in plan content, including changes under paragraph (c)(2) of this section.

(e) The State plan may provide for funding projects to demonstrate new approaches to direct services that enhance the independence, productivity, and integration and inclusion into the community of individuals with developmental disabilities. Direct service demonstrations must be short-term, with a strategy to locate on-going funding from other sources after five years. Any State desiring to receive assistance beyond five years, under this subtitle, shall include in the State plan the information listed in paragraphs (e)(1) through (3) of this section, and AIDD reserves the right as the overseeing agency to deny the continuation of the demonstration project beyond five years.

(1) The estimated period for the project's continued duration;

(2) Justifications of why the project cannot be funded by the State or other sources and should receive continued funding; and

(3) Provide data outcomes showing evidence of success.

(f) The State plan may provide for funding of other demonstration projects or activities, including but not limited to outreach, training, technical assistance, supporting and educating communities, interagency collaboration and coordination, coordination with related councils, committees and programs, barrier elimination, systems design and redesign, coalition development and citizen participation, and informing policymakers. Demonstrations must be short-term, with a strategy to locate on-going funding from other sources after five years. Any State desiring to receive assistance beyond five years, under this subtitle, shall include in the State plan the information listed in paragraphs (f)(1) through (3) of this section, and AIDD reserves the right as the overseeing agency to deny the continuation of the demonstration project beyond five years.

(1) The estimated period for the project's continued duration;

(2) Justifications on why the project cannot be funded by the State or other resources and should receive continued funding; and

(3) Provide data showing evidence of success.

(g) The State plan must contain assurances that are consistent with section 124 of the Act (42 U.S.C. 15024).

§ 1386.31 State plan submittal and approval.

(a) The Council shall issue a public notice about the availability of the proposed State plan or State plan amendment(s) for comment. The notice shall be published in formats accessible to individuals with developmental disabilities and the general public (*e.g.* public forums, Web sites, newspapers, and other current technologies) and shall provide a 45-day period for public review and comment. The Council shall take into account comments submitted within that period, and respond in the State plan to significant comments and suggestions. A summary of the Council's responses to State plan comments shall be submitted with the State plan and made available for public review. This document shall be made available in accessible formats upon request.

(b) The State plan or amendment must be submitted to AIDD 45 days prior to the fiscal year for which it is applicable.

(c) Failure to submit an approvable State plan or amendment prior to the Federal fiscal year for which it is applicable may result in the loss of Federal financial participation. Plans received during a quarter of the Federal fiscal year are approved back to the first day of the quarter so costs incurred from that point forward are approvable. Costs resulting from obligations incurred during the period of the fiscal year for which an approved plan is not in effect are not eligible for Federal financial participation.

(d) The Secretary, or his or her designee, must approve any State plan or plan amendment provided it meets the requirements of the Act and this regulation.

§ 1386.32 Periodic reports: Federal assistance to State Councils on Developmental Disabilities.

(a) The Governor or appropriate State financial officer must submit financial status reports (AIDD–02B) on the programs funded under this subpart semiannually.

(b) By January 1 of each year, the State Council on Developmental Disabilities shall submit to AIDD, an Annual Program Performance Report through the system established by AIDD. In order to be accepted by AIDD, reports must meet the requirements of section 125(c)(7) of the Act (42 U.S.C. 15025) and the applicable regulations, include the information on its program necessary for the Secretary, or his or her designee, to comply with section 105(1),

(2), and (3) of the Act (42 U.S.C. 15005), and any other information requested by AIDD. Each Report shall contain information about the progress made by the Council in achieving its goals including:

(1) A description of the extent to which the goals were achieved;

(2) A description of the strategies that contributed to achieving the goals;

(3) To the extent to which the goals were not achieved, a description of factors that impeded the achievement;

(4) Separate information on the self-advocacy goal described in section 124(c)(4)(A)(ii) of the Act (42 U.S.C. 15024);

(5) As appropriate, an update on the results of the comprehensive review and analysis of the extent to which services, supports, and other assistance are available to individuals with developmental disabilities and their families, including the extent of unmet needs for services, supports, and other assistance for those individuals and their families, in the State as required in section 124(c)(3) of the Act (42 U.S.C. 15024);

(6) Information on individual satisfaction with Council supported or conducted activities;

(7) A description of the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) receive;

(8) To the extent available, a description of the adequacy of health care and other services, supports, and assistance received by individuals with developmental disabilities served through home and community-based waivers (authorized under section 1915(c) of the Social Security Act);

(9) An accounting of the funds paid to the State awarded under the DD Council program;

(10) A description of resources made available to carry out activities to assist individuals with developmental disabilities directly attributable to Council actions;

(11) A description of resources made available for such activities that are undertaken by the Council in collaboration with other entities; and

(12) A description of the method by which the Council will widely disseminate the annual report to affected constituencies and the general public and will assure that the report is available in accessible formats.

(c) Each Council must include in its Annual Program Performance Report information on its achievement of the measures of progress.

§ 1386.33 Protection of employees interests.

(a) Based on section 124(c)(5)(J) of the Act (42 U.S.C. 15024(c)(5)(J)), the State plan must assure fair and equitable arrangements to protect the interest of all institutional employees affected by actions under the plan to provide community living activities. The State must inform employees of the State's decision to provide for community living activities. Specific arrangements for the protection of affected employees must be developed through negotiations between the appropriate State authorities and employees or their representatives.

(b) Fair and equitable arrangements must include procedures that provide for the impartial resolution of disputes between the State and an employee concerning the interpretation, application, and enforcement of protection arrangements. To the maximum extent practicable, these arrangements must include provisions for:

(1) The preservation of rights and benefits;

(2) Guaranteeing employment to employees affected by action under the plan to provide alternative community living arrangements; and

(3) Employee training and retraining programs.

§ 1386.34 Designated State Agency.

(a) The Designated State Agency shall provide the required assurances and other support services as requested and negotiated by the Council. These include:

(1) Provision of financial reporting and other services as provided under section 125(d)(3)(D) of the Act; and

(2) Information and direction, as appropriate, on procedures on the hiring, supervision, and assignment of staff in accordance with State law.

(b) If the State Council on Developmental Disabilities requests a review by the Governor (or State legislature, if applicable) of the Designated State Agency, the Council must provide documentation of the reason for change, and recommend a new preferred Designated State Agency by the Governor (or State legislature, if applicable).

(c) After the review is completed by the Governor (or State legislature, if applicable), and if no change is made, a majority of the non-State agency members of the Council may appeal to the Secretary, or his or her designee, for a review of the Designated State Agency if the Council's independence as an advocate is not assured because of the actions or inactions of the Designated State agency.

(d) The following steps apply to the appeal of the Governor's (or State legislature, if applicable) designation of the Designated State Agency.

(1) Prior to an appeal to the Secretary, or his or her designee, the State Council on Developmental Disabilities, must give a 30 day written notice, by certified mail, to the Governor (or State legislature, if applicable) of the majority of non-State members' intention to appeal the designation of the Designated State Agency.

(2) The appeal must clearly identify the grounds for the claim that the Council's independence as an advocate is not assured because of the action or inactions of the Designated State Agency.

(3) Upon receipt of the appeal from the State Council on Developmental Disabilities, the Secretary, or his or her designee, will notify the State Council on Developmental Disabilities and the Governor (or State legislature, if applicable), by certified mail, that the appeal has been received and will be acted upon within 60 days. The Governor (or State legislature, if applicable) shall within 10 working days from the receipt of the Secretary's, or his or her designated person's, notification provide written comments to the Secretary, or his or her designee, (with a copy sent by registered or certified mail to the Council) on the claims in the Council's appeal. Either party may request, and the Secretary, or his or her designee, may grant, an opportunity for an informal meeting with the Secretary, or his or her designee, at which representatives from both parties will present their views on the issues in the appeal. The meeting will be held within 20 working days of the submission of written comments by the Governor (or State legislature, if applicable). The Secretary, or his or her designee, will promptly notify the parties of the date and place of the meeting.

(4) The Secretary, or his or her designee, will review the issue(s) and provide a final written decision within 60 days following receipt of the appeal from the State Council on Developmental Disabilities. If the determination is made that the Designated State Agency should be redesignated, the Governor (or State legislature, if applicable) must provide written assurance of compliance within 45 days from receipt of the decision.

(5) Anytime during this appeals process the State Council on Developmental Disabilities may withdraw such request if resolution has

been reached with the Governor (or State legislature, if applicable) on the Designated State Agency. The Governor (or State legislature, if applicable) must notify the Secretary, or his or her designee, in writing of such a decision.

(e) The Designated State Agency may authorize the Council to contract with State agencies other than the Designated State Agency to perform functions of the Designated State Agency.

§ 1386.35 Allowable and non-allowable costs for Federal assistance to State Councils on Developmental Disabilities.

(a) Under this subpart, Federal funding is available for costs resulting from obligations incurred under the approved State plan for the necessary expenses of administering the plan, which may include the establishment and maintenance of the State Council, and all programs, projects, and activities carried out under the State plan.

(b) Expenditures which are not allowable for Federal financial participation are:

(1) Costs incurred by institutions or other residential or non-residential programs which do not comply with the Congressional findings with respect to the rights of individuals with developmental disabilities in section 109 of the Act (42 U.S.C. 15009).

(2) Costs incurred for activities not provided for in the approved State plan; and

(3) Costs not allowed under other applicable statutes, Departmental regulations, or issuances of the Office of Management and Budget.

(c) Expenditure of funds that supplant State and local funds are not allowed. Supplanting occurs when State or local funds previously used to fund activities under the State plan are replaced by Federal funds for the same purpose. However, supplanting does not occur if State or local funds are replaced with Federal funds for a particular activity or purpose in the approved State plan if the replaced State or local funds are then used for other activities or purposes in the approved State plan.

(d) For purposes of determining aggregate minimum State share of expenditures, there are three categories of expenditures:

(1) Expenditures for projects or activities undertaken directly by the Council and Council staff to implement State plan activities, as described in section 126(a)(3) of the Act, require no non-Federal aggregate of the necessary costs of such activities.

(2) Expenditures for projects whose activities or products target individuals with developmental disabilities who live in urban or rural poverty areas, as determined by the Secretary, or his or her designee, but not carried out directly by the Council and Council staff, as described in section 126(a)(2) of the Act, shall have non-Federal funding of at least 10 percent in the aggregate of the necessary costs of such projects.

(3) All other projects not directly carried out by the Council and Council staff shall have non-Federal funding of at least 25 percent in the aggregate of the necessary costs of such projects.

(e) The Council may vary the non-Federal funding required on a project-by-project, activity-by-activity basis (both poverty and non-poverty activities), including requiring no non-Federal funding from particular projects or activities as the Council deems appropriate so long as the requirement for aggregate non-Federal funding is met.

§ 1386.36 Final disapproval of the State plan or plan amendments.

The Department will disapprove any State plan or plan amendment only after the following procedures have been complied with:

(a) The State plan has been submitted to AIDD for review. If after contacting the State on issues with the plan with no resolution, a detailed written analysis of the reasons for recommending disapproval shall be prepared and provided to the State Council and State Designated Agency.

(b) Once the Secretary, or his or her designee, has determined that the State plan, in whole or in part, is not approvable, notice of this determination shall be sent to the State with appropriate references to the records, provisions of the statute and regulations, and all relevant interpretations of applicable laws and regulations. The notification of the decision must inform the State of its right to appeal in accordance with subpart E of this part.

(c) The Secretary's, or his or her designee's, decision has been forwarded to the State Council and its Designated State Agency by certified mail with a return receipt requested.

(d) A State has filed its request for a hearing with the Secretary, or his or her designee, within 21 days of the receipt of the decision. The request for a hearing must be sent by certified mail to the Secretary, or his or her designee. The date of mailing the request is considered the date of filing if it is supported by independent evidence of mailing. Otherwise the date of receipt shall be considered the date of filing.

Subpart E—Practice and Procedure for Hearings Pertaining to States' Conformity and Compliance With Developmental Disabilities State Plans, Reports, and Federal Requirements

General

§ 1386.80 Definitions.

For purposes of this subpart:

Payment or allotment. The term ''payment'' or ''allotment'' means an amount provided under part B or C of the Developmental Disabilities Assistance and Bill or Rights Act of 2000. This term includes Federal funds provided under the Act irrespective of whether the State must match the Federal portion of the expenditure. This term shall include funds previously covered by the terms ''Federal financial participation,'' ''the State's total allotment,'' ''further payments,'' ''payments,'' ''allotment'' and ''Federal funds.''

Presiding officer. The term ''presiding officer'' means anyone designated by the Secretary to conduct any hearing held under this subpart. The term includes the Secretary, or the Secretary's designee, if the Secretary or his or her designee presides over the hearing. For purposes of this subpart the Secretary's ''designee'' refers to a person, such as the Administrator of ACL, who has been delegated broad authority to carry out all or some of the authorizing statute. The term designee does not refer to a presiding officer designated only to conduct a particular hearing or hearings.

§ 1386.81 Scope of rules.

(a) The rules of procedures in this subpart govern the practice for hearings afforded by the Department to States pursuant to sections 124, 127, and 143 of the Act. (42 U.S.C. 15024, 15027 and 15043).

(b) Nothing in this part is intended to preclude or limit negotiations between the Department and the State, whether before, during, or after the hearing to resolve the issues that are, or otherwise would be, considered at the hearing. Negotiation and resolution of issues are not part of the hearing, and are not governed by the rules in this subpart, except as otherwise provided in this subpart.

§ 1386.82 Records to the public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding are subject to public inspection.

§ 1386.83 Use of gender and number.

As used in this subpart, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing either gender may be applied to the other gender or to organizations.

§ 1386.84 Suspension of rules.

Upon notice to all parties, the Secretary or the Secretary's designee may modify or waive any rule in this subpart, unless otherwise expressly provided, upon determination that no party will be unduly prejudiced and justice will be served.

§ 1386.85 Filing and service of papers.

(a) All papers in the proceedings must be filed with the designated individual in an original and two copies. Only the originals of exhibits and transcripts of testimony need be filed.

(b) Copies of papers in the proceedings must be served on all parties by personal delivery or by mail. Service on the party's designated representative is deemed service upon the party.

Preliminary Matters—Notice and Parties

§ 1386.90 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Secretary, or his or her designee, to the State Council on Developmental Disabilities and the Designated State Agency, or to the State Protection and Advocacy System or designating official. The notice must state the time and place for the hearing and the issues that will be considered. The notice must be published in the **Federal Register**.

§ 1386.91 Time of hearing.

The hearing must be scheduled not less than 30 days, nor more than 60 days after the notice of the hearing is mailed to the State.

§ 1386.92 Place.

The hearing must be held on a date and at a time and place determined by the Secretary, or his or her designee with due regard for convenience, and necessity of the parties or their representatives. The site of the hearing shall be accessible to individuals with disabilities.

§ 1386.93 Issues at hearing.

(a) Prior to a hearing, the Secretary or his or her designee may notify the State in writing of additional issues which will be considered at the hearing. That notice must be published in the **Federal Register**. If that notice is mailed to the State less than 20 days before the date of the hearing, the State or any other party, at its request, must be granted a postponement of the hearing to a date 20 days after the notice was mailed or such later date as may be agreed to by the Secretary or his or her designee.

(b) If any issue is resolved in whole or in part, but new or modified issues are presented, the hearing must proceed on the new or modified issues.

(c)(1) If at any time, whether prior to, during, or after the hearing, the Secretary, or his or her designee, finds that the State has come into compliance with Federal requirements on any issue in whole or in part, he or she must remove the issue from the proceedings in whole or in part as may be appropriate. If all issues are removed the Secretary, or his or her designee, must terminate the hearing.

(2) Prior to the removal of an issue, in whole or in part, from a hearing involving issues relating to the conformity with Federal requirements under part B of the Act, of the State plan or the activities of the State Protection and Advocacy System, the Secretary, or his or her designee, must provide all parties other than the Department and the State (see § 1386.94(b)) with the statement of his or her intention to remove an issue from the hearing and the reasons for that decision. A copy of the proposed State plan provision or document explaining changes in the activities of the State's Protection and Advocacy System on which the State and the Secretary, or his or her designee, have settled must be sent to the parties. The parties must have an opportunity to submit in writing within 15 days their views as to, or any information bearing upon, the merits of the proposed provision and the merits of the reasons for removing the issue from the hearing.

(d) In hearings involving questions of noncompliance of a State's operation of its program under part B of the Act, with the State plan or with Federal requirements, or compliance of the State Protection and Advocacy System with Federal requirements, the same procedure set forth in paragraph (c)(2) of this section must be followed with respect to any report or evidence resulting in a conclusion by the Secretary, or his or her designee, that a State has achieved compliance.

(e) The issues considered at the hearing must be limited to those issues of which the State is notified as provided in § 1386.90 and paragraph (a) of this section, and new or modified issues described in paragraph (b) of this section, and may not include issues or parts of issues removed from the proceedings pursuant to paragraph (c) of this section.

§ 1386.94 Request to participate in hearing.

(a) The Department, the State, the State Council on Developmental Disabilities, the Designated State Agency, and the State Protection and Advocacy System, as appropriate, are parties to the hearing without making a specific request to participate.

(b)(1) Other individuals or groups may be recognized as parties if the issues to be considered at the hearing have caused them injury and their interests are relevant to the issues in the hearing.

(2) Any individual or group wishing to participate as a party must file a petition with the designated individual within 15 days after notice of the hearing has been published in the **Federal Register**, and must serve a copy on each party of record at that time in accordance with § 1386.85(b). The petition must concisely state:

(i) Petitioner's interest in the proceeding;

(ii) Who will appear for petitioner;

(iii) The issues the petitioner wishes to address; and

(iv) Whether the petitioner intends to present witnesses.

(c)(1) Any interested person or organization wishing to participate as amicus curiae must file a petition with the designated individual before the commencement of the hearing. The petition must concisely state:

(i) The petitioner's interest in the hearing;

(ii) Who will represent the petitioner; and

(iii) The issues on which the petitioner intends to present argument.

(2) The presiding officer may grant the petition if he or she finds that the petitioner has a legitimate interest in the proceedings and that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues.

(3) An amicus curiae may present a brief oral statement at the hearing at the point in the proceedings specified by the presiding officer. It may submit a written statement of position to the presiding officer prior to the beginning of a hearing and must serve a copy on each party. It also may submit a brief or written statement at such time as the parties submit briefs and must serve a copy on each party.

Hearing Procedures

§ 1386.100 Who presides.

(a) The presiding officer at a hearing must be the Secretary, his or her designee, or another person specifically designated for a particular hearing or hearings.

(b) The designation of a presiding officer must be in writing. A copy of the designation must be served on all parties and amici curiae.

§ 1386.101 Authority of presiding officer.

(a) The presiding officer has the duty to conduct a fair hearing, avoid delay, maintain order, and make a record of the proceedings. The presiding officer has all powers necessary to accomplish these ends, including, but not limited to, the power to:

(1) Change the date, time, and place of the hearing, upon notice to the parties. This includes the power to continue the hearing in whole or in part;

(2) Hold conferences to settle or simplify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceedings;

(3) Regulate participation of parties and amici curiae and require parties and amici curiae to state their positions with respect to the issues in the proceeding;

(4) Administer oaths and affirmations;

(5) Rule on motions and other procedural items on matters pending before him or her, including issuance of protective orders or other relief to a party against whom discovery is sought;

(6) Regulate the course of the hearing and conduct of counsel therein;

(7) Examine witnesses;

(8) Receive, rule on, exclude, or limit evidence or discovery;

(9) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him or her;

(10) If the presiding officer is the Secretary, or his or her designee, make a final decision;

(11) If the presiding officer is a person other than the Secretary or his or her designee, the presiding officer shall certify the entire record, including recommended findings and proposed decision, to the Secretary or his or her designee; and

(12) Take any action authorized by the rules in this subpart or 5 U.S.C. 551–559.

(b) The presiding officer does not have authority to compel the production of witnesses, papers, or other evidence by subpoena.

(c) If the presiding officer is a person other than the Secretary or his or her designee, his or her authority is to render a recommended decision with respect to program requirements which are to be considered at the hearing. In case of any noncompliance, he or she shall recommend whether payments or allotments should be withheld with respect to the entire State plan or the activities of the State's Protection and Advocacy System, or whether the payments or allotments should be withheld only with respect to those parts of the program affected by such noncompliance.

§ 1386.102 Rights of parties.

All parties may:

(a) Appear by counsel, or other authorized representative, in all hearing proceedings;

(b) Participate in any prehearing conference held by the presiding officer;

(c) Agree to stipulations of facts which will be made a part of the record;

(d) Make opening statements at the hearing;

(e) Present relevant evidence on the issues at the hearing;

(f) Present witnesses who then must be available for cross-examination by all other parties;

(g) Present oral arguments at the hearing; and

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 1386.103 Discovery.

The Department and any party named in the notice issued pursuant to § 1386.90 has the right to conduct discovery (including depositions) against opposing parties as provided by the Federal Rules of Civil Procedure. There is no fixed rule on priority of discovery. Upon written motion, the presiding officer must promptly rule upon any objection to discovery action. The presiding officer also has the power to grant a protective order or relief to any party against whom discovery is sought and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may issue any order and impose any sanction other than contempt orders authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1386.104 Evidentiary purpose.

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather, it must be presented in statements, memoranda, or briefs, as directed by the presiding officer. Brief opening statements, which shall be limited to a statement of the party's position and what it intends to prove, may be made at hearings.

§ 1386.105 Evidence.

(a) *Testimony.* Testimony by witnesses at the hearing is given orally under oath or affirmation. Witnesses must be available at the hearing for cross-examination by all parties.

(b) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Such stipulations, or any exhibit proposed by any party, must be exchanged at the prehearing conference or at a different time prior to the hearing if the presiding officer requires it.

(c) *Rules of evidence.* Technical rules of evidence do not apply to hearings conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination are applied where reasonably necessary by the presiding officer. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his or her direct examination. The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record is open to examination by the parties and opportunity must be given to refute facts and arguments advanced on either side of the issues.

§ 1386.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or rebellious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at the hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

§ 1386.107 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing is placed in the correspondence section of the docket of the proceeding. This material is not deemed part of the evidence or record in the hearing.

§ 1386.108 Official transcript.

The Department will designate the official reporter for all hearings. The official transcript of testimony taken, together with any stipulations, exhibits, briefs, or memoranda of law filed with them is filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates

fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance. Transcripts must be taken by stenotype machine and not be voice recording devices, unless otherwise agreed by all of the parties and the presiding officer.

§ 1386.109 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision, constitute the exclusive record for decision.

Post-Hearing Procedures, Decisions

§ 1386.110 Post-hearing briefs.

The presiding officer must fix the time for filing post-hearing briefs. This time may not exceed 30 days after termination of the hearing and receipt of the transcript. Briefs may contain proposed findings of fact and conclusions of law. If permitted, reply briefs may be filed no later than 15 days after filing of the post-hearing briefs.

§ 1386.111 Decisions following hearing.

(a) If the Secretary, or his or her designee, is the presiding officer, he or she must issue a decision within 60 days after the time for submission of post-hearing briefs has expired.

(b)(1) If the presiding officer is another person designated for a particular hearing or hearings, he or she must, within 30 days after the time for submission of post-hearing briefs has expired, certify the entire record to the Secretary (or his or her designee) including the recommended findings and proposed decision.

(2) The Secretary, or his or her designee, must serve a copy of the recommended findings and proposed decision upon all parties and amici.

(3) Any party may, within 20 days, file exceptions to the recommended findings and proposed decision and supporting brief or statement with the Secretary, or his or her designee.

(4) The Secretary, or his or her designee, must review the recommended decision and, within 60 days of its issuance, issue his or her own decision.

(c) If the Secretary, or his or her designee, concludes:

(1) In the case of a hearing pursuant to sections 124, 127, or 143 of the Act, that a State plan or the activities of the State's Protection and Advocacy System does not comply with Federal requirements, he or she shall also specify whether the State's payment or allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his or her discretion, the payment or allotment will be limited to the parts of the State plan or the activities of the State's Protection and Advocacy System not affected by the noncompliance.

(2) In the case of a hearing pursuant to section 127 of the Act that the State is not complying with the requirements of the State plan, he or she also must specify whether the State's payment or allotment will be made available to the State or whether, in the exercise of his or her discretion, the payment or allotment will be limited to the parts of the State plan not affected by such noncompliance. The Secretary, or his or her designee, may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Secretary, or his or her designee, under this section is the final decision of the Secretary and constitutes ''final agency action'' within the meaning of 5 U.S.C. 704 and the ''Secretary's action'' within the meaning of section 128 of the Act (42 U.S.C. 15028). The Secretary's, or his or her designee's, decision must be promptly served on all parties and amici.

§ 1386.112 Effective date of decision by the Secretary.

(a) If, in the case of a hearing pursuant to section 124 of the Act, the Secretary, or his or her designee, concludes that a State plan does not comply with Federal requirements, and the decision provides that the payment or allotment will be authorized but limited to parts of the State plan not affected by such noncompliance, the decision must specify the effective date for the authorization of the payment or allotment.

(b) In the case of a hearing pursuant to sections 127 or 143 of the Act, if the Secretary, or his or her designee, concludes that the State is not complying with the requirements of the State plan or if the activities of the State's Protection and Advocacy System do not comply with Federal requirements, the decision that further payments or allotments will not be made to the State, or will be limited to the parts of the State plan or activities of the State Protection and Advocacy System not affected, must specify the effective date for withholding payments or allotments.

(c) The effective date may not be earlier than the date of the decision of the Secretary, or his or her designee, and may not be later than the first day of the next calendar quarter.

(d) The provision of this section may not be waived pursuant to § 1386.84.

PART 1387—PROJECTS OF NATIONAL SIGNIFICANCE

Sec.
1387.1 General requirements.

Authority: 42 U.S.C. 15001 *et seq.*

§ 1387.1 General requirements.

(a) All projects funded under this part must be of national significance and serve or relate to individuals with developmental disabilities to comply with subtitle E of the Act, sections 161–163 (42 U.S.C. 15081–15083).

(b) In general, Projects of National Significance (PNS) provide technical assistance, collect data, demonstrate exemplary and innovative models, disseminate knowledge at the local and national levels, and otherwise meet the goals of Projects of National Significance section 161 (42 U.S.C. 15081).

(c) Projects of National Significance may engage in one or more of the types of activities provided in section 161(2) of the Act.

(d) In general, eligible applicants for PNS funding are public and private non-profit entities, 42 U.S.C. 15082, such as institutions of higher learning, State and local governments, and Tribal governments. The program announcements will specifically state any further eligibility requirements for the priority areas in the fiscal year.

(e) Faith-based organizations are eligible to apply for PNS funding, providing that the faith-based organizations meet the specific eligibility criteria contained in the program announcement for the fiscal year.

PART 1388—THE NATIONAL NETWORK OF UNIVERSITY CENTERS FOR EXCELLENCE IN DEVELOPMENTAL DISABILITIES, EDUCATION, RESEARCH, AND SERVICE

Sec.
1388.1 Definitions.
1388.2 Purpose.
1388.3 Core functions.
1388.4 National training initiatives on critical and emerging needs.
1388.5 Applications.
1388.6 Governance and administration.
1388.7 Five-year plan and annual report.

Authority: 42 U.S.C. 15001 *et seq.*

§ 1388.1 Definitions.

States. For the purpose of this part, ''State'' means each of the several States of the United States, the District of

Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Guam.

§ 1388.2 Purpose.

(a) The Secretary, or his or her designee awards grants to eligible entities designated as University Centers for Excellence in Developmental Disabilities Education, Research, and Service (''UCEDDs'', or ''Centers'') in each State to pay for the Federal share of the cost of the administration and operation of the Centers. Centers shall:

(1) Provide leadership in, advise Federal, State, and community policymakers about, and promote opportunities for individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life.

(2) Be interdisciplinary education, research, and public service units of universities or public not-for-profit entities associated with universities that engage in core functions, described in § 1388.3, addressing, directly or indirectly, one or more of the areas of emphasis, as defined in § 1385.3 of this chapter.

(b) To conduct National Training Initiatives on Critical and Emerging Needs as described in § 1388.4.

§ 1388.3 Core functions.

The Centers described in § 1388.2 must engage in the core functions referred to in this section, which shall include:

(a) Provision of interdisciplinary pre-service preparation and continuing education of students and fellows, which may include the preparation and continuing education of leadership, direct service, clinical, or other personnel to strengthen and increase the capacity of States and communities to achieve the purpose of the DD Act of 2000.

(b) Provision of community services:

(1) That provide training or technical assistance for individuals with developmental disabilities, their families, professionals, paraprofessionals, policy-makers, students, and other members of the community; and

(2) That may provide services, supports, and assistance for the persons listed in paragraph (b)(1) of this section through demonstration and model activities.

(c) Conduct of research, which may include basic or applied research, evaluation, and the analysis of public policy in areas that affect or could affect, either positively or negatively, individuals with developmental disabilities and their families.

(d) Dissemination of information related to activities undertaken to address the purpose of the DD Act of 2000, especially dissemination of information that demonstrates that the network authorized under Subtitle D of the Act is a national and international resource that includes specific substantive areas of expertise that may be accessed and applied in diverse settings and circumstances.

§ 1388.4 National training initiatives on critical and emerging needs.

(a) Supplemental grant funds for National Training Initiatives (NTIs) on critical and emerging needs may be reserved when each Center described in section 152 of the DD Act has received a grant award of at least $500,000, adjusted for inflation.

(b) The grants shall be awarded to Centers to pay for the Federal share of the cost of training initiatives related to the unmet needs of individuals with developmental disabilities and their families.

(c) The grants shall be awarded on a competitive basis, and for periods of not more than 5 years.

§ 1388.5 Applications.

(a) To be eligible to receive a grant under § 1388.2 for a Center, an entity shall submit to the Secretary, or his or her designee, an application at such time, in such manner, and containing such information, as the Secretary, or his or her designee, may require for approval.

(b) Each application shall describe a five-year plan that must include:

(1) Projected goal(s) related to one or more areas of emphasis described in § 1385.3 of this chapter for each of the core functions.

(2) Measures of progress.

(c) The application shall contain or be supported by reasonable assurances that the entity designated as the Center will:

(1) Meet the measures of progress;

(2) Address the projected goals, and carry out goal-related activities, based on data driven strategic planning and in a manner consistent with the objectives of subtitle D of the Act, that:

(i) Are developed in collaboration with the Consumer Advisory Committee established pursuant to paragraph (c)(5) of this section;

(ii) Are consistent with, and to the extent feasible complement and further, the Council goals contained in the State plan submitted under section 124 of the DD Act of 2000 and the goals of the Protection and Advocacy System established under section 143 of the DD Act of 2000; and

(iii) Will be reviewed and revised annually as necessary to address emerging trends and needs.

(3) Use the funds made available through the grant to supplement, and not supplant, the funds that would otherwise be made available for activities described in § 1388.2(a)(1) and (2).

(4) Protect, consistent with the policy specified in section 101(c) of the DD Act of 2000 the legal and human rights of all individuals with developmental disabilities (especially those individuals under State guardianship who are involved in activities carried out under programs assisted under subtitle D of the Act).

(5) Establish a Consumer Advisory Committee:

(i) Of which a majority of the members shall be individuals with developmental disabilities and family members of such individuals;

(ii) That is comprised of:

(A) Individuals with developmental disabilities and related disabilities;

(B) Family members of individuals with developmental disabilities;

(C) A representative of the State Protection and Advocacy System;

(D) A representative of the State Council on Developmental Disabilities;

(E) A representative of a self-advocacy organization described in section 124(c)(4)(A)(ii)(I) of the DD Act of 2000 (42 U.S.C. 15024(c)(4)(A)(ii)(I)); and

(F) Representatives of organizations that may include parent training and information centers assisted under section 671or 672 of the Individuals with Disabilities Education Act (20 U.S.C. 1471, 1472), entities carrying out activities authorized under section 104 or 105 of the Assistive Technology Act of 1998 (29 U.S.C. 3003, 3004), relevant State agencies, and other community groups concerned with the welfare of individuals with developmental disabilities and their families.

(iii) That reflects the racial and ethnic diversity of the State;

(iv) That shall:

(A) Consult with the Director of the Center regarding the development of the five-year plan;

(B) Participate in an annual review of, and comment on, the progress of the Center in meeting the projected goals contained in the plan;

(C) Make recommendations to the Director of the Center regarding any proposed revisions of the plan that might be necessary; and

(v) Meet as often as necessary to carry out the role of the committee, but at a minimum twice during each grant year.

(6) To the extent possible, utilize the infrastructure and resources obtained

through funds made available under the grant to leverage additional public and private funds to successfully achieve the projected goals developed in the five-year plan;

(7) Have a director with appropriate academic credentials, demonstrated leadership, expertise regarding developmental disabilities, significant experience in managing grants and contracts, and the ability to leverage public and private funds; and

(i) Allocate adequate staff time to carry out activities related to each of the core functions described in § 1388.3.

(ii) [Reserved]

(8) Educate, and disseminate information related to the purpose of the DD Act of 2000 to the legislature of the State in which the Center is located, and to Members of Congress from such State.

(d) All applications submitted under this section shall be subject to technical and qualitative review by peer review groups as described under paragraph (d)(1) of this section.

(1) Each peer review group shall include such individuals with disabilities and parents, guardians, or advocates of or for individuals with developmental disabilities, as are necessary to carry out this section.

(2) [Reserved]

(e)(1) The Federal share of the cost of administration or operation of a Center, or the cost of carrying out a training initiative, supported by a grant made under subtitle D of the Act may not be more than 75 percent of the necessary cost of such project, as determined by the Secretary, or his or her designee.

(2) In the case of a project whose activities or products target individuals with developmental disabilities who live in an urban or rural poverty area, as determined by the Secretary, or his or her designee, the Federal share of the cost of the project may not be more than 90 percent of the necessary costs of the project, as determined by the Secretary, or his or her designee.

§ 1388.6 Governance and administration.

(a) The UCEDD must be associated with, or an integral part of, a university and promote the independence, productivity, integration, and inclusion of individuals with developmental disabilities and their families.

(b) The UCEDD must have a written agreement or charter with the university, or affiliated university that specifies the UCEDD designation as an official university component, the relationships between the UCEDD and other university components, the university commitment to the UCEDD, and the UCEDD commitment to the university.

(c) Within the university, the UCEDD must maintain the autonomy and organizational structure required to carry out the UCEDD mission and provide for the mandated activities.

(d) The UCEDD Director must report directly to, or be, a University Administrator who will represent the interests of the UCEDD within the University.

(e) The University must demonstrate its support for the UCEDD through the commitment of financial and other resources.

(f) UCEDD senior professional staff, including the UCEDD Director, Associate Director, Training Director, and Research Coordinator, must hold faculty appointments in appropriate academic departments of the host or an affiliated university, consistent with university policy. UCEDD senior professional staff must contribute to the university by participation on university committees, collaboration with other university departments, and other university community activities.

(g) UCEDD faculty and staff must represent the broad range of disciplines and backgrounds necessary to implement the full inclusion of individuals with developmental disabilities in all aspects of society, consonant with the spirit of the Americans with Disabilities Act (ADA).

(h) The management practices of the UCEDD, as well as the organizational structure, must promote the role of the UCEDD as a bridge between the University and the community. The UCEDD must actively participate in community networks and include a range of collaborating partners.

(i) The UCEDD's Consumer Advisory Committee must meet regularly. The membership of the Consumer Advisory Committee must reflect the racial and ethnic diversity of the State or community in which the UCEDD is located. The deliberations of the Consumer Advisory Committee must be reflected in UCEDD policies and programs.

(j) The UCEDD must maintain collaborative relationships with the SCDD and P&A. In addition, the UCEDD must be a permanent member of the SCDD and regularly participate in Council meetings and activities, as prescribed by the Act.

(k) The UCEDD must maintain collaborative relationships and be an active participant with the UCEDD network and individual organizations.

(l) The UCEDD must demonstrate the ability to leverage additional resources.

(m) The university must demonstrate that the UCEDD have adequate space to carry out the mandated activities.

(n) The UCEDD physical facility and all program initiatives conducted by the UCEDD must be accessible to individuals with disabilities as provided for by section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act.

(o) The UCEDD must integrate the mandated core functions into its activities and

programs and must have a written plan for each core function area.

(p) The UCEDD must have in place a long range planning capability to enable it to respond to emergent and future developments in the field.

(q) The UCEDD must utilize state-of-the-art methods, including the active participation of individuals, families and others of UCEDD programs and services to evaluate programs. The UCEDD must refine and strengthen its programs based on evaluation findings.

(r) The UCEDD Director must demonstrate commitment to the field of developmental disabilities, leadership, and vision in carrying out the mission of the UCEDD.

(s) The UCEDD must meet the ''Employment of Individuals with Disabilities'' requirements as described in section 107 of the Act.

§ 1388.7 Five-year plan and annual report.

(a) As required by section 154(a)(2) of the DD Act of 2000 (42 U.S.C. 15064), the application for core funding for a UCEDD shall describe a five-year plan, including a projected goal or goals related to one or more areas of emphasis for each of the core functions in section 153(a)(2) of the DD Act of 2000 (42 U.S.C.15063).

(1) For each area of emphasis under which a goal has been identified, the UCEDD must state in its application the measures of progress with the requirements of the law and applicable regulation, in accordance with current practice.

(2) If changes are made to the measures of progress established for a year, the five-year plan must be amended to reflect those changes and approved by AIDD upon review.

(3) By July 30 of each year, a UCEDD shall submit an Annual Report, using the system established or funded by AIDD. In order to be accepted by AIDD, an Annual Report must meet the requirements of section 154(e) of the Act (42 U.S.C. 15064) and, the applicable regulations, and include the information necessary for the Secretary, or his or her designee, to comply with section 105(1), (2), and (3) of the Act (42 U.S.C. 15005) and any other information requested by AIDD. The Report shall include information on progress made in

achieving the UCEDD's goals for the previous year, including:

(i) The extent to which the goals were achieved;

(ii) A description of the strategies that contributed to achieving the goals;

(iii) The extent to which the goals were not achieved;

(iv) A detailed description of why goals were not met; and

(v) An accounting of the manner in which funds paid to the UCEDD for a fiscal year were expended.

(4) The Report also must include information on proposed revisions to the goals and a description of successful efforts to leverage funds, other than funds under the Act, to pursue goals consistent with the UCEDD program.

(5) Each UCEDD must include in its Annual Report information on its achievement of the measures of progress.

(b) [Reserved]

[FR Doc. 2015–18070 Filed 7–24–15; 8:45 am]

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