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FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2008–12]

Extension of Administrative Fines Program

AGENCY: Federal Election Commission.

ACTION: Final rule and transmittal of rule to Congress.

SUMMARY: Congress amended the Federal Election Campaign Act of 1971, as amended (''FECA''), to extend the expiration date for the Administrative Fines Program (''AFP'') from December 31, 2008 to December 31, 2013. Under the AFP, the Commission may assess civil monetary penalties for violations of the reporting requirements of section 434(a) of the FECA. Accordingly, the Commission is extending the applicability of the AFP rules and the AFP penalty schedules. Further information is provided in the Supplementary Information that follows.

DATES: *Effective Date:* December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Albert J. Kiss, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Explanation and Justification for 11 CFR 111.30

Section 640 of the Treasury and General Government Appropriations Act, 2000, Public Law No. 106–58, 113 Stat. 430, 476–77 (1999) (''2000 Appropriations Act''), amended 2 U.S.C. 437g(a)(4) to provide for a modified enforcement process for violations of certain reporting requirements. Under 2 U.S.C. 437g(a)(4)(C), the Commission may assess a civil monetary penalty for violations of the reporting requirements of 2 U.S.C. 434(a). These amendments to 2 U.S.C. 437g(a)(4) originally applied only to violations occurring between January 1, 2000 and December 31, 2001. *See* 2000 Appropriations Act, section 640(c). Congress, however, extended authorization for the AFP several times. *See, e.g.*, section 721 of the Transportation, Treasury, Housing and Urban Development, Judiciary, District of Columbia, and Independent Agencies Appropriations Act, 2006, Public Law No. 109–115, 119 Stat. 2396, 2493 (2005) (extending the AFP to December 31, 2008).

Commission regulations governing the AFP can be found at 11 CFR part 111, subpart B. The Commission incorporated the legislative sunset date into its rule describing the applicability of the AFP in 11 CFR 111.30, and has consistently revised section 111.30 to extend the AFP sunset date in accordance with subsequent legislation. *See, e.g., Final Rule on Extension of Administrative Fines Program*, 70 FR 75717 (Dec. 21, 2005) (changing sunset date in 11 CFR 111.30 to December 31, 2008).

Congress amended the FECA by extending the Commission's authority to assess civil monetary penalties under the Administrative Fines Program to violations of the Act's reporting requirements for reporting periods that began on or after January 1, 2000, and that end on or before December 31, 2013. *See* Public Law No. 110–433, 122 Stat. 4971 (2008), sec. 1(a). It also struck section 640(c) of the 2000 Appropriations Act. *See* Public Law No. 110–433, sec. 1(b). These amendments are effective as if included in the 2000 Appropriations Act at its enactment (i.e., on September 29, 1999). *See* Public Law No. 110–433, sec. 1(c).

This final rule implements Congress's extension of the AFP by revising section 111.30 to reflect the extension of the Commission's authority to impose civil monetary penalties for violations that relate to reporting periods that end on or before December 31, 2013. It also deletes the second sentence of section 111.30, which formerly provided that the AFP did not apply to reports that were due between January 1, 2004 and February 10, 2004 and that related to reporting periods that began and ended between January 1, 2004 and February 10, 2004. The Commission is not making any other revisions to the AFP rules at this time.

The Commission is promulgating this final rule without notice or an opportunity for comment because it falls under the ''good cause'' exemption in the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). This exemption allows agencies to dispense with notice and comment when ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* A notice and comment period for this final rule is impracticable because it would result in a gap in the applicability of the AFP rules between when the current regulation expires on December 31, 2008 and the date when a new final rule could be effective after additional notice and comment. *See* Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 200 (1946) (''Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings''). In addition, this final rule merely extends the applicability of the AFP and does not change the substantive regulations themselves. Those regulations were already subject to notice and comment three times: first, when they were proposed in March 2000, 65 FR 16534, and adopted in May 2000, 65 FR 31787; second, when substantive revisions to the AFP were proposed in April 2002, 67 FR 20461, and adopted in March 2003, 68 FR 12572; and third, when substantive revisions to the AFP were proposed in December 2006, 71 FR 71093, and adopted in March 2007, 72 FR 14662. Thus, this final rule satisfies the ''good cause'' exemption, and it is appropriate and necessary for the Commission to publish this final rule without providing a notice and comment period.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on November 24, 2008. Because this is a non-major rule, it is not subject to the delayed effective date provisions of 5 U.S.C. 801(a)(3).

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The provisions of the Regulatory Flexibility Act are not applicable to this final rule because the Commission was not required to publish a notice of proposed rulemaking or to seek public comment under 5 U.S.C. 553 or any other laws. 5 U.S.C. 603(a) and 604(a). Therefore, no regulatory flexibility analysis is required.

List of Subjects in 11 CFR Part 111

Administrative practice and procedures, Elections, Law enforcement.

■ For the reasons set out in the preamble, subchapter A, Chapter I of Title 11 of the *Code of Federal Regulations* is amended as follows:

PART 111—COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))

■ 1. The authority citation for part 111 continues to read as follows:

Authority: 2 U.S.C. 432(i), 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

■ 2. Section 111.30 is revised to read as follows:

§ 111.30 When will subpart B apply?

Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a) committed by political committees and their treasurers that relate to the reporting periods that begin on or after July 14, 2000 and end on or before December 31, 2013.

Dated: November 24, 2008.

On behalf of the Commission,

Donald F. McGahn II,

Chairman, Federal Election Commission.

[FR Doc. E8–28398 Filed 11–28–08; 8:45 am]

BILLING CODE 6715–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702 and 704

RIN 3133–AD43

Prompt Corrective Action; Amended Definition of Post-Merger Net Worth

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is adopting a final rule implementing a statutory amendment that expands the definition of ''net worth'' that applies to natural person credit unions under regulatory capital standards known as ''prompt corrective action.'' The expanded definition allows the acquiring credit union, in a merger of natural person credit unions, to combine the merging credit union's retained earnings with its own to determine the acquirer's post-merger ''net worth.'' For a merger in which the acquirer is a corporate credit union, the proposed rule similarly redefines corporate credit union capital to allow the acquirer to combine with its capital the retained earnings of the merging credit union to determine the acquirer's post-merger capital.

DATES: This rule is effective December 31, 2008, and applies to credit union mergers that are subject to financial reporting under Financial Accounting Statement No. 141(R), *Business Combinations* (2007).

FOR FURTHER INFORMATION CONTACT: *Technical:* Karen Kelbly, Chief Accountant, Office of Examination and Insurance, at the above address or by telephone: 703/518–6389; *Legal:* Steven W. Widerman, Trial Attorney, Office of General Counsel, at the above address or by telephone: 703/518–6557.

SUPPLEMENTARY INFORMATION:

A. Background

1. Natural Person Credit Unions

a. *Prompt Corrective Action.* The Credit Union Membership Access Act, Pub. L. No. 105–219, 112 Stat. 913 (1998) (''CUMAA''), mandated a system of regulatory capital standards for natural person credit unions called ''prompt corrective action'' (''PCA'' or ''regulatory capital''). 12 U.S.C. 1790d *et seq.* PCA imposes minimum capital standards and corresponding remedies to improve net worth. *Id.* The NCUA Board implemented a comprehensive system of PCA primarily under Part 702.[1] 12 CFR 702 *et seq.*

Under PCA, a natural person credit union's ''net worth ratio'' determines its classification among five statutory net worth categories. 12 U.S.C. 1790d(c); 12 CFR 702.102. CUMMA defined ''net worth ratio'' as the ratio of the credit union's net worth to its total assets. 12 U.S.C. 1790d(o)(3). It then expressly limited a credit union's ''net worth'' to ''the retained earnings balance of the credit union, as determined under generally accepted accounting principles [GAAP].'' *Id.* § 1790d(o)(2)(A).[2] The ''retained earnings only'' definition of net worth thus incorporated GAAP by reference generally, subject to future amendments and interpretations; it did not incorporate GAAP as a snapshot that preserved what GAAP then prescribed or how it was then interpreted.

b. *The ''Pooling Method'' of Financial Reporting.* The predominant practice under GAAP for financial reporting of a merger between credit unions has been to apply the ''pooling method.'' That method required an acquiring or continuing credit union (''acquiring credit union'') to combine with its own financial statement components the like components of the merging credit union. Under CUMAA's ''retained earnings only'' definition of net worth, the ''pooling method'' preserved an incentive to merge because it allowed an acquiring credit union to combine its own retained earnings with that of the merging credit union to determine the acquirer's post-merger net worth ratio.

c. *The ''Acquisition Method'' of Financial Reporting.* In 2001, the Financial Accounting Standards Board (''FASB''), the body that sets GAAP for financial reporting of business combinations, adopted Financial Accounting Statement No. 141, *Business Combinations* (2002). FAS 141 replaced the ''pooling method'' of financial reporting of business combinations between non-mutual ''for profit'' enterprises with the ''purchase method.'' In December 2007, FASB decided to extend the ''purchase method'' of financial reporting—which it renamed the ''acquisition method''—to business combinations between mutual ''for profit'' enterprises (''mutual combinations''), such as credit union mergers, that take place in the first annual reporting period beginning on or after December 15, 2008. Financial Accounting Statement No. 141(R), *Business Combinations* (2007) (''FAS 141(R)'') at ¶74.

[1] This is the fifth amendment to Part 702 since it was originally adopted in 2000. The first amendment incorporated limited technical corrections. 65 FR 55439 (Sept. 14, 2000). The second amendment deleted sections made obsolete by adoption of a uniform quarterly schedule for filing Call Reports. 67 FR 12459 (March 19, 2002). The third amendment incorporated a series of revisions and adjustments to improve and simplify the implementation of PCA. 67 FR 71078 (Nov. 29, 2002). Finally, the fourth amendment added a third risk-weighting tier to the standard risk-based net worth component for member business loans. 68 FR 56537, 56546 (Oct. 1, 2003). A proposal to modify the criteria for filing a net worth restoration plan, 67 FR 7113 (Nov. 29, 2002), was never adopted.

[2] The CUMAA definition of ''net worth'' applies to regulatory capital only. For financial reporting purposes, CUMMA requires credit unions to adhere to GAAP in the Call Reports required to be filed with the NCUA Board. 12 U.S.C. 1782(a)(6)(C)(i). The Financial Services Regulatory Relief Act of 2006, discussed *infra*, did not change that mandate.

Congress gave the other federal financial institution regulators the latitude to prescribe the ''relevant capital measures'' of their institutions. 12 U.S.C. 1831o(c)(1). As a result, the ''core capital'' of banks and thrifts is defined to include virtually all GAAP equity components, 12 CFR 325.2(v), not just the ''retained earnings'' component of equity.

The ''acquisition method'' of financial reporting of credit union mergers would require the fair value of the net assets acquired in a merger to be classified as a direct addition to the acquirer's equity, not as an addition to its retained earnings. FAS 141(R) at ¶A67. Since CUMMA defines a natural person credit union's ''net worth ratio'' as the ratio of its net worth to its total assets, 12 U.S.C. 1790d(o)(3), and because the ''retained earnings only'' definition of net worth does not permit credit unions to count ''additions of equity'' that are not retained earnings in their net worth (the numerator of the net worth ratio), an acquirer's net worth will not increase as the result of a merger. On the contrary, the ''acquisition method'' may well *reduce* an acquirer's post-merger net worth because, as a ratio of total assets (the denominator of the net worth ratio), it will be diluted by the addition and fair valuation of assets acquired in the merger.

Due to the ''retained earnings only'' limitation on net worth that applies to credit unions, the ''acquisition method'' of financial reporting would have exactly the opposite effect of the ''pooling method.'' It would discourage credit union mergers by excluding a merging credit union's retained earnings from the post-merger net worth of the acquiring credit union.

d. *Statutory Expansion of Net Worth Definition.* Out of concern that FAS 141(R), when subject to the ''retained earnings only'' definition of net worth, would stifle credit union mergers, Congress amended the CUMAA definition. The Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109–351, 120 Stat. 1966 (''2006 Relief Act''), expanded the definition of a natural person credit union's ''net worth'' for PCA purposes to include, in addition to its own retained earnings, ''any amounts that were previously retained earnings of any other credit union with which [it] has combined.'' 12 U.S.C. 1790d(o)(2)(A) (2006).[3] The expanded definition permits the acquiring credit union ''to follow the new FASB rule while still allowing the capital of both credit unions to flow forward as regulatory capital and thus preserve the incentive for desirable credit union mergers.''[4] For a comparison of the financial reporting and regulatory capital consequences of a credit union merger under present GAAP (the pre-FAS 141(R) ''pooling method'') and under new GAAP (the post-FAS 141(R) ''acquisition method'') both with and without implementing the expanded net worth definition, see the proposed rule. 73 FR 44197, 44199 (July 30, 2008).

2. Corporate Credit Unions

The 2006 Relief Act did not affect corporate credit unions because they are exempt from PCA. 12 U.S.C. 1790d(m). But corporate credit unions are subject by regulation to a minimum ''capital ratio,'' 12 CFR 704.3(d), and to a minimum ''retained earnings ratio'' calculated on a monthly basis. *Id.* § 704.3(i). When either ratio falls below the prescribed minimum, the corporate credit union is subject to PCA-like remedies (*e.g.*, ''capital restoration plan,'' earnings retention requirement, and ''capital directives''). *Id.* §§ 704.2(g)–(i), 704.3(i). The definitions associated with corporate credit union capital in Part 704 must be modified to correspond with the expanded definition of PCA net worth to enable an acquiring corporate credit union to include in its post-merger capital the merging credit union's retained earnings.

3. Proposed Rule

The NCUA Board issued a proposed rule to implement the expanded definition of PCA net worth in advance of the effective date of FAS 141(R) to benefit natural person credit union mergers taking place after that date. 73 FR 44197 (July 30, 2008). The proposed rule also modifies Part 704 to expand the corresponding definitions associated with corporate credit union capital. 12 CFR 704.2.

NCUA received 15 comment letters on the proposed rule—four from federally-chartered natural person credit unions, three from state-chartered natural person credit unions, one from a corporate credit union, six from credit union industry trade associations, and one from a banking industry trade association. Three commenters supported the rule without reservation, 10 offered qualified support, some suggesting specific revisions to the rule text, and two commenters opposed the rule, advocating revisions that exceed the scope of the NCUA Board's rulemaking authority. The comments on the proposed rule are addressed below.

B. Discussion of Comments on Proposed Rule

1. Part 702—Natural Person Credit Union's Post-Merger Net Worth

The proposed rule expanded the ''retained earnings only'' definition of a natural person credit union's ''net worth'' by reorganizing and then revising the PCA definition of ''net worth.'' *Id.* § 702.2(f). The rule added the critical language: ''For a credit union that acquires another credit union in a mutual combination, net worth includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.'' 73 FR at 44201. The critical language used the term ''mutual combination'' in place of ''merger'' and defined it (consistent with GAAP) as ''a transaction in which a credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union for the purpose of providing a return in the form of economic benefits directly to owner members.'' FAS 141(R) at ¶¶ 3d–e.

The term ''mutual combination'' was defined to narrowly extend the expanded ''net worth'' definition beyond just mergers between intact credit unions to include certain purchase and assumption (''P&A'') transactions in which a ''whole institution'' is conveyed exclusive of certain collateral obligations that would arise under a pre-existing contract. *Id.* An example of such a transaction takes place when NCUA liquidates a credit union and, in a P&A transaction, then sells the liquidated credit union's assets, liabilities, and existing depositor relationships, etc., to another credit union, but only after repudiating the executory obligations of a contract for servicing the liquidated credit union's loan portfolio.

Of the commenters who focused on the language of the proposed rule, several sought clarification of the definition of a ''mutual combination.'' Two commenters sought to insert the words ''upon combination'' as follows in the phrase ''an integrated set of assets and activities that *upon combination* is capable of being conducted and managed as a credit union.'' To modify the definition as the commenters suggested would allow the acquisition of a group of assets that does *not* constitute a business, and thus is ineligible for the ''acquisition method'' in the first place, to receive the regulatory capital benefit of this rule—replicating the result of the ''pooling method.'' FASB, not NCUA, drew the

[3] NCUA advocated expanding the ''retained earnings only'' definition more broadly to include the ''equity acquired in a merger.'' This would have more closely aligned the post-merger regulatory capital definition with CUMAA's financial reporting requirement that credit unions adhere to GAAP in Call Reports required to be filed with the NCUA Board. 12 U.S.C. 1782(a)(6)(C)(i).

[4] Staff of Senate Comm. on Banking, Housing and Urban Affairs, 109th Cong., *Section-by-Section Analysis of Financial Services Regulatory Relief Act of 2006* (Comm. Print 2006) at 3 (available at: *http://banking.senate.gov/public/_files/RegRel_summary.pdf*)

distinction between assets that constitute a business and those that do not, but the final rule is intended to benefit only those transactions to which FAS 141(R) applies.

Of the others who addressed the ''mutual combination'' definition, two were critical of the management ''purpose'' criterion. They contended that requiring ''an integrated set of assets and activities * * * to be managed as a credit union *for the purpose of providing a return in the form of economic benefits directly to owner members*'' could be construed to unnecessarily restrict a credit union's ability to consider all factors relevant to determining whether a merger would benefit its members. The management ''purpose'' criterion is part of the FAS 141(R) definition of a ''business.'' FAS 141(R) at ¶3.d. However, the commenter's argument has merit because the proposed rule was never meant to be construed to impose such an obstacle. Accordingly, the final rule excludes the ''for the purpose of * * *'' language from subsection (3) of its definition ''net worth.''

Several commenters expressed a fundamental disagreement with the result of this rulemaking. One commenter maintained that CUMAA's ''retained earnings only'' definition of ''net worth'' deviated from GAAP, and that the proposed rule's expanded definition is no better. To comply with GAAP, this commenter advocated defining ''net worth'' to include all components of GAAP ''equity'' like the bank regulators do. Despite acknowledging that NCUA has no control over applicable accounting standards, another commenter insisted on retaining the ''pooling method'' instead of following the ''acquisition method.'' One commenter criticized the proposed rule because the ''acquisition method'' mandated by FAS 141(R) relies on ''fair value accounting,'' which will compel credit unions to hire valuation professionals on a continuing basis. Finally, one commenter who supported the proposed rule wanted to further expand net worth to encompass ''acquired equity including retained earnings after valuation of the acquired credit union.'' This would achieve for regulatory capital purposes precisely the result the ''acquisition method'' proscribes for financial reporting purposes: Combining the merging credit union's acquired equity with that of the acquirer. Without that result, the same commenter asked, how should a merging credit union's retained earnings be reported for accounting purposes?

With the exception of the last comment (which is addressed below), resolving these fundamental disagreements with the proposed rule is beyond the scope of the NCUA Board's rulemaking authority. NCUA does not establish GAAP, does not oversee FASB, and does not have the discretion to reinstate the ''pooling method'' or to disregard fair value accounting. The 2006 Relief Act authorized NCUA, by rulemaking, to expand the PCA definition of ''net worth'' to include the retained earnings of an acquired credit union. It did not give NCUA the authority to override or expand limitations and definitions set by law or by GAAP.

Finally, two commenters pointed out the need to amend the Call Report to accommodate the final rule. To that end, NCUA will revise the ''statement of financial condition'' in the Call Report so that it collects identifiable intangibles and goodwill, as well as an ''equity acquired'' component. Further, a supplementary schedule will collect data on post-December 31, 2008, credit union combinations, including the merging credit union's acquisition-point retained earnings as measured under GAAP. These reported amounts, if not taken during a given quarter to cover losses in excess of GAAP retained earnings, will flow forward to the Call Report's automatic net worth calculator in accordance with this rule. To the extent ''equity acquired'' is eroded by credit union losses, the acquired credit union's regulatory capital (*i.e.*, its retained earnings balance under GAAP as collected on the supplementary Call Report schedule) must be reduced accordingly. NCUA will furnish instructions explaining these Call Report revisions and clarifying how to report a merging credit union's retained earnings for regulatory reporting purposes.

With the modifications explained above, the final rule adopts the expanded ''net worth'' definition, thus enabling an acquiring credit union to approximate for PCA purposes the post-merger net worth that the ''pooling method'' would have produced,[5] while adhering to FAS 141(R) for purposes of financial reporting of the merger.

2. Part 704—Corporate Credit Union's Post-Merger Capital

The proposed rule modifies Part 704 to expand the definitions associated with corporate credit union capital to correspond to the expanded definition of PCA ''net worth'' in Part 702. To that end, the Board revised definitions of a corporate credit union's ''capital,'' ''core capital'' and ''retained earnings ratio'' to include ''the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.'' 73 FR at 44201. As in Part 702, the definition of a ''mutual combination'' was used to encompass both the acquisition of a credit union by merger and also, very narrowly, the acquisition of a ''whole institution'' previously liquidated by NCUA, exclusive of certain collateral obligations that would arise under a pre-existing contract.

To more closely replicate the regulatory capital result the ''pooling method'' would have yielded, the proposed rule excluded identifiable and unidentifiable intangibles[6] from the definition of a corporate credit union's ''moving daily average net assets'' (''MDANA'')—the denominator of its ''capital ratio.'' 12 CFR 704.3(d); *see* note 5 *supra*. That denominator under the ''pooling method'' would not otherwise reflect a merging credit union's intangibles or the increased valuation of its tangible assets. While replicating the ''pooling method'' result, these modifications allow an acquiring corporate credit union to adhere to FAS 141(R) for purposes of financial reporting of the credit union merger. The NCUA Board invited public comment on the proposal to exclude intangibles from the definition of a corporate credit union's MDANA.

In addition to the comments on Part 702 in the preceding section that also apply to Part 704, three commenters addressed revisions that are specific to Part 704. Recognizing that the NCUA Board has flexibility in establishing regulatory capital requirements for corporate credit unions, one commenter recommended adding an acquired credit union's ''acquired equity'' to corporate ''capital,'' ''core capital'', and the numerator of the ''retained earnings ratio,'' rather than limiting the addition to the acquired credit union's retained earnings. The commenter believes this approach is consistent with GAAP, would help to promote efficiencies, and would allay uncertainties in the marketplace.

The NCUA Board has considered the recommended approach but declines to adopt it. The introduction of ''acquired equity'' would be inconsistent with Congressional intent as reflected in the

[5] The result approximates, but does not duplicate, that of the ''pooling method'' because neither CUMAA nor the 2006 Relief Act authorizes the exclusion of intangibles from the ''total assets'' denominator of a natural person credit union's net worth ratio.

[6] Identifiable intangibles could include existing member relationships (i.e., core deposit intangibles) and unserved portions of a field of membership; unidentifiable intangibles include predominantly goodwill.

fact that Congress chose not to include it in the regulatory capital of natural person credit unions. It would be appropriate to revisit ''acquired equity'' were the NCUA Board to consider restructuring corporate credit union regulatory capital to conform to GAAP. The same is true with respect to this commenter's suggestion to also reflect goodwill in the regulatory capital measure of a corporate credit union, as a GAAP measurement would do.

A commenter who, although displeased with FASB's elimination of the ''pooling method,'' supports the proposed rule asked for clarification of the rule's reference to the retained earnings of ''an integrated set of activities and assets, at the point of acquisition.'' For the reasons given above in reference to natural person credit unions, the purpose of this language in Part 704 is to extend the expanded definition of corporate credit union capital very narrowly to the acquisition of a ''whole institution'' that NCUA previously liquidated, exclusive of certain collateral obligations that would arise under a pre-existing contract. In this context, the ''integrated set of activities and assets'' language will ensure that the retained earnings that were earned and counted as net worth of the merging credit union will remain within the credit union system.

The same commenter asked whether the exclusion of intangibles from the definition of a corporate credit union's MDANA would apply to intangibles created before the final rule's effective date. The answer is that the exclusion applies to all identifiable intangibles and goodwill regardless of date of origination. The numerator of the ''capital,'' ''core capital'' and ''retained earnings'' ratios does not include intangibles and goodwill. In order not to dilute the ratios, and to duplicate the ''pooling method'' result, neither should the denominator.

A commenter objected that the NCUA Board lacks the authority to, in effect, preserve the ''pooling method'' for corporate credit union mergers by regulation. The premise of this objection is that CUMAA exempted corporate credit unions from PCA, and the 2006 Relief Act did not subject them to it. From this premise, the commenter draws the inference that NCUA needs explicit Congressional authorization to permit an acquiring corporate credit union to count the retained earnings of a merging credit union as part of its capital. Without that authority, corporate credit unions must apply the ''acquisition method'' to credit union mergers.

What this commenter overlooks is that Congress did authorize the NCUA Board to charter ''central credit unions'' and subject them to ''such rules, regulations and orders as the Board deems appropriate.'' 12 U.S.C. 1766(a). Thus, the NCUA Board has the authority to prescribe the capital structure of corporate credit unions and the flexibility to permit them to replicate the regulatory capital results of the ''pooling method.'' Even so, the NCUA Board still requires corporate credit unions to file regulatory reports that are consistent with GAAP.

Finally, among several minor technical corrections to the proposed revisions to Part 704, the final rule replaces the term ''unidentifiable intangibles'' with the term ''goodwill.''

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis describing any significant economic impact a proposed regulation may have on a substantial number of small credit unions (primarily those under $10 million in assets). The final rule implements an Act of Congress expanding the definition of a natural person credit union's net worth. 12 U.S.C. 1790d(o)(2)(A) (2006). The rule affects the calculation of the post-merger net worth of an acquiring credit union in a credit union merger, the vast majority of which exceed $10 million in assets. Accordingly, the final rule will not have a significant economic impact on a substantial number of small credit unions. Therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This final rule implements an Act of Congress expanding the definition of a natural person credit union's net worth. 12 U.S.C. 1790d(o)(2)(A) (2006). NCUA has determined that the rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget. Control number 3133–0154 has been issued for Part 702 and control number 3133–0129 has been issued for Part 704. Both will be displayed in the table at 12 CFR Part 795.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on State and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final rule implements a statutory mandate that applies to all federally-insured credit unions, including State-chartered credit unions, and thus may raise some federalism implications. However, the proposal is unlikely to have a 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 because it facilitates, rather than diminishes, the ability of State-chartered credit unions to combine with other credit unions.

Treasury and General Government Appropriations Act, 1999

NCUA has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by section 551 of the APA. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of SBREFA. As required by SBREFA, NCUA will file the appropriate reports with Congress and the General Accounting Office so this rule may be reviewed.

List of Subjects in 12 CFR Parts 702 and 704

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on November 20, 2008.

Mary Rupp,

Secretary of the Board.

■ For the reasons set forth above, 12 CFR parts 702 and 704 are amended as follows:

PART 702—PROMPT CORRECTIVE ACTION

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 2. Amend § 702.2 by revising paragraph (f) to read as follows:

§ 702.2 Definitions.

* * * * *

(f) *Net Worth* means—

(1) The retained earnings balance of the credit union at quarter-end as determined under generally accepted accounting principles, subject to paragraph (f)(3) of this section. Retained earnings consists of undivided earnings, regular reserves, and any other appropriations designated by management or regulatory authorities;

(2) For a low income-designated credit union, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders and the NCUSIF; and

(3) For a credit union that acquires another credit union in a mutual combination, net worth includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition. A mutual combination is a transaction in which a credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

* * * * *

PART 704—CORPORATE CREDIT UNIONS

■ 1. The authority citation for Part 704 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1781, 1789.

■ 2. Amend § 704.2 by:

■ a. Revising the current definitions of *''Capital'', ''Core capital'', ''Moving daily average net assets''* and *''Retained earnings ratio''* to read as set forth below; and

■ b. Adding the definition of *''Mutual combination''* to read as follows:

§ 704.2 Definitions.

* * * * *

Capital means the sum of a corporate credit union's retained earnings, paid-in capital, and membership capital. For a corporate credit union that acquires another credit union in a mutual combination, capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

Core capital means the sum of a corporate credit union's retained earnings, and paid-in capital. For a corporate credit union that acquires another credit union in a mutual combination, core capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

Moving daily average net assets means the average of daily average net assets exclusive of identifiable intangibles and goodwill for the month being measured and the previous eleven (11) months.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

* * * * *

Retained earnings ratio means the corporate credit union's retained earnings divided by its moving daily average net assets. For a corporate credit union that acquires another credit union in a mutual combination, the numerator of the retained earnings ratio also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

[FR Doc. E8–28462 Filed 11–28–08; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM08–1–001; Order No. 712–A]

Promotion of a More Efficient Capacity Release Market

Issued November 21, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an order addressing the requests for clarification and/or rehearing of Order No. 712 [73 FR 37058, June 30, 2008]. Order No. 712 revised Commission regulations governing interstate natural gas pipelines to reflect changes in the market for short-term transportation services on pipelines and to improve the efficiency of the Commission's capacity release program. The order permitted market based pricing for short term capacity releases and facilitated asset management arrangements (AMA) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified in the order that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity. Finally, the Commission waived its prohibition on tying and bidding requirements for capacity releases made as part of state-approved open access programs. This order generally denies rehearing and clarifies Order No. 712.

DATES: *Effective Date:* The amendments to the regulations will become effective 30 days after publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and John Wellinghoff.

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Order on Rehearing and Clarification

Order No. 712–A

(Issued November 21, 2008)

1. On June 19, 2008, the Commission issued Order No. 712,[1] a Final Rule that revised the Commission's Part 284 regulations concerning the release of firm capacity by shippers on interstate natural gas pipelines in order to enhance the efficiency and effectiveness of the secondary capacity release market. Specifically, the Final Rule made the following changes to the Commission's policies and regulations:

- The rule lifted the maximum rate ceiling on secondary capacity releases of one year or less to enhance the efficiency of the market while continuing to regulate long term capacity releases of more than one year and pipeline rates and services.
- The rule modified the Commission's policies and regulations to facilitate the use of AMAs. The first modification is to exempt capacity releases that implement AMAs from the Commission's prohibition on tying capacity releases to any extraneous conditions. The second change is to exempt capacity releases made as part of an AMA from the bidding requirements set forth in section 284.8 of the Commission's regulations.
- The rule established a definition of AMAs that will qualify for the tying and bidding exemptions. The definition provides for both delivery and supply side AMAs and requires that an asset manager satisfy certain delivery and/or purchase obligations.
- The rule also revised the Commission's prohibition against tying to allow a releasing shipper to include conditions in a release of storage capacity regarding the sale and/or repurchase of gas in storage inventory, even outside the AMA context. Specifically, this exemption from tying is meant to allow a shipper that releases storage capacity to require a replacement shipper to take title to any gas in the released capacity at the time the release takes effect and/or to return the storage capacity to the releasing shipper at the end of the release with a specified amount of gas in storage.
- Finally, the rule modified the Commission's regulations to facilitate retail open access programs by exempting capacity releases made under state-approved programs from the Commission's capacity release bidding requirements.

2. Three parties sought rehearing of Order No. 712.[2] Six parties sought rehearing and/or clarification.[3] Three parties filed for clarification only.[4] The Marketer Petitioners requested clarification and reconsideration. As discussed below, the Commission largely denies rehearing but grants clarification in part and makes certain adjustments to the regulations regarding AMAs.

I. Removal of the Price Ceiling for Released Capacity

A. Background

3. In Order No. 712, the Commission revised its regulations to remove the price ceiling on short term capacity releases. The Commission found that it had previously provided pipelines with the flexibility to enter into negotiated rate transactions that are permitted to exceed the maximum rate ceiling, as long as the shipper could avail itself of the pipeline's cost-of-service recourse rate. The Commission also found that

[1] *Promotion of a More Efficient Capacity Release Market,* 73 FR 37058 (June 30, 2008), *FERC Statutes and Regulations* ¶ 31,271 (2008).

[2] Those parties are Allegheny Energy Supply Company, LLC (Allegheny), Shell NA LNG LLC (Shell LNG) and Statoil Natural Gas LLC, Chevron USA Inc., and Constellation Energy Commodities Group, Inc. (collectively, LNG Petitioners).

[3] Those parties are the Interstate Natural Gas Association of America (INGAA), Iroquois Gas Transmission System, LP (Iroquois), the Natural Gas Supply Association and the Electric Power Supply Association (NGSA), Public Service Company of North Carolina, Inc., South Carolina Electric & Gas Company, and Scana Energy Marketing Inc. (collectively Scana), Spectra Energy Transmission LLC and Spectra Energy Partners (Spectra), Vector Pipeline LP (Vector) and Williston Basin Interstate Pipeline Company (Williston). INGAA filed a separate request for rehearing and a separate request for clarification.

[4] Those parties are the American Gas Association (AGA), BP Energy Company (BP) and Reliant Energy Inc. (Reliant).

removing the price ceiling for short term releases would extend such pricing flexibility to releasing shippers, subject to the continued protection of the recourse rate for capacity purchased directly from the pipeline.

4. The Commission noted the increased use of negotiated rate transactions by shippers and pipelines based on gas price differentials and found that such use demonstrated that buyers and sellers are attracted to the ability to calibrate the price of transportation to its value in the market. The Commission also found that the maximum rate ceiling as applied to capacity release transactions denied releasing and replacement shippers the same ability enjoyed by the pipelines to negotiate transactions that reflect the market value of capacity at all times. With the price ceiling in effect, releasing shippers were unable to effectively use price differentials as a measure of capacity value because they were denied the ability to recover the value of capacity during peak periods when that value exceeds the maximum rate cap.

5. The Commission further found that because the existing capacity release price ceiling did not reflect short-term variations in the market value of the capacity, the price ceiling inhibits the efficient allocation of capacity and harms, rather than helps, the short-term shippers it is intended to protect. Removal of the price ceiling will permit short-term capacity release prices to rise to market clearing levels, thereby allocating capacity to those that value it the most while providing accurate price signals to the marketplace. The Commission also found that the price ceiling harmed captive customers holding long-term contracts on the pipeline, and that the price ceiling reduces the dissemination of accurate capacity pricing information.

6. The Commission recognized that in removing the price ceiling from short term capacity releases it was departing from a cost-of-service ratemaking methodology, but determined that given the benefits to be derived from removing the price ceiling, sufficient protections existed against the exercise of market power by releasing shippers.

7. The Commission reviewed data collected over many years, which showed that as a general matter, the rates resulting from removal of the price cap for capacity release should be reasonably competitive. But the Commission did not rely solely on competition to ensure just and reasonable prices.[5] The Commission found that the same recourse rate that protects against the potential exercise of market power in pipeline negotiated rate transactions would serve a similar function in protecting against the potential exercise of market power by releasing shippers. The Commission found that any attempt by a releasing shipper to withhold capacity in order to raise rates will be undermined because the pipeline will be required to sell that capacity as interruptible capacity to a shipper willing to pay the maximum rate.[6]

8. The Commission also reasoned that the releasing shippers' ability to exercise market power in the short-term capacity release market is limited because short-term customers are not captive, even if only connected to one pipeline. Thus, the Commission found that short-term shippers always have the option simply not to take service, if the price demanded is above competitive market levels.[7]

9. In sum, the Commission found that its removal of the price ceiling on short-term capacity release transactions provides on balance advantages that ''offset whatever harm the occasional high rate might entail.'' [8] The Commission found that removal of the price cap permits more efficient utilization of capacity by permitting prices for short-term capacity releases to rise to market clearing levels, thereby permitting those who place the highest value on the capacity to obtain it and that it will also provide potential customers with additional opportunities to acquire capacity. Finally, the Commission found that by providing more accurate price signals concerning the market value of pipeline capacity, removal of the price ceiling for short-term capacity releases promotes the efficient construction of new capacity by highlighting the location, frequency, and severity of transportation constraints.

10. The Commission determined not to remove the price ceiling for pipeline short-term services, stating that by its action in removing the price ceiling from short-term capacity releases, the Commission intended to permit releasing shippers some of the same flexible pricing authority the Commission has already granted pipelines through the negotiated rate program.[9] The Commission stated that the pipelines' request to lift the maximum rate on short-term releases would effectively negate the recourse rate protection against the use of market power that the Commission included in its negotiated rate program. The Commission also determined that the maximum rate ceiling on pipeline capacity acts as a recourse rate for both pipeline transactions and capacity release transactions and thereby protects both pipeline customers and replacement shippers on capacity release transactions.[10]

11. The Commission also explained that pipelines differed from capacity releasers in that they are the principal holders of capacity and, therefore, the pipelines possess greater ability to exercise market power by withholding capacity and not constructing facilities than do releasing shippers.[11]

12. No party sought rehearing of the Commission's determination to remove the price ceiling for capacity release transactions. The only major issue raised on rehearing is whether to remove the price ceiling from pipeline short-term services. A number of clarification and rehearing requests also were filed regarding specific issues related to the removal of the price ceiling for released capacity.

B. Price Ceiling Applicable to Pipeline Capacity

1. Rehearing Requests

13. INGAA, Williston and Spectra filed requests for rehearing regarding the

[5] Specifically, the Commission also stated:

[t]he Commission finds that the short-term capacity release market is generally competitive. Therefore competition, together with our continuing requirement that pipelines must sell short-term firm and interruptible services to any shipper offering the maximum rate, and the Commission's ongoing monitoring efforts will keep short-term capacity release rates within the ''zone of reasonableness'' required by *INGAA* and *Farmers Union*. Order No. 712 at P 39.

[6] Order No. 712 at P48–49. In this respect, the Commission continued the same protection on which it relied in Order No. 637. *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,282, *clarified,* Order No. 637–A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied,* Order No. 637–B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America* v. *FERC,* 285 F.3d 18 (D.C. Cir. 2002), *order on remand,* 101 FERC ¶ 61,127 (2002), *order on reh'g,* 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n* v. *FERC,* 428 F.3d 255 (D.C. Cir. 2005) (Order No. 637).

[7] Order No. 712 at P 50.

[8] Order No. 712 at P 51 (citing, *Interstate Natural Gas Association of America,* 285 F.3d 18, 33 (D.C. Cir. 2002) (INGAA)).

[9] Order No. 712 at P 83. In fact, the Commission reasoned that pipelines already possess significant pricing discretion in that they may enter into negotiated rate transactions above the maximum rate or by establishing that they lack market power and requesting market based rate authority or by requesting seasonal rates for their systems. The Commission stated that its rule was designed solely to give releasing shippers some of the same flexibility enjoyed by the pipelines, subject to the same recourse rate protection. Order No. 712 at P 86.

[10] Order No. 712 at P 83.

[11] Order No. 712 at P 84–85.

Commission's decision to retain the price ceiling for short-term pipeline services, while removing the price ceiling on short-term capacity releases.[12] They assert that the same data and rationale that supports removing the price ceiling from short-term capacity releases also supports the removal of the price ceiling for short-term pipeline capacity.[13]

14. They argue that the Commission acknowledged that short-term released capacity and short-term pipeline capacity compete in the same market, and maintain that the finding that the short-term market is ''generally competitive,'' supports lifting the price ceiling for short-term pipeline capacity.

15. They also maintain that the distinctions between released capacity and pipeline capacity set forth by Order No. 712 do not support retention of the price ceiling for pipeline capacity. They maintain that these distinctions are based on two incorrect premises: first, that interstate pipelines have market power in the relevant market; and second, that a capped rate for pipeline capacity is necessary as a safeguard against abuse in the released capacity and pipeline capacity markets. Therefore, they maintain that the Commission acted arbitrarily and capriciously in not treating short-term pipeline and released capacity similarly. Further, INGAA argues that the disparate treatment of released and pipeline capacity under Order No. 712 cannot be excused by reference to flexible rate options and policies open to the pipelines because such options continue to leave rates capped or cannot be attained as a practical matter.

2. Commission Determination

16. The Commission denies the requests for rehearing, and continues to find that maintenance of the maximum rate ceilings for pipeline short-term transactions is necessary to protect against the potential exercise of market power. As we explained in Order No. 712, the removal of the rate ceiling for short-term capacity release transactions is designed to extend to capacity release transactions the pricing flexibility already available to pipelines through negotiated rates without compromising the fundamental protection provided by the availability of recourse rate service. In the Alternative Rate Design Policy statement, we offered the pipelines the flexibility to exceed the price cap in one of two ways: Pipelines can either make a filing with appropriate information to establish the market is competitive or pipelines can negotiate rates as long as the shipper has the option of purchasing capacity at the recourse (maximum) tariff rate.[14] In Order No. 712, we provide releasing shippers with flexibility similar to that enjoyed by the pipelines, while retaining the recourse rate as a protection for the buyer against the potential exercise of market power by both pipelines and releasing shippers.[15]

17. While our examination of the capacity release record did indicate that capacity release prices seem to suggest a competitive market for released capacity as a general matter, we did not make a finding, as suggested in the rehearing requests, that the entire secondary market is competitive. We recognize that on some portions of the pipeline grid, little effective competition may exist.[16] As we emphasized on several occasions in Order No. 712, precisely because we did not make such a competitive market finding, we are ''continuing to insist on the maintenance of the pipeline's recourse rate as protection against the exercise of market power.'' [17] As we explained, on parts of the pipeline grid where all firm capacity may be held by only a few or one firm shipper, the availability of the recourse rate prevents those shippers from withholding their capacity in order to charge a price above competitive levels. If a releasing shipper seeks to charge more than the maximum rate for capacity, and the pipeline segment is not constrained, the replacement shipper would have the option of turning down the deal and purchasing the capacity from the pipeline at the cost-based just and reasonable interruptible or short-term firm rate.

18. Moreover, as we also explained in Order No. 712, the implications of removing the price ceiling for pipeline capacity are more serious than for capacity release. Pipelines, due in part to their economies of scale, can exercise market power over pipeline capacity, particularly with respect to the construction of long-term capacity.[18] As the Court of Appeals for the District of Columbia Circuit has stated:

> Federal regulation of the natural gas industry is thus designed to curb pipelines' potential monopoly power over gas transportation. The enormous economies of scale involved in the construction of natural gas pipelines tend to make the transportation of gas a natural monopoly.[19]

19. Unlike releasing shippers, pipelines have a greater ability to exercise market power because of their control over the expansion of the pipeline itself. If a pipeline could on its own or as part of an oligopolistic market structure exercise market power in the short-term market, it would have an incentive not to construct additional needed capacity (withhold new capacity) because of the excess revenues it can garner in the short-term market. As the Commission explained in Order No. 637:

> Without rate regulation, pipelines would have the economic incentive to exercise market power by withholding capacity (including not building new capacity) in order to raise rates and earn greater revenue by creating scarcity. Because pipeline rates are regulated, however, there is little incentive for a pipeline to withhold capacity, because even if it creates scarcity, it cannot charge rates above those set by its cost-of-service. Since pipelines cannot increase revenues by withholding capacity, rate regulation has the added benefit of providing pipelines with a financial incentive to build new capacity when demand exists * * *. Thus, annual rate regulation protects against the pipeline's exercise of market power by limiting the incentive of a monopolist to withhold capacity in order to increase price as well as creates a positive incentive for a pipeline to add capacity when needed by the market.[20]

20. Not only may there be segments of a pipeline or even an entire pipeline

[12] These parties do not object to the removal of the price ceiling for capacity release transactions. *See* INGAA at 6. (''INGAA supports lifting the price cap on short-term released capacity * * *''), Spectra at 5 (''The Commission was correct to remove the price caps on short-term capacity release capacity'').

[13] INGAA at 1, Williston at 2, Spectra at 2.

[14] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996).

[15] The court in *INGAA* recognized the value of the recourse rate in protecting against the exercise of market power by both pipelines and releasing shippers:

> As to deliberate withholding of capacity, the Commission reasoned that this too was not within the power of capacity holders. If holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate—which is still applicable to the pipelines. 285 F.3d at 33.

[16] *Williston Basin Interstate Pipeline Co.*, 519 F.3d 497, 502 (D.C. Cir. 2008) (where the pipeline's largest customer is its affiliate, the competitive capacity resale market is ''smaller than one would otherwise expect''); *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1156 (D.C. Cir. 1996) (''when the capacity available for sale on a particular pipeline is limited, holders of even relatively small capacity allotments can exercise market power'').

[17] Order No. 712 at P 61.

[18] *Id.* P 67, 85.

[19] *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996).

[20] Order No. 637 at 31,270. *See Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053, at 61,191 (2000) (''there is little reason for the pipeline to exercise market power by withholding new capacity because the maximum rates established by the Commission prevent it from charging rates above the just and reasonable rates based on its cost of service''), *aff'd, Process Gas Consumers Group* v. *FERC*, 292 F.3d 831, 834 (D.C. Cir. 2002).

that is not competitive, as discussed above, but as we found in Order No. 712,[21] and as the pipelines have conceded, perfect arbitrage does not exist between the capacity release market and the market for pipeline capacity.[22] As a result, the pipelines will have the ability to exercise market power, which will create the very incentive our regulation is designed to prevent: An incentive to not construct capacity when it is needed and would ordinarily be profitable.[23] In balancing the risks and benefits of removing the price ceiling for pipeline capacity, we chose in Order No. 712 to err on the side of providing greater protection against the exercise of market power by both the pipelines and releasing shippers by retaining the recourse rate protection of regulated pipeline rates.

21. We find that the arguments raised by the pipelines on rehearing are the same arguments addressed in Order No. 712, and as discussed below, we do not find these arguments sufficient to change our determination to retain the price ceiling for short-term pipeline services.

a. Competitive Market Findings

22. INGAA, Williston, and Spectra all argue that the Commission's finding that the capacity release market is ''generally competitive'' justifies removing the price ceiling for pipeline short-term services as well. They maintain that released capacity and pipeline capacity compete with each other and that by concluding that the presence of a ''generally competitive'' market justified the removal of the rate ceiling for short-term release capacity the Commission also justified the removal of the price ceiling for short term pipeline capacity. These parties argue that because the data does not distinguish between released capacity and pipeline capacity there is no reason to treat one class of capacity differently from the other.[24]

23. The Commission agrees that to a large extent released capacity and pipeline capacity compete against each other. But, as we discussed above, we did not make a finding that the entire secondary market is competitive. Rather, we found that the extent of competition in the market for capacity release in conjunction with the maintenance of the recourse rate for pipeline services was sufficient to remove the price ceiling for capacity release.[25] As the Commission stated:

> The Commission is not relying only on a competitive market to ensure just and reasonable rates. The pipeline's maximum rates for short-term firm and interruptible services serve as recourse rate protection for negotiated rate transactions, and will provide the same protection to replacement shippers by giving them access to a just and reasonable rate if the releasing shipper seeks to exercise market power.[26]

24. Relying on our finding in Order No. 637, we explained that maintenance of the recourse rate is necessary in factual circumstances in which even with capacity release, competition is limited:

> The Commission is continuing to protect against the possibility that, in an oligopolistic market structure, the pipe-line and firm shipper will have a mutual interest in withholding capacity to raise the price because the Commission is continuing cost based regulation of pipeline transportation transactions. The pipeline will be required to sell both short-term and long-term capacity at just and reasonable rates. In the short-term, a releasing shipper's attempt to withhold capacity in order to raise prices above maximum rates will be undermined because the pipeline will be required to sell that capacity as interruptible capacity to a shipper willing to pay the maximum rate. Shippers also have the option of purchasing long-term firm capacity from the pipelines at just and reasonable rates.[27]

25. In retaining the recourse rate as protection against the exercise of market power, we recognized that, on many parts of the pipeline grid, sufficient competition may not exist to discipline pricing.[28] This can occur on laterals, at the extreme ends of certain pipeline systems where only one or a small number of firm capacity holders are present, or in some cases on an entire small pipeline. For example, on the Williston Basin pipeline as of 2000, 93 percent of the capacity of the pipeline was held by an affiliate of the pipeline.[29] We did not, and cannot, make a finding that such a market is sufficiently competitive to remove the protection afforded by the recourse rate.[30] As we explained in Order No. 712, the recourse rate in this situation will serve to protect the replacement shipper because if Williston's affiliate seeks to charge a price for released capacity above the just and reasonable maximum rate that is unjustified by competitive conditions, ''the replacement shipper has the option of turning down the deal and purchasing the capacity from the pipeline at the just and reasonable interruptible rate.'' [31]

26. Pipelines that believe their markets are competitive can file for market based rates under our Alternative Rate Design Policy Statement to show that their markets are competitive. We did not undertake such an analysis in this rulemaking, however, and therefore cannot find that removing the price ceiling from pipeline short-term services, and hence eliminating the recourse rate protection, assures just and reasonable rates.

27. Even on pipelines with secondary markets more competitive than Williston's, market power may exist on

[21] Order No. 712 at P 107.

[22] INGAA at 11. If perfect arbitrage did exist, no market for interruptible transportation would exist on fully subscribed pipelines because releasing shippers would capture the benefits of their unused capacity for themselves.

[23] C. McConnell, S. Brue, *Microeconomics: Principles, Problems, and Policies*, 211 (McGraw-Hill, 2004) (''by making it illegal to charge more than the [competitive price] per unit, the regulatory agency has removed the monopolist's incentive to restrict output to [the monopoly quantity] to obtain a higher price and greater profit'').

[24] See INGAA at 8, Spectra at 12 and Williston at 4 (''The Commission's findings that the short term capacity release market is workably competitive was not based on data that distinguishes between the types of sellers of capacity.'').

[25] As the Commission stated:

> One of the principal reasons for removing the price ceiling on released capacity is the existence of the pipeline's service as recourse in the event market power is exercised. Order No. 712 at P 101, citing, *Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053 (2000), *reh'g denied*, 94 FERC ¶ 61,097 (2001), *petitions for review denied sub nom., Process Gas Consumers Group* v. *FERC*, 292 F.3d 831, 837 (D.C. Cir. 2002).

[26] Order No. 712 at P 48. The reliance on the recourse rate as protection was repeated continuously throughout the order. Order No. 712 at P 31, 39, 61, 101.

[27] Order No. 637 at 31,282, *aff'd, INGAA*, at 32 (''[i]f holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate—which is still applicable to the pipelines'').

[28] Order No. 712 at P 61 (the recourse rate provides protection ''even on laterals or other parts of the pipeline grid where all firm capacity may be held by only a few or one firm shipper, those shippers cannot withhold their capacity in order to charge a price above competitive levels'').

[29] *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61081, at P24 n.29 (2006), *remanded on other grounds, Williston Basin Interstate Pipeline Co.* v. *FERC*, 519 F.3d 497, 502 (DC Cir. 2008) (recognizing that where the pipeline's largest customer is its affiliate, the competitive capacity resale market is ''smaller than one would otherwise expect''). In the proceeding at issue in these opinions, Williston did not even agree to permit a small customer to convert to Part 284 service so that it would be able to release capacity in competition with Williston and its affiliate.

[30] Such competitive problems can occur on other pipelines as well. For example, in addition to the Williston pipeline, affiliates on Equitrans, L.P, National Fuel Gas Supply Corp., and Questar Pipeline have a very high proportion of transportation service (from 50 percent–70 percent, and Tuscarora Gas Transmission Company has a non-affiliated shipper with 77 percent of its capacity. *See Index of Customers*, July 2008, FERC Form No. 549–B (*http://www.ferc.gov/docs-filing/eforms/form-549b/data.asp*). Considering the relevant information, we cannot make a finding that the secondary market is sufficiently competitive throughout the country that we can safely eliminate the recourse rate.

[31] Order No. 712 at P 61.

particular portions of the pipelines. Moreover, in Order No. 712, the Commission pointed out that a variety of pipeline limitations on shippers' release rights can limit the effectiveness of competition and arbitrage between the pipelines and releasing shippers. Pipelines' ability to selectively discount [32] can reduce the incentive of releasing shippers to compete with pipelines, as do negotiated rate agreements that contain provisions providing that the pipeline will share any revenues the shipper receives from a capacity release in excess of its discounted or negotiated rate.[33] Pipelines have indeed recognized that these provisions help insulate them from competition.[34] But the pipelines cannot legitimately argue that they should be able to limit themselves from competition on the one hand, and then seek to remove the recourse rate which serves to protect customers from the effects of such insulation. Retaining the recourse rate helps protect against the exercise of market power on such segments.[35]

28. Williston, in its rehearing request, claims that the Commission failed to explain how pipelines' ability to selectively discount relates to the retention of the maximum rate for pipeline short-term services. The ability of pipelines to selectively discount demonstrates that they have market power and are able to prevent arbitrage.[36] As we have explained above, limitations on the effectiveness of arbitrage could enable pipelines to exercise market power in some markets.[37]

b. Withholding Construction of Needed Pipeline Infrastructure

29. In Order No. 712, the Commission found that maintenance of the price ceiling on pipeline capacity was necessary to ensure that proper incentives to construct needed pipeline infrastructure were retained. On rehearing, the pipelines argue that because the pipeline capacity is identical to the released capacity, the Commission acted arbitrarily in lifting the capacity only on short-term released capacity and not on pipeline capacity. They argue that the Commission erred in asserting that they could exercise market power by withholding capacity, maintaining that capacity is either subscribed or not and that the Commission regulations require that all available capacity be sold.

30. First, as discussed above, the Commission has a sound basis for not removing the recourse rate from pipeline services, because the recourse rate acts as a check against both the market power of releasing shippers and the pipelines themselves in situations in which insufficient competition exists. Second, as we found in Order No. 712, and discussed above, ownership of the pipeline is not identical to shippers that lease the use of such capacity.[38]

31. Unlike shippers that cannot control the total amount of capacity, pipelines, because they control their own systems, can affect the total quantum of capacity by determining whether to construct additional capacity. The fundamental precept of our cost-of-service regulation of pipelines is based on ensuring that pipelines do not withhold existing capacity or future capacity.[39] The Commission prevents the withholding of future capacity by ensuring that pipelines do not have an economic incentive to refrain from constructing additional capacity when demand suggests that such capacity is needed and would be profitable. A pipeline that possesses market power and could charge supra-competitive prices in the short-term market will have an economic incentive not to build new capacity to relieve the scarcity permitting it to charge higher prices. As we stated in Order No. 712, as long as cost-of-service rate ceilings apply, pipelines will have a greater incentive to build new capacity to serve all the demand for their service than to withhold capacity, because the only way the pipeline could increase current revenues and profits would be to invest in additional facilities to serve the increased demand.[40]

32. The pipelines assert, without evidentiary support, that their construction decisions would not be influenced by prices in the short-term market. INGAA, for example, contends that ''rather than driving up prices, withholding unsubscribed firm capacity only results in lost sales.'' [41]

33. Basic economic theory holds that firms with market power, like pipelines, will construct less capacity than competitive firms because doing so results in higher prices and profits. A company with market power will produce less of a product or service, and at a higher price, than if the company were in a competitive market. Unlike a competitive firm that produces where marginal cost [42] intersects demand,[43] a firm with market power produces where the revenue from producing one additional unit of output (marginal revenue) [44] is greater than the cost of producing that unit (marginal cost).[45] With a typical downward sloping demand curve, the intersection of marginal cost and marginal revenue is at a smaller output and a higher price than would be produced by a competitive

[32] Selective discounting refers to the ability of pipelines to limit discounts to specific points so that those discounts cannot be arbitraged to alternate points at which the pipelines have less competition. In cases where pipelines use selective discounting, shippers can release at alternate points only if they pay the pipeline's maximum rate, thus eliminating or decreasing the profit the shipper can make on the release.

[33] *See LSP Cottage Grove, L.P.* v. *Northern Natural Gas Co.*, 111 FERC ¶ 61,108, at P 58–59 (2005).

[34] *See Williston Basin Interstate Pipeline Co.* v. *FERC*, 358 F.3d 45, 50 (D.C. Cir. 2004).

[35] Order No. 712 at P 88.

[36] As the U.S. Court of Appeals recognized in a case brought by Williston itself:

A pipeline is unlikely to be able to increase throughput by selective discounting, however, if capacity at secondary points can be transferred readily among shippers through resale at the discounted rate. Indeed, economic theory tells us price discrimination, of which selective discounting is a species, is least practical where arbitrage is possible—that is, where a low-price buyer can resell to a high-price buyer.

Williston Basin Interstate Pipeline Co. v. *FERC*, 358 F.3d 45, 50 (D.C. Cir. 2004). *See* F.M. Scherer, *Industrial Market Structure and Economic Performance*, 253 (Rand McNally College Publishing Co. 1970) (in order to price discriminate ''the seller must have some control over price—some market power'').

[37] Selective discounting decreases competition even when price exceeds the maximum rate. For example, assume that on a pipeline with a maximum rate of $1.00, a shipper has a discounted rate of $.75, and it values the capacity at $1.10, perhaps because it would cost $1.10 to use storage or a peak shaving device to replace the gas lost through the capacity release. If the shipper were required to pay the additional $.25 to the pipeline under the Commission's selective discounting policy, the shipper would release its capacity only when the capacity price is $1.35 or greater. Without the selective discounting policy, the shipper would be willing to release whenever the capacity price is $1.10 or greater.

[38] Order No. 712 at P 84 (*quoting, INGAA* at 35).

[39] Order No. 637 at 31,270.

[40] Order No. 712 at P 85.

[41] INGAA at 7 (citing, Comments of the Interstate Natural Gas Association of America, Docket No. RM08–1 (filed Jan. 25, 2008)).

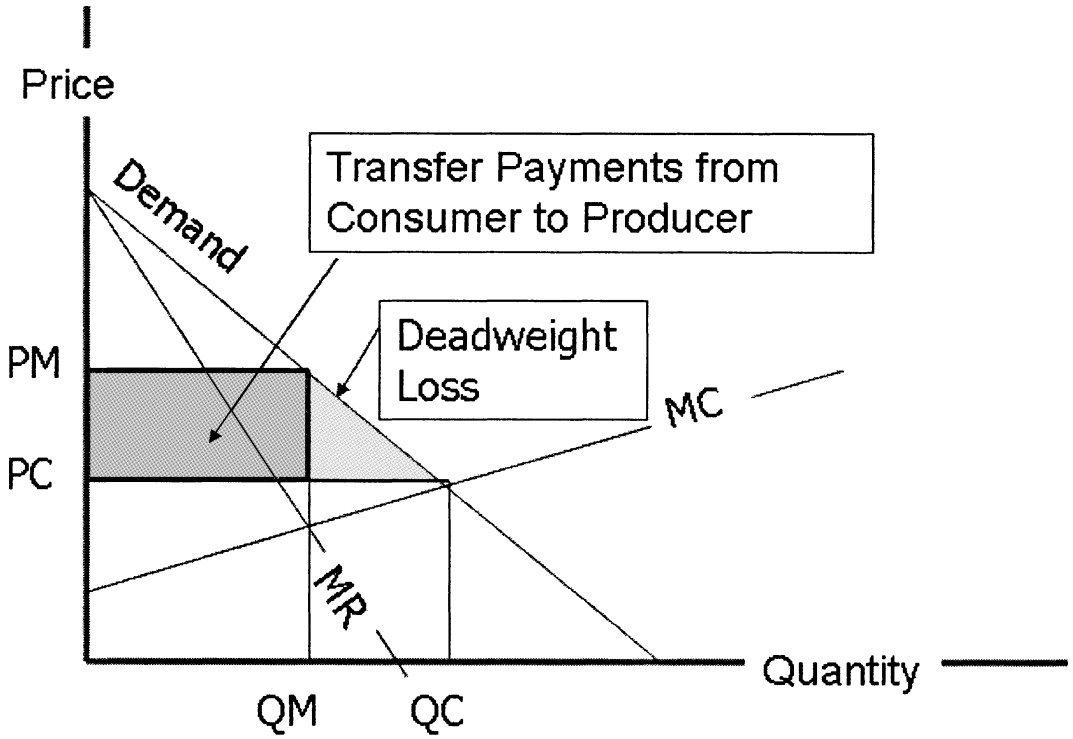
[42] Marginal cost is the added cost of producing one more unit.

[43] At this price, the firm recovers in price the added cost of producing one more unit. If the firm produced more units, the extra cost of producing those units would be less than the price paid for them.

[44] Marginal revenue is the extra revenue created by producing one more unit of output.

[45] As long as producing one more unit adds more to revenue than to cost, the firm with market power is better off (earns a profit) by producing that unit. Although producing one more unit would still be profitable even at a higher output (because the cost of producing that unit is less than the price) the firm with market power's overall revenue would decline because it has to charge everyone the lower price in order to add that unit. *See* A. Mas-Colell, M.D. Whinston, J. Green, *Microeconomic Theory*, 385 (Oxford University Press US, 1995) (the reason the monopolist's output is below the competitive level is ''the monopolist's recognition that a reduction in the quantity it sells allows it to increase the price on its remaining sales'').

outcome.[46] As the following graph demonstrates, a firm with market power will produce at Point QM with a price at PM, although the competitive quantity would be at Point QC and price at Point PC.[47]



34. Although producing at the higher output (and lower price) of a competitive market would still be profitable even for the firm with market power, the firm with market power makes more money if it reduces output and increases price.[48]

35. While current Commission regulations do not permit pipelines to withhold already-constructed capacity,[49] pipelines can withhold capacity by not constructing as much capacity as a competitive market would dictate. Even though long-term rates would still be capped under the pipelines' proposals, pipelines able to charge supra-competitive prices in the interruptible or short-term firm market would still have the same disincentive to build capacity to reach the competitive level, because such construction would result in less overall profit for the pipeline.[50]

36. INGAA argues that the Commission is acting inconsistently because the Commission found that lifting the price ceiling on released capacity gave an incentive to increase construction.[51] But INGAA takes the quoted portion of Order No. 712 out of context. The Commission was pointing out that high capacity release prices would send pipelines a signal that capacity is scarce and additional capacity is needed to relieve the scarcity. This same principle does not apply to removing the price ceiling for pipeline capacity. As pointed out above, if pipelines with market power find that maintaining scarce pipeline capacity increases their profits, then they will have much less incentive to construct long-term capacity because such capacity could result in lower profitability. The extent to which the pipelines' incentives to construct will be reduced is dependent on the circumstances facing each pipeline. But because pipelines can still exercise market power (as discussed above), we cannot find sufficient justification for removing recourse rate protection based solely on the unsupported statements of pipelines that short-term rates will never be sufficient to reduce or eliminate the amount of long-term capacity they choose to construct.

37. A recent example illustrates why the recourse rate is needed to ensure that pipelines retain the incentive to build needed pipeline infrastructure. After Order No. 712 became effective, capacity release prices exceeded maximum rates principally from the Rocky Mountains to the northwest and to the east. This was attributed to an excess supply of gas to be transported from the Rocky Mountains in relation to pipeline capacity.[52] Such scarcity

[46] Jean Tirole, *The Theory of Industrial Organization*, 66 (MIT Press, 1988) (''The monopoly sells at a price greater than the socially optimal price, which is its marginal cost'').

[47] Deadweight loss refers to the loss to society resulting from the firm with market power withholding the production of product that consumers value at more than the cost of production. Transfer payments refer to the extra income that the firm with market power earns as compared to what it would earn in a competitive market. It represents the amount of money transferred from consumers to the producer.

[48] In a competitive market, if a firm tried to price at Point PM, other firms would enter the market at that price, which would have the effect of increasing output and reducing the price for all firms to Point PC. R. Posner, *Economic Analysis of the Law* 198 (2d ed. Little, Brown, and Company, 1977).

[49] *See Tennessee Gas Pipeline Co.,* 91 FERC ¶ 61,053, at 61,191 (2000) (''there is little reason for the pipeline to exercise market power by withholding new capacity because the maximum rates established by the Commission prevent it from charging rates above the just and reasonable rates based on its cost of service''), *aff'd, Process Gas Consumers Group* v. *FERC,* 292 F.3d 831, 834 (D.C. Cir. 2002).

[50] For example, if a pipeline's affiliate holds the bulk of transportation capacity of a pipeline, the affiliate (if the recourse rate protection were removed) presumably has sufficient market power to raise short-term prices in a constrained market. The construction of additional capacity to relieve that scarcity could then result in a diminishment of the overall profitability of the company.

[51] INGAA at 7 (citing, Order No. 712 at P 60).

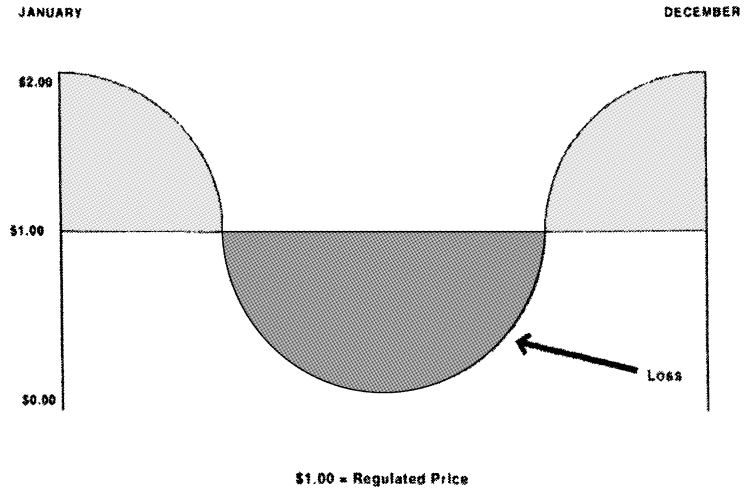
[52] *See* G. Lander, *Capacity Center Releases Post Order 712 Capacity Trading Stats* (September 2008)

should be a prime indicator to the pipelines of the need to expand capacity from the Rocky Mountains. Because shippers do not control expansion decisions, permitting the price to exceed the maximum rate helps to allocate scarce capacity efficiently to the highest valued user. However, if pipelines were able to capture the higher than maximum rate prices for such transactions, their incentives to expand would be blunted because any such expansion would reduce the scarcity revenues they would be receiving. The retention of the recourse rate for pipeline transactions ensures that pipelines have the proper incentive to build new capacity when capacity release prices show that construction of such capacity is needed and would be profitable.

c. Pricing Flexibility

38. INGAA, Williston and Spectra all maintain that the Commission's action in removing the price ceiling from short term capacity releases has given releasing shippers more flexibility in pricing their capacity than the pipelines have in pricing their capacity under the Commission's programs.[53]

39. In particular, they assert that negotiated rates are not as flexible as capacity releases. Williston asserts that negotiated rates must be submitted as a tariff filing, which requires a period of 30 days advance notice, before the rates can go into effect. Therefore, Williston argues that negotiated rate agreements are not useful in responding to a short-term price spike. Spectra argues that the requirement that the negotiated rate must be accompanied by a recourse rate alternative effectively means that pipelines are unable to sell short-term services above the maximum recourse rate. Spectra asserts that under either the net present value or first-come, first-served allocation methodologies, shippers have no reason to offer to pay more than the maximum rate for service even if the market would bear such a rate. Spectra maintains that as a result pipelines cannot recover their cost-of-service because they are required to discount capacity prices during off-peak periods, but cannot charge above maximum rates when such prices are justified, as shown in the following hypothetical graph included in Spectra's rehearing request.[54]



40. We recognize that negotiated rates and the capacity release program are not identical. For example, the capacity release program still requires bidding for deals of greater than one month (except for AMA transactions), while pipelines can negotiate rates without any bidding delay. On the other hand, negotiated rates do have to be filed with the Commission as Williston points out.

41. But we do not agree that the differences between these programs are as significant as the pipelines suggest. For example, contrary to Williston's argument, the Commission has waived the 30-day notice filing for negotiated rate deals, allowing such transactions to go into effect immediately:

> A pipeline may file the numbered tariff sheet implementing the negotiated rate at the time it intends the rate to go into effect. The Commission does not intend to suspend the effectiveness of the negotiated rate filings or impose a refund obligation for those rates. For these reasons, the Commission will readily grant requests to waive the 30 day notice requirement.[55]

42. Thus, negotiated rate transactions can occur as quickly as capacity release transactions. Moreover, there is no restriction on the use of negotiated rates even for short-term transactions.

43. Spectra argues that shippers will not enter into negotiated rate contracts above the recourse rate. The principal use of negotiated rates is to enable pipelines and shippers to enter into transactions that reflect the value of capacity as measured by price indices. Indeed, one of the principal reasons for removing the rate ceiling on capacity releases is to extend similar flexibility to price releases on price indices even when such prices exceed the maximum rate.[56] Spectra offers no reason why shippers would be any more reluctant to enter into negotiated rate contracts with the pipeline for short-terms using index

(contact CapacityCenter.com) *as reported in* Foster Natural Gas Report No. 2711 (September 12, 2008) (describing report issued by CapacityCenter.com on post Order No. 712 capacity release transactions showing higher than maximum rate releases out of the Rocky Mountains); Letter from Wyoming Governor Dave Freudenthal to Wyoming Legislature's Joint Minerals, Business and Economic Development Interim Committee (August 21, 2008) (indicating need for additional pipeline infrastructure), *http://governor.wy.gov/press-releases/state-of-wyoming-should-not-enter-into-the-pipeline-business-governor-says.html.*

[53] *See* Spectra at 30 (pipelines will face a competitive disadvantage); INGAA at 10 (alternatives do not provide comparable rate flexibility) and Williston at 12 (Order No. 712 provides releasing shippers with significantly greater pricing flexibility than is available to pipelines).

[54] Spectra at 17.

[55] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 74 FERC ¶ 61,076, at 61,241–42. (1996).

[56] *See Standards for Business Practices for Interstate Natural Gas Pipelines,* 72 FR 38,757 (July 16, 2007), FERC Stats. & Regs. ¶ 31,251 at P 51 (2007), (industry requesting ability to use price indices for released capacity).

prices than they would be to enter into such contracts with releasing shippers.

44. We also disagree with Spectra's contention that under the Commission's determination, the pipeline will be unable to recover its cost-of-service. The graph included by Spectra is a typical graph of demand on a pipeline, where capacity is more valuable during the winter heating season than during the off-peak summer season. But that does not mean that the pipeline will be unable to recover its cost-of-service. As Spectra recognizes, shippers needing capacity in the winter cannot simply wait until they need capacity because capacity in the winter is scarce and under the pipeline's allocation requirements, shippers are unlikely to obtain the amount of capacity they need if they wait. Therefore, shippers like local distribution companies (LDCs) that need capacity for the winter typically will sign a long-term contract (or at least a full year's contract) at maximum rate to ensure that they will have the capacity they need during the peak winter season.

45. Moreover, pipelines are not precluded from recovering their cost-of-service in any event. Under longstanding Commission policy,[57] pipelines may adjust the volumes used to design their maximum recourse rates, so that they can recover their full cost-of-service, even though competition requires them to offer discounts including during off-peak periods. Also, as we pointed out in Order No. 712, pipelines have the option of applying for seasonal rates in such circumstances.

46. Spectra is correct that in limited circumstances (where a pipeline has unsubscribed capacity and suddenly demand for that capacity exceeds the available supply), the recourse rate will prevent the pipeline from allocating capacity to the shipper placing the highest value on the capacity. But that is the very nature of the protection afforded by recourse rates, and as discussed above, we cannot relax the recourse rate protection given that the entirety of the market has not been shown to be sufficiently competitive. As we explained in Order No. 712, we need to balance the risks of removing the price ceiling and the benefits from such removal, and we have decided that ensuring sufficient protection against market power must take precedence over potential losses in efficiency.[58]

47. Williston, Spectra, and INGAA also maintain that the other pricing flexibility the Commission mentioned in Order No. 712, filing for market-based rates and the use of seasonal rates, are not as flexible as removal of the price ceiling for capacity release. We did not maintain that these programs were identical. We simply pointed to them as potential flexibility that is available to the pipelines, and as discussed above, the use of seasonal rates may be a solution for situations in which demand differs significantly between seasons.

48. The pipelines specifically argue that market-based rate filings for pipeline transportation are difficult to make and that the Commission utilizes stringent criteria in evaluating such filings. But we find that, precisely because pipelines have such enormous economies of scale and enjoy market power, the application of economically correct standards is appropriate in reviewing an application to remove rate regulation entirely.

49. INGAA and Williston maintain that because the alternatives proposed by the Commission for pipelines are not as flexible as capacity release, the Commission's policy unjustifiably burdens and injures pipelines. Because the pipelines, even under their own proposals, would still be regulated under cost-of-service principles, any lack of flexibility would not result in losses to pipelines because cost-of-service ratemaking provides each pipeline with an opportunity to recover all of their reasonably incurred costs. If the Commission were to remove the recourse rate from the pipelines' short-term services, pipelines still would need to account for any extra revenues derived from short-term services as part of their overall cost-of-service. Because, as discussed above, we have not found the short-term market to be fully competitive, and pipelines are able to recover their cost-of-service, we find that maintaining the recourse rate is necessary to ensure continued protection of customers and does not unduly harm pipelines.

d. Bifurcated Markets

50. The pipelines again assert that the Commission has created a bifurcated market and that such a market will compromise allocative efficiency. INGAA asserts that because pipelines do not have market power there is no reason for the Commission to bifurcate the market to mitigate against pipeline market power and to rely on arbitrage, which the Commission admits is imperfect, to correct any market inefficiencies. Spectra argues that Order No. 712 regulates the short term capacity market on an asymmetric basis and that this will create a bifurcated market. It asserts that Order No. 712 regulated the short term capacity release market subject to light-handed, market-based regulation, but regulated pipeline participants in the same market continue under the more burdensome cost-of-service regime. Sempra also argues that the Commission's examples of arbitrage in Order No. 712 apply only to interruptible service, but that pipelines may have firm service available and bifurcated markets can occur.

51. As we explained in Order No. 712, we have attempted to reduce the costs of arbitrage so that we do not create a seriously bifurcated market. If arbitrage exists, then a bifurcated market will not be created regardless of whether the pipeline is selling interruptible or firm service. With respect to interruptible service, no shipper can rely on obtaining interruptible service at a lower than market price because it can lose the capacity to a replacement shipper obtaining a release, which has higher priority. Thus, if the market is constrained, those needing capacity will not be attempting to rely on their position in the interruptible queue but will be seeking firm released capacity. Similarly, bifurcated markets would not be created with respect to firm service because, as we discussed earlier, even if one shipper obtained capacity from the pipeline at a lower than market price, it could reallocate that capacity through the release market as long as arbitrage costs are not too high.

52. But as we recognized in Order No. 712, arbitrage is not perfect, and so there may be situations in which a bifurcated market may occur. Indeed, the fact that arbitrage is not perfect may provide the pipelines with market power.

53. Whatever amount of limited market bifurcation occurs, therefore, is a cost that must be incurred to maintain the protection against market power afforded by the recourse rate. INGAA provides no data supporting its contention that the markets are competitive, and, as discussed earlier, the Commission did not make such a finding, and in fact found that maintenance of the recourse rate is

[57] *See e.g. Southern Natural Gas Co.,* 65 FERC ¶ 61,347, at 62,829–40 (1993), *order on reh'g,* 67 FERC ¶ 61,155, at 61,456 (1994); *Williston Basin Interstate Pipeline Company,* 67 FERC ¶ 61,137, at 61,377–383 (1994) (''Williston's ceiling rates will be designed to give it the opportunity to recover its new cost-of-service if throughput is the same as during the base period despite the fact that it is reasonable to project a continuation of lower discounted rates for certain customers after the effective date of the subject rates.''); *see also Williston Basin Interstate Pipeline Company,* 107 FERC ¶ 61,164, at P 79–80 (2004).

[58] Order No. 712 at P 108. Depending on the costs of arbitrage, Spectra's example would not result in an inefficient allocation of capacity. As long as one shipper can release capacity to the other, the shipper placing the greatest value on the capacity would be able to obtain the capacity.

necessary precisely because various parts of the interstate grid may not be competitive. No amount of arbitrage will ensure a competitive market if a single shipper controls a large portion of the pipeline capacity either on the pipeline as a whole or in any individual market.

e. Proposed Alternatives

54. On rehearing Spectra offers two alternatives that it suggests will potentially mitigate any harm from removing the price ceiling from pipeline services.[59] It argues that the Commission could allow pipelines to post capacity, at the pipeline's option, through the same process and requirements as short-term capacity releases. If the pipeline opted to post some of its capacity using this mechanism, the capacity would be awarded to the highest bidder, without a rate cap. Spectra argues that, if the Commission deems further safeguards necessary, it proposed in its initial comments that the Commission could remove the price cap on short-term firm services but retain it on short-term interruptible services. This approach, it asserts, would retain a recourse rate alternative for all firm customers.

55. In the NOPR leading to Order No. 637, the Commission proposed an auction to provide recourse rate protection, similar to the one proposed by Spectra, in which pipelines would be able to participate by including their capacity along with that of released capacity. At that time most of the comments, including those of the pipelines, opposed such mandatory auctions, and the Commission did not adopt that proposal.[60] The Commission, however, did indicate in Order No. 637 that it would be open to a voluntary auction proposal from pipelines, such as the one suggested by Spectra, so long as such a proposal would protect against the exercise of market power by the pipeline:

> An auction also may be a means by which a pipeline could sell some or all of its capacity without a price cap if the auction is designed in such a way as to protect against the pipeline's ability to withhold capacity and exercise market power.* * * [T]he pipelines must design the auction in ways to prevent the withholding of capacity and the exercise of market power. Capacity can be withheld by a pipeline in two primary ways: the pipeline can withhold capacity directly by not putting it into the auction; or it can indirectly withhold capacity through the use of a reserve price. In a proposal for auctions without a rate cap, all capacity available at the time of the auction would have to be included in the auction. The auction proposal also needs to address the appropriate limitations that should be placed on the level at which the pipeline can establish reserve prices, particularly whether different reserve prices should be established for peak and off-peak capacity.[61]

56. The Commission also included specific guidance addressing basic principles for constructing such an auction to ensure that it would be transparent, verifiable, and non-discriminatory.[62] Despite the opportunity offered in Order No. 637, no pipeline has ever proposed to use an auction methodology to allocate capacity at prices exceeding the maximum recourse rate. Spectra does not claim that it proposed this auction proposal in its initial comments, and provides no details in its rehearing request about how it would structure such an auction to ensure that pipelines cannot exercise market power, ensure that sufficient arbitrage opportunities exist so that releasing shippers can compete equally, and ensure that the pipeline retains an incentive to construct long-term capacity when it is needed.[63] Other parties have not had an opportunity to comment on the details of such a proposal, and we, therefore, do not have a sufficient record to rule on a generic basis on such a proposal in this rulemaking. But Spectra, and other pipelines, can still make such a proposal through an NGA section 4 filing on an individual case-by-case basis, as indicated in Order No. 637.

C. Clarification Regarding Specific Issues

1. Consecutive Releases

a. Clarification Requests

57. Allegheny, the Marketer Petitioners and Reliant all note that under the Commission's regulations, they would be permitted to post for bid at around the same time capacity to be released for multiple, consecutive short-term periods. Each of these parties requests that in order to provide clarity to the market, the Commission specifically clarify that such releases are permissible.

58. Allegheny argues that the Commission erred by failing specifically to find that the offer by a capacity holder of simultaneous discrete sequential releases of its capacity, each for up to one year at prices above the pipeline's current maximum tariff rates, is consistent with Order No. 712. Allegheny asserts that such a clarification would allow a capacity holder to auction all of its capacity rights in one-year blocks, and to award the capacity to the replacement shippers offering the highest price for the capacity in future years without running afoul of the price cap. Each replacement shipper would lock into a contractual commitment for only one year. Allegheny asserts that each auction could produce a different price for the capacity, and thereby allow the market to reflect changing expectation about the congestion value of the capacity.

59. The Marketer Petitioners also request clarification that it is permissible for a releasing shipper and a replacement shipper to engage in two (or more) consecutive short-term (one year or less) releases of the same capacity, at the same (or approximately the same) time, without subjecting the releases to the maximum rate cap.[64] Reliant adds that permitting a firm shipper to post for bidding, at or near the same time, capacity for multiple successive short-term releases would work to achieve the Commission's goal of ensuring that capacity be allocated to those who value it most.

[59] Williston, in a single sentence without providing details, seems also to endorse a bidding approach. Williston at 10.

[60] *Regulation of Short-Term Natural Gas Transportation Services,* Order No. 637, 65 FR 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091, at 31,279 (Feb. 9, 2000).

[61] Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,295. The Commission's concern with reserve prices was to ensure that if a pipeline can benefit from competition by selling at above the maximum rate during peak periods, it also should be required to sell capacity at more competitive prices during off-peak periods. If pipelines were permitted to set the reserve price at the existing maximum rate during off-peak periods, they still would be able to exercise market power with respect to off-peak transactions, for example, by selectively discounting. Requiring the pipeline to set a lower reserve price during off-peak periods, therefore, would ensure more competitive pricing during all time periods.

[62] *See* Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,296.

[63] In its initial comment and its rehearing request, Spectra also offers no details about how its proposal to allow pipelines to sell short-term firm capacity without a rate ceiling would work. For example, it does not explain how short-term firm capacity is to be differentiated from long-term firm capacity because available capacity on a pipeline would be available for any time period. Spectra also fails to explain how bidding on short-term and long-term capacity would be evaluated to ensure that the pipeline was not favoring a short-term bid over a long-term bid. Should Spectra choose to make a Natural Gas Act (NGA) section 4 filing with respect to its proposals, it would need to specify the details of its plan and how it would protect against market power.

[64] Marketer Petitioners at 11. As an example, the Marketer Petitioners question whether, subject to applicable pipeline tariff provisions, a shipper may, on the same day, post for bidding without a maximum rate cap limitation (i) a release of a capacity package for the year 2009, (ii) a release of the same capacity package for the year 2010, and (iii) a release of the same capacity package for the year 2011.

b. Commission Determination

60. The Commission will deny the requests for clarification as discussed below. In the Commission's view, permitting a releasing shipper to simultaneously post for bid consecutive short-term contracts whose total term exceeds one year would be contrary to the Commission's decision to lift the price ceiling only for releases of one year or less. In Order No. 712, the Commission explained that it removed the price ceiling for short-term capacity releases in order to allow the prices of short-term capacity release transactions to reflect short-term variations in the market value of that capacity. Specifically, the Commission stated that, ''[b]ecause the existing capacity release price ceiling does not reflect short-term variations in the market value of the capacity, the price ceiling inhibits the efficient allocation of capacity and harms, rather than helps, the short-term shippers it is intended to protect.'' [65] Moreover, in Order No. 712, the Commission also considered whether to extend the removal of the price cap to long-term releases, but reasoned that, ''the Commission's policy emphasis in this rule is on short-term transactions, because that is where there is a problem to be solved. No commenter has made a convincing argument that price ceilings on longer term transactions create significant allocative inefficiencies or market failures. Accordingly, the Commission concludes that the current record does not warrant removal of the price ceiling on long-term capacity releases.'' [66]

61. When a shipper seeks to release its capacity for a period of more than one year, albeit in separate blocks of a year or less, the release cannot be considered to be for the purpose of responding to short-term variations in the value of the capacity as contemplated by the Commission when it removed the price ceiling for short-term capacity. Further, if the Commission were to permit releasing shippers to simultaneously post for bidding consecutive short-term releases at market rates extending for more than a year, such action would result in granting *de facto* permission to permit long-term releases at market rates, contrary to the Commission's findings in Order No. 712.

62. Therefore, the Commission will revise its regulations so that the lifting of the price cap for short-term releases will only apply to releases that take effect within one year of the date the pipeline is notified of the release. This will prevent shippers from releasing units of capacity in a manner designed to circumvent the price ceilings that the Commission has determined must remain in effect.

2. Definition of Short-Term

63. Iroquois states that Order No. 712 defines a short-term release as a release of capacity for ''one year or less''; and defines a long-term release as ''more than one year.'' [67] Iroquois argues that this definition is different from the Commission's current definitions of short and long term as applied to the right of first refusal. Iroquois points out that in Order No. 636–A, the Commission determined that the regulation's right of first refusal applies to firm long-term contracts and that ''[a] long-term transportation service is one that is pursuant to a contract for a term of one year or more.'' [68] Iroquois argues that modifying the determination of what is a short-term or long-term contract in the manner proposed by the Commission in Order No. 712 could reduce customer rights. Iroquois seeks clarification that Order No. 712 did not modify the definition of ''short term'' and ''long term,'' so that a long-term contract will continue to be defined as a contract for a term that is one year or more and that the current definition of short term as being ''less than one year'' will remain in effect.

64. We chose to define a release exempt from the price ceiling as being one year or more to enable releasing shippers to enter into reasonable commercial contracts for a standard duration, rather than for atypical periods, such as 364 days. However, we clarify that this definition has no application beyond defining those capacity releases exempt from the price ceiling. Specifically, we have not changed the definition of those contracts that qualify for the right of first refusal, as raised by Iroquois.[69] Shippers will continue to qualify for a right of first refusal by entering into contracts to purchase transportation or storage services directly from a pipeline of one year or more.[70]

3. Lump Sum Payments

65. Allegheny states that the Commission's regulations, rules and precedents do not clearly specify how to determine whether a permanent release of a discounted rate contract exceeds the maximum tariff rate when the replacement shipper makes a lump-sum payment to the releasing shipper of the present value difference between the maximum rate and the discounted rate. Allegheny argues that the Commission's regulations permit a capacity holder paying a discounted rate to release its capacity to a replacement shipper at the maximum rate and keep the difference, unless the service agreement with the pipeline specifically provides for a different arrangement.[71] Allegheny points out that the Commission has granted waivers of the long-tem release price cap in the context of shippers seeking to exit the natural gas business but it did not rule on the question of whether the lump sum payment exceeded the price cap on capacity releases.[72] Allegheny asserts that the Commission should resolve this uncertainty regarding the calculation of the maximum rate because it inhibits the negotiation of permanent capacity releases.

66. We find no need to provide clarification with respect to lump sum payments for permanent releases because under our regulations permanent releases cannot involve lump sum payments. Allegheny is correct that under our capacity release program, shippers holding discount contracts are permitted to release capacity at a rate up to the maximum rate under the contract. Under such releases, the releasing shipper remains liable for the full

[65] Order No. 712 at P 34.

[66] *Id.* P 79.

[67] Iroquois at 2 (citing, proposed section 284.8 (b) of the Commission's regulations and Order No. 712 at P 30).

[68] Iroquois at 3 (citing, Order No. 636–A, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. ¶ 30,950 at 30,627, *order on reh'g*, Order No. 636–B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636–C, 78 FERC ¶ 61,186 (1997).

[69] Order No. 712 did not modify 18 CFR 284.221 (d)(2), which continues to provide a right of first refusal ''if the individual transportation arrangement is for firm transportation under a contract with a term of one year or more'' and satisfies certain other requirements.

[70] The Commission chose to make the ROFR applicable to contracts of one year or more for the same reason we have chosen to apply the price cap exemption to contracts of one year or less: both definitions enable reasonable commercial contracts to qualify. We also clarify that capacity release contracts are not subject to a right of first refusal.

[71] Allegheny at 7 ((citing, Order No. 636–A at p. 30,557; *Great Lakes Gas Transmission Limited Partnership*, 64 FERC ¶ 61,017, at p. 61,170 (1993) (''As provided in Order No. 636–A, Great Lakes should clarify that a releasing shipper is credited with the total amount of the replacement shipper's reservation charge, even if it exceeds the reservation charge paid by the releasing shipper to Great Lakes.'')); *Southern Natural Gas Co.*, 62 FERC ¶ 61,136, at p. 61,960 (1993).

[72] Allegheny at 8 (citing, *Wasatch Energy, LLC*, 118 FERC ¶ 61,173, at P 9 (2007); *Duke Energy Marketing America, LLC*, 114 FERC ¶ 61,198, at P 13 (2006); *Northwest Pipeline Corp.*, 109 FERC ¶ 61,044, at P 30 (2004)).

amount of its reservation charges.[73] But in such temporary releases no lump sum payment is made. Rather, because the releasing shipper is still obligated to the pipeline for its full reservation charge, the releasing shipper receives a credit or payment against its overall bill reflecting the replacement shipper's payment. Therefore, a shipper releasing capacity on a temporary basis pays its full reservation charge to the pipeline and receives a payment representing the rate paid by the replacement shipper.

67. Permanent releases, however, are different, because under a permanent release, the releasing shipper releases its capacity for the entire remaining term of its contract and the pipeline and shipper agree to terminate the releasing shipper's contract, so that the releasing shipper no longer has any liability to the pipeline to pay for the capacity.[74] Under a permanent release, therefore, the releasing shipper receives no payment or credit (whether lump sum or otherwise); its contract simply is terminated.[75]

II. Asset Management Arrangements

A. Background

68. In Order No. 712, the Commission revised its capacity release regulations and policies in order to facilitate the use of AMAs. Based on the industry-wide support for the use of AMAs, the Commission found that AMAs are in the public interest because they are beneficial to numerous market participants and to the market in general. The Commission therefore made two basic changes in order to eliminate obstacles to the utilization and implementation of AMAs. First, we exempted capacity releases meant to implement AMAs from the prohibition on tying capacity releases to extraneous conditions. Second, the Commission amended its section 284.8 regulations to exempt capacity releases meant to implement AMAs from competitive bidding.

69. In Order No. 712, the Commission noted that AMAs are a relatively recent development in the natural gas market, which the Commission did not anticipate when it adopted the capacity release program in Order No. 636. The intended purpose of the capacity release program under Order No. 636 was to permit shippers to ''reallocate unneeded firm capacity'' to those who do need it.[76] The bidding requirements of section 284.8 and the prohibition against tying the release to extraneous conditions were all part of the Commission's fundamental goal of ensuring that such unneeded capacity would be reallocated to the person who values it the most. The Commission found that such ''capacity reallocation will promote efficient load management by the pipeline and its customers and, therefore, efficient use of pipeline capacity on a firm basis throughout the year.''[77] The Commission thus developed its capacity release policies and regulations based on the assumption that shippers would handle their own gas purchase and transportation arrangements and release their capacity only when they were not using the capacity to serve their own needs.

70. Based on industry comments, however, it became clear that this basic assumption underlying the capacity release program does not hold true in the context of AMAs. As the Commission found in Order No. 712, a distinguishing factor between standard capacity releases and AMAs is that in the AMA context, the releasing shipper is not releasing unneeded capacity but capacity that it needs to serve its own supply function. Releasing shippers in the AMA context are releasing capacity for the primary purpose of transferring the capacity to entities that they perceive have greater skill and expertise both in purchasing low cost gas supplies, and in maximizing the value of the capacity when it is not needed to meet the releasing shipper's gas supply needs. In short, AMAs entail the releasing shipper transferring its capacity to a third party expert who will perform the functions the Commission expected releasing shippers would do for themselves—purchasing their own gas supplies and releasing capacity or making bundled sales when the releasing shipper does not need the capacity to satisfy its own needs. The goal of the changes adopted by the Commission in Order No. 712 was to make the capacity release program more efficient by bringing it in line with these developments in today's secondary gas markets.

71. In Order No. 712 the Commission agreed with the industry-wide view that AMAs provide significant benefits to a variety of participants in the natural gas and electric marketplaces and to the secondary natural gas market itself. One of the most important aspects of AMAs is that they provide broad benefits to the marketplace in general. By permitting capacity holders to use third party experts to manage their gas supply arrangements and their pipeline capacity, AMAs can lower gas supply costs for releasing shippers and provide for more efficient use of the pipeline grid. AMAs also bring diversity to the mix of capacity holders and customers that are served through the capacity release program, thus enhancing liquidity and diversity for natural gas products and services. AMAs result in an overall increase in the use of interstate pipeline capacity, as well as facilitating the use of capacity by different types of customers in addition to LDCs. AMAs benefit the natural gas market by creating efficiencies as a result of more load-responsive gas supply, and an increased utilization of transportation capacity. AMAs also bring benefits to consumers, mostly through reductions in consumer costs. AMAs provide, in general, for lower gas supply costs, resulting in ultimate savings for end use customers. The overall market benefits described above also inure to consumers.[78]

72. As noted above, in light of these substantial benefits provided by AMAs, the Commission in Order No. 712 modified its capacity release regulations and policies to exempt pre-arranged capacity releases meant to implement AMAs from the prohibition against tying and from the bidding requirements of section 284.8 of the Commission's regulations. The decision to modify the Commission's policies and regulations to facilitate the use of AMAs is widely supported and not challenged by those parties filing for clarification or rehearing or Order No. 712. In general, those parties seek minor modifications to the Commission's method for implementing AMAs or seek to expand

[73] 18 CFR 284.8(f) (''unless otherwise agreed by the pipeline, the contract of the shipper releasing capacity will remain in full force and effect'').

[74] *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at 62,311–12 (1992); *Rockies Express Pipeline LLC*, 121 FERC ¶ 61, 130 (2007) (*Rockies Express*) (citing, *Pacific Gas Transmission Co.*, 76 FERC ¶ 61,246, at 62,270 (1996), *reh'g denied*, 82 FERC ¶ 61,289, at 62,135 (1998) (stating that the Commission's general policy is that there are no credits to the releasing shipper after a permanent release, but approving a settlement provision allowing a particular shipper such credits for permanent releases in the unique circumstances of that case)).

[75] The cases cited by Allegheny on reverse auctions are inapposite because these were special requests for waivers for firms that were exiting the gas business, and the Commission made clear that the releasing shipper could not profit from the transaction by receiving more than the maximum rate for the capacity. *Duke Energy Marketing America, LLC*, 114 FERC ¶ 61,198, at P 29 (2006). Allegheny can apply for waivers if it can similarly justify its request based on exigent circumstances.

[76] Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. ¶ 30,939 at p. 30,418.

[77] *Id.*

[78] The Commission noted in Order No. 712 that these benefits have been recognized by state commissions and the National Regulatory Research Institute. Order No. 712 at P 126 and n. 122.

the flexibility and/or authority granted to parties desiring to enter into AMAs.

B. Definition of AMAs

73. In Order No. 712 the Commission established a definition of AMAs that was intended to strike a balance between facilitating flexible and innovative AMAs and drawing a clear line between AMAs and standard capacity releases. The definition established in Order No. 712 is as follows:

> Any pre-arranged release that contains a condition that the releasing shipper may, on any day during a minimum period of five months out of each twelve-month period of the release, call upon the replacement shipper to (i) deliver to the releasing shipper a volume of gas up to one-hundred percent of the daily contract demand of the released transportation capacity or (ii) purchase a volume of gas up to the daily contract demand of the released transportation capacity. If the capacity release is for a period of less than one year, the asset manager's delivery or purchase obligation described in the previous sentence must apply for the lesser of five months or the term of the release. If the capacity release is a release of storage capacity, the asset manager's delivery or purchase obligation need only be one-hundred percent of the daily contract demand under the release for storage withdrawals or injections, as applicable.

74. The Commission imposed a delivery and/or purchase obligation on the replacement shipper in order to distinguish between *bona fide* AMAs that would qualify for the exemptions provided to AMAs and standard capacity releases. Thus, as shown, the definition of AMA requires that to qualify a pre-arranged release must contain a condition that ''the releasing shipper may, on any day during a minimum period of five months out of each twelve month period of the release, call upon the replacement shipper to (i) deliver to the releasing shipper a volume of gas up to one-hundred percent of the daily contract demand of the released transportation capacity or (ii) purchase a volume of gas up to the daily contract demand of the released transportation capacity.'' [79] The Commission also explained that, by requiring that the asset manager's delivery or purchase obligation in AMAs with terms less than a year apply for the lesser of five months or the term of the release, the definition effectively required that the delivery/purchase obligation for any AMA between five months and a year would be for five months of the release, and that the delivery/purchase obligation would apply to the entire term of any AMA of less than five months.

75. The Commission reasoned that the definition of AMA established in Order No. 712 would further its goal of delineating AMAs from standard capacity releases by placing a significant delivery/purchase obligation, applicable during at least five months out of each 12 month period of the release, on the asset manager. The Commission further explained that under the definition the releasing shipper will have the right to call upon the asset manager to deliver the full contract volume on every day of the five month minimum, though it need not actually do so. Thus the definition also furthers the Commission's goal of defining AMAs in such a way that they will be flexible enough to allow diverse parties to enter into AMAs and for those parties to be able to maximize the value of pipeline capacity within the context of an AMA. The definition only requires a delivery obligation on behalf of the replacement shipper for a portion of each twelve month period, thus giving the asset manager additional assurance it can utilize the capacity during non-peak periods. The definition adopted in Order No. 712 also allows for releasing shippers to only release a portion of their capacity, places no limitations on the asset manager that would require it to use the released capacity to make its deliveries to the releasing shipper, and does not limit the type of party that can enter into an AMA.

76. Numerous parties seek clarification and reconsideration of several aspects of the definition. First, Marketer Petitioners assert that the ''five-month'' delivery/purchase obligation is ''out of proportion'' in the context of releases of less than a year because it would require an asset manager to have a delivery purchase obligation almost every day during an AMA with a six month term. Marketer Petitioners claim such an obligation would substantially reduce the incentives for asset managers and may create market inefficiencies.[80] They also note that it is unclear what the delivery purchase obligation would be for a 13-month term under Order No. 712. The NGSA agrees with the Marketer Petitioners that the five month delivery/purchase obligation is too stringent. Both parties thus request that the Commission adopt a ''five-twelfths'' rule for the delivery/purchase obligation for capacity releases to implement AMAs, whereby the obligation of the asset manager would be revised to five-twelfths of the days in the term of the AMA, regardless of the term of the agreement. Those parties also request that the Commission clarify that the five-month obligation does not require that the months (or days) be consecutive.[81]

77. The Commission will not adopt an outright ''five-twelfths'' rule to replace the five month delivery purchase obligation for AMAs. The Commission established the exemptions for AMAs as opposed to standard capacity releases on the premise that the capacity released to implement an AMA was not excess capacity of the releasing shipper but capacity that the releasing shipper needed to serve its own needs.[82] In Order No. 712, the Commission determined that a delivery/purchase obligation of at least five months out of each twelve month period of the release would appropriately distinguish *bona fide* AMAs from standard capacity releases. The Commission arrived at the five month minimum requirement based on the fact that, at least in cold weather markets, the period of peak use is generally regarded as being the five months from November through March. Thus, a five-month delivery/purchase obligation in a twelve month release would roughly correspond to a releasing shipper's need to call upon the capacity to serve its peak requirements, while giving the asset manager assurance it can utilize the capacity during non-peak periods.

78. However, AMAs may also be for a term of less than a year. In these circumstances, the release is less likely to encompass any seasonal variations in the releasing shipper's need for the capacity to be used on its behalf. Therefore, the shorter the term of the release, the less reason there is to exempt some portion of the release term from the AMA delivery/purchase obligation. Thus, the Commission concludes that, in order to assure that releases of less than a year are part of a *bona fide* AMA in which the capacity will be used on behalf of the releasing shipper, the asset manager's delivery/purchase obligation should be increasingly stringent the shorter the term of the release. The AMA definition adopted by Order No. 712 accomplishes this by requiring that the asset manager's delivery/purchase obligation apply to the entire term of any AMA of less than five months and apply to at least five months of any release of

[79] Order No. 712 at P 153.

[80] Marketer Petitioners at 4.

[81] Marketer Petitioners at 4, NGSA at 6.

[82] *See e.g.* Order No. 712 at P 121 (stating that the distinguishing factor between a *bona fide* AMA and a standard capacity release ''is that in the AMA context, the releasing shipper is not releasing unneeded capacity, but capacity that it needs to serve its own supply function.'')

between five and twelve months. Accordingly, the Commission will retain the current minimum five month obligation for AMAs of one year or less.

79. The Commission recognizes, however, that the asset manager's obligation under the ''five month'' rule may be unclear for a release that is more than one year and not an exact number of years, for example a 13-month term, as pointed out by the Marketer Petitioners. Thus, the Commission is revising the definition of AMA established in Order No. 712 to provide that the delivery/purchase obligation for a release of more than one year will be five months (or 155 days) of each 12 month period of the release and five-twelfths of the days of any additional period of the release not equal to 12 months.[83] The delivery/purchase obligation for a 13 month AMA therefore, would be a minimum of five months out of the first 12 month period and five-twelfths of the thirteenth month of the agreement. The concerns discussed above about the need for a more stringent purchase/delivery obligation in short term releases of less than a year do not apply to releases with terms of more than a year, because such releases will encompass any seasonal variations in the releasing shipper's need for the capacity to be used for its own purposes. The Commission accordingly concludes that the revised definition will balance its goals of ensuring that there is a significant obligation on the asset manager to distinguish AMAs from standard capacity releases while also allowing sufficient flexibility for parties to negotiate beneficial AMAs.

80. Parties also seek clarification that the five month delivery purchase obligation, or a daily obligation if accepted by the Commission, does not require the obligation to be for a single consecutive period. Marketer Petitioners for example, request that the Commission clarify that the ''delivery/purchase obligation of section 284.8(h)(3) does not require the months to be consecutive'' and would be satisfied by the use of any five months.[84] The NGSA contends that the Commission should clarify that the five month obligation need not be on consecutive days but can be ''satisfied by an AMA that imposes a delivery obligation on nonconsecutive days as long as those nonconsecutive days amount to a total of five twelfths of the term of the AMA.''[85]

81. The Commission grants clarification that the delivery purchase obligation for an AMA need not be for a single consecutive period. The Commission did not intend by the definition established in Order No. 712, and the definition as written does not require, that the obligation must be for five consecutive months. To provide flexibility in fashioning AMAs the Commission is aware that parties may want to divide the delivery/purchase obligation in a manner that corresponds to whatever variations exist in the releasing shipper's need to use the capacity over the course of a year. Thus, under the revised rule established in this order, the minimum delivery/purchase obligation may be satisfied by use of any combination of months and/or days during the term of the release that equals the requisite obligation for that release. In this regard, the parties need not use calendar months for purposes of complying with the requirement that the delivery/purchase obligation equal at least five months out of each twelve month period of the release. The parties may spread the obligation over days, rather than months, so long as the total obligation equals five months, treating 31 days as equal to one month.

82. The AGA, Marketer Petitioners and Scana request that the Commission provide clarification and consistency in the regulatory language to describe the delivery/purchase obligation in the transportation capacity and storage injection and withdrawal context. They note that Order No. 712 adopted a standard for the replacement shipper in an AMA to deliver and/or purchase ''up to one-hundred percent of the daily contract demand of the released transportation capacity'' but that the standard for releases of storage capacity is for ''one-hundred percent of the daily contract demand under the release for storage injection and withdrawals.'' The parties contend that the same ''up to'' language should apply to releases of both storage and transportation capacity meant to implement an AMA and that the Commission did not intend in Order No. 712 to impose different obligations on asset managers depending on type of capacity released.

83. The Commission agrees. The Commission intended in Order No. 712 to establish the same obligation on releasers of transportation and storage capacity, *i.e.*, that they need to be obligated to deliver and/or purchase up to 100 percent of the daily contract demand of the applicable agreement. The Commission is therefore revising section 284.8 of its regulations accordingly.

84. The AGA, the Marketer Petitioners and Scana state that often pipeline tariffs contain ratchet provisions that limit the ability of a storage customer to make injections and withdrawals from storage at maximum contract levels. Consequently, the maximum amount of gas a storage customer may be able to withdraw may fluctuate. These parties seek clarification that the delivery/purchase obligation under a storage AMA incorporates or is intended to reflect any limitations on the customers' injection or withdrawal rights contained in the service provider's tariff.

85. The Commission grants the requested clarification. The Commission's goal in Order No. 712 was to facilitate efficient and beneficial AMAs. This goal would not be advanced by disqualifying an AMA because of an operational limit imposed by the service provider's tariff on a customer's injection or withdrawal rights. All AMA agreements are subject to the tariff provisions of the service provider. Storage ratchet provisions limit the customer's contractual right to demand service. The delivery/purchase obligation under a storage AMA was intended to reflect such limits on the customer's contract demand and thus is satisfied if the releasing shipper has the right to call upon the asset manager to deliver or purchase gas consistent with the withdrawal or injection rights available under the tariff to the asset manager at the time the releasing shipper requires performance.

86. Scana requests clarification that in a situation where parties include released capacity on both an upstream and downstream pipeline in an AMA, the delivery obligation only applies to the capacity released on the downstream pipeline that directly connects to the releasing shipper's delivery point.[86] Scana contends that when a shipper acquires capacity on several interconnected pipelines to create a seamless transportation path from a supply access point to the shipper's delivery point, the capacity released on each pipeline will not be the same because the shipper typically needs more capacity on the upstream pipeline in order to account for additional fuel retention. Scana points to an example in the Commission's November 15, 2007 Notice of Proposed Rulemaking, showing that an asset manger's delivery obligation is not cumulative where an AMA involves separate releases, as support for its request that the Commission clarify that the delivery obligation for a multi-pipeline AMA need only be satisfied on

[83] The Commission is making conforming changes to section 284.8 of its regulations.

[84] Marketer Petitioners at 5.

[85] NGSA at 5.

[86] Scana at 5.

the downstream pipeline connected to the delivery point.[87]

87. The Commission denies Scana's request. Scana states that in an AMA where capacity is released on an upstream and a downstream pipeline, the amount of capacity released will be greater on the upstream pipeline. It provides no reasons, however, as to why the delivery/purchase obligation under such an AMA should be limited to the furthermost downstream pipeline that is connected to the delivery point. As discussed previously, the purpose of the minimum delivery/purchase obligation is to ensure that each release to an asset manager is part of a *bona fide* AMA, *i.e.*, that the capacity included in the release is not simply unneeded capacity, but is capacity which the releasing shipper has a continuing need to use for its own business purposes. However, if the delivery/purchase obligation in Scana's example did not apply to the full amount of the upstream released capacity, the releasing shipper could include in the upstream capacity release capacity that it does not need for its own legitimate business purposes during the term of the release. It is the Commission's position that the asset manager's delivery/purchase obligation must apply to the full contract demand under each capacity release in the transportation chain. Thus, while Scana is correct that the delivery/purchase obligation is not cumulative of the capacity in a released chain of contracts that constitute a single capacity path, there is still a delivery/purchase obligation up to the contract demand of each specific contract.

88. Scana and BP also seek clarification that where both storage capacity and transportation capacity are combined in an AMA that the storage and transportation obligations are not cumulative. As with upstream and downstream transportation capacity on several pipelines, the delivery obligation of the AMA is not cumulative of the storage capacity and the transportation capacity used to transport the gas to or from storage, but to qualify for the exemptions the asset manager must meet the necessary obligation under each separate agreement.

C. Exemption From Bidding for AMAs

89. In Order No. 712, the Commission exempted pre-arranged releases to implement AMAs from the bidding requirements of section 284.8 of its regulations. The Commission concluded that, in the AMA context, the bidding requirement creates an unwarranted obstacle to the efficient management of pipeline capacity and supply assets. The Commission noted that all capacity releases made to implement AMAs are pre-arranged because it is important that a releasing shipper be able to use the asset manager of its choice to effectuate the components of the agreement. Unlike a normal capacity release where the releasing shipper is often shedding excess capacity and has no intention of an ongoing relationship with the replacement shipper, in the AMA context the identity of the replacement shipper is often critical because it will manage the releasing shipper's portfolio for some time into the future. The Commission determined that because the asset manager will manage the releasing shipper's gas supply operations on an ongoing basis, it is critical that the releasing shipper be able to release the capacity to its chosen asset manager. Requiring releases made in order to implement an AMA to be posted for bidding would thus interfere with the negotiation of beneficial AMAs by potentially preventing the releasing shipper from releasing the capacity to its chosen asset manager. Moreover, AMAs at their core entail a bundling of commodity sales with capacity release. As a result, it is difficult to have meaningful bidding on the released capacity as a stand-alone component of the arrangement because the values of the commodity and capacity components of the arrangement are not easily separated. The Commission thus concluded that the benefits of facilitating AMAs outweigh any disadvantages in exempting such releases from bidding.

90. The final rule provided that the exemption from bidding will apply to all releases to asset managers made for the purpose of implementing an AMA, regardless of the term of the AMA and whether the release is subject to the price ceiling. The rule also provided that the exemption from bidding for AMAs applies to all releases to an asset manager, including those made for the purpose of extending a short-term AMA. The Commission determined that the rationale for exempting releases to an asset manager from bidding applies equally to releases made for the purpose of extending a short-term AMA as to any other release to an asset manager. In all such releases, the identity of the asset manager is critical to the releasing shipper, because the releasing shipper will be relying on the asset manager to obtain its gas supplies. The Commission concluded that as with any other release to an asset manager, requiring releases made for the purpose of extending a short-term AMA to be posted for bidding could interfere with the negotiation of beneficial AMAs by potentially preventing such releases to be made to the releasing shipper's chosen asset manager. The final rule also extended the blanket exemption from bidding granted to AMAs to capacity releases made to a marketer participating in a state approved retail access program.

91. No party requests rehearing of the Commission's decision to exempt all releases to asset managers or marketers participating in retail unbundling programs from bidding. However, several parties filed requests for rehearing/clarification of the revised regulations the Commission adopted in order to implement that decision. Under Order No. 712, section 284.8(h)(1) exempts from the notification and bidding requirements in paragraphs 284.8(c) through (e): ''a release of capacity by a firm shipper to a replacement shipper for any period of 31 days or less, a release of capacity for more than one year at the maximum tariff rate, a release to an asset manager as defined in (h)(3) of this section, or a release to a marketer participating in a state-regulated retail access program as defined in (h)(4) of this section.'' Section (h)(2) provides that ''When a release of capacity for 31 days or less is exempt from bidding requirements under paragraph (h)(1) of this section a firm shipper may not roll-over, extend, or in any way continue the release without complying with the requirements of paragraphs (c) though (e) of this section, and may not re-release to the same replacement shipper under this paragraph at less than the maximum tariff rate until 28 days after the first release period has ended.''

92. The AGA, INGAA and Spectra request that the Commission clarify that the prohibition contained in section 284.8(h)(2) of the regulations against rollovers and re-releases without bidding to the same party within 28 days does not apply to AMAs or to releases pursuant to state mandated retail access programs.[88] They contend that while the rule generally exempts releases to implement AMAs and releases for retail choice marketers from bidding under section 284.8(h)(1), it is unclear whether the prohibition on rollovers in section 284.8(h)(2) applies to such releases that are for a term of 31 days or less. AGA notes that AMAs or retail choice releases may in many instances be for 31 days or less, and that

[87] Scana at 5 and n. 5 (citing *Promotion of a More Efficient Capacity Release Market,* Notice of Proposed Rulemaking, 72 FR 65,916 (November 27, 2007), FERC Stats. & Reg. ¶ 32.625 at P 9 and n. 92 (2007)).

[88] AGA at 6, INGAA request for clarification at 1.

to require competitive bidding to extend such releases would frustrate the final rule's goal of fostering such arrangements.

93. The Commission clarifies that the prohibition in section 284.8(h)(2) on rolling over a 31 day or less release to the same replacement shipper without bidding does not apply to AMAs or to releases pursuant to a state approved retail access program.[89] As stated in the rule, the regulatory language of section 284.8(h)(2) was designed so that the prohibition on extending exempt releases without bidding only applied to the first category of releases exempted from bidding by section 284.8(h)(1), namely releases of 31 days or less. The Commission intended by this language that releases pursuant to the other categories in section 284.8(h)(1), *i.e.*, releases for more than a year at maximum rate, releases to implement AMAs and releases to marketers participating in state retail access programs, would not be subject to the prohibition on extensions without bidding. The Commission's goal in the rule was to facilitate AMAs and state unbundling programs that would give retail end-users a greater choice of suppliers by generally exempting certain releases from its bidding requirements. The Commission did not intend to require bidding to extend such releases that are for 31 days or less. Accordingly the Commission clarifies that AMAs and releases pursuant to state approved retail access programs are not subject to the section 284.8(h)(2) prohibitions on extending releases without bidding.

94. The Commission is also revising the regulatory text of sections 284.8(h)(1) and (2) so as to more clearly limit the section 284.8(h)(2) prohibition on rollovers, extensions and re-releases to the same shipper without bidding to release transactions that were exempt from bidding solely by virtue of the fact they were for a term of 31 days or less. As revised, section 284.8(h)(1) separately sets forth each category of release that qualifies for an exemption from bidding as follows:

(h)(1) The following releases need not comply with the bidding requirements of paragraphs (c) through (e) of this section:

(i) A release of capacity to an asset manager as defined in paragraph (h)(4) of this section;

(ii) A release of capacity to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(5) of this section;

(iii) A release for more than one year at the maximum tariff rate; and

(iv) A release for any period of 31 days or less.

As revised, the section 284.8(h)(2) prohibition on re-releases to the same shipper without bidding will only apply: ''When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section.'' (*i.e.* is for 31 days or less).

95. Several parties also seek two clarifications with regard to section 284.8(h)(2) as it applies to releases of 31 days or less that do not qualify for the AMA or retail unbundling exemptions from bidding.[90] Their concerns focus on the language in section 284.8(h)(2) prohibiting re-releases ''to the same replacement shipper under this paragraph at less than the maximum tariff rate until 28 days after the first release period has ended.'' First, BP seeks clarification that this language does not prevent a releasing shipper from releasing the same capacity to the same replacement shipper for another consecutive period of 31 days or less if the releasing shipper subjects that capacity to the Commission's posting and bidding requirements.

96. The Commission grants this clarification. Order No. 712 did not change the language of section 284.8(h)(2) concerning the prohibition on re-releases to the same replacement shipper, which was originally adopted in Order No. 636–A. By its terms, that prohibition only applies to re-releases ''under this paragraph,'' namely to re-releases pursuant to the exemption from bidding for 31-day or less releases contained in paragraph (h) of section 284.8. Therefore, the prohibition on re-releases to the same replacement shipper does not apply to re-releases made pursuant to the notice and bidding requirements in paragraphs (c) through (e) of section 284.8. As Order No. 636–B explained, the purpose of the prohibition on re-releases to the same shipper until 28 days after the first release was ''to protect the integrity and allocative efficiency of the capacity release mechanism by preventing parties from avoiding the bidding requirement by extending short-term releases.''[91] That purpose is satisfied so long as the re-release to the same replacement shipper is subject to bidding.

97. Second, INGAA, Spectra, Williston, NGSA and EPSA note that Order No. 712 retained the existing language of section 284.8(h)(2) that limits the 28-day prohibition on re-releases to the same shipper without bidding to re-releases ''at less than the maximum tariff rate.'' Those seeking clarification assert that the retention of this language is potentially inconsistent with the Commission's decision to remove the price ceiling on short term capacity releases of a year or less. They state that the language limiting the 28-day prohibition on rolling over releases of 31 days or less without bidding to re-releases ''at less than the maximum tariff rate'' could be read to permit re-releases to the same replacement shipper without bidding for periods of a year or less if the release rate is at or higher than the pipeline's maximum recourse rate. Therefore, they seek clarification that all re-releases for a period of a year or less, which are no longer subject to a maximum ceiling rate, must be subject to bidding, regardless of the release rate. INGAA and Spectra also seek clarification that the ''at less than maximum tariff rate'' language now applies only in the context of re-releases for more than one year to which the maximum rate ceiling still applies.

98. The Commission grants clarification. Because Order No. 712 removed the maximum rate ceiling for all releases of one year or less, all such releases must be subject to bidding, unless they qualify for exemptions from bidding for: (1) Releases of 31 days or less, (2) releases to asset managers, or (3) releases to marketers participating in a state regulated retail access program. The exemption from bidding for releases at the maximum tariff rate is only applicable to releases of more than a year, because only those releases are subject to a maximum tariff rate. Therefore, a capacity release that was not subject to bidding pursuant to the exemption for releases of 31 days or less may not be rolled over to the same replacement shipper without bidding until 28 days after the end of the first release period, unless the re-release is for more than a year at the maximum rate and thus qualifies for the exemption from bidding for maximum rate releases.

99. Consistent with the revisions to section 284.8(h)(1) set forth above, and the various clarifications discussed above, the Commission has determined to modify section 284.8(h)(2) so as to more clearly state its intent. As revised, section 284.8(h)(2) reads as follows:

(h)(2) When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section, a firm shipper may not roll over, extend or in any way continue the release to the same replacement shipper using the 31

[89] Indeed the Commission expressed this intention for AMAs in the rule itself, when it stated that the exemption from bidding for AMAs applies to all releases to an asset manager, ''including those made for the purpose of extending a short-term AMA.'' Order No. 712 at P 135.

[90] *See e.g.,* INGAA clarification request at 2, Spectra at 37, NGSA and EPSA at 10, and BP at 8.

[91] Order No. 636–B, 61 FERC ¶ 61,272 at 61,995.

days or less bidding exemption until 28 days after the first release period has ended. The 28-day hiatus does not apply to any re-release to the same replacement shipper that is posted for bidding or that qualifies for any of the other exemptions from bidding in paragraph (h)(1).

100. This revised language ensures that a release of 31 days or less, which was exempt from bidding solely pursuant to the exemption for short term transactions, may not be rolled over to the same replacement shipper until at least 28 days after the first release period has ended, unless (1) the releasing shipper posts the new release for bidding or (2) the new release qualifies for one of the three other exemptions from bidding. In order to qualify for the maximum rate exemption from bidding, the re-release must be for a term of more than a year. The releasing shipper could release the capacity to another shipper under the bidding exemption for releases of 31 days or less, as stated in Order No. 636–B.[92]

D. Posting and Reporting Requirements

101. In Order No. 712, the Commission revised its regulations to include new posting requirements for capacity releases to implement AMAs. Specifically, the Commission determined that any posting under section 284.13(b) that relates to a release to implement an AMA should include (1) the fact that the release is to an asset manager and (2) the delivery or purchase obligation of the AMA, in addition to the information required to be posted for all capacity releases. The Commission reasoned that the requirement of an asset manager to deliver or purchase gas to fulfill the releasing shipper's supply or marketing obligations is the cornerstone for differentiating AMAs from standard capacity releases. In order to ensure that capacity releases posited as AMAs eligible for the exemptions from tying and bidding are *bona fide* AMAs, the Commission must have a means to monitor this critical component of the arrangement. Accordingly the Commission revised section 284.13(b)(1) of its regulations to add a new subsection (x) specifying that a posting of any capacity release meant to implement an AMA must specify the volumetric level of the replacement shipper's delivery or purchase obligation and the time periods during which that obligation is in effect. The Commission also added new subsection (xi) requiring that a release to a marketer participating in a state regulated retail access program must be so identified in the posting. The Commission noted that existing regulations required parties to identify asset managers and agents in the index of customers. The Commission further stated that parties are not required to include commercially sensitive aspects of AMAs. Certain parties seek rehearing and/or clarification of these parts of Order No. 712.

1. Posting Requirements

102. Marketer Petitioners request reconsideration concerning the information required to be posted in connection with a release of capacity associated with an AMA under Order No. 712.[93] Marketer Petitioners submit that the specific days/months during which an AMA manager's delivery/purchase obligation is in effect should not have to be posted in the release. Instead, they assert that the fact the release is associated with an AMA, the identity of the asset manager, and the fact that the asset manager's delivery/purchase obligation is for the requisite quantity and time period should be adequate to demonstrate that the release is associated with a *bona fide* AMA. Marketer Petitioners argue that posting the specifics of the delivery/purchase obligation may result in disclosure of competitive and commercially sensitive information that will reduce the flexibility of parties in structuring AMAs.

103. The Commission denies the reconsideration request. As noted above, the Commission in Order No. 712 found that the delivery/purchase obligation is the foundation for differentiating AMAs from standard capacity releases, and that the Commission needed a way to accurately monitor this component of an AMA. Thus the Commission revised its regulations to include the specifics of what it deemed necessary to execute this monitoring function. Marketer Petitioners assert that it is adequate to include the fact that the manager's delivery/purchase obligation is for the requisite quantity and time period to demonstrate the validity of the AMA, but they do not state how those facts can be discerned without information regarding the volumetric level of the obligation and the time periods that it will be in effect. Further, Marketer Petitioners claim that posting of specific dates will potentially result in disclosure of commercially sensitive information but provide no details as to how such information is commercially sensitive. The Commission finds that it is important for determining the validity of *bona fide* AMAs that it and the public can see and review the details of how the release qualifies as an AMA under the definition. The Marketer Petitioners' request is thus denied.

2. Index of Customers

104. Several parties seek clarification that the Commission did not intend to amend its regulations pertaining to the Index of Customers.[94] They note that in Order No. 712 the Commission revised certain of its regulations concerning the posting and reporting requirements for AMAs under the new rule. In that discussion the Commission stated that ''sections 284.13(c)(2)(viii) and (ix) require that the pipeline's index of customers include the name of any agent or asset manager managing a shipper's transportation service and whether that agent or asset manager is an affiliate of the releasing shipper.'' [95] The parties point out that the actual language in the referenced regulation relating to affiliate relationships requires the reporting on the index of customers of any ''affiliate relationship between the *pipeline* and a shipper's asset manager or agent.'' 18 CFR 284.139(c)(2)(ix) (*emphasis added*). They seek clarification that the discussion in the preamble is not intended to modify the language of section 284.13(c)(2)(ix) concerning the Index of Customers.

105. The Commission clarifies that the discussion in Order No. 712 inadvertently misstated the regulation and that the Commission did not intend to change the language or impact of section 284.13(c)(2)(ix), nor as the parties note, did the Commission make any revisions to that section in Order No. 712. Therefore, pipelines will not be required to state in their Index of Customers whether there is an affiliate relationship between the releasing shipper and its asset manager. However, the Commission notes that existing section 284.13(b)(ix) requires that the pipeline's posting of capacity release transactions include a statement ''whether there is an affiliate relationship between * * * the releasing and replacement shipper.'' Therefore, the pipeline's transactional reports will indicate whether the releasing shipper and any asset manager to which it releases capacity are affiliated. The Commission also notes that section 284.13(c)(2)(viii) does require that the index of customers include the name of any agent or asset

[92] Order No. 636–B, 61 FERC at 61,995.

[93] Marketer Petitioners at 8–9.

[94] *See*, INGAA at 3, Iroquois at 7, Spectra at 38, Williston at 18.

[95] Order No. 712 at P 172.

manager managing a shipper's transportation service.[96]

106. INGAA seeks clarification that the posting requirements for capacity releases under AMAs apply only to capacity releases initiated and reported to the pipeline after the effective date of Order No. 712. The Commission so clarifies. Nothing in Order No. 712 indicates that any provision would take effect retroactively. Further, no capacity releases to implement AMAs under Order No. 712 are valid until the effective date of the rule. Accordingly, pipelines need only report capacity releases that are meant to implement AMAs under Order No. 712 after the effective date of the rule.

E. Miscellaneous AMA Issues

107. The NGSA requests that the Commission clarify that on days when the releasing shipper has a right to call upon the asset manager to deliver or purchase gas under an AMA, the parties may specify a nomination deadline no earlier than the 8 a.m. on the weekday morning before gas flows, after which the asset manager may release any capacity not wanted by the releasing shipper without recall in order to maximize the value of the capacity.[97] The NGSA asserts that as written, Order No. 712 requires the asset manager to provide the releasing shipper an absolute call on the full contract volume of the released capacity on every day of the five month minimum period. According to the NGSA, a strict reading of the shipper's right would require an asset manager to re-release the capacity subject to recall during each day of the delivery/purchase obligation period, thereby limiting the value of the capacity and the AMA.

108. The NGSA submits that one way to address this issue is for the Commission to allow the parties to an AMA to agree to a specific nomination deadline after which the asset manager would be free to market the capacity without any recall rights. NGSA asserts that nomination deadlines are regular features of AMAs and may be fixed at various times depending on the needs of the parties and pipeline specifications, and that 8 a.m. on the weekday before gas flows is a commonly used deadline. Under such a scenario, the releasing shipper may call upon the replacement shipper for the full contract volume until the nomination deadline. In the event that the releasing shipper knows the day before, however, that it does not need all or some portion of the capacity at the nomination deadline, the asset manager would be free to release the unwanted capacity without any recall rights, thus maximizing the value of the capacity to the mutual benefit of both the releasing shipper and the asset manager.

109. The Commission grants NGSA's clarification request to allow the parties to an AMA to specify a deadline in their AMA agreement after which the asset manager may re-release the capacity without attaching a recall provision. This deadline may be no earlier than 8 a.m. on the weekday before gas flows. As noted by NGSA, allowing the parties to establish a deadline after which the releasing shipper can no longer exercise its recall right is consistent with the Commission's goal of maximizing the value of capacity released pursuant to an AMA. The Commission finds limiting the ability to determine a deadline to no earlier than 8 a.m. on the weekday prior to gas flow is reasonable as a means of providing this flexibility while ensuring that parties do not utilize the deadline as a means of essentially vitiating the delivery purchase obligation of the AMA.[98]

110. BP requests clarification that a releasing shipper may include more capacity in its AMA than it has previously used to supply its natural gas needs.[99] BP notes that in Order No. 712 the Commission supported the delivery/purchase obligation for AMAs by referring to the fact that an asset manager should be able to reasonably forecast a releasing shipper's needs based on historical usage. BP contends that because in nearly all cases shippers acquire capacity for use as a mechanism for gas supply, a releasing shipper should be able to include its portfolio of assets making up an AMA transportation capacity that it owns, not only that capacity historically used to meet past peak day demands or to transport supply. It asserts that entities on both the supply and demand side typically purchase and hold capacity in excess of its historic gas needs.

111. The Commission grants the requested clarification. In referring to an asset manager's ability to make reasonable judgments about the releasing shipper's demand or supply requirements the Commission did not in any way limit the capacity that could be included in an AMA to that reflected by historical usage. A releasing shipper may include more capacity in an AMA than it has previously used to meet its needs, provided that the releasing shipper owns that capacity and that the delivery/purchase obligation in the AMA applies to all the capacity included in the AMA.

112. Marketer Petitioners seek clarification that a release of AMA capacity by an asset manager to another asset manager is eligible for the exemptions under section 284.8(h)(3) of the regulations.[100] They point out that different asset managers have expertise in different markets, and thus may desire to work cooperatively with other asset managers to maximize the value of the capacity. One way for this to occur is for one asset manager to re-release capacity received from the original releasing shipper to a second asset manager.

113. The Commission clarifies that an asset manager may release capacity it obtained as part of an AMA to another asset manager. Provided each release is made to implement an AMA and satisfies the delivery/purchase obligation and other criteria in the definition of AMA, such releases would qualify for the exemptions granted by Order No. 712 to AMAs.

114. BP seeks clarification that any entity holding interstate transportation capacity may enter into an AMA as a releasing shipper, including wholesale marketers. BP cites to Order No. 712 and the Commission's statement that the definition adopted in the rule was meant to be flexible enough so that it ''does not limit the type of party that can enter into an AMA.'' The Commission grants clarification. As BP itself points out, the definition was meant to be flexible enough so as to not limit the type of entities that could take advantage of AMAs so long as the criteria in the definition are satisfied.

III. State Mandated Retail Unbundling

115. In Order No. 712, the Commission determined that capacity releases by LDCs to implement state approved retail access programs should be granted the same blanket exemptions from the prohibition against tying and the bidding requirements as capacity releases made in the AMA context. The

[96] Spectra also requests clarification that the Commission's statement in P 136 of Order No. 712, stating that the existing requirements referenced in section 284.13(c)(2)(viii) (Index of Customers) of the regulations still apply with regard to identifying asset managers, which was followed by a statement that the Commission was adding a requirement to post the asset manager's delivery obligation to the releasing shipper, did not intend to add any requirements to the index of customers. The Commission so clarifies. The Commission clearly stated in that paragraph that the new reporting requirements were ''in addition'' to the existing requirements under the index of customers.

[97] NGSA at 6.

[98] The Commission notes that 8 a.m. on the day before gas flows is consistent with the current North American Energy Standards Board (NAESB) standard for notification by the releasing shipper of a recall of capacity. *See* NAESB Standard 5.3.44.

[99] BP at 3.

[100] Marketer Petitioners at 12.

Commission found that state retail unbundling programs that give retail end-users a greater choice of suppliers from whom to purchase their gas provide benefits similar to AMAs. Accordingly, the Commission clarified in Order No. 712 that the prohibition against tying does not apply to releases by an LDC to a marketer that agrees to sell gas to the LDC's retail customers under a state approved retail access program. The Commission also amended section 284.8(h) in order to provide an exemption from bidding for such releases. Under Order No. 712, in order to qualify for the exemption, the capacity release must be used by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the LDC that provides delivery service to such retail consumers. The Commission also stated that the exemption does not apply to re-releases made by marketers participating in the retail access program.

116. The AGA seeks clarification that consecutive short-term releases to a marketer participating in a state-regulated retail access program will not be considered a long-term release subject to the maximum rate ceiling.[101] The AGA states that pursuant to the state approved programs local distribution companies typically release capacity to the same retail marketers on a monthly or other regular basis. AGA contends that consecutive short term releases to a retail marketer under a state approved program are different than long-term transactions because a retail marketer is generally only eligible to contract for released capacity to the extent of its market share and the short term releases often vary with each separate transaction based on changes to the marketer's share of the retail market or the source of the released capacity.

117. The Commission grants clarification. In the circumstances described by AGA, consecutive short-term releases to the same marketer are appropriately treated as separate short-term releases not subject to the maximum rate ceiling. Marketers taking these releases have no continuing right to any particular capacity from one release to the next. Rather, the amount of capacity released to each marketer is dependent upon their continuing participation in the retail access program and varies with their market share. There is nothing in the Commission's current regulations or the revisions in this order that would lead the Commission to deem such a series of short term releases under a state program to be a single long-term release.

118. Marketer Petitioners request that the Commission clarify that a marketer participating in a state approved retail access program can re-release its capacity to an asset manager that will fulfill the marketer's obligations under the state approved program.[102] The Commission grants clarification. The statement in Order No. 712 that the exemptions afforded to marketers participating in state approved retail access programs did not apply to re-releases made by such marketers was referring to a re-release that was a standard capacity release, not a re-release to an asset manager. As clarified above, an asset manager may re-release to a second asset manager and if the release satisfies the criteria of the AMA definition, the exemptions will apply. Likewise, a marketer participating in a state regulated retail access program may re-release to an asset manager and the second release will qualify for the exemptions afforded AMAs as long as it meets the necessary requirements.

119. BP seeks clarification that a marketer participating in a retail unbundling program can use its released capacity to serve customers who are not subject to the retail access program during periods when the capacity is not needed to serve retail access customers. BP contends that such use of excess capacity would facilitate the efficient use of capacity and put retail access providers in a position comparable to that of asset managers.

120. The Commission grants clarification. In establishing the exemptions for AMAs the Commission found in part that AMAs were beneficial because they would encourage maximum use of capacity during periods when it was not needed by the releasing shipper. Similarly, alternative use of capacity by a marketer participating in a retail access program during periods when that capacity is not needed to serve the retail access customers' needs promotes the efficient use of capacity.

121. BP also seeks clarification that a wholesale supplier who obtains capacity directly from an LDC as part of an unbundling program but who is not a marketer under the program nevertheless qualifies for the tying and bidding exemptions.[103] As the Commission understands this request by BP, it seeks the exemptions afforded to retail access marketers for a release of capacity to a wholesale supplier, who will in turn sell gas to the retail access marketer. In other words, BP seeks the exemption for an entity that is one-step removed from the situation under which Order No. 712 grants exemptions from tying and bidding.

122. The Commission declines to grant BP's request in this generic rulemaking proceeding. As noted, BP requests the Commission to approve a specific deal structure that does not meet the criteria under which the rule generally grants exemptions. BP is free to file separately on a case-by-case basis for approval of individual arrangements that it believes may merit a waiver of the Commission's bidding and tying strictures.

123. Lake Apopka Natural Gas District, Florida (Lake Apopka) filed a late request for clarification, or reconsideration, requesting the Commission clarify that the blanket exemptions from tying and bidding granted for releases made as part of a state approved retail access program apply equally to self-regulated municipals. Lake Apopka states that it is a special district created by the state of Florida and authorized to transport and distribute natural gas to its member municipalities and to other municipalities. Lake Apopka states that its rates and terms of service are not subject to regulation by the Florida Public Service Commission. Lake Apopka currently does not have a retail access program and provided no information in its pleading as to the way in which such a program would be structured and whether it would have protections comparable to state governmental review.

124. The Commission denies Lake Apopka's request. As noted, the Commission's bidding requirements and its prohibition against tying are meant to ensure a transparent, liquid, and non-discriminatory wholesale energy market. In cases where retail access programs have been reviewed and approved by state regulators, there is a sound basis to believe that retail access and wholesale access programs are working toward common goals of promoting customer choice and competition, subject to state supervision and oversight. State regulators can review a proposed program and establish essential conditions to ensure that a local utility monopoly does not create a retail access program that transfers its market power to an unregulated affiliate at the expense of local retail ratepayers and nearby wholesale market competitors.

125. From the information provided, it appears that these protections are lacking in the situation described by

[101] AGA at 9.

[102] *Id. See also* BP at 8–9.

[103] BP at 9.

Lake Apopka. The Commission's determination in Order No. 712 was not intended to apply to such wholly unregulated entities and the Commission declines to revise its regulations to grant a blanket exemption in this rulemaking proceeding. The Commission is open to considering waiver requests on this issue on a case-by-case basis if presented to us in a fully justified proposal.

126. Vector Pipeline LP (Vector) filed a request for clarification or in the alternative rehearing asking that the Commission clarify that Canadian provincial retail unbundling programs will be treated the same as state unbundling programs under Order No. 712. Vector notes that Order No. 712's exemption from bidding for state-regulated open access programs defines a state retail unbundling program as one ''approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail customers.'' [104] Vector states that it does not oppose the exemption but contends that the Commission should clarify that it also applies to programs authorized by a province in Canada. Vector states that it has firm shippers on its system that have participated in a retail unbundling program authorized by the Province of Ontario and that the Commission has previously treated such Canadian programs identical to state retail unbundling programs.[105]

127. The Commission grants clarification. As noted by Vector, during the period when the price cap on short-term releases was removed pursuant to Order No. 637, the Commission granted Union Gas, a firm shipper on Vector's system, a waiver of the Commission's posting and bidding requirements to further its efforts to participate in a provincial retail unbundling program similar to waivers the Commission issued for domestic LDCs to participate in state approved retail unbundling programs during the same period. The Commission finds that its rationale in equating Canadian provincial retail unbundling programs with state approved retail access programs for the purposes of Order No. 637 applies equally to Order No. 712's bidding exemption for such programs. Accordingly, the Commission clarifies that Canadian provincial retail unbundling programs will be treated the same as state unbundling programs for purposes of the bidding exemption for state-regulated retail unbundling programs under Order No. 712.

IV. Tying of Storage Capacity and Inventory

128. In Order No. 712, the Commission granted an exception to its prohibition on tying to allow a releasing shipper to include conditions in a release concerning the sale and/or repurchase of gas in storage inventory outside the AMA context. The Commission reasoned that in the storage context, storage capacity is inextricably attached to the gas in storage, and that by allowing releasing shippers to condition the release of storage capacity on the sale and or repurchase of gas in storage inventory and on there being a certain amount of gas left in storage at the end of the release, the Commission would enhance the efficient use of storage capacity while at the same time ensuring that the releasing shipper would have gas in storage for the winter.

129. The AGA requests clarification that the exemption from the tying prohibition applies to other terms and conditions related to the purchase and sale of storage gas in inventory.[106] It argues that such an exemption is akin to the clarification for AMAs that the tying exemption applies to all other agreements necessary to implement the agreement.[107] AGA notes as an example that credit requirements may be necessary to address the risks associated with transferring substantial amounts of commodities, particularly storage gas. AGA states that given the large quantities of gas in storage sought to be transferred and the high commodity prices in today's marketplace, a bidder that is creditworthy for purposes of pipeline transportation service may not be sufficiently creditworthy to provide security for commodity transfers. AGA suggests that the current creditworthy provisions contained in pipeline tariffs only cover the risks associated with failure of shipper to pay for capacity and are likely inadequate to address commodity transfer risks.

130. The Commission agrees that in the situation where a release of pipeline capacity is tied to storage inventory, existing pipeline creditworthy provisions may not be adequate to cover the risks associated with the transfer of large amounts of storage gas. As the AGA points out, given the relatively high prices of commodities in today's natural gas marketplace, a bidder that is creditworthy relative to the risks associated with pipeline services may not be creditworthy in terms of being able to secure large quantities of storage gas. The Commission has recognized elsewhere the difference between the potential values of pipeline services as opposed to the value of the commodity.[108] Accordingly, the Commission clarifies that with regard to a storage release that includes a condition regarding the sale and/or repurchase of gas outside the AMA context as authorized by Order No. 712, the parties may negotiate further terms and conditions related to the commodity portion of the transaction, and such agreements shall not be subject to the prohibition against tying of extraneous conditions.

131. BP seeks clarification on several aspects of the storage tying exception. First, BP seeks clarification that the Commission's statement that it would allow the releasing shipper to require the replacement shipper to take title to the gas in storage does not require that the replacement shipper actually pay the releasing shipper for gas in storage in situations where the replacement shipper will return the capacity to the releasing shipper with an equivalent amount of gas in storage. According to BP parties may make arrangements where the payment of consideration is deferred until no later than when the storage capacity is returned to the releasing shipper.

132. The Commission grants clarification. Order No. 712 is intended to permit parties flexibility in structuring storage release arrangements. It is reasonable that these arrangements may at times involve in-kind transfers of gas in lieu of monetary payments.

133. BP also requests clarification that when the Commission stated that it was providing an exception from the tying prohibition to allow a releasing shipper to include conditions in a release concerning the sale and/or repurchase of gas in storage inventory even outside the AMA context, that it did not mean to limit the allowed ties to the examples provided, *i.e.*, transfer of title to gas in storage and return of a specified amount of gas. BP asserts that those are only two of the potential ties between storage capacity and inventory and that other extraneous conditions exist that contain the same inextricable link between storage capacity and gas in storage, such as a call option on gas in storage.[109] BP

[104] Vector at 1.

[105] *Id.* (citing, *Union Gas Ltd.,* 93 FERC ¶61,074 (2000)).

[106] The Commission in Order No. 712 clarified that if an AMA meets the essential elements of the definition of AMAs, then the tying exemption applies to all other agreements necessary to implement the AMA. Order No. 712 at P 171.

[107] AGA at 9.

[108] *See e.g., Gulf South Pipeline Co., LP,* 103 FERC ¶61,129, at 61,422 (2003).

[109] BP at 7 and n.14.

asserts that the Commission should allow ties other than those specified in the rule.

134. The Commission acknowledges that there may be different means by which parties may effectuate a transfer of title to the gas in storage, or that parties may desire, as BP suggests, to allow for an option for the releasing shipper to require the replacement shipper to sell the gas in storage back to the releasing shipper if it needs to use the storage gas. The Commission thus clarifies that parties may utilize different methods to transfer the title to the gas and may include such a method as a condition in a combined storage capacity and inventory release. The Commission's clarification, however, is limited to ties related to the gas in storage. If parties desire to condition storage releases on non-commodity related items, then such parties should file separately with the Commission for approval of those transactions.

135. BP also seeks clarification for the following three scenarios regarding how storage releases that include conditions concerning storage inventory should be posted for bidding:

(i) if no pre-arranged replacement shipper exists but the releasing shipper has established a purchase price for the gas, the posting for the capacity must include the purchase price and all bids will be based on an equivalent purchase price so that the winning replacement shipper will be decided solely upon the competing bids for the capacity itself;

(ii) if a pre-arranged shipper exists, the posting will include the purchase price for the gas offered by the pre-arranged shipper, and any competing bids must be based on an equivalent purchase price so that the winning replacement shipper will be decided solely upon the competing bids for the capacity itself; or

(iii) if no purchase price has been established by the releasing shipper and/or offered by a pre-arranged shipper, the posting will indicate that the winning bid will be based solely upon the offers made on the capacity itself, along with a condition subsequent providing that the parties will mutually agree on a purchase price for the gas after the award.

136. BP states that in situation (iii), if the parties are unable to mutually agree upon a price, the award will be voided and the capacity may be re-posted by the releasing shipper.[110]

137. BP asserts that if the condition on the replacement shipper is the purchase of remaining gas in storage, then the consideration to be paid for the capacity and the price of the gas both become economic factors for the transaction. BP states that the intent of its request for clarification of the examples is to make the capacity the only economic factor to be evaluated for purposes of competitive bidding.

138. The Commission agrees with BP that the only factor that should be considered for competitive bidding purposes in the context where storage capacity is tied to storage inventory is the capacity. This is because the bidding requirements in the Commission's regulations only apply to capacity releases and must result in a rate that the replacement shipper will pay to the pipeline for services using the released capacity. With regard to how releases with conditions concerning storage inventory may be posted, Commission policy allows releasing shippers to include in capacity release postings reasonable and non-discriminatory terms and conditions, provided that all such terms and conditions are posted on the pipeline's EBB, are objectively stated, are applicable to all potential bidders, and relate solely to the details of acquiring capacity on interstate pipelines.[111] BP's first two suggestions for posting scenarios appear consistent with these requirements. The third, however, could be problematic in light of the fact that the commodity price would not be posted or objectively stated.

V. Liquefied Natural Gas

139. In Order No. 712, the Commission rejected a request that parties be allowed to link throughput agreements and/or sales of gas at the outlet of an NGA Section 3 liquefied natural gas (LNG) terminal with a prearranged capacity release on an interstate pipeline connected to the terminal, akin to the exemption for AMAs that allows the tying of released capacity to gas sales agreements. Several parties [112] had argued that LNG importers often hold firm capacity on interstate pipelines adjacent to the terminals to ensure that re-gasified LNG can exit the terminal efficiently and be transported to the markets on the interstate pipeline grid. The requesting parties suggested that the Commission should recognize and permit the natural link between an LNG terminal throughput agreement and an agreement to release downstream pipeline capacity and clarify that such a tie is permissible.

140. The Commission declined to grant the LNG importers' request in Order No. 712. The Commission noted that Order No. 712 permitted the use of supply side AMAs and that LNG importers holding firm capacity on interstate pipelines connected to an LNG terminal were free to use a supply AMA. The Commission also found that the requesters had not provided adequate detail on the types of transactions for which they were requesting the exemptions to explain why a further exemption beyond that provided for supply AMAs is required for LNG facilities, and that it was unclear from their comments how far downstream they sought to have the exemption apply. The Commission also found that the record was insufficient to evaluate the possible benefits of the requested exemption or the effect on open access competition that such an exemption might have. The Commission stated that it was open to considering waiver requests on the issue on a case-by-case basis if presented to it in a fully justified proposal.

141. Several parties seek rehearing of the Commission's decision. The LNG Petitioners argue that the Commission erred in declining to grant the requested clarification that it would be a permissible tie for permit holders of capacity at an LNG terminal to link throughput agreements and/or sales of gas at the outlet of an LNG terminal with a pre-arranged capacity release on an interstate pipeline directly connected to the LNG terminal, or alternatively to provide an exemption for such transactions.[113] They also contend that the Commission erred by not granting an exemption from bidding for capacity releases included in such transaction. They assert the Commission erred further by concluding that LNG and pipeline capacity holders could instead use supply side AMAs, and that it was unreasonable for the Commission to grant tying and bidding exemptions for releases to implement AMAs and retail state unbundling programs but not for LNG capacity holders. Shell LNG makes similar arguments and the NGSA states that the exemption should be granted.

142. The LNG Petitioners state that they have contracts with the owners of U.S. LNG terminals to use the capacity of those terminals to receive, store and regasify LNG. The LNG Petitioners also hold transportation capacity on open access interstate pipelines directly connected to the LNG terminal. Some of the terminals provide open access service pursuant to part 284 of the Commission's regulations. Other terminals are not open access, as

[110] BP at 5–6.

[111] Order No. 636–B at 61,996 (citing Order No. 636–A at 30,557).

[112] Statoil and Shell LNG.

[113] In earlier comments the LNG Petitioners had requested only an exemption from the prohibition against tying. In their rehearing request, they now also seek an exemption from bidding because Order No. 712 removed the rate ceiling for short term releases. LNG Petitioners at 7, n. 20.

permitted by the Commission's *Hackberry* policy.[114]

143. The LNG Petitioners explain that they have been unable to enter into long-term contracts to purchase enough LNG from LNG suppliers, so that the LNG Petitioners can use their terminal and pipeline capacity for their own LNG. However, they assert that some LNG suppliers, including state-owned gas and oil companies and European and Asian utilities with significant natural gas reserves, are willing to negotiate arrangements under which the LNG Petitioners would, in essence, release both their terminal and interstate pipeline capacity to the LNG suppliers. The LNG suppliers would then use that capacity to import their own LNG into the United States, and they or their marketing affiliates would resell the regasified LNG in the downstream U.S. natural gas market. The LNG suppliers' use of the capacity would be sporadic, because it would depend on whether spot market gas prices and demand in competing markets justifies importing a particular LNG cargo into the U.S. The LNG Petitioners do not state what the term of these arrangements is likely to be, but it would appear that at least some of these arrangements would be for terms of between 31 days and one year, and thus would not qualify for the exemptions from bidding for either short term releases of 31 days or less or the exemption for maximum rate releases of more than a year.[115]

144. The LNG Petitioners and others contend that the above described transactions generally cannot be structured as supply side AMAs. They state that the traditional AMA model, where the releasing shipper is releasing capacity to an expert that will help to manage capacity that the releasing shipper still needs to serve its own supply function, does not fit their situation. In the context of the tying and bidding exemptions requested for LNG the terminal capacity holder is not seeking to have a third party manage or market that capacity. Rather, the capacity holder is attempting to demonstrate to the LNG supplier firm takeaway capacity from the LNG terminal so that the supplier will not strand its gas in the terminal. Therefore, they assert that the Commission's amendment of its regulations to permit supply side AMAs is not an adequate substitute for the exemptions they seek.

145. The Commission clarifies that with respect to LNG terminals providing open access service, where both the LNG terminal and the directly connected interstate pipeline are facilities subject to the Commission's Part 284 open access regulations, a holder of capacity in the LNG terminal has the right to release both its terminal capacity and its capacity on the downstream pipeline pursuant to the Commission's capacity release program. As the Commission stated in Order No. 712, existing Commission policy permits releasing shippers to tie releases of upstream and downstream capacity, and requires the replacement shipper to take a release of the aggregated contracts on both pipelines.[116] Thus, existing policy permits the holder of capacity in an open access LNG terminal to require a replacement shipper to take a release of both its terminal capacity and its pipeline capacity. In addition, even if the releases were not made as part of an AMA, the tied releases would be exempt from bidding if they qualified for either of the standard bidding exemptions of section 284.8(h) for releases of 31 days or less or prearranged releases to an LNG supplier for more than a year at the maximum rate. However, if the release were for a term of between 31 days and a year, the LNG capacity holder would have to post for third party bids any prearranged tied release with an LNG supplier. That is necessary to ensure that the tied release is made to the person placing the highest value on the subject capacity.

146. The Commission denies rehearing, however, with respect to non-open access LNG terminals. Such terminals are not subject to the Commission's open access policy, and any releases or assignments of terminal capacity would not be made pursuant to the Commission's capacity release program. Thus, there is no Commission process to ensure that a release of terminal capacity would be non-discriminatory and transparent. As noted by the LNG Petitioners, transfers of terminal capacity may be accomplished in a myriad of ways depending on the specifics of the agreements between the terminal owners and the capacity holders, including through a buy/sell arrangement. Thus, the Commission continues to lack sufficient knowledge about how the arrangements for use of a non-open access terminal may be structured to permit a generic decision in this rulemaking proceeding. Nor do we have a sufficient record at this time to evaluate the possible benefits of such an exemption or the effect on open access competition that such an exemption may have. Accordingly, the Commission does not find it reasonable to grant the requested blanket exemptions from tying and bidding in this rulemaking proceeding in the context of a non-open access LNG terminal. As stated in Order No. 712, the Commission is open to considering waiver requests for such transactions on a case-by-case basis if presented to it in a fully justified proposal.

VI. Information Collection Statement

147. Order No. 712 contains information collection requirements for which the Commission obtained approval from the Office of Management and Budget (OMB). The OMB Control Number for this collection of information is 1902–0169. This order generally denies requests for rehearing and clarifies certain provisions of Order No. 712. This order does not make substantive modifications to the Commission's information collection requirements and, accordingly, OMB approval for this order is not necessary. However, the Commission will send a copy of this order to OMB for informational purposes.

VII. Document Availability

148. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

149. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

150. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

[114] *Hackberry LNG Terminal, L.L.C.,* 101 FERC ¶ 61,294 (2002) (*Hackberry*).

[115] The removal of the price cap for all releases of one year or less means that all releases of more than 31 days and less than a year must be posted for bidding, unless they are made as part of an AMA or retail access program.

[116] Order No. 712 at P 127 n.123 (citing, Order No. 636–A at 30,558 and n. 144).

VIII. Effective Date and Congressional Notification

151. These regulations will become effective December 31, 2008.

List of Subjects in 18 CFR Part 284

Continental shelf, Natural gas, and Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends Part 284, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

■ 1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

■ 2. Amend § 284.8 as follows:

■ a. Paragraphs (b) and (h) are revised to read as follows:

§ 284.8 Release of firm capacity on interstate pipelines.

* * * * *

(b)(1) Firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release. A firm shipper may arrange for a replacement shipper to obtain its released capacity from the pipeline. A replacement shipper is any shipper that obtains released capacity.

(2) The rate charged the replacement shipper for a release of capacity may not exceed the applicable maximum rate, except that no rate limitation applies to the release of capacity for a period of one year or less if the release is to take effect on or before one year from the date on which the pipeline is notified of the release. Payments or other consideration exchanged between the releasing and replacement shippers in a release to an asset manager as defined in paragraph (h)(3) of this section are not subject to the maximum rate.

* * * * *

(h)(1) The following releases need not comply with the bidding requirements of paragraphs (c) through (e) of this section:

(i) A release of capacity to an asset manager as defined in paragraph (h)(4) of this section;

(ii) A release of capacity to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(5) of this section;

(iii) A release for more than one year at the maximum tariff rate; and

(iv) A release for any period of 31 days or less.

(v) If a release is exempt from bidding under paragraph (h)(1) of this section, notice of the release must be provided on the pipeline's Internet Web site as soon as possible, but not later than the first nomination, after the release transaction commences.

(2) When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section, a firm shipper may not roll over, extend or in any way continue the release to the same replacement shipper using the 31 days or less bidding exemption until 28 days after the first release period has ended. The 28-day hiatus does not apply to any re-release to the same replacement shipper that is posted for bidding or that qualifies for any of the other exemptions from bidding in paragraph (h)(1) of this section.

(3) A release to an asset manager exempt from bidding requirements under paragraph (h)(1)(i) of this section is any pre-arranged release that contains a condition that the releasing shipper may call upon the replacement shipper to deliver to, or purchase from, the releasing shipper a volume of gas up to 100 percent of the daily contract demand of the released transportation or storage capacity, as provided in paragraphs (h)(3)(i) through (h)(3)(iii) of this paragraph.

(i) If the capacity release is for a period of one year or less, the asset manager's delivery or purchase obligation must apply on any day during a minimum period of the lesser of five months (or 155 days) or the term of the release.

(ii) If the capacity release is for a period of more than one year, the asset manager's delivery or purchase obligation must apply on any day during a minimum period of five months (or 155 days) of each twelve-month period of the release, and on five-twelfths of the days of any additional period of the release not equal to twelve months.

(iii) If the capacity release is a release of storage capacity, the asset manager's delivery or purchase obligation need only be up to 100 percent of the daily contract demand under the release for storage withdrawals or injections, as applicable.

(4) A release to a marketer participating in a state-regulated retail access program exempt from bidding requirements under paragraph (h)(1)(ii) of this section is any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail consumers.

[FR Doc. E8–28217 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 556 and 558

[Docket No. FDA–2008–N–0039]

New Animal Drugs; Ractopamine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Elanco Animal Health. The NADA provides for use of ractopamine hydrochloride Type A medicated articles to make Type B and Type C medicated feeds used for increased rate of weight gain and improved feed efficiency in finishing turkeys.

DATES: This rule is effective December 1, 2008.

FOR FURTHER INFORMATION CONTACT: Timothy Schell, Center for Veterinary Medicine (HFV–128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8116, e-mail: *timothy.schell@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed NADA 141–290 that provides for use of TOPMAX 9 (ractopamine hydrochloride) Type A medicated article to make Type B and Type C medicated feeds used for increased rate of weight gain and improved feed efficiency in finishing turkeys. The NADA is approved as of November 12, 2008, and the regulations in 21 CFR 556.570 and 558.500 are amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to

support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management (see address in the previous paragraph) between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360b(c)(2)(F)(ii)), this approval qualifies for 3 years of marketing exclusivity beginning on the date of approval.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 556

Animal drugs, Foods.

21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 556 and 558 are amended as follows:

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

■ 1. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: 21 U.S.C. 342, 360b, 371.

■ 2. In § 556.570, add paragraph (b)(3) to read as follows:

§ 556.570 Ractopamine.

* * * * *

(b) * * *

(3) *Turkeys*—(i) *Liver (the target tissue)*. The tolerance for ractopamine (the marker residue) is 0.45 ppm.

(ii) *Muscle*. The tolerance for ractopamine (the marker residue) is 0.1 ppm.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 3. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 4. In § 558.500:

■ a. Revise paragraph (d)(1);

■ b. Redesignate paragraphs (d)(2) and (d)(3) as paragraphs (d)(4) and (d)(5);

■ c. Add new paragraphs (d)(2) and (d)(3);

■ d. In paragraph (e)(2)(i), in the ''Limitations'' column, remove ''Not for animals intended for breeding.''; and

■ e. Add paragraph (e)(3).

The revisions and additions read as follows:

§ 558.500 Ractopamine.

* * * * *

(d) * * *

(1) Labeling of Type B and Type C feeds shall bear the following: ''Not for animals intended for breeding.''

(2) Labeling of Type B and Type C swine feeds shall bear the following:

(i) ''No increased benefit has been shown when ractopamine concentrations in the diet are greater than 4.5 g/ton.''

(ii) ''Ractopamine may increase the number of injured and/or fatigued pigs during marketing.''

(3) Labeling of Type B and Type C tom turkey feeds shall bear the following: ''No increased benefit has been shown when ractopamine concentrations in the diet are greater than 4.6 g/ton.''

* * * * *

(e) * * *

(3) *Turkeys*—

Ractopamine in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
(i) 4.6 to 11.8 (5 to 13 ppm)		Finishing hen turkeys: For increased rate of weight gain and improved feed efficiency when fed for the last 7 to 14 days prior to slaughter.	Feed continuously as sole ration during the last 7 to 14 days prior to slaughter.	000986
(ii) 4.6 to 11.8 (5 to 13 ppm)		Finishing tom turkeys: For increased rate of weight gain and improved feed efficiency when fed for the last 14 days prior to slaughter.	Feed continuously as sole ration during the last 14 days prior to slaughter. Feeding ractopamine to tom turkeys during periods of excessive heat can result in increased mortality.	000986

Dated: November 24, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–28384 Filed 11–28–08; 8:45 am]

BILLING CODE 4160–01–S

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends Appendix D to the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans by adding the maximum guaranteeable pension benefit that may be paid by the PBGC with respect to a plan participant in a single-employer pension plan that terminates in 2009. The amendment is necessary because the maximum guarantee amount changes each year, based on changes in the contribution and benefit base under section 230 of the Social Security Act. The effect of the amendment is to advise plan administrators, participants and

beneficiaries of the increased maximum guarantee amount for 2009.

DATES: *Effective Date:* January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: Section 4022(b) of the Employee Retirement Income Security Act of 1974 provides for certain limitations on benefits guaranteed by the PBGC in terminating single-employer pension plans covered under Title IV of ERISA. One of the limitations, set forth in section 4022(b)(3)(B), is a dollar ceiling on the amount of the monthly benefit that may be paid to a plan participant (in the form of a life annuity beginning at age 65) by the PBGC. The ceiling is equal to ''$750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974 [$13,200].'' This formula is also set forth in § 4022.22(b) of the PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022). Appendix D to Part 4022 lists, for each year beginning with 1974, the maximum guaranteeable benefit payable by the PBGC to participants in single-employer plans that have terminated in that year.

Section 230(d) of the Social Security Act (42 U.S.C. 430(d)) provides special rules for determining the contribution and benefit base for purposes of ERISA section 4022(b)(3)(B). Each year the Social Security Administration determines, and notifies the PBGC of, the contribution and benefit base to be used by the PBGC under these provisions, and the PBGC publishes an amendment to Appendix D to Part 4022 to add the guarantee limit for the coming year.

The PBGC has been notified by the Social Security Administration that, under section 230 of the Social Security Act, $79,200 is the contribution and benefit base that is to be used to calculate the PBGC maximum guaranteeable benefit for 2009. Accordingly, the formula under section 4022(b)(3)(B) of ERISA and 29 CFR 4022.22(b) is: $750 multiplied by $79,200/$13,200. Thus, the maximum monthly benefit guaranteeable by the PBGC in 2009 is $4,500.00 per month in the form of a life annuity beginning at age 65. This amendment updates Appendix D to Part 4022 to add this maximum guaranteeable amount for plans that terminate in 2009. (If a benefit is payable in a different form or begins at a different age, the maximum guaranteeable amount is the actuarial equivalent of $4,500.00 per month.)

General notice of proposed rulemaking is unnecessary. The maximum guaranteeable benefit is determined according to the formula in section 4022(b)(3)(B) of ERISA, and these amendments make no change in its method of calculation but simply list 2009 maximum guaranteeable benefit amounts for the information of the public.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 4022

Pension insurance, Pensions, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE–EMPLOYER PLANS

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

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

■ 2. Appendix D to part 4022 is amended by adding a new entry to the end of the table to read as follows. The introductory text is reproduced for the convenience of the reader and remains unchanged.

Appendix D to Part 4022—Maximum Guaranteeable Monthly Benefit

The following table lists by year the maximum guaranteeable monthly benefit payable in the form of a life annuity commencing at age 65 as described by § 4022.22(b) to a participant in a plan that terminated in that year:

Year	Maximum guaranteeable monthly benefit
* * * * *	
2009	$4,500.00

Issued in Washington, DC, this 21st day of November, 2008.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. E8–28412 Filed 11–28–08; 8:45 am]

BILLING CODE 7709–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

Allocation of Assets in Single-Employer Plans; Valuation of Benefits and Assets; Expected Retirement Age

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends the Pension Benefit Guaranty Corporation's regulation on Allocation of Assets in Single-Employer Plans by substituting a new table that applies to any plan being terminated either in a distress termination or involuntarily by the PBGC with a valuation date falling in 2009, and is used to determine expected retirement ages for plan participants. This table is needed in order to compute the value of early retirement benefits and, thus, the total value of benefits under the plan.

DATES: *Effective Date:* January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) sets forth (in subpart B) the methods for valuing plan benefits of terminating single-employer plans covered under Title IV of the Employee Retirement Income Security Act of 1974. Guaranteed benefits and benefit liabilities under a plan that is undergoing a distress termination must be valued in accordance with part 4044, subpart B. In addition, when the PBGC terminates an underfunded plan involuntarily pursuant to ERISA section 4042(a), it uses the subpart B valuation rules to determine the amount of the plan's underfunding.

Under § 4044.51(b) of the asset allocation regulation, early retirement benefits are valued based on the annuity starting date, if a retirement date has

been selected, or the expected retirement age, if the annuity starting date is not known on the valuation date. Sections 4044.55 through 4044.57 set forth rules for determining the expected retirement ages for plan participants entitled to early retirement benefits. Appendix D of part 4044 contains tables to be used in determining the expected early retirement ages.

Table I in appendix D (Selection of Retirement Rate Category) is used to determine whether a participant has a low, medium, or high probability of retiring early. The determination is based on the year a participant would reach ''unreduced retirement age'' (*i.e.*, the earlier of the normal retirement age or the age at which an unreduced benefit is first payable) and the participant's monthly benefit at unreduced retirement age. The table applies only to plans with valuation dates in the current year and is updated annually by the PBGC to reflect changes in the cost of living, etc.

Tables II–A, II–B, and II–C (Expected Retirement Ages for Individuals in the Low, Medium, and High Categories respectively) are used to determine the expected retirement age after the probability of early retirement has been determined using Table I. These tables establish, by probability category, the expected retirement age based on both the earliest age a participant could retire under the plan and the unreduced retirement age. This expected retirement age is used to compute the value of the early retirement benefit and, thus, the total value of benefits under the plan.

This document amends appendix D to replace Table I–08 with Table I–09 in order to provide an updated correlation, appropriate for calendar year 2009, between the amount of a participant's benefit and the probability that the participant will elect early retirement. Table I–09 will be used to value benefits in plans with valuation dates during calendar year 2009.

The PBGC has determined that notice of and public comment on this rule are impracticable and contrary to the public interest. Plan administrators need to be able to estimate accurately the value of plan benefits as early as possible before initiating the termination process. For that purpose, if a plan has a valuation date in 2009, the plan administrator needs the updated table being promulgated in this rule. Accordingly, the public interest is best served by issuing this table expeditiously, without an opportunity for notice and comment, to allow as much time as possible to estimate the value of plan benefits with the proper table for plans with valuation dates in early 2009.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 4044

Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR part 4044 is amended as follows:

PART 4044—[AMENDED]

■ 1. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 2. Appendix D to part 4044 is amended by removing Table I–08 and adding in its place Table I–09 to read as follows:

Appendix D to Part 4044—Tables Used To Determine Expected Retirement Age

TABLE I–09—SELECTION OF RETIREMENT RATE CATEGORY

[For Plans with valuation dates after December 31, 2008, and before January 1, 2010]

Participant reaches URA in year—	Participant's retirement rate category is—	Low [1] if monthly benefit at URA is less than—	Medium [2] if monthly benefit at URA is—	High [3] if monthly benefit at URA is greater than— From To
2010	552	552	2,332	2,332
2011	565	565	2,385	2,385
2012	578	578	2,440	2,440
2013	591	591	2,496	2,496
2014	605	605	2,554	2,554
2015	619	619	2,612	2,612
2016	633	633	2,673	2,673
2017	647	647	2,734	2,734
2018	662	662	2,797	2,797
2019 or later	677	677	2,861	2,861

[1] Table II–A.
[2] Table II–B.
[3] Table II–C.

* * * * *

Issued in Washington, DC, this 21st day of November, 2008.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. E8–28413 Filed 11–28–08; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–148–FOR; OSM–2008–0014]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of Amendment.

SUMMARY: We are approving an amendment to the Pennsylvania regulatory program (the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The revisions relate to blasting for the development of shafts for underground mines and to blasting regulations in 25 Pa. Code Chapters 87, 88, 89, and 210.

DATES: *Effective Date:* December 1, 2008.

FOR FURTHER INFORMATION CONTACT: George Rieger, Director, Pittsburgh Field Division, Telephone: (717) 782–4036, e-mail: *grieger@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15, and 938.16.

II. Submission of the Amendment

By letter dated June 8, 2006 (Administrative Record No. PA 887.00), the Pennsylvania Department of Environmental Protection (PADEP) sent OSM a program amendment to address blasting for the development of shafts for underground mines and to make administrative changes to regulations relating to blasting in 25 Pa. Code Chapters 77, 87, 88, 89 and 210. However, by letter dated July 5, 2006 (Administrative Record No. PA 887.02), PADEP withdrew the provisions pertaining to industrial mineral underground mining provisions at Chapter 77 because they are not coal related. Therefore, only those changes in 25 Pa. Code 87, Surface Mining of Coal; 25 Pa. Code 88, Anthracite Coal; 25 Pa. Code 89, Underground Mining of Coal and Coal Preparation Facilities; and 25 Pa. Code 210, Blasters license will be addressed in this rule.

We announced receipt of the State's letters and the proposed regulatory changes in the July 31, 2006 **Federal Register** (71 FR 43087). In the same notice, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendments. We received a request from the public to hold a public hearing and subsequently we re-opened the public comment period and announced the public hearing in the September 11, 2006, **Federal Register** (71 FR 53351). We held a public hearing on September 21, 2006. The public comment period ended on September 28, 2006.

PADEP sent us a revised version of the amendment on April 4, 2008. The revisions are minor and non-substantive in nature, but some warrant noting because they involve wording changes. These changes are as follows: Definitions of the terms ''blast'' and ''blasting'' are added to sections 87.1 and 88.1; ''vibrations'' are further clarified to mean ''ground or airblast'' vibrations in sections 87.127(a) and (b), and in sections 88.135(a) and (b); ''noise'' is changed to ''airblast'' in section 87.127(e) (1); the term ''sound pressure'' is changed to ''airblast'' in sections 88.135(h) and (i); and the words ''identification of and the'' are added to section 88.137(4). We did not reopen the comment period when we received these revisions because, as noted above, we believe they do not change the substance of any of the amended provisions.

We received comments from the Mountain Watershed Association, Citizens Coal Council, Tri-State Citizens Mining Network's Center for Coalfield Justice, Ten Mile Protection Network, Concerned Citizens of Ligonier, Youghiogheny Riverkeeper, and the Kentucky Resources Council, Inc. dated September 21, 2006, (Administrative Record No. PA 887.08 and 887.09).

III. OSM's Findings

Following are the findings we made concerning the Amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. In some cases, Pennsylvania made the same modifications to regulations in several different chapters. In those cases, we discussed all the similar regulations together. Any revisions we do not specifically discuss below concern non-substantive wording or editorial changes and are approved herein without discussion. Our discussion of the amendment appears below by the applicable sections of the Pennsylvania Code.

1. 25 Pa. Code 87.1, 88.1, 89.5, and 210.11. Definitions

PADEP added a definition for the term ''mine opening blasting'' to 25 Pa. Code 87.1, 88.1, 89.5, and 210.11 as follows:

> ''Mine opening blasting—Blasting conducted for the purpose of constructing a shaft, slope, drift, or tunnel mine opening for an underground mine, either operating or under development, from the surface down to the point where the mine opening connects with the mineral strata to be or being extracted.''

While this provision has no direct Federal counterpart, its meaning is consistent with current mining practices; it is also consistent with SMCRA and the Federal regulations. Therefore, we are approving it.

2. 25 Pa. Code 87.1 and 88.1. Definitions

PADEP added definitions for the following words: ''Blast'' and ''Blasting.'' While these provisions have no direct Federal counterparts, their meanings are consistent with current mining practices and are also consistent with SMCRA and the Federal regulations. Therefore, we are approving them. They read as follows:

> ''Blast—A detonation of explosives.''
> ''Blasting—The detonation of explosives.''

3. 25 Pa. Code 87.124. Use of Explosives: General Requirements

PADEP is changing subsection (b) to correct a reference error from ''87.125'' to ''87.126 (relating to use of explosives: preblasting survey).''

As revised, subsection (b) provides as follows:

> ''Blasts that use more than 5 pounds of explosive or blasting agents shall be conducted according to the schedule required by section 87.126 (relating to use of explosives: public notice of blasting schedules).''

This provision corrects a reference error. We find that the provision does not render the Pennsylvania program less stringent than SMCRA or less effective than the Federal regulations, and are approving it.

4. 25 Pa. Code 87.126. Use of Explosives: Public Notice of Blasting Schedule

PADEP is changing ''shall'' to ''must'' in (b)(2) after ''schedule'' and deleting the phrase ''Each period may not exceed 4 hours'' at subsection (b)(2)(ii).

As amended, subsection (b)(2)(ii) provides as follows:

(b)(2) The blasting schedule must contain at a minimum the following:

* * * * *

(b)(2)(ii) Dates and time periods when explosives are to be detonated.

The changes made in this provision render 25 Pa. Code 87.126(b)(2) and (b)(2)(ii) substantively identical to and therefore no less effective than the Federal regulations at 30 CFR 816.64(c) and (c)(3) and are therefore approved.

5. 25 Pa. Code 87.127. Use of Explosives: Surface Blasting Requirements

PADEP is changing subsection (a) by adding the following after ''schedule'':

> * * * except that mine opening blasting conducted after the second blast, for that mine opening, may be conducted at any time of day or night as necessary to maintain stability of the mine opening to protect the health and safety of mineworkers. For mine opening blasting conducted after the second blast, for that mine opening, the Department may approve ground or airblast vibration limits at a dwelling, public building, school, church or commercial or institutional structure, that are less stringent than those specified in subsection (e) or (m) if consented to, in writing, by the structure owner and lessee, if leased to another party.

As amended, subsection (a) provides as follows:

> Blasting shall be conducted between sunrise and sunset, at times announced in the blasting schedule, except that mine opening blasting conducted after the second blast, for that mine opening, may be conducted at any time of day or night as necessary to maintain stability of the mine opening to protect the health and safety of mineworkers. For mine opening blasting conducted after the second blast, for that mine opening, the Department may approve ground or airblast vibration limits at a dwelling, public building, school, church or commercial or institutional structure, that are less stringent than those specified in Subsections (e) or (m) if consented to, in writing, by the structure owner and lessee, if leased to another party.

The Federal regulations at 30 CFR 817.61 require that ''[s]ections 817.61–68 apply to surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.'' Since the Federal regulations do not define the terms ''incident to underground coal mining'' or ''initial rounds of slopes and shafts'', PADEP has the discretion to apply a reasonable cut-off point with respect to underground blasting, beyond which the regulations need not be applied. PADEP has determined that mine opening blasting conducted after the second blast is not subject to all of Pennsylvania's blasting regulations, because it is not blasting conducted pursuant to a surface coal mining operation, but rather is underground mine blasting; as such, any exceptions to regulatory applicability, including those exceptions set forth in section 87.127(a), are permissible, according to PADEP. We find that mine opening blasting after the second blast is indeed a reasonable point to terminate full regulatory coverage pursuant to 30 CFR 817.61–68. Therefore, the exceptions proposed in section 87.127(a) are no less effective than the Federal regulations at 30 CFR 817.61, and are approved.

PADEP is revising subsection (b) by adding new language '' airblast or ground vibration limits,'' after ''or'' and by deleting the term ''excessive noise'' at the end of the sentence and replacing existing language with ''the adverse affects of ground vibration, airblast, or safety hazards.''

As amended, subsection (b) provides as follows:

> The Department may specify more restrictive time periods, airblast or ground vibration limits, based on public requests or other relevant information, according to the need to adequately protect the public from the adverse affects of ground vibration, airblast, or safety hazards.

We find that the provision as provided does not render the Pennsylvania program less stringent than SMCRA or less effective than the Federal regulations at 30 CFR 816.67(b)(1)(ii) and 816.67(d)(5), which allow the regulatory authority to set more stringent airblast limits or ground vibration limits if necessary to prevent damage due to blasting. Therefore, we are approving it.

PADEP is revising subsection (e) by deleting the following language, ''unless the structure is owned by the person who conducts the surface mining activities and is not leased to another person. The lessee may sign a waiver'', and replacing that language with the following language ''unless the structure is located on the permit area when the structure owner and lessee, if leased to another party, have each signed a* * *''

As amended, subsection (e) provides as follows:

> Airblast shall be controlled so that it does not exceed the noise level specified in this subsection at a dwelling, public building, school, church or commercial or institutional structure, unless the structure is located on the permit area when the structure owner and lessee, if leased to another party, have each signed a waiver relieving the operator from meeting the airblast limitations of this subsection.

The Federal regulations at 30 CFR 816.67(b) set airblast limits only at structures outside the permit area, whereas Pennsylvania has chosen to also set airblast limits at structures inside the permit area. Since there is no Federal requirement to set airblast limits at structures within the permit area, any waiver Pennsylvania proposes to its airblast limits for such structures cannot be less effective than the Federal regulations at 30 CFR 816.67(b). Therefore, we are approving it.

PADEP is deleting existing language in section 87.127(e)(1) and revising the maximum allowable noise level to 133 dBL.

As amended, subsection (e)(1) provides as follows:

The maximum allowable airblast level is 133 dBL.

While the current Federal regulations at 30 CFR 816.67(b)(1)(i) provide for a range of the maximum allowable airblast depending on the lower frequency limit of the measuring system used, a maximum airblast vibration of 133 dBL is appropriate when the lower frequency limit of the measuring system is 2 hertz (Hz) or lower.

All blasting seismographs manufactured today have 2 hertz microphones based on a standard developed with the International Society of Explosives Engineers Standards Committee. In addition, the Pennsylvania regulations, at 25 Pa. Code 87.54, require submission of a blasting plan, ''explaining how the applicant intends to comply with sections 87.124–129. * * *'' With respect to the 133 dBL maximum airblast level, the applicant must describe the type of monitoring system that will ensure compliance with that level. Since the measuring system (i.e., seismograph microphone) with the lower frequency response of 2 hertz or lower is the only one for which the 133 dBL limit is appropriate, we expect that the PADEP will only approve the use of this system. Based upon this, OSM finds that this revision is no less effective than the Federal regulations at 30 CFR 816.67(b)(1)(i) since all operators who measure airblasts with blasting seismographs will be required to use a measuring system with a lower frequency response of 2 hertz or lower, (+/ − 3dB). Therefore, we are approving this revised maximum decibel level.

PADEP is revising subsection (f)(1) to lower the distance from a blasting area where an operator must barricade and guard public highways and entrances to the operation from 1,000 feet to 800 feet. PADEP is also adding new language concerning alternative measures following the existing language.

As amended, subsection (f)(1) provides as follows:

> The operator may use an alternative measure to this requirement if the operator demonstrates, to the Department's satisfaction, that the alternative measure is at least as effective at protecting persons and property from the adverse affects of a blast. Alternative measures are measures such as:

(i) Slowing or stopping traffic in coordination with appropriate state or local authorities, including local police.

(ii) Using mats to suppress fly rock.

(iii) Designing the blast to prevent damage or injury to persons and property located on the public highways or at the operation's entrances by using design elements such as:

(A) Orienting the blast so that the direction of relief is away from public highways or operation entrances.

(B) Adjusting blast design parameters including:

(I) The diameter of holes.

(II) The number of rows.

(III) The number of holes.

(IV) The amount and type of explosive.

(VI) The amount and type of stemming.

(VII) The powder factor.

While this provision has no direct Federal counterpart, we find that it is consistent with the Federal regulations at 30 CFR 816.66(c), pertaining to access control, since any alternative measure chosen must be shown to be at least as effective at protecting persons and property as are barricades. Therefore, we are approving it.

PADEP is revising subsection (j) by deleting the cross-reference to subsection (n) and changing it to (m). This change was proposed because the proposed deletion of subsection (l), which is discussed below, will result in the relettering of the subsequent subsections of section 87.127. Thus, subsection (n) will become subsection (m) if the deletion of subsection (l) is approved. Since we are approving the deletion of subsection (l), we are also approving this cross-referencing change.

PADEP is deleting subsection (l) in its entirety. Subsection (l) previously provided as follows:

The use of a formula to determine maximum weight of explosives per delay for blasting operations at a particular site may be approved by the Department if the peak particle velocity of 1 inch per second required in 87.126 (relating to use of explosives: Public notice of blasting schedule) would not be exceeded.

While the Federal regulations at 30 CFR 816.67(d)(3) allow an operator to use a scale distance equation to determine the maximum weight of explosives allowable to be detonated in any 8-millisecond period without seismic monitoring, regulatory authorities are not required to provide the operators with this option. Therefore, we find that the deletion of the option to use a formula to determine maximum weight of explosives is no less effective than the Federal regulations at 30 CFR 816.67(d), and we are approving it.

6. 25 Pa. Code 87.129. Use of Explosives: Records of Blasting Operations

PADEP is changing subdivision (4) by adding the phrase: ''identification of and the'' after ''The'' at the beginning of the paragraph.

As amended subdivision (4) provides as follows:

The identification of and the direction and distance, in feet, to the nearest dwelling, public building, school, church, commercial or institutional building or other structure.

We find that the provision as provided does not render the Pennsylvania program less effective than the Federal regulations at 30 CFR 816.68(d). Therefore, we are approving it.

7. 25 Pa. Code 88.135. Blasting: Surface Blasting Requirements

Before discussing the several changes PADEP has proposed to this section of its anthracite mining regulations, it is appropriate to offer a summary of our standards for the review of proposed revisions to Pennsylvania's anthracite mining performance standards.

The Federal regulations at 30 CFR 820.11, pertaining to performance standards for anthracite mining in Pennsylvania, provide as follows:

Anthracite mines in Pennsylvania, as specified in section 529 of the Act, shall comply with its approved State program, including Commonwealth of Pennsylvania statutes and regulations, and revisions thereto that are approved by OSM pursuant to part 732 of this chapter.

In 1979, we explained in the preamble to the previous version of 30 CFR 820.11 how we would decide, pursuant to 30 CFR part 732, whether changes to Pennsylvania's anthracite mining performance standards could be approved:

If the [anthracite performance standard] regulations existing as of August 3, 1977 are made less stringent in any manner, the Secretary must elect to develop specific Federal performance standards to supplement the amended State regulation or, of [sic] considered desirable, the Secretary may apply the performance standards for surface mining and underground coal mining of Parts 816 and 817.

44 FR 14902, 15281 (March 13, 1979)

We interpret the standard above to mean that if we find a proposed anthracite performance standard provision to be no less stringent than the performance standard existing as of August 3, 1977, we will approve it under Section 529(a) of SMCRA, which required that the Federal regulations adopt the original (August 3, 1977) Pennsylvania anthracite regulations, and apply them to anthracite mining in lieu of SMCRA's own performance standards. If, however, we find the provision to be less stringent than its August 3, 1977 predecessor, we may still approve it, if we determine that it is no less effective than its Federal regulatory counterpart in 30 CFR part 816 or part 817. We will not approve any provision that is less stringent than its August 3, 1977, predecessor, and that is also less effective than its Federal regulatory counterpart.

PADEP added the following language to subsection (a) after ''sunset'':

* * * except that mine opening blasting conducted after the second blast for that mine opening may be conducted at any time of day or night as necessary to maintain stability of the mine opening to protect the health and safety of mineworkers. For mine opening blasting conducted after the second blast, for that mine opening, the Department may approve ground or airblast vibration limits at a dwelling, public building, school, church or commercial or institutional structure, that are less stringent than those specified in Subsection (h) if consented to, in writing, by the structure owner and lessee, if leased to another party.

As amended, subsection (a) provides as follows:

Blasting shall be conducted between sunrise and sunset, except that mine opening blasting conducted after the second blast for that mine opening may be conducted at any time of day or night as necessary to maintain stability of the mine opening to protect the health and safety of mineworkers. For mine opening blasting conducted after the second blast, for that mine opening, the Department may approve ground or airblast vibration limits at a dwelling, public building, school, church or commercial or institutional structure, that are less stringent than those specified in Subsection (h) if consented to, in writing, by the structure owner and lessee, if leased to another party.

While the allowance of exceptions to the requirement that blasting be conducted in daylight would render Pennsylvania's regulation less stringent than the current Pennsylvania provision, the proposed changes are no less effective than the Federal regulations at 30 CFR 817.61, for the reasons more fully discussed above in the finding for section 87.127(a). Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

PADEP changed subsection (b) by adding the following phrases: ''airblast or ground vibration limits,'' after ''periods'' and ''from the adverse affects

of ground vibration, airblast, or safety hazards'' after ''public.''

As amended, subsection (b) provides as follows:

The Department may specify more restrictive time periods, airblast or ground vibration limits, based on other relevant information, according to the need to adequately protect the public from the adverse affects of ground vibration, airblast, or safety hazards.

Pennsylvania's proposal to allow the PADEP to specify more restrictive airblast or ground vibration limits adds potential protections from blasting that are not in the current version of this provision. In addition, Pennsylvania has proposed to make clear what it is protecting the public from: The adverse effects of ground vibration, airblast, or safety hazards. These proposed changes would not render section 88.135(b) less effective than the current Pennsylvania provision. Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

PADEP amended subsection (f)(1) by adding new language concerning alternative measures following the existing language.

As amended, subsection (f)(1) provides as follows:

Public highways and entrances to the operation shall be barricaded and guarded by the operator if the highways and entrances to the operations are located within 800 feet of a point where a blast is about to be fired. The operator may use an alternative measure to this requirement if the operator demonstrates, to the Department's satisfaction, that the alternative measure is at least as effective at protecting persons and property from the adverse affects of a blast. Alternative measures are measures such as:

(i) Slowing or stopping traffic in coordination with appropriate state or local authorities, including local police.

(ii) Using mats to suppress fly rock.

(iii) Designing the blast to prevent damage or injury to persons and property located on the public highways or at the operation's entrances by using design elements such as:

(A) Orienting the blast so that the direction of relief is away from public highways or operation entrances.

(B) Adjusting blast design parameters including:

(I) The diameter of holes.

(II) The number of rows.

(III) The number of holes.

(IV) The amount and type of explosive.

(V) The burden and spacing.

(VI) The amount and type of stemming.

(VII) The powder factor.

Since any alternative measure chosen must be shown to be at least as effective at protecting persons and property as are barricades, the proposed changes would not render section 87.127(f)(1) less stringent than the current Pennsylvania provision. Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

PADEP is revising subsection (h) to delete the existing language, ''the maximum peak particle velocity may not exceed 2 inches per second'' and adding the following new language after ''operations,'', ''* * * the blasts shall be designed and conducted in a manner that achieves either a scaled distance of 90 or meets the maximum allowable peak particle velocity as indicated by Figure 1 * * *'' PADEP further changed the last sentence of this subsection by replacing ''sound pressure'' with ''airblast'' and by removing the phrase, ''130 DB linear at a frequency 6Hz or lower'' and replacing it with ''133 dBL.''

As amended, subsection (h) provides as follows:

In all blasting operations, the blasts shall be designed and conducted in a manner that achieves either a scaled distance of 90 or meets the maximum allowable peak particle velocity as indicated by Figure 1 at the location of any dwelling, public building, school, church or commercial or institutional building. Peak particle velocities shall be recorded in three mutually perpendicular directions; longitudinal, transverse and vertical. The maximum peak particle velocity shall be the largest of any of three measurements. The Department may reduce the maximum peak particle velocity allowed, if it determines that a lower standard is required because of density of population or land use, age or type of structure, geology or hydrology of the area, frequency of blasts, or other factors. The airblast level may not exceed 133 dBL.

These proposed changes to section 88.135(h) would not render the provision less stringent than the current Pennsylvania regulation. More specifically, we conclude that the proposed uniform maximum airblast level of 133 dBL is no less stringent than the current Pennsylvania regulation, for the same reasons that we concluded that the same revision to 25 Pa. Code 87.127 (e)(1) did not render that provision less effective than the corresponding Federal regulation. Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving these changes to the special permanent program performance standards for anthracite mines in Pennsylvania.

PADEP is revising subsection (i) by deleting the word ''limitation'' and by adding the phrase ''and airblast limitations.''

As amended subsection (i) provides as follows:

The maximum peak particle velocity and airblast limitations of this section do not apply at the following locations:

(1) At structures owned by the person conducting the mining activity, and not leased to another party.

(2) At structures owned by the person conducting the mining activity, and leased to another party, if a written waiver by the lessee is submitted to the Department prior to the blasting.

While the proposed change exempts certain structures from airblast limitations as well as peak particle velocity limitations, and is less stringent than the current Pennsylvania regulation, it is substantively identical to the Federal regulations at 30 CFR 816.67(e).

Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

PADEP is removing subsection (l) in its entirety. This subsection previously provided as follows:

The use of a formula to determine maximum weight of explosives per delay for blasting operations at a particular site may be approved by the Department if the peak particle velocity of 2 inches per second would not be exceeded.

This proposed deletion would not render section 88.135 less stringent than the current Pennsylvania regulation. Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

8. 25 Pa. Code 88.137. Use of Explosives: Records of Blasting Operations

PADEP is revising subdivision (4) by adding the phrase: ''identification of and the'' after ''The'' at the beginning of the paragraph.

As amended subdivision (4) provides as follows:

The identification of and the direction and distance, in feet, to the nearest dwelling, public building, school, church, commercial or institutional building or other structure.

Since the proposed change requires that additional data be provided in the records of blasting regulations, it would not render section 88.137 less stringent than the current Pennsylvania

regulation. Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

9. 25 Pa. Code 88.493. Minimum Environmental Protection Performance Standards

PADEP is revising subdivision (7)(i) by replacing the existing language ''initial rounds of slopes, shafts and tunnels'' with new language ''mine opening blasting.''

As amended, subdivision (7)(i) provides as follows:

> A person who conducts surface blasting activities incident to underground mining activities, including, but not limited to, mine opening blasting shall conduct the activities in compliance with sections 88.45 and 88.134–88.137.

Since the proposed change adds mine opening blasting to the list of activities to be subject to the referenced permitting requirement (88.45) and performance standards (88.134–137), and since mine opening blasting includes initial rounds of slope, shafts, and tunnels, it would not render section 88.493 less stringent than the current version of the regulation. Therefore, in accordance with Section 529(a) of SMCRA and the Federal regulations at 30 CFR 820.11, we are approving this revision to the special permanent program performance standards for anthracite mines in Pennsylvania.

10. 25 Pa. Code 89.62. Use of Explosives

PADEP is revising this section to replace the existing language ''initial rounds of slopes, shafts and tunnels'' with ''mine opening blasting.''

As amended, 25 Pa. Code 89.62 provides as follows:

> Each person who conducts surface blasting activities incident to underground mining activities, including, but not limited to, mine opening blasting, shall conduct the activities in compliance with Chapter 87 (relating to surface mining of coal).

As noted above in finding no. 5, the Federal regulations do not define the term ''initial rounds of slopes and shafts''. However, the PADEP's definition of mine opening blasting includes ''blasting for the purpose of constructing a shaft, slope, drift or tunnel mine opening'', which naturally would include blasting for the initial rounds of slopes and shafts. Therefore, this revision is no less effective than the Federal regulations at 30 CFR 817.61(a) and (c)(1) and is hereby approved.

11. 25 Pa. Code 210.12. Scope

PADEP is revising this section to add new language after ''Commonwealth'', ''Except for persons engaging in mine opening blasting.''

As amended, 25 Pa. Code 210.12 provides as follows:

> This chapter applies to persons engaging in the detonation of explosives within this Commonwealth. Except for persons engaging in mine opening blasting, this chapter does not apply to persons authorized to detonate explosives or to supervise blasting activities under: * * *

The provisions that follow, but that are omitted from the provision, are references to the Pennsylvania Anthracite Coal Mine Act (52 P.S. 70.101–70.1405) and the Pennsylvania Bituminous Coal Mine Act (52 P.S. 701–101–701–706). These statutes regulate underground anthracite and bituminous mining, respectively, and include separate requirements for blasters and blasting activities. However, PADEP regulates mine opening blasting as surface blasting incident to underground mining, in accordance with the Federal regulations. This provision clarifies that distinction, in that it requires blasters to obtain licenses to conduct surface blasting. While the provision has no direct Federal requirement, we find it to be no less effective than the Federal regulations at 30 CFR part 850, and hereby approve it.

12. 25 Pa. Code 210.17. Issuance and Renewal of Licenses

PADEP is revising subsection (a) to add the following new language ''mine opening blasting'' after ''demolition,'' and after ''mining,''.

As amended, section 210.17 provides as follows:

> A blaster's license is issued for a specific classification of blasting activities. The classifications will be determined by the Department and may include general blasting (which includes all classifications except demolition, mine opening blasting and underground noncoal mining), trenching and construction, seismic and pole line work, well perforation, surface mining, underground noncoal mining, mine opening blasting, industrial, limited and demolition.

The proposed change makes clear that mine opening blasting is not general blasting, but rather is a specific classification of blasting to which all requirements of Chapter 210 apply. While the provision has no direct Federal counterpart, we are approving it because it is consistent with the Federal regulations at 30 CFR part 850, which require certification of blasters engaged in the use of explosives in surface coal mining operations.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment in the July 31, 2006 **Federal Register** (71 FR 43087) and then extended the comment in the September 11, 2006, **Federal Register** (71 FR 53351).

We held a public hearing on the rulemaking on September 21, 2006 (Administrative Record No. 887.11) and received responses from three different commenters representing Mountain Watershed Association.

1. Commenters expressed concern regarding 25 Pa. Code 87.127(a), which would allow mine opening blasting after the second blast to be conducted at any time, rather than from just sunrise to sunset. The commenters assert that the criteria for exempting mine opening blasting after the second blast from the sunrise to sunset period appear to be inconsistent with exemption criteria in the Federal regulations at 30 CFR 816.64(a). While the Federal regulations allow an exemption where the operator can demonstrate that the public will be protected from adverse noise and other impacts, the proposed State revision allows exemptions to protect the health and safety of mineworkers. The regulation also fails to consider the health of adjacent landowners, according to the commenters. In addition, the commenters contend that the regulation is less effective than the Federal regulations at 30 CFR 816.67(e), in that it would allow Pennsylvania to approve lower vibration limits for mine opening blasting after the second blast at a structure owned by a person other than the permittee. One commenter asked how a homeowner could possess the knowledge to execute an informed waiver of the airblast or ground vibration limits.

Response: We are approving the changes applicable to mine opening blasting after the second blast, in section 87.127(a), because, as explained in finding no. 5, such blasting is not regulated under 30 CFR 817.61–68.

2. Commenters objected to the change in language to ''the adverse effect of vibration or safety hazards'' in section 87.127(b) when the Federal rules require protection of the public from ''adverse noise and other impacts.''

Response: The Federal counterpart regulations at 30 CFR 816.67(b)(1)(ii) and 816.67(d)(5) allow the regulatory authority to establish lower airblast or ground vibration limits where necessary to prevent damage. The commenters' reference to protecting the public from ''adverse noise and other impacts'' is

found in 30 CFR 816.64(a)(2), which pertains to exceptions to the requirement to conduct blasting between sunrise and sunset, but does not pertain to the establishment of lower airblast or ground vibration limits. By requiring stricter limits to protect the public from ''the adverse effects of ground vibration, airblast, or safety hazards, Pennsylvania's revised regulation will provide at least the same, if not greater, protection than its Federal counterparts.

3. Commenters expressed concern regarding the allowance of weaker vibration limits and air blast limits in section 87.127(e). This amendment, according to the commenters, is less effective than the Federal regulations at 30 CFR 816.67(e), in that it would allow Pennsylvania to approve lower vibration limits at a structure owned by a person other than the permittee.

Response: We disagree with the commenters. As noted in finding no. 5, above, we are approving this revision to 25 Pa. Code 87.127(e) because Federal regulations include no airblast limits for structures located within the permit area.

4. A commenter expressed concern that the proposed maximum airblast as proposed in section 87.127(e)(1) exceeds the Federal counterpart in 30 CFR 816.67(b)(1).

Response: We acknowledge the commenter's concern; however, as noted in finding no. 5, above, we are approving this revision to 25 Pa. Code 87.127(e)(1). Our approval is based on the fact all blasting seismographs manufactured today have 2 hertz microphones based on a standard developed with the International Society of Explosives Engineers Standards Committee, and based on our conclusion that the State's blasting plan regulation, in concert with revised subdivision (e)(1), will preclude the PADEP from approving the use of any blasting seismograph that uses a different type of microphone. Therefore only the 133 dBL limit is applicable.

5. Commenters express concern about the 1000' to 800' change for blocking roads and the option of alternative access control in section 88.135(f)(1). Commenters are concerned that OSM is allowing the Pennsylvania State Program to eliminate access control in lieu of alternative measures.

Response: The Federal regulations at 30 CFR 816.66 merely require access control to the blast area. They do not specifically require that public highways and entrances to the operation be barricaded and guarded by the operator.

6. A commenter asserted that the distance measured should be clarified to include an object for measurement (from the blast hole) and outside the permit area in section 87.129.

Response: We disagree with the commenter. The introductory paragraph of 25 Pa. Code 87.129 requires a record to be kept for each ''blast,'' and should, therefore, be interpreted to mean that the object of measurement is the nearest blast hole. We also note that the Pennsylvania regulations are more effective because it requires maintaining information for the regulating of blasts that occur near buildings located both inside the permit area as well as outside the permit area.

7. In reference to the proposed deletion of section 87.127(l), one commenter questioned the validity of the Siskind theory of peak particle velocity of one inch per second, when, according to the commenter, this theory ''was condemned back in 1980 by [Siskind's] peers * * *, [is] based on data and a methodology that has never been fully tested, and * * * violates common sense.''

Response: Since subsection (l) is being deleted in its entirety, and since the one inch per second peak particle velocity standard is not otherwise at issue in this revision, the comment is beyond the scope of this rulemaking.

8. A commenter opposed the use of the peak particle velocity measure as a measure of safety or blasting damage, but rather advocated consideration of the actual damage caused by blasting. This same commenter stated that the pre-blast survey should be used by the PADEP for comparing the condition of the structure before and after blasting; if the structure is more damaged after blasting, the burden should be on the operator to prove that the damage was not caused by blasting.

Response: The use of peak particle velocity as a blasting threshold is authorized by the Federal regulations, at 30 CFR 816.67 and 817.67. Pre-blast surveys and presumptions of liability are not subjects of this revision.

9. Commenters expressed numerous concerns about the amendments to section 88.135 (25 Pa. Code 88.135 is in the Pennsylvania Code for Anthracite Coal Mining), namely that of the peak particle velocity and maximum allowable noise levels.

Response: As discussed in the findings above, where proposed revisions to anthracite performance standards are no less effective than those currently in the Pennsylvania program, we are approving them pursuant to the Federal regulations at 30 CFR 820.11. We are approving the changes to 88.135(b), (f)(1), and (l) and one change to 88.135(h). Where proposed changes would be less effective than the current versions of the Pennsylvania regulations, but are no less effective than their Federal counterparts, we are also approving them pursuant to the Federal regulations at 30 CFR 820.11. We are approving the revisions to 88.135(a) and (i). Finally, we are approving the proposed change to 88.135(h), which would allow a higher maximum airblast level of 133 dBL. Our approval is based on the fact all blasting seismographs manufactured today have 2 hertz microphones based on a standard developed with the International Society of Explosives Engineers Standards Committee, and based on our conclusion that the State's blasting plan regulation, in concert with revised subdivision (e)(1), will preclude the PADEP from approving the use of any blasting seismograph that uses a different type of microphone. Therefore only the 133 dBL limit is applicable.

10. A commenter stated that OSM's summary of the amendment should be written in plain language, and include portions of the regulations immediately preceding and following the amended provisions, so that people may more readily understand the changes.

Response: OSM will take this comment under consideration when writing subsequent **Federal Register** notices announcing receipt of program amendments.

11. A commenter disputed OSM's statement in the proposed rule that the amendment ''will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*'' To the contrary, the commenter stated, ''[b]lasting damages have a significant economic effect on private homeowners.''

Response: Under the Regulatory Flexibility Act, the term ''small entity'' means the same thing as the terms ''small business'', ''small organization'' and ''small governmental jurisdiction''. 5 U.S.C. § 601(6) Thus, the provision cited does not apply to individuals, including private homeowners.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 887.01). No comments were received.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i) we requested comments on the amendment from EPA (Administrative Record No. PA 887.00). The EPA reviewed the amendment and did not identify any inconsistencies with the Clean Water Act or other statutes or regulations under EPA's jurisdiction (Administrative Record Number PA 887.04). Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.). Because the provisions of this amendment do not relate to air or water quality standards, we did not request EPA's concurrence.

V. OSM's Decision

Based on the above findings, we are approving the Pennsylvania program amendment sent to us on June 8, 2006, as revised on July 5, 2006, and on April 4, 2008 (Administrative Record No. PA 887.00, 887.02, and 887.12, respectively). To implement this decision, we are amending the Federal regulations at 30 CFR 938 which codify decisions concerning the Pennsylvania program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. 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.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Government

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State Regulatory program and does not involve a Federal Regulation Involving Indian Lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon

counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 29, 2008.

Thomas D. Shope,

Regional Director, Appalachian Region.

■ For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

PART 938—PENNSYLVANIA

■ 1. The authority citation for part 938 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

■ 2. Section 938.15 is amended by adding a new entry to the table in chronological order by ''Date of final publication'' to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
June 8, 2006	December 1, 2008	25 Pa. Code 210.11, 87.1, 88.1, and 89.5 added definition for mine opening blasting; 87.124(b) correction of reference error; 87.126(b)(2)(ii) phrase deletion; 87.127(b), 87.127(e), 87.127(e)(1) ,87.127(f)(1); 87.129(4);88.135(a), 88.135(b), 88.135(f)(1), 88.135(h) , 88.135(i); 88.493(7)(i); 89.62 (adding new language); 87.127(l) and 88.135(l) (deleted in their entirety).

[FR Doc. E8–28445 Filed 11–28–08; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy has determined that USS LOUISVILLE (SSN 724) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective December 1, 2008 and is applicable beginning 19 November 2008.

FOR FURTHER INFORMATION CONTACT: Commander M. Robb Hyde, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone number: 202–685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR part 706.

This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy, under authority delegated by the Secretary of the Navy, has certified that USS LOUISVILLE (SSN 724) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Rule 21(a) pertaining to the location of the masthead lights over the fore and aft centerline of the ship. The Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine Safety, Navigation (Water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

PART 706–CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for 32 CFR Part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by adding, in numerical order, the following entry for USS LOUISVILLE (SSN 724):

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

TABLE TWO

Vessel	Number	Masthead lights, distance to stbd of keel in meters; Rule 21(a)	Forward anchor light, distance below flight dk in meters; § 2(K), Annex I	Forward anchor light, number of; Rule 30(a)(i)	AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii)	AFT anchor light, number of; Rule 30(a)(ii)	Side lights, distance below flight dk in meters; § 2(g), Annex I	Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I	Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I
*	*	*	*	*	*	*	*	*	*
USS LOUISVILLE	SSN 724.	0.41							
*	*	*	*	*	*	*	*	*	*

* * * * *

Approved: November 19, 2008.

M. Robb Hyde,

Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).

[FR Doc. E8–28414 Filed 11–28–08; 8:45 am]

BILLING CODE 3810–FF–P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 381

[Docket No. 2008–6 CRB NCBRA]

Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges announce a cost of living adjustment (''COLA'') of 3.7% in the royalty rates that colleges, universities, and other nonprofit educational institutions that are not affiliated with National Public Radio pay for the use of published nondramatic musical compositions in the ASCAP, BMI and SESAC repertories. The COLA is based on the change in the Consumer Price Index from October 2007 to October 2008.

DATES: *Effective Date:* January 1, 2009.

FOR FURTHER INFORMATION CONTACT: LaKeshia Brent, CRB Program Specialist. Telephone: (202) 707–7658.

SUPPLEMENTARY INFORMATION: Section 118 of the Copyright Act [1] creates a compulsory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 CFR parts 253 and 381.

Final regulations governing the terms and rates of copyright royalty payments with respect to certain uses by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic, and sculptural works for the license period beginning January 1, 2008, and ending December 31, 2012, were published in the **Federal Register** on November 30, 2007.[2] Pursuant to these regulations, on or before December 1 of each year the Judges shall publish a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items (''CPI–U'')) during the period from the most recent index published prior to the previous notice, to the most recent index published prior to December 1 of that year.[3] The regulations also require that the Judges publish a revised schedule of rates for the public performance of musical compositions in the ASCAP, BMI, and SESAC repertories by public broadcasting entities licensed to colleges and universities, reflecting the change in the CPI–U.[4] Accordingly, the Judges are hereby announcing the change in the CPI–U and applying the annual COLA to the rates set out in 37 CFR 381.5(c).

The change in the cost of living as determined by the CPI–U during the period from the most recent index published before December 1, 2008, to the most recent index published before December 1, 2007, is 3.7%.[5] Rounding to the nearest dollar,[6] the royalty rates for the performance of published nondramatic musical compositions in the repertories of ASCAP, BMI, and SESAC are $298, $298, and $120, respectively.

List of Subjects in 37 CFR Part 381

Copyright, Music, Radio, Television, Rates.

Final Regulations

■ For the reasons set forth in the preamble, Part 381 of title 37 of the Code of Federal Regulations is amended to read as follows:

PART 381—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

■ 1. The authority citation for part 381 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1), and 803

■ 2. Section 381.5 is amended by revising paragraphs (c)(1) through (c)(3) as follows:

§ 381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

* * * * *

(c) * * *

(1) For all such compositions in the repertory of ASCAP, $298 annually.

(2) For all such compositions in the repertory of BMI, $298 annually.

[1] 17 U.S.C. 118.

[2] 72 FR 67646.

[3] 37 CFR 381.10(a).

[4] 37 CFR 381.10(b) (requiring publication of a revised schedule of rates for 37 CFR 381.5).

[5] The most recent CPI–U figures are published in October of each year and use the period 1982–84 to establish a reference base of 100. The index for October 2008 was 216.573, while the figure for October 2007 was 208.936.

[6] See 37 CFR 381.10(b) (adjusted royalty rates shall be ''fixed at the nearest dollar'').

(3) For all such compositions in the repertory of SESAC, $120 annually.

* * * * *

Dated: November 25, 2008.

James Scott Sledge,

Chief Copyright Royalty Judge.

[FR Doc. E8–28466 Filed 11–28–08; 8:45 am]

BILLING CODE 1410–72–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2004–0083; FRL–8747–1]

RIN 2060–AM71

Amendments to National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to amend the national emission standards for electric arc furnace (EAF) steelmaking facilities that are area sources of hazardous air pollutants published on December 28, 2007. The amendments to the area source standards for EAF steelmaking facilities clarify applicability of the opacity limit, make the performance test requirements for particulate matter consistent with requirements in the new source performance standards for EAF steelmaking facilities, allow title V test data to be used to demonstrate compliance, and revise the definition of ''scrap provider'' to include EAF steelmaking facilities that own and operate a scrap shredder.

DATES: This final rule is effective on March 2, 2009 without further notice, unless EPA receives significant adverse comment by December 31, 2008. If the effective date is delayed, timely notice will be published in the **Federal Register**. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that some or all of the amendments in this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0083 by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov*.
- *Fax:* (202) 566–9744.
- *Mail:* National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0083. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Phil Mulrine, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5289; fax number: (919) 541–3207; e-mail address: *mulrine.phil@epa.gov*.

SUPPLEMENTARY INFORMATION:

The information presented in this preamble is organized as follows:

I. Why is EPA using a direct final rule?
II. Does this action apply to me?
III. Where can I get a copy of this document?
IV. What should I consider as I prepare my comments to EPA?
V. What are the changes to the area source NESHAP for EAF steelmaking facilities?
  A. Melt Shop Opacity Limit
  B. Particulate Matter Performance Test Requirements
  C. Certifying Initial Compliance Based on Previous Tests
  D. Definition of ''Scrap Provider''
VI. Statutory and Executive Order Reviews
  A. Executive Order 12866: Regulatory Planning and Review
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act
  D. Unfunded Mandates Reform Act
  E. Executive Order 13132: Federalism
  F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
  G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
  H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  I. National Technology Transfer Advancement Act
  J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
  K. Congressional Review Act

I. Why is EPA using a direct final rule?

EPA is publishing this final rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no significant adverse comment. These amendments to the national emission standards for hazardous air pollutants (NESHAP) EAF steelmaking facilities that are area sources (40 CFR part 63, subpart

YYYYY) consist of technical corrections and clarifications that do not make material changes to the rule's requirements. However, in the ''Proposed Rules'' section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rule to amend the area source standards if EPA receives significant adverse comments on this final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on the rule, see the **ADDRESSES** section of this document. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the amendments or certain amendments in this final rule will not take effect. We would address all comments in any subsequent final rule based on the proposed rule.

II. Does this action apply to me?

The regulated categories and entities potentially affected by the final rule include:

Category	NAICS code[1]	Examples of regulated entities
Industry	331111	Steel mills with electric arc furnace steelmaking facilities that are area sources.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 63.10680 of subpart YYYYY (National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

III. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

IV. What should I consider as I prepare my comments to EPA?

Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2004–0083. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

V. What are the changes to the area source NESHAP for EAF steelmaking facilities?

On December 28, 2007 (72 FR 74088), we issued the NESHAP for Area Sources: Electric Arc Furnace Steelmaking Facilities (40 CFR part 63, subpart YYYYY). The final rule establishes air emission control requirements for new and existing facilities that are area sources of hazardous air pollutants. The final standards include emission limits for particulate matter (PM)(a surrogate for specific metal hazardous air pollutants) reflecting performance of generally available control technology (GACT), and pollution prevention standards for the control of mercury emissions reflecting performance of the maximum achievable control technology.

A. Melt Shop Opacity Limit

This final rule makes a technical clarification to the melt house opacity limit in paragraph (b)(2) of 40 CFR 63.10686 (What are the requirements for electric arc furnaces and argon-oxygen decarburization vessels?). The promulgated rule prohibits the discharge from an EAF or argon-oxygen decarburization (AOD) vessel of any gases which ''exit from a melt shop and, due *solely* (emphasis added) to the operations of any affected EAF(s) or AOD vessel(s), exhibit 6 percent opacity or greater.'' This final rule amends that language by removing the word ''solely'' from the text of the emissions limit. We are making this change because, in a few cases, fugitive emissions from other sources may be unavoidably commingled with the emissions from EAF(s) and AOD vessel(s). In those cases, the only practical way to determine compliance with the opacity limit is to observe the opacity of the combined emissions. On the other hand, if intermittent emissions from another source occasionally commingle with the fugitive emissions from the affected EAF(s) or AOD vessel(s) (such as emissions from point or fugitive sources that operate intermittently), the opacity determination must be made when the other sources are not interfering with the observations. The owner or operator has an incentive to make opacity observations when the emissions are not commingled because the additional emissions would result in higher opacity readings.

We are making a similar change to paragraph (d)(2) of 40 CFR 63.10686 (What are the requirements for electric arc furnaces and argon-oxygen decarburization vessels?), which establishes requirements for demonstrating initial compliance by means of an opacity performance test. In the promulgated rule, the first sentence of paragraph (d)(2) specifies the test methods to be used and the second sentence pertains to combined emissions from sources not subject to subpart YYYYY. The second sentence of paragraph (d)(2) states that ''When emissions from any EAF or AOD vessel are combined with emissions from emission sources not subject to this subpart, you must demonstrate compliance with the melt shop opacity limit based *only* (emphasis added) on emissions from the emission sources subject to this subpart.'' This final rule removes the word ''only'' from the second sentence. We are making this correction for the same reasons just

discussed for removing the word ''solely.''

B. Particulate Matter Performance Test Requirements

Paragraph (d) of 40 CFR 63.10686 (What are the requirements for electric arc furnaces and argon-oxygen decarburization vessels?) establishes requirements for demonstrating initial compliance by means of a PM performance test. Paragraph (d)(1)(v) of this section specifies the test method to be used, the number of test runs that comprise a test, and the sampling time for each test run. The promulgated rule requires the facility to sample EAFs only when metal is being melted and refined and to sample AOD vessels only when the operation(s) are being conducted. This final rule changes the EAF requirements to require either that: (1) The sampling time and volume for each run meet the requirement in 40 CFR 60.275a (the new source performance standard (NSPS)), or (2) each run consist of at least one heat cycle (i.e., a test run must include charging, melting and tapping operations). This change reflects EPA's actual intent in promulgating the December 2007 rule. Our intent there was to be consistent with the NSPS for EAFs and to require that sampling be performed over the entire heat cycle, not just during melting. See 72 FR 53826 where we explained that the NSPS PM limit was GACT, so that one could reasonably infer that the emission limit would be implemented as required in the NSPS. If the rule is left uncorrected, sampling would not have to be performed during charging and tapping, both of which generate emissions; consequently, sampling only when melting would not be representative of the complete EAF production cycle.

Paragraph (d)(4) of 40 CFR 63.10686 states the Administrator must approve procedures that will be used to determine compliance when emissions are combined with those from facilities not subject to this subpart. We are clarifying that these and other site-specific factors for a few facilities with a complex configuration of facilities controlled by a common emission control system must receive the Administrator's approval of procedures to determine compliance, including cases in which emissions are combined from multiple facilities subject to this subpart and when combined from multiple facilities that include both those subject and not subject to the subpart.

C. Certifying Initial Compliance Based on Previous Tests

Paragraph (d)(6) of 40 CFR 63.10686 (What are the requirements for electric arc furnaces and argon-oxygen decarburization vessels?) allows the owner or operator to use a previous performance test for an emissions source to demonstrate initial compliance for that emissions source provided the tests meet the rule's requirements: (1) The previous test must have been conducted within 5 years of the compliance date of the current rule using the procedures in paragraphs (d)(1) and (2) of § 63.10686, (2) the previous test was for that facility, and (3) the previous test was representative of current or anticipated operating processes and conditions. The rule also includes provisions in paragraph (d)(2) for conducting a new test if the permitting authority finds that the previous test is unacceptable.

This final rule makes three changes to the provisions governing the use of a previous performance test as the basis for certifying initial compliance. The first change allows the use of a previous test conducted for compliance certification according to the facility's title V permit if the test was conducted within 5 years of the compliance date for the current rule. This change is consistent with our intent to allow the use of a valid previous performance test, such as a test conducted for compliance certification in the facility's title V permit, if the test was conducted within 5 years of the compliance date. The second change is the addition of a provision which states that, if results of a previous performance test are utilized, the previous performance tests for PM emissions and melt shop opacity are not required to have been conducted simultaneously. We are making this change to prevent the unnecessary burden of requiring a new PM performance test simply because opacity observations were not made during the previous PM performance test. The opacity of fugitive emissions and the PM emission control performance can be measured separately to determine compliance. The third change is the addition of new paragraph (d)(7) which allows use of the baseline parametric monitoring information collected during a prior performance test to meet the requirements in 40 CFR 60.275a(f) if the information was collected under conditions that are representative of current or anticipated operating conditions. Documentation of representative conditions would be provided in the test report for the prior performance test and in company records of the EAF steel production rate during the test. This clarification also reduces the unnecessary burden of requiring a new performance test just to collect operating data to establish baseline parameters (e.g., fan motor amperes or volumetric flow rate) when these parameters have already been established during previous valid performance tests.

D. Definition of ''Scrap Provider''

Section 63.10692 of the current rule (What definitions apply to this subpart?) defines a ''scrap provider'' (a term used in the pollution prevention standards for mercury) as ''the person (including a broker) who contracts directly with a steel mill to provide scrap that contains motor vehicle scrap. Scrap processors such as shredder operators or vehicle dismantlers that do not sell scrap directly to a steel mill are not *scrap providers*.'' This final rule adds a sentence to include within the definition EAF steel making facilities that own and operate a scrap shredder. Under this final rule, a scrap provider is:

> * * * the person (including a broker) who contracts directly with a steel mill to provide scrap that contains motor vehicle scrap. The owner or operator of an EAF steelmaking facility that also owns and operates a scrap shredder is a scrap provider for motor vehicle scrap that is processed in that shredder and supplied to the EAF steelmaking facility. Scrap processors such as shredder operators or vehicle dismantlers that do not sell scrap directly to a steel mill are not scrap providers.

This change is necessary because the previous definition did not address the possibility that EAF steelmaking facilities that operate their own onsite scrap shredders also can be scrap providers. There are a few instances where this occurs.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. These final amendments clarify applicability of the opacity limit, make the performance test requirements for particulate matter consistent with requirements in the new source performance standards for electric arc

furnace steelmaking facilities, allow title V test data to be used to demonstrate compliance, and revise the definition of ''scrap provider'' to include electric arc furnace steelmaking facilities that own and operate a scrap shredder. No new burden is associated with these requirements because the burden was included in the approved information request (ICR) for the existing rule. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR part 63 subpart YYYYY) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0608. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this final rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses at 13 CFR 121.201 (whose parent company has fewer than 1,000 employees for NAICS code 331111); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We have determined that the nine small entities in this area source category will not incur any adverse impacts because this action makes only technical corrections and clarifications that increase flexibility and does not create any new requirements or burdens. No costs are associated with these amendments to the NESHAP.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. The term ''enforceable duty'' does not include duties and conditions in voluntary Federal contracts for goods and services. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The technical corrections and clarifications made through this action contain no requirements that apply to such governments, impose no obligations upon them, and will not result in any expenditures by them or any disproportionate impacts on them.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The final rule makes certain technical corrections and clarifications to the NESHAP for EAF steelmaking area sources. These final corrections and clarifications do not impose requirements on State and local governments. Thus, Executive Order 13132 does not apply to the final rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 6, 2000). This final rule makes certain technical corrections and clarifications to the NESHAP for EAF steelmaking area sources. These final corrections and clarifications do not impose requirements on tribal governments. They also have no direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it makes technical corrections and clarifications to the area source NESHAP for EAF steelmaking facilities which is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. No. 104–113, section 12(d), 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency does not use available and applicable VCS.

This final rule does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The technical corrections and clarifications in this final rule do not change the level of control required by the NESHAP.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA will submit a report containing these final rule amendments 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 final rule amendments in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This final rule will be effective on March 2, 2009.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and Recordkeeping requirements.

Dated: November 24, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

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

Authority: 42 U.S.C. 7401 *et seq.*

Subpart YYYYY—[Amended]

■ 2. Section 63.10686 is amended by:
■ a. Revising paragraph (b)(2);
■ b. Revising paragraph (d)(1)(v);
■ c. Revising the second sentence in paragraph (d)(2);
■ d. Revising paragraph (d)(4);
■ e. Revising paragraph (d)(6); and
■ f. Adding paragraph (d)(7) to read as follows:

§ 63.10686 What are the requirements for electric arc furnaces and argon-oxygen decarburization vessels?

* * * * *

(b) * * *

(2) Exit from a melt shop and, due to the operations of any affected EAF(s) or AOD vessel(s), exhibit 6 percent opacity or greater.

* * * * *

(d) * * *

(1) * * *

(v) Method 5 or 5D of appendix A–3 of 40 CFR part 60 to determine the PM concentration. Three valid test runs are needed to comprise a PM performance test. For EAF, you must either meet the requirements in 40 CFR 60.275a for the sampling time and volume for each run, or each run must consist of at least one heat cycle as defined in 40 CFR 60.271a (i.e., a test run must include charging, melting and tapping operations). For AOD vessels, sample only during the heat cycle.

(2) * * * When emissions from any EAF or AOD vessel are combined with emissions from emission sources not subject to this subpart, you must demonstrate compliance with the melt shop opacity limit based on emissions from the emission sources subject to this subpart.

* * * * *

(4) You must notify and receive approval from the Administrator for procedures that will be used to determine compliance for an EAF or AOD vessel when emissions are combined with those from facilities not subject to this subpart, combined with those from multiple facilities subject to this subpart, or both.

* * * * *

(6) If you own or operate an existing affected source that is subject to the emissions limits in paragraph (b) or (c) of this section, you may certify initial compliance with the applicable emission limit for one or more emissions sources based on the results of a previous performance test for that emissions source in lieu of the requirement for an initial performance test provided that the test(s) were conducted within 5 years of the compliance date; the test(s) were conducted using the methods and procedures specified in paragraph (d)(1) or (2) of this section or were conducted as specified for compliance certification testing in the facility's title V permit; the test(s) were for the affected facility; and the test(s) were representative of current or anticipated operating processes and conditions. The previous performance tests for PM emissions and melt shop opacity are not required to have been conducted simultaneously. Should the permitting authority deem the prior test data unacceptable to demonstrate compliance with an applicable emissions limit, the owner or operator must conduct an initial performance test within 180 days of the compliance date or within 90 days of receipt of the notification of disapproval of the prior test, whichever is later.

(7) You may use information collected during a prior performance test to meet the parametric monitoring requirements in 40 CFR 60.275a(f) if the information was collected under conditions that are representative of current or anticipated operating conditions.

* * * * *

■ 3. Section 63.10692 is amended by revising the definition of ''Scrap provider'' to read as follows:

§ 63.10692 What definitions apply to this subpart?

* * * * *

Scrap provider means the person (including a broker) who contracts directly with a steel mill to provide scrap that contains motor vehicle scrap. The owner or operator of an EAF steelmaking facility that also owns and operates a scrap shredder is a scrap provider for motor vehicle scrap that is processed in that shredder and supplied to the EAF steelmaking facility. Scrap processors such as shredder operators or vehicle dismantlers that do not sell scrap directly to a steel mill are not *scrap providers.*

* * * * *

[FR Doc. E8–28455 Filed 11–28–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 51, 54, 61, and 69

[WC Docket Nos. 06–122, 05–337, 04–36, 03–109; CC Docket Nos. 01–92, 99–200, 99–68, 96–98, 96–45; FCC 08–262]

Universal Service Contribution Methodology; High-Cost Universal Service Support; IP-Enabled Services; Lifeline and Link Up; Developing a Unified Intercarrier Compensation Regime; Numbering Resource Optimization; Intercarrier Compensation for ISP-Bound Traffic; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Clarification.

SUMMARY: In this document, the Federal Communications Commission (Commission) took two actions. First, the Commission responded to a writ of mandamus that would have vacated the Commission's rules governing compensation for ISP-bound traffic had the Commission not acted by November 5, 2008. Specifically, the Commission held that although ISP-bound traffic falls within the scope of section 251(b)(5) of the Communications Act, this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to our authority under section 201 and 251(i) of the Act. The Commission thus maintained the $.0007 cap and the mirroring rule. Second, the Commission responded to the Comprehensive Reform Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board). The Commission is statutorily obligated to complete any proceeding regarding subsequent recommendations from the Joint Board within one year. The Commission thanked the Joint Board and its staff for their hard work in studying these difficult issues and in developing their recommendations, but chose not to implement these recommendations at this time.

DATES: Effective Date: November 5, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer McKee, Telecommunications Access Policy Division, Wireline Competition Bureau, 202–418–7400 or TTY: 202–418–0484 (universal service), or Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau, 202–418–1520 or TTY 202–418–0484 (intercarrier compensation).

SUPPLEMENTARY INFORMATION: This is the Commission's Order on Remand and Report and Order in WC Docket Nos. 06–122, 05–337, 04–36, 03–109; CC Docket Nos. 01–92, 99–200, 99–68, 96–98, 96–45, adopted on November 5, 2008 and released on November 5, 2008. Copies of the Order on Remand and Report and Order and Further Notice of Proposed Rulemaking and any subsequently filed documents in this matter are or will be available on the Commission's Internet site at *http://www.fcc.gov* and for public inspection Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m. at the FCC Reference Information Center, Portals II, 445 12th St., SW., Room CY–A257, Washington, DC 20554. Copies of any such documents may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5672, e-mail *fcc@bcpiweb.com.* Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau, at (202) 418–0531, TTY (202) 418–7365, or at f*cc504@fcc.gov.*

Order on Remand and Report and Order

1. The actions we take in this order respond to the writ of mandamus granted by the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) directing the Commission to respond to its prior remand of the Commission's intercarrier compensation rules for Internet Service Provider (ISP)-bound traffic. As discussed below, we conclude that we have authority to impose ISP-bound traffic rules.

A. Background

2. On February 26, 1999, the Commission issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it held that ISP-bound traffic is jurisdictionally interstate because end users access websites across state lines. Because the *Local Competition First Report and Order* concluded that the reciprocal compensation obligation in section 251(b)(5) applied only to local traffic, the Commission found in the Declaratory Ruling that ISP-bound traffic is not subject to section 251(b)(5). On March 24, 2000, in the Bell Atlantic decision, the D.C. Circuit vacated certain provisions of the Declaratory Ruling. The court did not question the Commission's finding that ISP-bound traffic is interstate. Rather, the court held that the Commission had not adequately explained how its end-to-end jurisdictional analysis was relevant to determining whether a call to an ISP is subject to reciprocal compensation under section 251(b)(5). In particular, the court noted that a LEC serving an ISP appears to perform the function of ''termination'' because the LEC delivers traffic from the calling party through its end office switch to the called party, the ISP.

3. On April 27, 2001, the Commission released the *ISP Remand Order,* which concluded that section 251(g) excludes ISP-bound traffic from the scope of Section 251(b)(5). The Commission explained that section 251(g) maintains the pre-1996 Act compensation requirements for ''exchange access, information access, and exchange services for such access,'' thereby excluding such traffic from the reciprocal compensation requirements that the 1996 Act imposed. The Commission concluded that ISP-bound traffic was ''information access'' and, therefore, was subject instead to the Commission's section 201 jurisdiction over interstate communications. The Commission also found ''convincing evidence in the record'' that carriers had ''targeted ISPs as customers merely to take advantage of * * * intercarrier payments'' (including offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud). It therefore adopted an ISP payment regime in order to ''limit, if not end, the opportunity for regulatory arbitrage.'' The Commission concluded that a bill-and-keep regime might eliminate incentives for arbitrage and force carriers to look to their own customers for cost recovery. To avoid a flash cut to bill-and-keep, however, the Commission adopted a compensation regime pending completion of the Intercarrier Compensation proceeding. Specifically, the regime adopted by the Commission consisted of: (1) A gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at $.0015 per minute-of-use and declining to $.0007 per minute-of-use; (2) a growth cap on total ISP-bound minutes for which a LEC may receive this compensation; (3) a ''new markets rule'' requiring bill-and-keep for the exchange of this traffic if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the regime; and (4) a ''mirroring rule'' that gave incumbent LECs the benefit of the rate cap only if

they offered to exchange all traffic subject to Section 251(b)(5) at the same rates. These rate caps reflected the downward trend in intercarrier compensation rates contained in then-recently negotiated interconnection agreements.

4. On May 3, 2002, the DC Circuit found that the Commission had not provided an adequate legal basis for the rules it adopted in the *ISP Remand Order*. Once again, the court did not question the Commission's finding that ISP-bound traffic is jurisdictionally interstate. Rather, the court held that section 251(g) of the Act did not provide a basis for the Commission's decision. The court held that section 251(g) is simply a transitional device that preserved obligations that predated the 1996 Act until the Commission adopts superseding rules, and that there was no pre-1996 Act obligation with respect to intercarrier compensation for ISP-bound traffic. Although the court rejected the legal rationale for the compensation rules, the court remanded, but did not vacate, the *ISP Remand Order* to the Commission, and it observed that ''there is plainly a non-trivial likelihood that the Commission has authority'' to adopt the rules. Accordingly, the rules adopted in the *ISP Remand Order* have remained in effect.

5. On November 5, 2007, Core filed a petition for writ of mandamus with the DC Circuit seeking to compel the Commission to enter an order resolving the court's remand in the *WorldCom* decision. On July 8, 2008, the court granted a writ of mandamus and directed the Commission to respond to the *WorldCom* remand in the form of a final, appealable order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the ISP Remand Order . The court directed the Commission to respond to the writ of mandamus by November 5, 2008.

B. Discussion

6. In this order, we respond to the DC Circuit's remand order in *WorldCom* v. *FCC*, and the court's writ of mandamus in *Core Communications Inc.* Specifically, we hold that although ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to our authority under section 201 and 251(i) of the Act.

1. Scope of Section 251(b)(5)

7. As an initial matter, we conclude that the scope of Section 251(b)(5) is broad enough to encompass ISP-bound traffic. To be sure, we acknowledge that, in the *Local Competition First Report and Order*, the Commission found that section 251(b)(5) applies only to local traffic, and some commenters continue to press for such an interpretation. As other commenters recognize, however, the Commission, in the ISP Remand Order, reconsidered that judgment and concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that ''local'' is not a term used in section 251(b)(5). We recognize, as the Supreme Court noted in *AT&T Corp.* v. *Iowa Utilities Board*, that ''[i]t would be a gross understatement to say that the 1996 Act is not a model of clarity.'' Nevertheless, we find that the better view is that section 251(b)(5) is not limited to local traffic.

8. We begin by looking at the text of the statute. Section 251(b)(5) imposes on all LECs the ''duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.'' The Act broadly defines ''telecommunications'' as ''the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' Its scope is not limited geographically (''local,'' ''intrastate,'' or ''interstate'') or to particular services (''telephone exchange service,'' telephone toll service,'' or ''exchange access''). We find that the traffic we elect to bring within this framework fits squarely within the meaning of ''telecommunications.'' We also observe that had Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5). Because Congress used the term ''telecommunications,'' the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.

9. In the *Local Competition First Report and Order* the Commission concluded that Section 251(b)(5) applies only to local traffic, but recognized that ''[u]ltimately * * * the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge.'' In the *ISP Remand Order*, the Commission reversed course on the scope of section 251(b)(5), finding that ''the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here.'' The *ISP Remand Order* noted that ''the term 'local,' not being a statutorily defined category, * * * is not a term used in section 251(b)(5).'' The Commission found that the scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing ''exchange access, information access, and exchange services for such access'' provided to interexchange carriers and information service providers until ''explicitly superseded by regulations prescribed by the Commission.'' On appeal, the DC Circuit left intact the Commission's findings concerning the scope of section 251(b)(5), although it took issue with other aspects of the *ISP Remand Order*.

10. We disagree with commenters who argue that section 251(b)(5) only can be applied to traffic exchanged between LECs, and not traffic exchanged between a LEC and another carrier. The Commission rejected that argument in the *Local Competition Order*, finding that section 251(b)(5) applies to traffic exchanged by a LEC and any other telecommunications carrier, and adopted rules implementing that finding. In a specific application of that principle, the Commission concluded that ''CMRS providers will not be classified as LECs,'' but nevertheless found that ''LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation agreements with all CMRS providers.'' No one challenged that finding on appeal, and it has been settled law for the past 12 years. We see no reason to revisit that conclusion now. While section 251(b)(5) indisputably imposes the duty to establish reciprocal compensation arrangements on LECs alone, Congress did not limit the class of potential beneficiaries of that obligation to LECs.

11. We also disagree with commenters who argue that section 252(d)(2)(A)(i) limits the scope of section 251(b)(5). Section 252(d)(2)(A)(i) provides that a state commission ''shall not consider the terms and conditions for reciprocal compensation to be just and reasonable'' unless ''such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.'' Verizon and others argue that this provision necessarily excludes interexchange traffic from the scope of section 251(b)(5), because at the time the 1996 Act was passed calls neither originated nor terminated on an interexchange carrier's network. We reject this reasoning because it

erroneously assumes that Congress intended the pricing standards in section 252(d)(2) to limit the otherwise broad scope of section 251(b)(5). We do not believe that Congress intended the tail to wag the dog.

12. Section 251(b)(5) defines the scope of traffic that is subject to reciprocal compensation. Section 252(d)(2)(A)(i), in turn, deals with the mechanics of who owes what to whom, it does not define the scope of traffic to which Section 251(b)(5) applies. Section 252(d)(2)(A)(i) provides that, at a minimum, a reciprocal compensation arrangement must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network of calls that originate on the network of the other carrier. Section 252(d)(2)(A)(i) does not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network. This does not mean, as Verizon suggests, that Section 251(b)(5) must be read as limited to traffic involving only two carriers. Rather, it means that there is a gap in the pricing rules in Section 252(d)(2), and the Commission has authority under section 201(b) to adopt rules to fill that gap.

13. We also reject Verizon's argument that a telecommunications carrier that delivers traffic to an ISP is not eligible for reciprocal compensation because the carrier does not ''terminate'' telecommunications traffic at the ISP. In the *Local Competition Order*, the Commission defined ''termination'' as ''the switching of traffic that is subject to Section 251(b)(5) at the terminating carrier's end office switch * * * and delivery of that traffic to the called party's premises.'' As the DC Circuit suggested in the *Bell Atlantic* decision, ''Calls to ISPs appear to fit this definition: The traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.' '' We agree.

14. Verizon also argues that the reference to reciprocal compensation in the competitive checklist in section 271, which was designed to ensure that local markets are open to competition, somehow shows that Congress intended to limit the scope of section 251(b)(5) to local traffic. We do not see how this argument sheds any light on the scope of section 251(b)(5). Congress no doubt included the reference to reciprocal compensation in section 271 because section 251(b)(5) applies to local traffic, a point that no one disputes. That does not suggest, however, that section 251(b)(5) applies only to local traffic.

15. We need not respond to every other variation of the argument that the history and structure of the Act somehow demonstrate that section 251(b)(5) is limited to local traffic. At best, these arguments show that one plausible interpretation of the statute is that section 251(b)(5) applies only to local traffic, a view that the Commission embraced in the *Local Competition First Report and Order*. These arguments do not persuade us, however, that this is the only plausible reading of the statute. Moreover, many of the same arguments based on the history and context of the adoption of section 251 to limit its scope to local traffic were rejected by the DC Circuit in the context of section 251(c). We find that the better reading of the Act as a whole, in particular the broad language of section 251(b)(5) and the grandfather clause in section 251(g), supports our view that the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).

16. Notwithstanding section 251(b)(5)'s broad scope, we agree with the finding in the *ISP Remand Order* that traffic encompassed by section 251(g) is excluded from Section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing ''receipt of compensation.'' Here, however, the DC Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from Section 251(b)(5) as ''there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.'' As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).

2. Authority Under Section 201

17. The section 251(b)(5) finding above, however, does not end our legal analysis here. That is because the ISP-bound traffic at issue here is clearly interstate in nature and thus also subject to our section 201 authority. The Commission unquestionably has authority to regulate intercarrier compensation with respect to interstate access services, rates charged by CMRS providers, and other traffic subject to Commission authority such as ISP-bound traffic. Section 2(a) of the Act establishes the Commission's jurisdiction over interstate services, for which the Commission ensures just, reasonable, and not unjustly and unreasonably discriminatory rates under section 201 and 202. Likewise, the Commission has authority over the rates of CMRS providers pursuant to section 332 of the Act.

18. In sections 251 and 252 of the Act, Congress altered the traditional regulatory framework based on jurisdiction by expanding the applicability of national rules to historically intrastate issues and state rules to historically interstate issues. In the *Local Competition First Report and Order*, the Commission found that the 1996 Act created parallel jurisdiction for the Commission and the states over interstate and intrastate matters under sections 251 and 252. The Commission and the states ''are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under Sections 251 and 252.'' Moreover, section 251(i) provides that ''[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.'' In the *Local Competition First Report and Order*, the Commission concluded that section 251(i) ''affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate activities.''

19. In implementing sections 251 and 252 in the *Local Competition First Report and Order*, the Commission's treatment of LEC–CMRS traffic provides an instructive example. Prior to the 1996 Act, the Commission expressly preempted ''state and local regulations of the kind of interconnection to which CMRS providers are entitled'' based on its authority under sections 201 and 332 of the Act. Nevertheless, in the *Local Competition First Report and Order*, the Commission brought LEC–CMRS interconnection within the section 251 framework as it relates to intraMTA (including interstate intraMTA) traffic. The Commission recognized, however, that it continued to retain separate authority over CMRS traffic.

20. Courts confirmed that, in permitting LEC–CMRS interconnection to be addressed through the section 251 framework, the Commission did not in any way lose its independent jurisdiction or authority to regulate that traffic under other provisions of the Act. Thus, although the Eighth Circuit invalidated the Commission's TELRIC pricing rules in general, it recognized that ''because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers, [including the reciprocal compensation rules] but only as these provisions apply to CMRS providers. Thus, [the pricing] rules * * * remain in full force and effect with respect to the CMRS providers, and our order of vacation does not apply to them in the CMRS

context.'' Subsequently, the DC Circuit held that CMRS providers were entitled to pursue formal complaints under section 208 of the Act for violations of the Commission's reciprocal compensation rules.

21. We build upon our actions in the *Local Competition First Report and Order* and find here that addressing ISP-bound traffic through the section 251 framework does not diminish the Commission's independent jurisdiction or authority to regulate traffic under other provisions of the Act. Specifically, we retain our authority under section 201 to regulate ISP-bound traffic, despite acknowledging that such traffic is section 251(b)(5) traffic. With respect to interstate services, the Act has long provided us with the authority to establish just and reasonable ''charges, practices, classifications, and regulations.'' The Commission thus retains full authority to regulate charges for traffic and services subject to federal jurisdiction, even when it is within the sections 251(b)(5) and 252(d)(2) framework. Because we re-affirm our findings concerning the interstate nature of ISP-bound traffic, which have not been vacated by any court, it follows that such traffic falls under the Commission's section 201 authority preserved by the Act and that we therefore have the authority to issue pricing rules pursuant to that section. This conclusion is reinforced by section 251(i) of the Act. As the Commission explained in the *ISP Remand Order*, section 251(i) ''expressly affirms the Commission's role in an evolving telecommunications marketplace, in which Congress anticipates that the Commission will continue to develop appropriate pricing and compensation mechanisms for traffic that falls within the purview of section 201.'' It concluded that section 251(i), together with section 201, equips the Commission with the tools necessary to keep pace with regulatory developments and new technologies. When read together, these statutory sections preserve the Commission's authority to address new issues that fall within its section 201 authority over interstate traffic, including compensation for the exchange of ISP-bound traffic. Consequently, in the *ISP Remand Order*, the Commission properly exercised its authority under section 201(b) to issue pricing rules governing the payment of compensation between carriers for ISP-bound traffic.

22. Our result today is consistent with the DC Circuit's opinion in *Bell Atlantic*, which concluded that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under section 251(b)(5). It is also consistent with the DC Circuit's *WorldCom* decision, in which the court rejected the Commission's view that section 251(g) excluded ISP-bound traffic from the scope of section 251(b)(5), but made no other findings. Finally, this result does not run afoul of the Eighth Circuit's decision on remand from the Supreme Court in the *Iowa Utilities Board* litigation, which held that ''the FCC does not have the authority to set the actual prices for the state commissions to use'' under section 251(b)(5). At the time of that decision, under the *Local Competition First Report and Order*, section 251(b)(5) applied only to local traffic. Thus, the Eighth Circuit merely held that the Commission could not set reciprocal compensation rates for local traffic. The court did not address the Commission's authority to set reciprocal compensation rates for interstate traffic. In sum, the Commission plainly has authority to establish pricing rules for interstate traffic, including ISP-bound traffic, under section 201(b), and that authority was preserved by section 251(i).

3. Other Issues

23. Most commenters urge the Commission to maintain the compensation rules governing ISP-bound traffic until the Commission is able to complete comprehensive intercarrier compensation reform. These parties contend that a higher compensation rate would create new opportunities for arbitrage and impose substantial financial burdens on wireless companies, incumbent LECs and state public utility commissions. They further claim that the existing regime has simplified interconnection negotiations.

24. In the *ISP Remand Order*, the Commission found that the one-way nature of ISP-bound traffic creates significant arbitrage opportunities. Due to the unbalanced nature of ISP-bound traffic, the Commission observed that reciprocal compensation arrangements created enormous incentives for competitive LECs to sign up ISPs as customers. The Commission cited evidence that competitive LECs, on average, terminated eighteen times more traffic than they originated, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, 90 percent of which was for ISP-bound traffic. The Commission concluded that ''the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments.'' This undermined the operation of competitive markets because competitive LECs were able to recover a disproportionate share of their costs from other carriers. To limit arbitrage opportunities that arose from ''excessively high reciprocal compensation rates,'' the Commission adopted a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at $.0015 per minute of use and declining to $.0007 per minute of use, the current cap. The Commission derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission. The interconnection agreements included lower rates for unbalanced traffic than for balanced traffic, and the rates declined over time, like the rate caps. Although the Commission made no specific findings with regard to the actual costs associated with delivering traffic to ISPs, it noted evidence in the record that technological advances were reducing the costs incurred by carriers when handling all forms of traffic. The Commission also noted that ''negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new agreements.''

25. On July 14, 2003, Core Communications, Inc. (''Core'') filed a petition pursuant to Section 10 of the Communications Act requesting that the Commission forbear from enforcing the rate caps and certain other provisions set forth in the *ISP Remand Order* with respect to the exchange of ISP-bound traffic between telecommunications carriers. In 2004, the Commission denied the petition with respect to rate caps and the mirroring rule, determining that Core had satisfied none of the three prongs of the statutory test for forbearance. First, the Commission found that forbearance from enforcement of the rate caps was not consistent with the public interest. To the contrary, the Commission concluded that rate caps remained necessary to prevent regulatory arbitrage and to promote efficient investment in telecommunications services and facilities. Second, the Commission found limited potential for discrimination under the rate caps. The caps applied to ISP-bound traffic only to the extent that an incumbent carrier offered to exchange all traffic at the same rate under section 251(b)(5). Accordingly, the Commission concluded that Core had not proven that the rate caps resulted in impermissible discrimination against or between competitive carriers or services. Finally,

the Commission found that Core had not demonstrated that enforcement of the rate caps was not necessary for the protection of consumers. Core advanced speculative general claims that the caps caused artificially high rates, had forced competitive carriers from the market, and had deterred investment in telecommunications services, all to consumers' detriment. The Commission rejected these unsupported claims, explaining that the rate caps were designed to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service and to avoid regulatory arbitrage and discrimination between services. For these reasons, the Commission denied Core's petition for forbearance insofar as rate caps were concerned.

26. In 2006, the DC Circuit affirmed our decision not to forbear from the rate cap (and the mirroring rule). The Court found reasonable the Commission's ''view that the rate caps are necessary to prevent the subsidization of dial-up Internet access consumers by consumers of basic telephone service'' that would occur if reciprocal compensation rates applied to one-way ISP-bound traffic. The Court likewise rejected Core's contention that the rate cap was ''unreasonably discriminatory,'' both because one-way ISP-bound calls were fundamentally different from other forms of traffic and because the mirroring rule ensures that '''the caps apply to ISP-bound traffic only if an incumbent LEC offers to exchange all section 251(b)(5) traffic at the same rate.''' Finally, the Court concluded that the Commission's concern that the rate cap was necessary to prevent '''regulatory arbitrage' and 'distorted economic incentives''' was reasonable.

27. The policy justifications provided by the Commission in 2001 for the rules at issue here have not been questioned by any court. In addition, the policy justifications provided by the Commission for refusing to forbear from enforcement of these rules were upheld by the DC Circuit in 2006. We therefore disagree with parties who suggest that the Commission, in responding to the DC Circuit's remand in *WorldCom*, must offer detailed new justifications for the ISP intercarrier payment regime; we have already offered our justifications for that regime. Moreover, both the *WorldCom* remand and *Core* writ of mandamus focused on the issue of legal authority. We also reject arguments that the Commission unlawfully delegated its authority in the *ISP Remand Order* and arguments that the Commission addressed previously in the *Core Forbearance Order*.

28. The Commission long has stated its intention to move to a more unified intercarrier compensation regime. Progress is difficult due to competing priorities, such as competition, innovation, universal service, and other goals. The Commission recognized in 2001 that ISP-bound traffic represented a unique arbitrage problem that required immediate attention, based on the policy concerns discussed above. The Commission remains committed to moving towards a more unified intercarrier compensation regime, as evidenced by the Further Notice issued in conjunction with this order.

29. In sum, we maintain the $.0007 cap and the mirroring rule pursuant to our Section 201 authority. These rules shall remain in place until we adopt more comprehensive intercarrier compensation reform.

II. Report and Order—Reform of High-Cost Universal Service Support

30. In this report and order, we address the ''Recommended Decision'' of the Federal-State Joint Board on Universal Service (Joint Board), which was released on November 20, 2007. As discussed below, we appreciate the great efforts expended by the Joint Board and its staff in considering how best to reform the current high-cost support mechanism and in developing its recommendations. We choose not to implement the recommendations contained in the *Comprehensive Reform Recommended Decision* at this time, however.

A. Background

31. The 1996 Act amended the Communications Act of 1934 with respect to the provision of universal service. In the 1996 Act, Congress sought to preserve and advance universal service, while at the same time opening all telecommunications markets to competition. Section 254(b) of the Act directs the Joint Board and the Commission to base policies for the preservation and advancement of universal service on several general principles, plus other principles that the Commission may establish. Among other things, section 254(b) directs that there should be specific, predictable, and sufficient federal and state universal service support mechanisms; quality services should be available at just, reasonable, and affordable rates; and access to advanced telecommunications and information services should be provided in all regions of the nation.

32. The Commission implemented the universal service provisions of the 1996 Act in the 1997 *Universal Service First Report and Order*. Among other things, the Commission adopted rules to create explicit universal service support mechanisms for customers living in rural and high-cost areas. Pursuant to section 254(e) of the Act, an entity must be designated as an eligible telecommunications carrier (ETC) to receive high-cost universal service support. ETCs may be incumbent LECs, or non-incumbent LECs, which are referred to as ''competitive ETCs.'' Under the existing high-cost support distribution mechanism, incumbent LEC ETCs receive high-cost support for their intrastate services based on their costs. Competitive ETCs receive support for each line based on the support the incumbent LEC would receive for that line in the service area. This support to competitive ETCs is known as ''identical support.'' The Commission's universal service high-cost support rules do not distinguish between primary and secondary lines; therefore, high-cost support may go to a single end user for multiple connections. Further, the Commission's rules result in subsidizing multiple competitors in the same high-cost area.

33. High-cost support for competitive ETCs has grown rapidly over the last several years, placing extraordinary pressure on the federal universal service fund. In 2001, high-cost universal service support totaled approximately $2.6 billion. By 2007, the amount of high-cost support had grown to approximately $4.3 billion per year. In recent years, this growth has been due mostly to increased support provided to competitive ETCs, which receive high-cost support based on the per-line support that the incumbent LECs receive pursuant to the identical support rule. Competitive ETC support, in the six years from 2001 through 2007, has grown from under $17 million to $1.18 billion—an annual growth rate of over 100 percent. This ''funded competition'' has grown significantly in a large number of rural, insular, or high-cost areas; in some study areas more than 20 competitive ETCs currently receive support.

34. To address the growth in competitive ETC support, the Joint Board recommended an interim cap on the amount of high-cost support available to competitive ETCs, pending comprehensive high-cost universal service reform. The Commission adopted this recommendation on May 1, 2008.

35. For the past several years, the Joint Board and the Commission have been exploring ways to reform the Commission's high-cost program. In the most recent high-cost support

comprehensive reform efforts, the Joint Board issued a recommended decision on November 20, 2007. The Universal Service Joint Board's recommended decision included several recommendations to address the growth in high-cost support and to reform the high-cost mechanisms. Specifically, the Universal Service Joint Board recommended that the Commission should: (1) Deliver high-cost support through a provider of last resort fund, a mobility fund, and a broadband fund; (2) cap the high-cost fund at $4.5 billion, the approximate level of 2007 high-cost support; (3) reduce the existing funding mechanisms during a transition period; (4) add broadband and mobility to the list of services eligible for support under section 254 of the Act; (5) eliminate the identical support rule; and (6) ''explore the most appropriate auction mechanisms to determine high-cost universal service support.''

36. On January 29, 2008, the Commission released the *Joint Board Comprehensive Reform NPRM*, seeking comment on the *Joint Board's Comprehensive Reform Recommended Decision*. Pursuant to section 254(a)(2), the Commission ''shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.''

B. Discussion

37. We have carefully reviewed the Joint Board's *Comprehensive Reform Recommended Decision* and the comments that were filed in response to the Commission's *Joint Board Comprehensive Reform NPRM*. We thank the Joint Board and its staff for their hard work in studying these difficult issues and in developing their recommendations. We choose not to implement these recommendations at this time, however.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–28464 Filed 11–28–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

[Docket No. PHMSA–2005–23447]

RIN 2137–AE25

Pipeline Safety: Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT)

ACTION: Stay of final rule.

SUMMARY: This Notice stays the effective date of a final rule published October 17, 2008 (73 FR 62148). In accordance with the Congressional Review Act, the final rule will be effective on December 22, 2008, 60 days after the final rule was transmitted to Congress .

DATES: Effective December 1, 2008 §§ 192.112, 192.328, 192.611(a)(1); 192.611(a)(3)(i), (ii) and (iii); 192.619(a) and (d); and 192.620 are stayed until December 22, 2008.

FOR FURTHER INFORMATION CONTACT: Alan Mayberry by phone at (202) 366–5124, or by e-mail at *alan.mayberry@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Supplementary Background

On October 17, 2008 PHMSA issued a final rule under Docket No. PHMSA–2005–23447 amending the Pipeline Safety Regulations (PSR; 49 CFR parts 190–199) to increase the regulatory maximum allowable operating pressure (MAOP) for certain gas transmission pipelines. The October 17, 2008 **Federal Resister** notice announced that the final rule would be effective November 17, 2008, thirty days after its publication. Because the final rule is a major rule within the meaning of the Congressional Review Act, however, its effective date must be delayed until 60 days after publication in the **Federal Register** or transmission to Congress, whichever is later. The final rule was transmitted to Congress on October 22, 2008. Accordingly, we are staying its effective date until December 22, 2008.

Issued in Washington, DC, on November 24, 2008 under authority delegated in 49 CFR part 1.

Carl T. Johnson,

Administrator.

[FR Doc. E8–28435 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 071203794–81464–02]

RIN 0648–AW36

Pacific Halibut Fisheries; Subsistence Fishing

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to amend the subsistence fishery rules for members of an Alaska Native tribe eligible to harvest Pacific halibut in waters in and off Alaska for customary and traditional use. The action correctly defines the location of Village of Kanatak tribal headquarters and International Pacific Halibut Commission (IPHC) halibut regulatory area (Area) in which the tribe's members may subsistence fish. The action would change the tribe's headquarters from Egegik to Wasilla and the corresponding Area from 4E to Area 3A. The intent of this action is to remove restrictions on participation of Village of Kanatak tribal members in traditional subsistence fisheries for Pacific halibut by correcting the tribe's headquarters to its actual location in Wasilla.

DATES: Effective December 31, 2008.

ADDRESSES: Copies of the Categorical Exclusion and Regulatory Impact Review prepared for this action, as well as the environmental assessment prepared for the original subsistence halibut action are available by mail from NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, Alaska; and via the Internet at the NMFS Alaska Region website at *http://alaskafisheries.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Peggy Murphy, 907–586–7843.

SUPPLEMENTARY INFORMATION: The United States and Canada participate in the International Pacific Halibut Commission (IPHC) and promulgate regulations governing the Pacific halibut (*Hippoglossus stenolepis*) fishery under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). Regulations governing the allocation and catch of halibut in U.S. convention waters that are in agreement with the

Halibut Act may be developed by the North Pacific Fishery Management Council (Council). Regulations recommended by the Council must be approved by the Secretary of Commerce before being implemented through the National Marine Fisheries Service (NMFS). The Council prepared an environmental assessment/regulatory impact review (EA/RIR) for subsistence halibut fisheries in January 2003 (see **ADDRESSES**), and NMFS published the final rule to implement subsistence halibut regulations on April 15, 2003 (68 FR 18145). The Alaska Native tribe, Village of Kanatak is recognized in the regulations as an organized tribal entity with its tribal headquarters located in Egegik, Alaska, within Area 4E. However, the tribe's headquarters are actually located in Wasilla, Alaska in Area 3A. The initial assignment of the tribal headquarters location to Egegik was incorrect.

The lists of rural communities and native tribes recommended by the Council and approved by the Secretary for subsistence fishing eligibility were derived from positive customary and traditional findings for halibut and bottomfish made by the Alaska State Board of Fisheries. The Council retains exclusive authority to recommend changes to the list of communities at § 300.65(g)(1) and Alaska Native tribes at § 300.65(g)(2) with customary and traditional uses of Pacific halibut. The Council recognized the Kanatak Tribal Council's request to correct its fishing area because the erroneous listing prevented some members of the Kanatak tribe from participating in traditional subsistence fisheries except in Area 4E. The Council responded by recommending an amendment of the regulations to change the listing of the Village of Kanatak's headquarters from Egegik to Wasilla and a corresponding change in the halibut regulatory area for subsistence fishing from Area 4E to Area 3A.

This action effectively changes the restriction on individual participation in subsistence fishing and is expected to redistribute some of the harvesting effort of the Village of Kanatak tribal members from Area 4E to Area 3A, and increase customary and traditional uses of halibut by individual members of the tribe in Area 3A. Because Wasilla is a community located in the Anchorage–Matsu–Kenai non–rural area within Area 3A, tribal members who reside there would be required to subsistence fish for halibut in Area 3A pursuant to § 300.65(h)(4). Area 3A is easier for tribal members to access than Area 4E, hence the tribe's request to correct the location of its tribal headquarters in regulations at § 300.65(g)(2).

The action will also improve accuracy of current regulations, and the quality of subsistence halibut information. Alternative actions considered and rejected may be found in the RIR prepared for this action. The background and need for this action were described in further detail in the preamble to the proposed rule for this action (73 FR 45201; August 4, 2008). The RIR and proposed rule are available on the Internet and from NMFS (see **ADDRESSES**).

The proposed rule was published in the **Federal Register** on August 4, 2008 (73 FR 45201), and the public review and comment period closed on September 3, 2008. No comments were received, and thus no changes have been made to the final rule from the proposed rule.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the International Pacific Halibut Commission (IPHC), the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c) allows the Regional Council having authority for a particular geographical area to develop regulations governing the allocation and catch of halibut in U.S. Convention waters as long as those regulations do not conflict with IPHC regulations. This final action is consistent with the Council's authority to allocate the halibut resource among fishery participants in the waters in and off Alaska.

Executive Order (E.O.) 13175 of November 6, 2000 (25 U.S.C. 450 note), the Executive Memorandum of April 29, 1994 (25 U.S.C. 450 note), and the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995) outline the responsibilities of NMFS in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 109–447 (118 Stat 3267), extends the consultation requirements of E.O. 13175 to Alaska Native corporations. NMFS has special obligations to consult and coordinate with tribal governments and Alaska Native Claims Settlement Act (ANCSA) corporations on a government-to-government basis. This rule affects individual members of the Village of Kanatak tribe, but not the tribe itself, and the village of Kanatak is not recognized as an ANCSA corporation. NMFS recognizes the importance of communication, and during the process of developing the proposed action, NMFS consulted with the Alaska Native Subsistence Halibut Working Group and the Kanatak Tribal Administrator.

The final rule was determined to be not significant for the purposes of E.O. 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this action, if adopted, would not have a significant economic impact on a substantial number of small entities. The action directly regulates subsistence practices of individuals, and will not apply to small entities within the meaning of the Regulatory Flexibility Act. Because there will not be a significant impact on a substantial number of small entities, a regulatory flexibility analysis is not required and none was prepared.

List of Subjects for 50 CFR Part 300

Alaska, Alaska Natives, Fisheries, Fishing, Pacific halibut fisheries, Tribes.

Dated: November 25, 2008.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, NMFS amends 50 CFR part 300 as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for 50 CFR part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 2. In § 300.65, in paragraph (g)(2):

■ A. In the table for Halibut Regulatory Area 3A, add in alphabetical order an entry for ''Wasilla''.

■ B. In the table for Halibut Regulatory Area 4E, revise the entry for ''Egegik''.

The addition and revision read as follows.

§ 300.65 Catch sharing plan and domestic management measures in waters in and off Alaska.

* * * * *

(g) * * *

(2) * * *

Halibut Regulatory Area 3A

Place with Tribal Headquarters	Organized Tribal Entity
* * * * * * *	
Wasilla	Village of Kanatak
* * * * * * *	

* * * * *

Halibut Regulatory Area 4E

Place with Tribal Headquarters	Organized Tribal Entity
* * * * * * *	
Egegik	Egegik Village
* * * * * * *	

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[FR Doc. E8–28461 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 080408542–8615–01]

RIN 0648–XK69

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Whiting Allocation

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

ACTION: Reapportionment of surplus Pacific whiting allocation; request for comments.

SUMMARY: NMFS has determined that 35,000 metric tons (mt) of the 97,669 mt shore-based sector allocation would not be used by December 31, 2008. Therefore, NMFS has reapportioned the surplus whiting to the other sectors in the fishery.

DATES: The 20,000 mt reallocation was effective from 0001 local time (l.t.) November 6, 2008, and the 15,000 mt allocation was effective from 1400 l.t. November 18, 2008, until the December 31, 2008, unless modified, superseded or rescinded. Comments will be accepted through December 16, 2008.

ADDRESSES: You may submit comments, identified by the RIN number 0648-XK69, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Fax: 206–526–6736, Attn: Becky Renko
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070, Attn: Becky Renko

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Fisheries, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115 0070; tel: 206–526–6110; fax: 206–526–6736; or, e-mail: *becky.renko@noaa.gov*.

SUPPLEMENTARY INFORMATION: This action is authorized by regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California.

The 2008 non–tribal commercial OY for whiting is 232,545 mt. Regulations at 50 CFR 660.323(a)(2) divide the commercial whiting optimum yield (OY) into separate allocations for the catcher/processor, mothership, and shore-based sectors. The catcher/processor sector is composed of vessels that harvest and process whiting. The mothership sector is composed of catcher vessels that harvest whiting and mothership vessels that process, but do not harvest whiting. The shore-based sector is composed of vessels that harvest whiting for delivery to land-based processors. Each commercial sector receives a portion of the commercial OY. For 2008 the catcher/processors received 34 percent (79,065 mt), the motherships received 24 percent (55,811 mt), and the shore-based sector received 42 percent (97,669 mt).

The best available information on November 5, 2008, indicated that 20,000 mt of the 97,669 mt shore–based sector(s allocation would not be used by December 31, 2008. Therefore, on November 5, 2008 NMFS reapportioned the surplus whiting. Such reapportionments are disbursed to the other sectors in the same proportion as each sector's allotted portion of the commercial OY. Facsimiles directly to fishing businesses and postings on the Northwest Regions internet site were used to provide actual notice to the affected fishers.

The best available information on November 18, 2008, indicated that an additional 15,000 mt of the revised 77,669 mt shore-based sector's allocation would not be used by December 31, 2008. Therefore an additional surplus of 15,000 mt of whiting was reapportioned from the shore-based sector to the catcher/processor sector at 1400 local time November 18, 2008. Facsimiles directly to fishing businesses and postings on the Northwest Regions internet site were used to provide actual notice to the affected fishers.

NMFS Action

This action announces the reapportionment of 20,000 mt of whiting from the shore-based sector to the catcher/processor and mothership sectors at 0001 local time November 6, 2008. The revised Pacific whiting allocations by sector for 2008 as of November 6, 2008 were: catcher/processor 90,789 mt, mothership 64,087 mt, and shore-based 77,669 mt. This action also announces the reapportionment of 15,000 mt of whiting from the shore-based sector to the catcher/processor sector at 1400 local time November 18, 2008. The revised Pacific whiting allocations by sector as of November 18, 2008 are: catcher/processor 105,789 mt, mothership 64,087 mt, and shore-based 62,669 mt.

Classification

The determinations to take these actions were based on the most recent data available. The aggregate data upon which the determinations were based are available for public inspection at the Office of the Regional Administrator (see **ADDRESSES**) during business hours.

These actions are authorized by the regulations implementing the FMP. The Assistant Administrator for Fisheries, NMFS, finds good cause to waive the requirement to provide prior notice and opportunity for comment on these actions pursuant to 5 U.S.C. 553 (3)(b)(B), because providing prior notice and opportunity would be impracticable. It would be impracticable because of the need for immediate action. NMFS has determined that providing an opportunity for prior notice and comment would be impractical and contrary to public interest. Delay of this action would leave whiting unharvested. In addition, the catcher/processors and motherships needed an immediate reallocation if they were to keep their workers employed. For these same reasons the agency finds good cause to waive the 30-day delay in effectiveness. These actions are taken under the authority of 50 CFR 660.323(c), and are exempt from

review under Executive Order 12866. Actual notice of the reapportionments was provided to the affected fishers.

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

Dated: November 25, 2008.

Emily H. Menashes,

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

[FR Doc. E8–28468 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 060824226–6322–02]

RIN 0648–AX43

Magnuson–Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures; Inseason Adjustments

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

ACTION: Final rule; inseason adjustments to biennial groundfish management measures; request for comments.

SUMMARY: This final rule announces inseason changes to management measures in the commercial Pacific Coast groundfish fisheries. These actions, which are authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP), are intended to allow fisheries to access more abundant groundfish stocks while protecting overfished and depleted stocks.

DATES: Effective 0001 hours (local time) December 1, 2008. Comments on this final rule must be received no later than 5 p.m., local time on December 26, 2008.

ADDRESSES: You may submit comments, identified by RIN 0648–AX43 by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Fax: 206–526–6736, Attn: Gretchen Arentzen.
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070, Attn: Gretchen Arentzen.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter ''N/A'' in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Gretchen Arentzen (Northwest Region, NMFS), phone: 206–526–6147, fax: 206–526–6736 and e–mail *gretchen.arentzen@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is accessible via the Internet at *http://www.gpoaccess.gov/fr/index.html*. Background information and documents are available at the Pacific Fishery Management Council's website at *http://www.pcouncil.org/*.

Background

The Pacific Coast Groundfish FMP and its implementing regulations at title 50 in the Code of Federal Regulations (CFR), part 660, subpart G, regulate fishing for over 90 species of groundfish off the coasts of Washington, Oregon, and California. Groundfish specifications and management measures are developed by the Pacific Fishery Management Council (Council), and are implemented by NMFS. A proposed rule to implement the 2007–2008 specifications and management measures for the Pacific Coast groundfish fishery and Amendment 16–4 of the FMP was published on September 29, 2006 (71 FR 57764). The final rule to implement the 2007–2008 specifications and management measures for the Pacific Coast Groundfish Fishery was published on December 29, 2006 (71 FR 78638). These specifications and management measures are codified in the CFR (50 CFR part 660, subpart G). The final rule was subsequently amended on: March 20, 2007 (71 FR 13043); April 18, 2007 (72 FR 19390); July 5, 2007 (72 FR 36617); August 3, 2007 (72 FR 43193); September 18, 2007 (72 FR 53165); October 4, 2007 (72 FR 56664); December 4, 2007 (72 FR 68097); December 18, 2007 (72 FR 71583); April 18, 2008 (73 FR 21057), May 9, 2008 (73 FR 26325), July 24, 2008 (73 FR 43139), October 7, 2008 (73 FR 58499), and October 14, 2008 (73 FR 60642).

Changes to current groundfish management measures implemented by this action were recommended by the Council, in consultation with Pacific Coast Treaty Indian Tribes and the States of Washington, Oregon, and California, at its November 2–7, 2008, meeting in San Diego, California. The Council recommended adjustments to current groundfish management measures to respond to updated fishery information and other inseason management needs. This action is not expected to result in greater impacts to overfished species than originally projected at the beginning of 2008. Estimated mortality of overfished and target species are the result of management measures designed to meet the Pacific Coast Groundfish FMP objective of achieving, to the extent possible, but not exceeding, OYs of target species, while fostering the rebuilding of overfished stocks by remaining within their rebuilding OYs.

Limited Entry Non–Whiting Trawl Fishery Management Measures

At their November 2008 meeting, the Council received new data and analyses on the catch of groundfish in the limited entry trawl fishery. The Council's recommendations for revising 2008 trawl fishery management measures provide additional harvest opportunities in some areas for target species with catches tracking behind projections.

Catches of petrale sole in the limited entry trawl fishery were tracking ahead of projections in spring 2008, when approximately 40 percent of the 2008 petrale sole OY was taken during the months of January and February. In response to projections that the 2008 petrale sole OY could be exceeded if the higher than projected catches continued throughout the year, the Council recommended, and NMFS implemented, precautionary reductions in petrale sole cumulative limits at their June 6–13, 2008, meeting. These reductions included a reduction in the cumulative limits for vessels using large and small footrope trawl gear from ''40,000 lb (18,144 kg) per two months'' to ''30,000 lb (13,608 kg) per two months'' in period 6 (November–December), and were intended to keep catches of petrale sole within the 2008 OY. At their September 10–14, 2008, meeting, the Council considered the most recent available fishery information and catch projections through the end of the year, which indicated that catches of petrale sole had slowed considerably from the high catches observed in January and

February 2008. Therefore the Council recommended and NMFS liberalized some of the petrale sole cumulative limits that had been lowered as a precautionary measure earlier in the year (73 FR 60642, October 14, 2008).

At their November 2–7, 2008, meeting, the Council considered data that indicated that catches of petrale sole were tracking behind 2008 projections made at the Council's September 2008 meeting, and that catches of petrale sole are now projected to come in below the 2008 OY if no adjustments to RCAs or cumulative limits are made during period 6 (November–December). The Council considered the most recently available data from the Pacific Fishery Information Network (PacFIN) at their November 2–7, 2008 meeting. These data, including catches through October 25, 2008, indicated that: 1,716 mt of the 2,499 mt petrale sole OY had been taken. Increases in petrale sole cumulative trip limits were analyzed for vessels using large and small footrope trawl gear North of 40°10.00′ N. lat. and for all trawl gear types South of 40°10.00′ N. lat. Increases for target species opportunities for vessels using selective flatfish trawl gear North of 40°10.00′ N. lat. were considered, but not recommended by the Council due to the need to keep canary rockfish impacts within the 2008 canary rockfish OY.

Many cumulative trip limits are established for two-month periods. A two-month limit can be raised in the middle of the period, therefore, this increase would become effective during the two-month cumulative limit, on December 1.

Based on these analyses above, the Council recommended and NMFS is implementing an increase in the limited entry trawl fishery cumulative limits, in Period 6, effective December 1: for petrale sole taken with large and small footrope gears North of 40°10.00′ N. lat. from ''45,000 lb (20,412 kg) per two months'' to ''60,000 lb (27,216 kg) per two months''; and for petrale sole South of 40°10.00′ N. lat. from ''65,000 lb (29,484 kg) per two months'' to ''75,000 lb (34,019 kg) per two months''.

Classification

These actions are taken under the authority of 50 CFR 660.370(c) and are exempt from review under Executive Order 12866.

These actions are taken under the authority of the Magnuson–Stevens Fishery Conservation and Management Act (Magnuson–Stevens Act), and are in accordance with 50 CFR part 660, the regulations implementing the FMP. These actions are based on the most recent data available. The aggregate data upon which these actions are based are available for public inspection at the Office of the Administrator, Northwest Region, NMFS, (see **ADDRESSES**) during business hours.

For the following reasons, NMFS finds good cause to waive prior public notice and comment on the revisions to the 2008 groundfish management measures under 5 U.S.C. 553(b)(B) because notice and comment would be impracticable and contrary to the public interest. Also for the same reasons, NMFS finds good cause to waive part of the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective December 1, 2008.

The recently available data upon which these recommendations were based was provided to the Council, and the Council made its recommendations, at its November 2–7, 2008, meeting in San Diego, California. The Council recommended that these changes be implemented on or as close as possible to December 1, 2008. There was not sufficient time after that meeting to draft this document and undergo proposed and final rulemaking before these actions need to be in effect. For the actions to be implemented in this final rule, affording the time necessary for prior notice and opportunity for public comment would prevent the Agency from managing fisheries using the best available science by approaching without exceeding the OYs for federally managed species. The adjustments to management measures in this document affect: the limited entry commercial trawl fishery off Washington, Oregon, and California. These adjustments to management measures must be implemented in a timely manner, by December 1, 2008, to: allow fishermen an opportunity to harvest higher trip limits for stocks with catch tracking behind their projected 2008 catch levels.

Changes to the petrale sole cumulative limits in the limited entry trawl fishery are needed to relieve a restriction by allowing fishermen increased opportunities to harvest available healthy stocks and to approach, but not exceed, the 2008 OY for petrale sole. They must be implemented in a timely manner by December 1, 2008, so that fishermen are allowed to harvest healthy stocks when they are available in December and meet the objective of the Pacific Coast Groundfish FMP to allow fisheries to approach, but not exceed, OYs. It would be contrary to the public interest to wait to implement these changes until after public notice and comment, because allowing this additional harvest is important to coastal communities.

Delaying these changes would keep management measures in place that are not based on the best available data which could deny fishermen access to available harvest. Such delay would impair achievement of one of the Pacific Coast Groundfish FMP objectives of providing for year–round harvest opportunities or extending fishing opportunities as long as practicable during the fishing year.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: November 25, 2008.

Emily H. Menashes

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

■ For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

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

■ 2. Tables 3 (North) and 3 (South) to part 660, subpart G are revised to read as follows:

Table 3 (North) to Part 660, Subpart G -- 2007-2008 Trip Limits for Limited Entry Trawl Gear North of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read § 660.301 - § 660.399 before using this table 10/01/08

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[6/]:						
1	North of 48°10.00' N. lat.	shore - modified 200 fm [7/]	shore - 200 fm	shore - 150 fm			shore - modified 200 fm [7/]
2	48°10.00' N. lat. - 46°38.17' N. lat.	75 fm - modified 200 fm [7/]	60 fm - 200 fm	60 fm - 150 fm		75 fm - 150 fm	75 fm - modified 200 fm [7/]
3	46°38.17' N. lat. - 46°16.00 N. lat.		60 fm - 200 fm		60 fm - 150 fm		
4	46°16.00 N. lat. - 45°46.00' N. lat.		75 fm - 200 fm	75 fm - 150 fm		75 fm - 200 fm	
5	45°46.00' N. lat. - 43°20.83' N. lat.		75 fm - 200 fm				
6	43°20.83' N. lat. - 42°40.50' N. lat.	shore - modified 200 fm [7/]	shore - 200fm				shore - modified 200 fm [7/]
7	42°40.50' N. lat. -40°10.00' N. lat.	75 fm - modified 200 fm [7/]	75 fm - 200 fm	60 fm - 200 fm		75 fm - 200 fm	75 fm - modified 200 fm 7/

Selective flatfish trawl gear is required shoreward of the RCA; all trawl gear (large footrope, selective flatfish trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope trawl gear is prohibited shoreward of the RCA. Midwater trawl gear is permitted only for vessels participating in the primary whiting season.

See § 660.370 and § 660.381 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 and §§ 660.396-660.399 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).

State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.

8	**Minor slope rockfish[2/] & Darkblotched rockfish**	1,500 lb/ 2 months				
9	**Pacific ocean perch**	1,500 lb/ 2 months				
10	**DTS complex**					
11	Sablefish					
12	large & small footrope gear	14,000 lb/ 2 months		19,000 lb/ 2 months	24,000 lb/ 2 months	19,000 lb/ 2 months
13	selective flatfish trawl gear	5,000 lb/ 2 months			7,000 lb/ 2months	
14	multiple bottom trawl gear [8/]	5,000 lb/ 2 months			7,000 lb/ 2months	
15	Longspine thornyhead					
16	large & small footrope gear	25,000 lb/ 2 months				
17	selective flatfish trawl gear	3,000 lb/ 2 months				
18	multiple bottom trawl gear [8/]	3,000 lb/ 2 months				
19	Shortspine thornyhead					
20	large & small footrope gear	12,000 lb/ 2 months		25,000 lb/ 2 months		
21	selective flatfish trawl gear	3,000 lb/ 2 months				
22	multiple bottom trawl gear [8/]	3,000 lb/ 2 months				
23	Dover sole					
24	large & small footrope gear	80,000 lb/ 2 months				90,000 lb/ 2 months
25	selective flatfish trawl gear	40,000 lb/ 2 months	50,000 lb/ 2 months	40,000 lb/ 2 months	50,000 lb/ 2 months	
26	multiple bottom trawl gear [8/]	40,000 lb/ 2 months	50,000 lb/ 2 months	40,000 lb/ 2 months	50,000 lb/ 2 months	

TABLE 3 (North)

Table 3 (North). Continued

27	**Whiting**							TABLE 3 (North) con't
28	midwater trawl	Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.373 for season and trip limit details. -- After the primary whiting season: CLOSED.						
29	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.						
30	**Flatfish** (except Dover sole)							
31	Arrowtooth flounder							
32	large & small footrope gear	150,000 lb/ 2 months						
33	selective flatfish trawl gear	10,000 lb/ 2 months						
34	multiple bottom trawl gear [8/]	10,000 lb/ 2 months						
35	Other flatfish [3/], English sole, starry flounder, & Petrale sole							
36	large & small footrope gear for Other flatfish [3/], English sole, & starry flounder	110,000 lb/ 2 months	110,000 lb/ 2 months, no more than 30,000 lb/ 2 months of which may be petrale sole.	110,000 lb/ 2 months, no more than 20,000 lb/ 2 months of which may be petrale sole.			110,000 lb/ 2 months	
37	large & small footrope gear for Petrale sole	40,000 lb/ 2 months					60,000 lb/ 2 months	
38	selective flatfish trawl gear for Other flatfish [3/], English sole, & starry flounder	70,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.	70,000 lb/ 2 months, no more than 18,000 lb/ 2 months of which may be petrale sole.	50,000 lb/ 2 months, no more than 18,000 lb/ 2 months of which may be petrale sole.	80,000 lb/ 2 months, no more than 18,000 lb/ 2 months of which may be petrale sole.	80,000 lb/ 2 months, no more than 16,000 lb/ 2 months of which may be petrale sole.	80,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.	
39	selective flatfish trawl gear for Petrale sole							
40	multiple bottom trawl gear [8/]	70,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.	70,000 lb/ 2 months, no more than 18,000 lb/ 2 months of which may be petrale sole.	50,000 lb/ 2 months, no more than 18,000 lb/ 2 months of which may be petrale sole.	80,000 lb/ 2 months, no more than 18,000 lb/ 2 months of which may be petrale sole.	80,000 lb/ 2 months, no more than 16,000 lb/ 2 months of which may be petrale sole.	80,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.	
41	**Minor shelf rockfish [1/], Shortbelly, Widow & Yelloweye rockfish**							
42	midwater trawl for Widow rockfish	Before the primary whiting season: CLOSED. -- During primary whiting season: In trips of at least 10,000 lb of whiting, combined widow and yellowtail limit of 500 lb/ trip, cumulative widow limit of 1,500 lb/ month. Mid-water trawl permitted in the RCA. See §660.373 for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED.						
43	large & small footrope gear	300 lb/ 2 months						
44	selective flatfish trawl gear	300 lb/ month		1,000 lb/ month, no more than 200 lb/ month of which may be yelloweye rockfish			300 lb/ month	
45	multiple bottom trawl gear [8/]	300 lb/ month		300 lb/ 2 months, no more than 200 lb/ month of which may be yelloweye rockfish			300 lb/ month	

Table 3 (North). Continued

46	**Canary rockfish**				
47	large & small footrope gear	CLOSED			
48	selective flatfish trawl gear	100 lb/ month	300 lb/ month	100 lb/ month	
49	multiple bottom trawl gear [8/]	CLOSED			
50	**Yellowtail**				
51	midwater trawl	Before the primary whiting season: CLOSED. -- During primary whiting season: In trips of at least 10,000 lb of whiting: combined widow and yellowtail limit of 500 lb/ trip, cumulative yellowtail limit of 2,000 lb/ month. Mid-water trawl permitted in the RCA. See §660.373 for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED.			
52	large & small footrope gear	300 lb/ 2 months			
53	selective flatfish trawl gear	2,000 lb/ 2 months			
54	multiple bottom trawl gear [8/]	300 lb/ 2 months			
55	**Minor nearshore rockfish & Black rockfish**				
56	large & small footrope gear	CLOSED			
57	selective flatfish trawl gear	300 lb/ month			
58	multiple bottom trawl gear [8/]	CLOSED			
59	**Lingcod** [4/]				
60	large & small footrope gear	1,200 lb/ 2 months	4,000 lb/ 2 months		
61	selective flatfish trawl gear	1,200 lb/ 2 months	1,200 lb/2 months		
62	multiple bottom trawl gear [8/]	1,200 lb/ 2 months	1,200 lb/2 months		
63	**Pacific cod**	30,000 lb/ 2 months	70,000 lb/ 2 months		30,000 lb/ 2 months
64	**Spiny dogfish**	200,000 lb/ 2 months	150,000 lb/ 2 months	100,000 lb/ 2 months	
65	**Other Fish** [5/]	Not limited			

TABLE 3 (North) con't

1/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish.
2/ Splitnose rockfish is included in the trip limits for minor slope rockfish.
3/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
4/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
5/ "Other fish" are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at §§ 660.391-660.394.
7/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
8/ If a vessel has both selective flatfish gear and large or small footrope gear on board during a cumulative limit period (either simultaneously or successively), the most restrictive cumulative limit for any gear on board during the cumulative limit period applies for the entire cumulative limit period.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 3 (South) to Part 660, Subpart G -- 2007-2008 Trip Limits for Limited Entry Trawl Gear South of 40°10' N. Lat.

Other Limits and Requirements Apply -- Read § 660.301 - § 660.399 before using this table

10/01/08

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[6/]:						
1	South of 40°10' N. lat.	100 fm - 150 fm[7/]					
	All trawl gear (large footrope, selective flatfish trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope trawl gear is prohibited shoreward of the RCA. Midwater trawl gear is permitted only for vessels participating in the primary whiting season.						
	See § 660.370 and § 660.381 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 and §§ 660.396-660.399 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).						
	State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.						
2	**Minor slope rockfish[2/] & Darkblotched rockfish**						
3	40°10' - 38° N. lat.	15,000 lb/ 2 months					
4	South of 38° N. lat.	55,000 lb/ 2 months					
5	**Splitnose**						
6	40°10' - 38° N. lat.	15,000 lb/ 2 months			10,000 lb/ 2 months		15,000 lb/ 2 months
7	South of 38° N. lat.	40,000 lb/ 2 months					
8	**DTS complex**						
9	Sablefish	14,000 lb/ 2 months		19,000 lb/ 2 months	24,000 lb/ 2 months		19,000 lb/ 2 months
10	Longspine thornyhead	25,000 lb/ 2 months					
11	Shortspine thornyhead	12,000 lb/ 2 months		25,000 lb/ 2 months			
12	Dover sole	80,000 lb/ 2 months					90,000 lb/ 2 months
13	**Flatfish** (except Dover sole)						
14	Other flatfish[3/], English sole, & starry flounder	110,000 lb/ 2 months	110,000 lb/ 2 months, no more than 30,000 lb/ 2 months of which may be petrale sole.				110,000 lb/ 2 months
15	Petrale sole	50,000 lb/ 2 months					75,000 lb/ 2 months
16	Arrowtooth flounder	10,000 lb/ 2 months					
17	**Whiting**						
18	midwater trawl	Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.373 for season and trip limit details. -- After the primary whiting season: CLOSED.					
19	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.					

TABLE 3 (South)

Table 3 (South). Continued

20	**Minor shelf rockfish[1/], Chilipepper, Shortbelly, Widow, & Yelloweye rockfish**					**TABLE 3 (South) con't**
21	large footrope or midwater trawl for Minor shelf rockfish & Shortbelly	300 lb/ month				
22	large footrope or midwater trawl for Chilipepper	2,000 lb/ 2 months	12,000 lb/ 2 months	8,000 lb/ 2 months		
23	large footrope or midwater trawl for Widow & Yelloweye	CLOSED				
24	small footrope trawl for Minor Shelf, Shortbelly, Widow & Yelloweye	300 lb/ month				
25	small footrope trawl for Chilipepper	2,000 lb/ 2 months			5,000 lb/ 2 months	
26	**Bocaccio**					
27	large footrope or midwater trawl	300 lb/ 2 months				
28	small footrope trawl	CLOSED				
29	**Canary rockfish**					
30	large footrope or midwater trawl	CLOSED				
31	small footrope trawl	100 lb/ month	300 lb/ month	100 lb/ month		
32	**Cowcod**	CLOSED				
33	**Minor nearshore rockfish & Black rockfish**					
34	large footrope or midwater trawl	CLOSED				
35	small footrope trawl	300 lb/ month				
36	**Lingcod[4/]**					
37	large footrope or midwater trawl	1,200 lb/ 2 months	4,000 lb/ 2 months			
38	small footrope trawl		1,200 lb/ 2 months			
39	**Pacific cod**	30,000 lb/ 2 months	70,000 lb/ 2 months		30,000 lb/ 2 months	
40	**Spiny dogfish**	200,000 lb/ 2 months	150,000 lb/ 2 months	100,000 lb/ 2 months		
41	**Other Fish[5/] & Cabezon**	Not limited				

1/ Yellowtail is included in the trip limits for minor shelf rockfish.
2/ POP is included in the trip limits for minor slope rockfish
3/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
4/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
5/ Other fish are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling.
6/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at §§ 660.391-660.394.
7/ South of 34°27' N. lat., the RCA is 100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

[FR Doc. E8–28457 Filed 11–25–08; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 231
Monday, December 1, 2008

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1205

[Doc. #AMS–CN–08–0063; CN–08–003]

Cotton Research and Promotion Program: Designation of Cotton-Producing States; Hearing on Proposed Amendments to Cotton Research and Promotion Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of hearing on proposed rulemaking.

SUMMARY: Notice is hereby given of a public hearing to receive evidence on proposed amendments to the Cotton Research and Promotion Order (Order). The Agricultural Marketing Service (AMS) is proposing to amend the Order to implement section 14202 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234), hereinafter referred to as the ''2008 Farm Bill'', that amended the Cotton Research and Promotion Act (7 U.S.C. 2101–2118), hereinafter referred to as the ''Cotton Act.'' The 2008 Farm Bill designated the States of Kansas, Virginia, and Florida in the definition of ''cotton-producing state'' effective beginning with the 2008 crop of cotton. In addition, AMS proposes to make any such changes as may be necessary to the order to conform to any amendment that may result from the hearing.

DATES: The hearing date is Friday, December 5, 2008, beginning at 9 a.m. in Washington, DC.

ADDRESSES: The hearing will be held at the U.S. Department of Agriculture, Jamie L. Whitten Building, Room 107A, 1400 Independence Avenue, SW., Washington, DC 20250. For admittance to the Federal building where the hearing is held, all attendees will be required to show a valid government issued photo identification, such as a driver's license.

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Chief, Research and Promotion Staff, Cotton and Tobacco Programs, AMS, USDA, Stop 0224, 1400 Independence Ave., SW., Room 2639–S, Washington, DC 20250–0224, telephone (202) 720–6603, facsimile (202) 690–1718, or e-mail at *Shethir.Riva@usda.gov.*

SUPPLEMENTARY INFORMATION: The Cotton Research and Promotion Order [7 CFR part 1205] is authorized under the Cotton Research and Promotion Act [7 U.S.C. 2101–2118]. This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code, and therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601–612) seeks to ensure that within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. Interested persons are invited to present evidence at the hearing on the possible regulatory and informational impacts of the proposals on small businesses.

These amendments have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the proposals.

The Cotton Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 12 of the Cotton Act, any person subject to an order may file with the Secretary a petition stating that the order, any provision of the plan, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Cotton Act provides that the District Court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling, provided a complaint is filed within 20 days from the date of the entry of ruling.

The Cotton Act authorizes and provides for the establishment of the Cotton Board (Board) and the Cotton Research and Promotion Program (Program). The Board is currently composed of 37 members and 37 alternate members (22 producer and 15 importer members and alternate members) and one consumer advisor. The Board is responsible for carrying out an effective and continuous program of research and promotion in order to strengthen the competitive position of Upland cotton by expanding domestic and foreign markets for cotton, improving fiber quality, and lowering the costs of production.

Section 14202 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234) (2008 Farm Bill) amended the Cotton Act by adding the States of Kansas, Virginia, and Florida to the definition of ''cotton-producing state'' effective beginning with the 2008 crop of cotton. In accordance with this amendment, AMS is proposing to amend the Research and Promotion Order [7 CFR part 1205] to incorporate the States of Kansas, Virginia, and Florida into the definition of cotton-producing state as well as the definition of cotton-producing region.

Section 1205.314 currently defines Cotton-Producing State as, ''Cotton-producing State means each of the following States and combination of States: Alabama-Florida; Arizona; Arkansas; California-Nevada; Georgia; Louisiana; Mississippi; Missouri-Illinois; New Mexico; North Carolina-Virginia; Oklahoma; South Carolina; Tennessee-Kentucky; Texas.'' Currently, Kansas is not included in this definition, Virginia is combined as a region with North Carolina, and Florida is combined as a region with Alabama. AMS is proposing to amend the definition so that Kansas is added and Florida and Virginia are separated from their current partner states as provided for in the 2008 Farm Bill.

In addition, the agency is also proposing to amend the definition of cotton-producing region in section 1205.319 to make it consistent with the change to the definition of cotton-producing State. ''Cotton-producing region'' is currently defined as ''each of the following groups of cotton-producing States: (a) Southeast Region: Alabama-Florida, Georgia, North Carolina-Virginia, and South Carolina;

(b) Midsouth Region: Arkansas, Louisiana, Mississippi, Missouri-Illinois, and Tennessee-Kentucky; (c) Southwest Region: Oklahoma and Texas; (d) Western Region: Arizona, California-Nevada, and New Mexico.''

The amendments proposed herein would allow the States of Kansas, Virginia, and Florida to have at least one member and an additional member for each 1 million bales or major fraction (more than half) thereof of cotton produced in the state and marketed above one million bales during the period specified in the regulations for determining Board membership.

Finally, AMS proposes to make any such changes as may be necessary to the Order to conform to any amendment that may result from the hearing.

The hearing is called pursuant to the provisions of the Cotton Act and the applicable rules of practice and procedure governing proceedings under research, promotion, and information programs (7 CFR part 1200). The public hearing is held for the purpose of determining whether the proposed amendments or appropriate modifications thereof will tend to effectuate the declared policy of the Act, as amended by the 2008 Farm Bill.

Evidence also will be taken to determine whether emergency conditions exist that would warrant omission of a recommended decision under the rules of practice and procedure (7 CFR 1200.13(d)) with respect to any proposed amendments.

Testimony is invited at the hearing on the proposals contained in this notice. All persons wishing to submit written material as evidence at the hearing should be prepared to submit four copies of such material at the hearing and should have prepared testimony available for presentation at the hearing.

From the time the notice of hearing is issued and until the issuance of a final decision in this proceeding, USDA employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. The prohibition applies to employees in the following organizational units: Office of the Secretary of Agriculture; Office of the Administrator, AMS; Office of the General Counsel; and the Cotton and Tobacco Programs, AMS.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

List of Subjects in 7 CFR Part 1205

Advertising, Agricultural research, Cotton, Marketing agreements, Reporting and recordkeeping requirements.

PART 1205—COTTON RESEARCH AND PROMOTION

For the reasons set forth in the preamble, 7 CFR part 1205 is proposed to be amended as follows:

1. The authority citation for 7 CFR part 1205 continues to read as follows:

Authority: 7 U.S.C. 2101–2118 and 7 U.S.C. 7401.

2. Testimony is invited on the following proposals or appropriate alternatives or modifications to the proposal.

Proposals submitted by USDA:

Proposal Number 1

3. Revise § 1205.314 to read as follows:

§ 1205.314 Cotton-producing State.

''Cotton-producing State'' means each of the following States and combination of States: Alabama; Arizona; Arkansas; California-Nevada; Florida; Georgia; Kansas; Louisiana; Mississippi; Missouri-Illinois; New Mexico; North Carolina; Oklahoma; South Carolina; Tennessee-Kentucky; Texas; and Virginia.

Proposal Number 2

4. Revise § 1205.319, to read as follows:

§ 1205.319 Cotton-producing region.

''Cotton-producing region'' means each of the following groups of cotton producing States:

(a) Southeast Region: Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia;

(b) Midsouth Region: Arkansas, Louisiana, Mississippi, Missouri-Illinois, and Tennessee-Kentucky;

(c) Southwest Region: Kansas, Oklahoma and Texas;

(d) Western Region: Arizona, California-Nevada, and New Mexico.

Proposal Number 3

Make other such changes as may be necessary to the order to conform with any amendment thereto that may result from the hearing.

Dated: November 24, 2008.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. E8–28569 Filed 11–28–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 1010

RIN 1990–AA31

Conduct of Employees and Former Employees; Exemption From Post-Employment Restrictions for Communications; Furnishing Scientific or Technological Information

AGENCY: Office of the General Counsel, U.S. Department of Energy.

ACTION: Notice of proposed rulemaking and opportunity for comment.

SUMMARY: The Department of Energy (DOE) today issues a proposed rule to establish procedures under which a former employee of the executive branch may obtain approval from DOE to make communications to DOE solely for the purpose of furnishing scientific or technological information during the period the former employee is subject to post-employment restrictions set forth in 18 U.S.C. 207(a), (c), and (d). The proposed rule also would further define the term ''scientific or technological information,'' for which an exemption is provided by 18 U.S.C. 207(j)(5).

DATES: Public comment on this proposed rule will be accepted until December 31, 2008.

ADDRESSES: You may submit comments, identified by RIN 1990–AA31, by any of the following methods:

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

2. E-mail to *standardsofconduct@hq.doe.gov.* Include RIN 1990–AA31 in the subject line of the e-mail. Please include the full body of your comments in the text of the message or as an attachment.

3. *Mail:* Address written comments to Sue E. Wadel, Deputy Assistant General Counsel for General Law, U.S. Department of Energy, Office of the General Counsel, Mailstop GC–77, Room 6A–211, 1000 Independence Avenue, SW., Washington, DC 20585.

Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt. You may obtain copies of comments submitted in response to this notice of proposed rulemaking from the contact person.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure

has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

FOR FURTHER INFORMATION CONTACT: Sue E. Wadel, Deputy Assistant General Counsel for General Law, U.S. Department of Energy, Office of the General Counsel, Mailstop GC–77, Room 6A–211, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–1522 or *Sue.Wadel@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Proposed Rule
III. Regulatory Review

I. Background

DOE proposes to revise the title of 10 CFR Part 1010 from ''Conduct of Employees'' to ''Conduct of Employees and Former Employees.'' In addition, a title will be added identifying 10 CFR section 1010.101 *et seq.* as ''Subpart A—Conduct of Employees.'' These proposed revisions are being made because DOE proposes to amend the Conduct of Employees regulations at 10 CFR Part 1010 to establish procedures under which a former employee of the executive branch may obtain approval to make communications to DOE solely for the purpose of furnishing scientific or technological information during the period the former employee is subject to post-employment restrictions set forth in 18 U.S.C. 207(a), (c), and (d). DOE also proposes a definition of the term ''scientific or technological information,'' used in 18 U.S.C. 207(j)(5), to provide former employees with guidance on the types of communications that would qualify for the exemption from otherwise applicable post-employment restrictions.

Pursuant to 18 U.S.C. 207(j)(5), former employees of the executive branch of the United States may make communications with an executive branch agency ''solely for the purpose of furnishing scientific or technological information,'' notwithstanding the post-employment restrictions at 18 U.S.C. 207(a), (c), and (d). Section 207(j)(5) provides that such communications must be made under procedures acceptable to the department to which the communication is directed, or the head of such department must consult with the Director of the Office of Government Ethics (OGE) and certify in the **Federal Register** that the former employee meets certain requirements to make such communications. The purpose of this proposed rule is to (1) establish the procedures acceptable to DOE for former executive branch employees making scientific or technological communications; and (2) provide, in a definition of the term ''scientific or technological information,'' the criteria for the types of communications of scientific or technological information that former executive branch employees may make to DOE pursuant to 18 U.S.C. 207(j)(5).

The proposed rule defines scientific and technological information as that which is of a scientific or technological character, such as technical or engineering information relating to the natural sciences. This proposed definition does not extend to information associated solely with a nontechnical discipline such as law, economics, or political science.

II. Discussion of Proposed Rule

Proposed section 10 CFR 1010.202, defines the statutory term ''scientific or technological information,'' providing criteria for program officials and the Designated Agency Ethics Official (DAEO) to use when evaluating requests from former employees for approval to communicate such information to DOE offices and officials. The program office official and DAEO shall consider the former executive branch employee's qualifications, the information to be conveyed, the former executive branch employee's Federal position, the extent of the former executive branch employee's participation in the same particular matter, and whether DOE's interest would be served by allowing such communications. Section 1010.202 also proposes to define the term ''authorized communication'' as the transmission of scientific or technological information that has been approved by DOE under the procedures that would be established by this rulemaking.

Proposed section 10 CFR 1010.203, sets forth the procedures under which a former employee of the executive branch may obtain approval for communicating scientific or technological information to DOE offices or officials. A former employee of the executive branch must contact the program office to which he or she wishes to make such communications. The Director of the program office, in consultation with the DAEO, shall advise the former executive branch employee in writing whether he or she may make such communications.

The proposed regulation does not apply to testimony as an expert in an adversarial proceeding in which the United States is a party or has an interest. Restrictions on testimony, and exceptions thereof, are prescribed in 18 U.S.C. 207(j)(6).

III. Regulatory Review

A. Executive Order 12866

This proposed rule has been determined not to be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. National Environmental Policy Act

DOE has determined that this proposed rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings interpreting or amending an existing rule that do not change the environmental effect thereof. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov.*

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed rule will only affect individuals who were formerly employed by the executive branch of the Federal government if they want to communicate with DOE on scientific or technological matters. On the basis of the foregoing, DOE certifies that this proposed rule would not have a

significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

No new record keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, are imposed by this proposed rule.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law No. 104–4, generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or on the private sector, of $100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

This proposed rule would apply only to former executive branch employees who want to communicate with DOE on scientific or technological matters. It would not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, this proposed rule would not impose a Federal mandate on State, local, or tribal governments or on the private sector.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999, Public Law No. 105–277, requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. The proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is unnecessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

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

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 44 U.S.C. 3516 note (2001), provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this proposed rule in accordance with the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the Office of Information and Regulatory Policy as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action.

Accordingly, DOE has not prepared a Statement of Energy Effects.

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved the issuance of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 1010

Conduct standards, Conflicts of interest, Ethical conduct, Government employees.

Issued in Washington, DC, on November 20, 2008.

David R. Hill,

General Counsel.

For the reasons stated in the preamble, DOE proposes to amend chapter X of Title 10 of the Code of Federal Regulations as set forth below:

PART 1010—CONDUCT OF EMPLOYEES AND FORMER EMPLOYEES

1. The authority citation for part 1010 is revised to read as follows:

Authority: 5 U.S.C. 301, 303, 7301; 5 U.S.C. App. (Ethics in Government Act); 5 U.S.C. App. (Inspector General Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105; 18 U.S.C. 207, 208.

2. The heading to Part 1010 is revised as set forth above.

3. Sections 1010.101 through 1010.104 are designated as Subpart A and the heading is added to read as set forth below:

Subpart A—Conduct of Employees

* * * * *

§ 1010.101 [Amended]

4. Section 1010.101 is amended by removing the word ''part,'' and adding the word ''subpart'' in its place.

5. A new Subpart B is added to Part 1010 to read as follows:

Subpart B—Procedures for Exemption of Scientific and Technological Information Communications From Post-Employment Restrictions

Sec.
1010.201 Purpose and scope.
1010.202 Definitions.
1010.203 Procedures for review and approval of requests.

§ 1010.201 Purpose and scope.

(a) This subpart sets forth criteria for the types of communications on scientific or technological matters permitted under 18 U.S.C. 207(j)(5) by defining the term ''scientific or technological information.'' This subpart also establishes the procedures for receiving and approving requests from former employees of the executive branch to make such communications to DOE.

(b) This subpart applies to any former employee of the executive branch subject to the post-employment conflict of interest restrictions in 18 U.S.C. 207(a), (c), and (d), who wishes to communicate with DOE under the exemption in 18 U.S.C. 207(j)(5) for the purpose of furnishing scientific or technological information to DOE offices or officials.

(c) This subpart does not apply to a former DOE employee's testimony as an expert in an adversarial proceeding in which the United States is a party or has a direct and substantial interest.

§ 1010.202 Definitions.

For purposes of this subpart:

(a) *Agency designee* refers to an individual serving in a position in DOE requiring appointment by the President of the United States with the advice and consent of the Senate.

(b) *Authorized communication* means any transmission of scientific or technological information to any DOE office or official that is approved by DOE under § 1010.203 of this subpart.

(c) *DOE* refers to the U.S. Department of Energy.

(d) *Scientific or technological information* includes:

(1) Information of a scientific or technological nature, including, but not limited to, technical or engineering information relating to the natural sciences;

(2) Information in meritorious or convincing scientific or technological proposals;

(3) Information that informs Federal officials of the significance of other scientific or technological alternatives that could impact the validity, usefulness, or ability to measure the completeness of the data supplied on those alternatives; or

(4) Information regarding the feasibility, risk, cost, or speed of implementation of a DOE project or program when necessary to appreciate fairly the practical significance of the information.

§ 1010.203 Procedures for review and approval of requests.

(a) Any former employee of the executive branch subject to the constraints of the post-employment restrictions of 18 U.S.C. 207(a), (c), and (d) who wishes to communicate scientific or technological information to DOE must contact the DOE office with which the former employee wishes to communicate and request authorization to make such communication. This request must address, in detail, information regarding each of the factors set forth in paragraphs (c)(1) through (c)(6) and (c)(8) of this section.

(b) In consultation with the Designated Agency Ethics Official (DAEO), the agency designee must advise the former employee in writing whether the proposed communication is an authorized communication. This authority cannot be delegated.

(c) In deciding whether a proposed communication is an authorized communication, the agency designee receiving the request and the DAEO must consider the following factors:

(1) Whether the former employee has relevant scientific or technical qualifications;

(2) Whether the former employee has qualifications that are otherwise unavailable;

(3) The nature of the scientific or technological information to be conveyed;

(4) The former employee's position prior to termination;

(5) The extent of the former employee's involvement in the matter at issue during his or her employment, including:

(i) The former employee's involvement in the same particular matter involving specific parties;

(ii) The time elapsed since the former employee's participation in such matter; and

(iii) The offices within the Federal department or agency involved in the matter both during the former employee's period of employment in the executive branch and at the time the request is being made;

(6) The existence of pending or anticipated matters before the Federal government from which the former employee or his or her current employer may financially benefit, including contract modifications, grant applications, and proposals; and

(7) Whether DOE's interests would be served by allowing the proposed communication; and

(8) Any other information relevant to deciding if there is an intent to influence a decision or action of DOE.

[FR Doc. E8–28267 Filed 11–28–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2008–1141, formerly CGD11–03–005]

RIN 1625–AA09

Drawbridge Operation Regulations; Connection Slough, Bacon Island, CA

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard has revised its proposal to amend the regulations governing the operation of the Connection Slough Drawbridge, originally published at 68 FR 183 (Sept. 22, 2003). The revised proposal reopens the comment period. The proposal is being revised at the request of the bridge owner to include drawbridge operator contact information, for waterway users to schedule drawspan openings during advance notice periods. The proposal would ensure a drawbridge operator can be contacted, is present at the drawbridge during identified increased navigation periods, and reduces the hours a drawbridge operator is required to be at the drawbridge and not gainfully employed.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before March 2, 2009 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–1141 using any one of the following methods:

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

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

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

(4) *Fax:* 202–493–2251.

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Mr. David H. Sulouff, Bridge Administrator, (510) 437–3516. If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–1141), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2008–1141'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert USCG–2008–1141 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or the Commander (dpw), Eleventh Coast Guard District, Bridge Section, Bldg. 50–2 Coast Guard Island, Alameda, CA, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

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

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

Tuscany Research Institute and CCRC Farms, LLC, owners of Mandeville Island and owner/operators of the drawbridge between Mandeville and Bacon Islands, mile 2.5, Connection Slough, near Stockton, CA, have requested Coast Guard review of the existing drawbridge operating regulation found in Title 33, Code of Federal Regulations, Part 117.150. The present request from the bridge owner included detailed drawbridge operating logs from January 2000 through June 2008, showing seasonal peak vessel operating times through the drawbridge, and documenting a significant decrease in calls for operation of the drawspan between September 16 and May 14, annually, or between the hours of 5 p.m. and 9 a.m. This supports their request to adjust the existing advance notice period to more closely match the reduced navigational activity.

The existing regulation, 33 CFR 117.150, requires the drawbridge, from May 1 through October 31, to open on signal between the hours of 6 a.m. and 10 p.m., and from November 1 through April 30, to open on signal between the hours of 9 a.m. and 5 p.m. All other

times the drawbridge must open on signal if notice is given at least 4 hours in advance. The drawbridge must open upon 1-hour notice for emergency vessel operation.

It is important to note that the existing regulation presently allows the drawbridge owner to operate the drawbridge with advance notice, during certain dates and times. It does not allow the drawbridge to remain closed or to obstruct navigation, when the proper signals to open have been given.

Discussion of Proposed Rule

The proposed changes to 33 CFR 117.150, will not relieve the bridge owner from opening the drawspan for waterway traffic. The existing and proposed regulations allow the drawbridge owner to operate the drawbridge with advance notice, during certain dates and times. The drawspan will not be allowed to remain closed or to obstruct navigation, when the proper signals to open have been given.

The proposed changes are as follows:

From May 15 through September 15 the drawbridge shall open on signal between the hours of 9 a.m. and 5 p.m., and it shall open upon 12 hours advance notice between the hours of 5 p.m. and 9 a.m.

From September 16 through May 14 the bridge shall open upon 12 hours advance notice between the hours of 9 a.m. and 5 p.m., and it shall open upon 24 hours advance notice between the hours of 5 p.m. and 9 a.m.

Advance notice shall be given to the drawbridge operator by telephone at (209) 464–2959 or (209) 464–7928 weekdays between 8 a.m. and 5 p.m., and at (209) 993–8878 all other times.

The proposed changes would lower the costs of operating the bridge for the bridge owner without significantly impacting navigation. As proposed, this change would not reduce the availability of the drawspan to open for vessels. It would require mariners to contact the drawbridge earlier, when planning a transit through the drawbridge during the advance notice periods. The proposed change would allow the drawbridge to be operated on an advance notice schedule, similar to other nearby drawbridges on adjacent channels in the Delta. It would allow the drawbridge owner to utilize the drawbridge operator more effectively during documented navigational inactivity at the drawbridge, and still have the operator available at the drawbridge to provide an opening when a vessel arrives.

Should the proposed change be implemented and fail to meet the reasonable needs of vessel traffic, nothing in this proposal or the Final Rule would preclude review and adjustment of the regulation to ensure navigational needs are satisfied. In support of documenting the effectiveness of the proposed change, and potential future changes, the Coast Guard will require CCRC Farms' continued submission of drawbridge operating logs and land traffic counts at this drawbridge.

Mariners are encouraged to notify the Coast Guard Bridge Office promptly of any alleged violation of drawbridge operating regulations, to allow effective investigation and correction of bridge-related discrepancies.

Since all drawbridges are subject to emergency operation in compliance with 33 CFR 117.31, the individual emergency operation text will be removed from the regulation.

The Coast Guard requires the bridge owner to install signage on the upstream and downstream sides of the drawbridge, in compliance with 33 CFR 117.55, to post the advance notice schedules, with telephone numbers and point of contact to be notified for drawbridge operation.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule on commercial traffic operating on the waterway to be so minimal that a full Regulatory Evaluation is unnecessary.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule is neutral to all business entities since it only clarifies how the bridge is operated and the bridge is still required to open on demand for vessels.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Mr. David H. Sulouff, Bridge Administrator, Eleventh Coast Guard District, Bridge Section, at (510) 437–3516. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination under the Instruction that this action is not likely to have a significant effect on the human environment. There are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

2. Revise § 33 CFR 117.150 to read as follows:

§ 117.150 Connection Slough.

The draw of the Reclamation District No. 2027 bridge between Mandeville and Bacon Islands, mile 2.5 near Stockton, from May 15 through September 15, shall open on signal between the hours of 9 a.m. and 5 p.m., and it shall open upon 12 hours advance notice between the hours of 5 p.m. and 9 a.m.; and from September 16 through May 14 the draw shall open upon 12 hours advance notice between the hours of 9 a.m. and 5 p.m., and it shall open upon 24 hours advance notice between the hours of 5 p.m. and 9 a.m.

Advance notice shall be given to the drawbridge operator by telephone at (209) 464–2959 or (209) 464–7928 weekdays between 8 a.m. and 5 p.m., and at (209) 993–8878 all other times.

Dated: November 12, 2008.

P.F. Zukunft,

Rear Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.

[FR Doc. E8–28476 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–15–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3001

[Docket No. RM2009–2; Order No. 139]

Periodic Reporting Rules

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rule; availability of rulemaking petition.

SUMMARY: Under a new law, the Postal Service must file an annual compliance report on costs, revenues, rates, and quality of service associated with its products. It recently filed documents with the Commission to change some of the methods it uses to compile the fiscal year 2008 report. In the Commission's view, these documents constitute a rulemaking petition. Therefore, this document provides notice of the Service's filing and an opportunity for public comment.

DATES: 1. *Initial comments:* December 5, 2008.

2. *Reply comments:* December 12, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION: Regulatory History. 73 FR 51983 (September 8, 2008); 73 FR 55464 (September 25, 2008); 73 FR 67455 (November 14, 2008).

On November 19, 2008, the Postal Service filed a petition to initiate an informal rulemaking proceeding to change accepted costing methods for purposes of periodic reporting.[1] The

[1] Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Further Proposed Methodology Changes for the FY

informal rulemaking procedures proposed would be comparable to those followed in Docket Nos. RM2008–2 and RM2008–6, and RM2009–1. In Docket No. RM2008–2, nine numbered proposals were the subject of notice and comment rulemaking procedures. In Docket No. RM2008–6, the Postal Service proposed two additional proposals to change costing methods, numbered ten and eleven. The Postal Service offered an additional proposal (numbered twelve) in Docket No. RM2009–1. Proposals one through nine, and ten through eleven were evaluated in PRC Order No. 115, October 10, 2008 and PRC Order No. 118, October 22, 2008, respectively. Proposal Twelve is pending. See PRC Order No. 130, November 7, 2008. The Postal Service refers to the change in accepted costing methods that it proposes in this docket as Proposal Thirteen. Labeling it Proposal Thirteen indicates that the proposal is sequential to, but distinguishable from, the proposals in Docket Nos. RM2008–2, RM2008–6, and RM2009–1. *See* Petition at 1.

Substance of the Postal Service's proposal. Single-piece Parcel Post was separated from competitive Parcel Post products in the FY 2007 Annual Compliance Report (FY 2007 ACR) without the benefit of input cost data that directly reflected the distinction. The FY 2007 ACR employed a cost model for single-piece Parcel Post that included mail processing and transportation cost avoidance estimates for Inter-BMC and Intra-BMC Parcel Post to support the discounts charged for those categories. *See* USPS–FY07–15 and USPS–FY07–16. In Docket No. RM2008–6, for FY 2008, the Commission approved the collection of ''bottom up'' costs separately for single-piece Parcel Post and for the various competitive Parcel Post products in the Postal Service's basic data collection systems (In-Office Cost System, Carrier Cost System, and Transportation Cost System). *See* Order No. 118, October 22, 2008, Proposal Ten. Because new input data will be used in the FY 2008 Annual Compliance Report (FY 2008 ACR) to obtain single-piece Parcel Post costs, adjustments need to be made to the models that estimate the costs associated with inter-BMC and intra-BMC single-piece parcels.

The Postal Service provides electronic spreadsheets showing where the FY 2008 data will go when it is received. *Id.* at 3. Those spreadsheets are briefly described below.

Parcel Post Single-Piece Trans.xls: Cost model showing transportation costs allocated to Inter- and Intra-BMC single-piece Parcel Post (replacing portions of USPS–FY07–16).

Parcel Post Single-Piece MP.xls: Cost model showing mail processing costs allocated to Inter- and Intra-BMC single-piece Parcel Post (replacing portions of USPS–FY07–15).

Parcel Post Cost Model Modifications.doc: Document describing modifications made to the Parcel Post mail processing and transportation cost models (formerly portions of USPS–FY07–15 and USPS–FY07–16) to accommodate new reporting methods in the [Cost and Revenue Analysis] CRA for single-piece Parcel Post.

The objective, background, rationale, and impact of Proposal Thirteen is described in an attachment to the Postal Service's Petition. It is reproduced below.

I. Procedural Expedition

The same factors that led the Commission to expedite review of the 11 proposals disposed of in Docket Nos. RM2008–2, RM2008–6, and RM2009–1 apply here. Proposal Thirteen appears to be a relatively straightforward proposal to adapt the cost avoidance models for single-piece Parcel Post to use the new CRA inputs that will soon become available. The Postal Service states that compared to the models employed in its FY 2007 ACR, these models are essentially unchanged in their conceptual approach, the mechanical relationships of the data elements, the assumptions used, and the analytical techniques applied. *Id.* at 2. Accordingly, public comments, if any, will be due on December 5, 2008, and reply comments will be due on or before December 12, 2008.

II. Substance of Postal Service Proposals

The Postal Service proposal, *see* Petition at 3, is described below.

Proposal Thirteen. Development of Single-Piece Parcel Post Mail Processing and Transportation cost Models.

Objective. Develop single-piece Parcel Post mail processing and transportation cost models that contain cost estimates for the Inter-BMC and Intra-BMC price categories.

Background. Parcel Post mail processing (USPS–FY07–15) and transportation (USPS–FY07–16) cost models were filed in Docket No. ACR2007. These cost models were used to derive cost estimates for all the Parcel Post price categories using a single set of cost model parameters. This methodology was relied upon because some parameters were only available in aggregate form. For example, an aggregate mail processing unit cost by shape estimate (USPS–FY07–26) was all that was available at that time.

Rationale. As the Commission discussed in Order No. 118, the Postal Service is now able to provide separate mail processing and transportation cost data for single-piece Parcel Post, Parcel Select, and Parcel Return Service for Fiscal Year 2008. It is therefore now possible to develop separate single-piece Parcel Post mail processing and transportation cost models. The document titled ''Parcel Post Cost Model Modifications'' lists the modifications required to develop single-piece Parcel Post mail processing and transportation cost models using the cost models that were filed in USPS–FY07–15 and USPS–FY07–16, respectively, as starting points.

Impact. In Docket No. ACR2007, single-piece Parcel Post mail processing and transportation cost estimates for the Inter-BMC and Intra-BMC price categories were not developed for the reasons described above. The fact that several cells on page 1 of the proposed mail processing model contain values of zero is not an indication that there is a problem with the model. These values merely indicate that the USPS–FY07–15 aggregate cost by shape estimate was removed from the model, given that it is not comparable to the single-piece estimate that should be used and is not yet available. The results that appear on page 1 of the proposed transportation cost model are also not meaningful as they were calculated using cost segment 8 and 14 data that represent all of Parcel Post, rather than the more narrowly defined category of single-piece Parcel Post. The single-piece transportation cost data are not yet available. Once all the Fiscal Year 2008 cost data are available and incorporated into the proposed cost models, it will only be possible to compare the single-piece Inter-BMC and Intra-BMC mail processing and transportation cost estimates to the aggregate (single-piece and bulk-entered) Inter-BMC and Intra-BMC cost estimates derived in USPS–FY07–15 and USPS–FY07–16, respectively.

III. Ordering Paragraphs

It is Ordered:

1. The Commission establishes Docket No. RM2009–2 to consider the Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Further Proposed Methodology Changes for the FY 2008 ACR (Proposal Thirteen), filed November 19, 2008.

2. Interested persons may submit initial comments on or before December 5, 2008.

2008 ACR (Proposal Thirteen), November 19, 2008 (Petition).

3. Reply comments may be submitted on or before December 12, 2008.

4. William C. Miller is designated as the Public Representative representing the interests of the general public in this proceeding.

5. The Secretary shall arrange for publication of this notice in the **Federal Register**.

By the Commission.

Authority: 39 U.S.C 3652.

Steven W. Williams,

Secretary.

[FR Doc. E8–28396 Filed 11–28–08; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2004–0083; FRL–8747–2]

RIN 2060–AM71

Amendments to National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the national emission standards for electric arc furnace (EAF) steelmaking facilities that are area sources of hazardous air pollutants published on December 28, 2007. The amendments to the area source standards for EAF steelmaking facilities would clarify applicability of the opacity limit, make the performance test requirements for particulate matter consistent with requirements in the new source performance standards for EAF steelmaking facilities, allow title V test data to be used to demonstrate compliance, and revise the definition of ''scrap provider'' to include electric are furnace steelmaking facilities that own and operate a scrap shredder. In the ''Rules and Regulations'' section of this **Federal Register**, we are amending the area source standards for EAF steelmaking facilities as a direct final rule without a prior proposed rule. If we receive no adverse comment, we will not take further action on this proposed rule.

DATES: Written comments must be received by December 31, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0083, by mail to National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Phil Mulrine, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5289; fax number: (919) 541–3207; e-mail address: *mulrine.phil@epa.gov.*

SUPPLEMENTARY INFORMATION: The information presented in this document is organized as follows:

I. Why is EPA issuing this proposed rule?
II. Does this action apply to me?
III. Where can I get a copy of this document?
IV. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. Why is EPA issuing this proposed rule?

This document proposes to take action on amendments to the national emission standards for EAF steelmaking area sources (40 CFR part 63, subpart YYYYY). We have published a direct final rule amending the area source standards for EAF steelmaking facilities in the ''Rules and Regulations'' section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the amendments in the direct final rule or certain amendments in the direct final rule and those amendments will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. Does this action apply to me?

Categories and entities potentially regulated by the proposed rule include:

Category	NAICS code[1]	Examples of regulated entities
Industry	331111	Steel mills with electric arc furnace steelmaking facilities that are area sources.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposed action. To determine whether your facility would be regulated by this proposed action, you should examine the applicability criteria in 40 CFR 63.10680 of subpart YYYYY (National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

III. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this proposed action will also be available

on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This proposed action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. These final amendments clarify applicability of the opacity limit, make the performance test requirements for particulate matter consistent with requirements in the new source performance standards for electric arc furnace steelmaking facilities, allow title V test data to be used to demonstrate compliance, and revise the definition of ''scrap provider'' to include electric arc furnace steelmaking facilities that own and operate a scrap shredder. No new burden is associated with these requirements because the burden was included in the approved information request (ICR) for the existing rule. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR part 63 subpart YYYYY) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0608. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses at 13 CFR 121.201 (whose parent company has fewer than 1,000 employees for NAICS code 331111); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. We have determined that the nine small entities in this area source category will not incur any adverse impacts because this proposed action makes only technical corrections and clarifications that do not create any new requirements or burdens. No costs are associated with these proposed amendments to the NESHAP.

We continue to be interested in the potential impacts of the proposed corrections and clarifications on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. The term ''enforceable duty'' does not include duties and conditions in voluntary Federal contracts for goods and services.

Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The technical corrections and clarifications made through this action contain no requirements that apply to such governments, impose no obligations upon them, and will not result in any expenditures by them or any disproportionate impacts on them.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule makes certain technical corrections and clarifications to the NESHAP for EAF steelmaking area sources. These proposed corrections and clarifications do not impose requirements on State or local governments. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule makes certain technical corrections and clarifications to the NESHAP for EAF steelmaking area sources. These proposed corrections and clarifications do not impose requirements on tribal governments. They also have no direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this proposed action. EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it makes technical corrections and clarifications to the area source NESHAP for EAF steelmaking facilities which is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The proposed action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104–113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when EPA decides not to use available and applicable voluntary consensus standards.

This proposed rule does not involve technical standards. Therefore, EPA is not considering the use of any VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12848 (58 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The technical corrections and clarifications in this proposed rule do not change the level of control required by the NESHAP.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: November 24, 2008.

Stephen L. Johnson,

Administrator.

[FR Doc. E8–28456 Filed 11–28–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571, 575 and 579

[Docket No. NHTSA–2008–0173]

Federal Motor Vehicle Safety Standards; Small Business Impacts of Motor Vehicle Safety

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of regulatory review; Request for comments.

SUMMARY: NHTSA seeks comments on the economic impact of its regulations on small entities. As required by Section 610 of the Regulatory Flexibility Act, we are attempting to identify rules that may have a significant economic impact on a substantial number of small entities. We also request comments on ways to make these regulations easier to read and understand. The focus of this notice is rules that specifically relate to passenger cars, multipurpose passenger vehicles, trucks, buses, trailers, incomplete vehicles, motorcycles, and motor vehicle equipment.

DATES: You should submit comments early enough to ensure that Docket Management receives them not later than January 30, 2009.

ADDRESSES: You may submit comments [identified by DOT Docket ID Number NHTSA–07–29294] by any of the following methods:

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

Instructions: For detailed instructions on submitting comments and additional information see the Comments heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://Docketsinfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Juanita Kavalauskas, Office of Regulatory Analysis, Office of Regulatory Analysis and Evaluation, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone 202–366–2584, fax 202–366–3189).

SUPPLEMENTARY INFORMATION:

I. Section 610 of the Regulatory Flexibility Act

A. Background and Purpose

Section 610 of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires agencies to conduct periodic reviews of final rules that have a significant economic impact on a substantial number of small business entities. The purpose of the reviews is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the objectives of applicable statutes, to minimize any significant economic impact of the rules on a substantial number of such small entities.

B. Review Schedule

The Department of Transportation (DOT) published its Semiannual Regulatory Agenda on November 22, 1999, listing in Appendix D (64 FR 64684) those regulations that each operating administration will review under section 610 during the next 12 months. Appendix D contained DOT's 10-year review plan for all of its existing regulations. On November 24, 2008, NHTSA is publishing in the **Federal Register** a revised 10-year review plan for its existing regulations.

The National Highway Traffic Safety Administration (NHTSA, ''we'') has divided its rules into 10 groups by subject area. Each group will be reviewed once every 10 years, undergoing a two-stage process—an Analysis Year and a Review Year. For purposes of these reviews, a year will coincide with the fall-to-fall publication schedule of the Semiannual Regulatory Agenda. The newly revised 10-year plan will assess years 9 and 10 of the old plan in years 1 and 2 of the new plan. Year 1 (2008) began in the fall of 2008 and will end in the fall of 2009; Year 2 (2009) will begin in the fall of 2009 and will end in the fall of 2010; and so on.

During the Analysis Year, we will request public comment on and analyze each of the rules in a given year's group to determine whether any rule has a significant impact on a substantial number of small entities and, thus, requires review in accordance with section 610 of the Regulatory Flexibility Act. In each fall's Regulatory Agenda, we will publish the results of the analyses we completed during the previous year. For rules that have subparts, or other discrete sections of rules that do have a significant impact on a substantial number of small entities, we will announce that we will be conducting a formal section 610 review during the following 12 months.

The section 610 review will determine whether a specific rule should be revised or revoked to lessen its impact on small entities. We will consider: (1) The continued need for the rule; (2) the nature of complaints or comments received from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules or with state or local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. At the end of the Review Year, we will publish the results of our review. The following table shows the 10-year analysis and review schedule:

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION SECTION 610 REVIEWS

Year	Regulations to be reviewed	Analysis year	Review year
1	49 CFR 571.223 through 571.500, and parts 575 and 579	2008	2009
2	23 CFR parts 1200 and 1300	2009	2010
3	49 CFR parts 501 through 526 and 571.213	2010	2011
4	49 CFR 571.131, 571.217, 571.220, 571.221, and 571.222	2011	2012
5	49 CFR 571.101 through 571.110, and 571.135, 571.138 and 571.139	2012	2013
6	49 CFR parts 529 through 578, except parts 571 and 575	2013	2014
7	49 CFR 571.111 through 571.129 and parts 580 through 588	2014	2015
8	49 CFR 571.201 through 571.212	2015	2016
9	49 CFR 571.214 through 571.219, except 571.217	2016	2017
10	49 CFR parts 591 through 595 and new parts and subparts	2017	2018

C. Regulations Under Analysis

During Year 1, we will continue to conduct a preliminary assessment of the following sections of 49 CFR parts 571.223 through 571.500, and part 579, and will add part 575 to that assessment.

Section	Title
571.223	Rear impact guards.
571.224	Rear impact protection.
571.225	Child restraint anchorage systems.
571.301	Fuel system integrity.
571.302	Flammability of interior materials.
571.303	Fuel system integrity of compressed natural gas vehicles.
571.304	Compressed natural gas fuel container integrity.
571.305	Electric-powered vehicles: electrolyte spillage and electrical shock protection.
571.401	Interior trunk release.
571.403	Platform lift systems for motor vehicles.
571.404	Platform lift installations in motor vehicles.
571.500	Low-speed vehicles.
Part 575	Consumer Information.
Part 579	Reporting of information and communications about potential defects.

We are seeking comments on whether any requirements in 49 CFR parts 571.223 through 571.500, and parts 575 and 579 have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. Business entities are generally defined as small businesses by Standard Industrial Classification (SIC) code, for the purposes of receiving Small Business Administration (SBA) assistance. Size standards established by SBA in 13 CFR 121.201 are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number

of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small. If your business or organization is a small entity and if any of the requirements in 49 CFR parts 571.223 through 571.500 or parts 575 or 579 have a significant economic impact on your business or organization, please submit a comment to explain how and to what degree these rules affect you, the extent of the economic impact on your business or organization, and why you believe the economic impact is significant.

If the agency determines that there is a significant economic impact on a substantial number of small entities, it will ask for comment in a subsequent notice during the Review Year on how these impacts could be reduced without reducing safety.

II. Plain Language

A. Background and Purpose

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings. paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this document.

B. Review Schedule

In conjunction with our section 610 reviews, we will be performing plain language reviews over a ten-year period on a schedule consistent with the section 610 review schedule. We will review 49 CFR parts 571.223 through 571.500 and parts 575 and 579 to determine if these regulations can be reorganized and/or rewritten to make them easier to read, understand, and use. We encourage interested persons to submit draft regulatory language that clearly and simply communicates regulatory requirements, and other recommendations, such as for putting information in tables that may make the regulations easier to use.

Comments

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21.) We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/ornb/fedreg/reproducible.html.* DOT' s guidelines may be accessed at *http://dmses.dot.gov/submitlDataQualityGuidelines.pdf.*

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

How can I read the comments submitted by other people?

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location.

You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Federal Docket Management System (FDMS) at *http://regulations.gov.*

(2) FDMS provides two basic methods of searching to retrieve dockets and docket materials that are available in the system: (a) ''Quick Search'' to search using a full-text search engine, or (b) ''Advanced Search,'' which displays various indexed fields such as the docket name, docket identification number, phase of the action, initiating office, date of issuance, document title, document identification number, type of document, **Federal Register** reference, CFR citation, etc. Each data field in the advanced search may be searched independently or in combination with other fields, as desired. Each search yields a simultaneous display of all available information found in FDMS that is relevant to the requested subject or topic.

(3) You may download the comments. However, since the comments are imaged documents, instead of word processing documents, the ''pdf'' versions of the documents are word searchable.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Marilena Armoni,

Acting Associate Administrator for the National Center for Statistics and Analysis.

[FR Doc. E8–28226 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–59–M

Notices

Federal Register

Vol. 73, No. 231

Monday, December 1, 2008

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

Forest Service

Lake Tahoe Basin Federal Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lake Tahoe Basin Federal Advisory Committee will hold a meeting on December 15, 2008 at the U.S. Forest Service Office, 35 College Drive, South Lake Tahoe, CA 96150. This Committee, established by the Secretary of Agriculture on December 15, 1998 (64 FR 2876), is chartered to provide advice to the Secretary on implementing the terms of the Federal Interagency Partnership on the Lake Tahoe Region and other matters raised by the Secretary.

DATES: The meeting will be held December 15, 2008, beginning at 1:30 p.m. and ending at 4 p.m.

ADDRESSES: The meeting will be held at the U.S. Forest Service Office, 35 College Drive, South Lake Tahoe, CA 96150.

FOR FURTHER INFORMATION CONTACT: Arla Hains, Lake Tahoe Basin Management Unit (LTBMU), Forest Service, 35 College Drive, South Lake Tahoe, CA 96150, (530) 543–2773.

SUPPLEMENTARY INFORMATION: Items to be covered on the agenda include:

- Committee operations.
- Status and updates on the Tahoe Regional Planning Agency (TRPA) Regional Plan and the Lake Tahoe Basin Management Unit Forest Plan Revision.
- Status of two Memorandums of Understanding (MOUs) which includes the Lahontan Regional Water Quality Control Board and TRPA, and the Forest Service and TRPA on hazardous fuels and vegetation projects.
- Post Angora fire restoration efforts.
- Status of the Lake Tahoe Restoration Act (LTRA) reauthorization.

Interested citizens are encouraged to attend at the above address. Issues may be brought to the attention of the Committee during the open public comment period at the meeting or by filing written statements for the Committee before or after the meeting. Please refer any written comments attention Arla Hains, Lake Tahoe Basin Management Unit at the contact address stated above.

If you have questions concerning special needs for this public meeting, or to request sign language interpretation, contact Linda Lind, no later than December 8, 2008 at (530) 543–2787 or TTY (530) 543–0956, or via e-mail at *LLind@fs.fed.us.*

Dated: November 24, 2008.

Terri Marceron,

Forest Supervisor.

[FR Doc. E8–28437 Filed 11–28–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Opportunity To Comment on the Applicants for the Unassigned Areas of East Texas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice and request for comments.

SUMMARY: GIPSA requests comments on the applicants for designation to provide official services in the unassigned areas of east Texas.

- Central Illinois Grain Inspection d/b/a Lone Star Grain Inspection (Central Illinois).
- Gulf Country Inspection Service, Inc. (Gulf Country).

DATE: Comments must be postmarked or electronically dated on or before December 31, 2008.

ADDRESSES: We invite you to submit comments on these applicants by any of the following methods:

- *Hand Delivery or Courier:* Karen Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250.
- *Fax:* (202) 690–2755 to the attention of Karen Guagliardo.
- *E-mail: Karen.W.Guagliardo@usda.gov.*
- *Mail:* Karen Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, STOP 3604, 1400 Independence Avenue, SW., Washington, DC 20250–3604.
- *Internet:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments and reading any comments posted online.

Read Applications and Comments: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Karen Guagliardo at 202–720–7312, e-mail *Karen.W.Guagliardo@usda.gov.*

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1. Therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the September 29, 2008, **Federal Register** (73 FR 56546), GIPSA asked persons interested in providing official services in the unassigned areas of east Texas to submit applications for designation.

There were two applicants for the east Texas area: Central Illinois, doing business as Lone Star Grain Inspection, applied for the entire area. Gulf Country, a corporation not currently designated and owned by Tyrone Robichaux, Richard Maynard, Pat LaCour, and Dan Williams, applied for the entire area.

GIPSA is publishing this notice to provide interested persons the opportunity to present comments concerning the applicants. Commenters are encouraged to submit reasons and pertinent data in support of or objection to the designation of the applicants. All comments must be submitted to the Compliance Division at the above address or at *http://www.regulations.gov.* Comments and other available information will be considered in making a final decision. GIPSA will publish notice of the final decision in the **Federal Register**, and will notify the applicants in writing of the decision.

Authority: 7 U.S.C. 71–87k.

Alan Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E8–28247 Filed 11–28–08; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Designation for the Alabama; Essex, IL; Springfield, IL; Savage, MN; and Washington Areas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: GIPSA is announcing designation of the following organizations to provide official services under the United States Grain Standards Act, as amended (USGSA or Act): Alabama Department of Agriculture and Industries (Alabama); Kankakee Grain Inspection, Inc. (Kankakee); Springfield Grain Inspection, Inc. (Springfield); State Grain Inspection, Inc. (State Grain); and Washington Department of Agriculture (Washington).

DATES: Effective January 1, 2009.

ADDRESSES: USDA, GIPSA, Karen Guagliardo, Chief, Review Branch, Compliance Division, STOP 3604, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250–3604.

FOR FURTHER INFORMATION CONTACT: Karen Guagliardo at 202–720–7312, e-mail *Karen.W.Guagliardo@usda.gov.*

Read Applications: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(b)).

SUPPLEMENTARY INFORMATION: In the June 2, 2008, **Federal Register** (73 FR 31431), GIPSA requested applications for designations to provide official services in the geographic areas assigned to the official agencies named above. Applications were due by July 1, 2008.

Alabama, Kankakee, Springfield, State Grain, and Washington were the sole applicants for designation to provide official services in the areas currently assigned to them, so GIPSA did not ask for additional comments on them.

GIPSA evaluated all available information regarding the designation criteria in section 7(f)(l) of the USGSA (7 U.S.C. 79(f)) and determined that Alabama, Kankakee, Springfield, State Grain and Washington are able to provide official services in the geographic areas specified in the June 2, 2008, **Federal Register**, for which they applied. These designation actions to provide official services are effective January 1, 2009, and terminate December 31, 2011, for Alabama, Kankakee, Springfield, State Grain, and Washington.

Interested persons may obtain official services by calling the telephone numbers listed below.

Official agency	Headquarters location and telephone	Designation start	Designation end
Alabama	Montgomery, AL, 251–438–2549; Additional Locations: Decatur and Mobile, AL	1/1/2009	12/31/2011
Kankakee	Essex, IL, 815–365–2268; Additional Location: Tiskilwa, IL	1/1/2009	12/31/2011
Springfield	Springfield, IL, 217–522–5233	1/1/2009	12/31/2011
State Grain	Savage, MN, 952–808–8566	1/1/2009	12/31/2011
Washington	Olympia, WA, 360–753–1484; Additional Locations: Colfax, Kalama, Pasco, Seattle, Spokane, Tacoma and Vancouver, WA.	1/1/2009	12/31/2011

Section 7(f)(1) of the USGSA authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)(1)).

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary but may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

Authority: 7 U.S.C. 71–87k.

Alan Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E8–28248 Filed 11–28–08; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Opportunity for Designation in Topeka, KS; Cedar Rapids, IA; Minot, ND; and Cincinnati, OH, Areas and Request for Comments on the Official Agencies Serving These Areas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: The designations of the official agencies listed below will end on June 30, 2009. GIPSA is asking persons interested in providing official services in the areas served by these agencies to submit applications for designation. GIPSA is also asking for comments on the quality of services provided by these currently designated agencies:

Kansas Grain Inspection Service, Inc. (Kansas);

Mid-Iowa Grain Inspection, Inc. (Mid-Iowa);

Minot Grain Inspection, Inc. (Minot); and

Tri-State Grain Inspection Service, Inc. (Tri-State).

DATES: Applications and comments must be received on or before January 2, 2009.

ADDRESSES: GIPSA invites you to submit applications and comments on this notice by any of the following methods:

- To apply for designation, go to ''FGIS*online*'' at *https://fgis.gipsa.usda.gov/default_home_FGIS.aspx* then select Delegations/Designations and Export Registrations (DDR). You will need a USDA e-authentication, username, password, and a customer number prior to applying.
- *Hand Delivery or Courier:* Karen Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250.
- *Fax:* (202) 690–2755, to the attention of: Karen Guagliardo.
- *E-mail: Karen.W.Guagliardo@usda.gov.*
- *Mail:* Karen Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, STOP 3604, 1400 Independence Avenue, SW., Washington, DC 20250–3604.

• *Internet:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting and reading comments online.

Read Applications and Comments: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Karen Guagliardo at 202–720–7312, e-mail *Karen.W.Guagliardo@usda.gov.*

SUPPLEMENTARY INFORMATION: Section 7(f)(1) of the United States Grain Standards Act (USGSA or Act) (7 U.S.C. 71–87k) authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services.

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary, but may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

CURRENT DESIGNATIONS BEING ANNOUNCED FOR RENEWAL

Official agency	Main office	Designation start	Designation end
Kansas	Topeka, KS	7/1/2009	6/30/2012
Mid-Iowa	Cedar Rapids, IA	7/1/2009	6/30/2012
Minot	Minot, ND	7/1/2009	6/30/2012
Tri-State	Cincinnati, OH	7/1/2009	6/30/2012

Kansas

Pursuant to Section 7(f)(2) of the USGSA, the following geographic area, in the States of Colorado, Kansas, Nebraska, and Wyoming is assigned to Kansas:

The entire State of Colorado.

The entire State of Kansas.

In Nebraska:

Bounded on the North by the northern Scotts Bluff County line; the northern Morrill County line east to Highway 385;

Bounded on the East by Highway 385 south to the northern Cheyenne County line; the northern and eastern Cheyenne County lines; the northern and eastern Deuel County lines;

Bounded on the South by the southern Deuel, Cheyenne, and Kimball County lines; and

Bounded on the West by the western Kimball, Banner, and Scotts Bluff County lines.

In Wyoming:

Goshen, Laramie, and Platt Counties.

Kansas' assigned geographic area does not include the following grain elevators inside Kansas' area which have been and will continue to be serviced by Hastings Grain Inspection, Inc.: Farmers Coop and Big Springs Elevator, both in Big Springs, Deuel County, Nebraska.

Mid-Iowa

Pursuant to Section 7(f)(2) of the USGSA, the following geographic area in the States of Minnesota and Iowa is assigned to Mid-Iowa:

In Minnesota:

Wabasha, Olmstead, Winona, Houston, and Fillmore Counties.

In Iowa:

Bounded on the North by the northern Winneshiek and Allamakee County lines;

Bounded on the East by the eastern Allamakee County line; the eastern and southern Clayton County lines; the eastern Buchanan County line; the northern and eastern Jones County lines; the eastern Cedar County line south to State Route 130;

Bounded on the South by State Route 130 west to State Route 38; State Route 38 south to Interstate 80; Interstate 80 west to U.S. Route 63; and

Bounded on the West by U.S. Route 63 north to State Route 8; State Route 8 east to State Route 21; State Route 21 north to D38; D38 east to State Route 297; State Route 297 north to V49; V49 north to Bremer County; the southern Bremer County line; the western Fayette and Winneshiek County lines.

Minot

Pursuant to Section 7(f)(2) of the USGSA, the following geographic area, in the State of North Dakota, is assigned to Minot:

Bounded on the North by the North Dakota State line east to the eastern Bottineau County line;

Bounded on the East by the eastern Bottineau County line south to the northern Pierce County line; the northern Pierce County line east to State Route 3; State Route 3 south to State Route 200;

Bounded on the South by State Route 200 west to State Route 41; State Route 41 south to U.S. Route 83; U.S. Route 83 northwest to State Route 200; State Route 200 west to U.S. Route 85; U.S. Route 85 south to Interstate 94; Interstate 94 west to the North Dakota State line; and

Bounded on the West by the North Dakota State line.

The following grain elevators, located outside of the above contiguous geographic area, are part of this geographic area assignment: Benson Quinn Company, Underwood, and Falkirk Farmers Elevator, Washburn, both in McLean County, North Dakota; and Harvey Farmers Elevator, Harvey, Wells County, North Dakota (located inside Grain Inspection, Inc.'s, area).

Tri-State

Pursuant to Section 7(f)(2) of the USGSA, the following geographic area in the States of Indiana, Kentucky, and Ohio is assigned to Tri-State:

In Indiana:

Dearborn, Decatur, Franklin, Ohio, Ripley, Rush (south of State Route 244), and Switzerland Counties.

In Kentucky:

Bath, Boone, Bourbon, Bracken, Campbell, Clark, Fleming, Gallatin, Grant, Harrison, Kenton, Lewis (west of State Route 59), Mason, Montgomery, Nicholas, Owen, Pendleton, and Robertson Counties.

In Ohio:

Bounded on the North by the northern Preble County line east; the western and northern Miami County lines east to State Route 296; State Route 296 east to State Route 560; State Route 560 south to the Clark County line; the northern Clark County line east to U.S. Route 68;

Bounded on the East by U.S. Route 68 south to U.S. Route 22; U.S. Route 22 east to State Route 73; State Route 73 southeast to the Adams County line; the eastern Adams County line;

Bounded on the South by the southern Adams, Brown, Clermont, and Hamilton County lines; and

Bounded on the West by the western Hamilton, Butler, and Preble County lines.

Opportunity for Designation

Interested persons, including Kansas, Mid-Iowa, Minot, and Tri-State, may apply for designation to provide official services in the geographic areas specified above under the provisions of section 7(f) of the USGSA and 7 CFR

800.196(d). Designation in the specified geographic areas is for the period beginning July 1, 2009, and ending June 30, 2012. To apply for designation or for more information contact the Compliance Division at the address listed above or visit the GIPSA Web site at *http://www.gipsa.usda.gov*.

Request for Comments

GIPSA is also publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by the Kansas, Mid-Iowa, Minot, and Tri-State official agencies. In the designation process, GIPSA is particularly interested in receiving comments citing reasons and pertinent data in support of or objection to the designation of the applicants. Submit all comments to the Compliance Division at the above address or at *http://www.regulations.gov*.

GIPSA will consider applications, comments, and other available information to determine which applicant will be designated.

Authority: 7 U.S.C. 71–87k.

Alan Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E8–28246 Filed 11–28–08; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended, the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

FOR FURTHER INFORMATION CONTACT: Brandon Farlander, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Ave., NW, Washington, DC 20230; telephone (202) 482–0182.

Upcoming Sunset Reviews for January 2009

There are no Sunset Reviews scheduled for initiation in January 2009.

For information on the Department's procedures for the conduct of sunset reviews, *See* 19 CFR 351.218. This notice is not required by statute but is published as a service to the international trading community. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Dep rtment's Policy Bulletin 98.3, ''Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders;'' Policy Bulletin, 63 FR 18871 (April 16, 1998) (''Sunset Policy Bulletin''). The Notice of Initiation of Five-year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Dated: November 25, 2008.

Stephen J. Claeys,

Deputy Assistant Secretaryfor AD/CVD Duty Operations.

[FR Doc. E8–28480 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4697.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213 (2004) of the Department of Commerce (the Department) Regulations, that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR). We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 20 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of the initiation **Federal Register** notice.

Opportunity to Request a Review: Not later than the last day of December 2008,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in December for the following periods:

	Period
Antidumping Duty Proceedings	
Argentina: Honey, A–357–812	12/1/07–11/30/08

[1] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when the Department is closed.

	Period
Brazil:	
Certain Carbon Steel Butt-Weld Pipe Fittings, A–351–602	12/1/07–11/30/08
Silicomanganese, A–351–824	12/1/07–11/30/08
Chile: Certain Preserved Mushrooms, A–337–804	12/1/07–11/30/08
India:	
Carbazole Violet Pigment 23, A–533–838	12/1/07–11/30/08
Certain Hot-Rolled Carbon Steel Flat Products, A–533–820	12/1/07–11/30/08
Stainless Steel Wire Rod, A–533–808	12/1/07–11/30/08
Indonesia: Certain Hot-Rolled Carbon Steel Flat Products, A–560–812	12/1/07–11/30/08
Japan:	
High and Ultra-High Voltage Ceramic Station Post Insulators, A–588–862	12/1/07–11/30/08
Polychloroprene Rubber, A–588–046	12/1/07–11/30/08
P.C. Steel Wire Strand, A–588–068	12/1/07–11/30/08
Superalloy Degassed Chromium, A–588–866	12/1/07–11/30/08
Welded Large Diameter Line Pipe, A–588–857	12/1/07–11/30/08
Republic of Korea: Welded ASTM A–312 Stainless Steel Pipe, A–580–810	12/1/07–11/30/08
Taiwan:	
Carbon Steel Butt-Weld Pipe Fittings, A–583–605	12/1/07–11/30/08
Porcelain-on-Steel Cooking Ware, A–583–508	12/1/07–11/30/08
Welded ASTM A–312 Stainless Steel Pipe, A–583–815	12/1/07–11/30/08
The People's Republic of China:	
Carbazole Violet Pigment 23, A–570–892	12/1/07–11/30/08
Cased Pencils, A–570–827	12/1/07–11/30/08
Hand Trucks and Parts Thereof, A–570–891	12/1/07–11/30/08
Honey, A–570–863	12/1/07–11/30/08
Malleable Cast Iron Pipe Fittings, A–570–881	12/1/07–11/30/08
Porcelain-on-Steel Cooking Ware, A–570–506	12/1/07–11/30/08
Silicomanganese, A–570–828	12/1/07–11/30/08
Countervailing Duty Proceedings	
Argentina: Honey, C–357–813	1/1/08–12/31/08
India:	
Carbazole Violet Pigment 23, C–533–839	1/1/07–12/31/07
Certain Hot-Rolled Carbon Steel Flat Products, C–533–821	1/1/08–12/31/08
Indonesia: Certain Hot-Rolled Carbon Steel Flat Products, C–560–813	1/1/08–12/31/08
Thailand: Certain Hot-Rolled Cabon Steel Flat Products, C–549–818	1/1/07–12/31/07

In accordance with 19 CFR 351.213(b) of the regulations, an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or exporters.[2] If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Please note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. See also the Import Administration Web site at *http://ia.ita.doc.gov.*

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Duty Operations, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with 19 CFR 351.303(f)(l)(i) of the regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of December 2008. If the Department does not receive, by the last day of December 2008, a request for

[2] If the review request involves a non-market economy and the parties subject to the review request do not qualify for separate rates, all other exporters of subject merchandise from the non-market economy country who do not have a separate rate will be covered by the review as part of the single entity of which the named firms are a part.

review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the U.S. Customs and Border Protection to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute but is published as a service to the international trading community.

Dated: November 25, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for AD/CVD Duty Operations.

[FR Doc. E8–28479 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–580–861)

Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea: Termination of Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 1, 2008.

FOR FURTHER INFORMATION CONTACT: Patrick Edwards or Dena Crossland, Office 7, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–8029 or (202) 482–3362, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 3, 2008, the Department of Commerce (Department) received antidumping duty petitions filed in proper form by the petitioners for the imposition of antidumping duties on certain circular welded carbon quality steel line pipe (line pipe) from the Republic of Korea (Korea) and the People's Republic of China (PRC), alleging that line pipe from these countries were being sold, or were likely to be sold, in the United States at less than fair value. The petitioners are United States Steel Corporation, Maverick Tube Corporation, Tex–Tube Company, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and AFL–CIO-CLC (collectively, Petitioners). On April 23, 2008, the Department initiated antidumping duty investigations of line pipe from Korea and the PRC. *See Certain Circular Welded Carbon Quality Steel Line Pipe From the Republic of Korea and the People's Republic of China: Initiation of Antidumping Duty Investigations*, 73 FR 23188 (April 29, 2008) (*Initiation Notice*).

On June 3, 2008, the International Trade Commission preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of line pipe from Korea and the PRC. *See Certain Circular Welded Carbon Quality Steel Line Pipe from China and Korea*, 73 FR 31712 (June 3, 2008).

On November 6, 2008, we published in the **Federal Register** the preliminary determination in the Korean investigation, concurrently postponing the final determination until no later than March 21, 2009. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea*, 73 FR 66020 (November 6, 2008).

Scope of Investigation

The merchandise that is the subject of this investigation is circular welded carbon quality steel pipe of a kind used for oil and gas pipelines (welded line pipe), not more than 406.4 mm (16 inches) in outside diameter, regardless of wall thickness, length, surface finish, end finish or stenciling.

The term ''carbon quality steel'' includes both carbon steel and carbon steel mixed with small amounts of alloying elements that may exceed the individual weight limits for nonalloy steels imposed in the Harmonized Tariff Schedule of the United States (HTSUS). Specifically, the term ''carbon quality'' includes products in which (1) iron predominates by weight over each of the other contained elements, (2) the carbon content is 2 percent or less by weight and (3) none of the elements listed below exceeds the quantity by weight respectively indicated:

(i) 2.00 percent of manganese,
(ii) 2.25 percent of silicon,
(iii) 1.00 percent of copper,
(iv) 0.50 percent of aluminum,
(v) 1.25 percent of chromium,
(vi) 0.30 percent of cobalt,
(vii) 0.40 percent of lead,
(viii) 1.25 percent of nickel,
(ix) 0.30 percent of tungsten,
(x) 0.012 percent of boron,
(xi) 0.50 percent of molybdenum,
(xii) 0.15 percent of niobium,
(xiii) 0.41 percent of titanium,
(xiv) 0.15 percent of vanadium, or
(xv) 0.15 percent of zirconium.

Welded line pipe is normally produced to specifications published by the American Petroleum Institute (API) (or comparable foreign specifications) including API A–25, 5LA, 5LB, and X grades from 42 and above, and/or any other proprietary grades or non–graded material. Nevertheless, all pipe meeting the physical description set forth above that is of a kind used in oil and gas pipelines, including all multiple–stenciled pipe with an API line pipe stencil is covered by the scope of this investigation.

The line pipe products that are the subject of this investigation are currently classifiable in the HTSUS under subheadings 7306.19.10.10, 7306.19.10.50, 7306.19.51.10, and 7306.19.51.50. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Termination of Antidumping Duty Investigation

On November 17, 2008, the Department received a letter from Petitioners notifying the Department that they are no longer interested in seeking relief and are withdrawing their petition on line pipe from Korea. Under section 734(a)(1)(A) of the Tariff Act of 1930, as amended (the Act), upon withdrawal of a petition, the administering authority may terminate an investigation after giving notice to all parties to the investigation. Further, 19 CFR 351.207(b)(1) states that the Department may terminate an investigation upon withdrawal of a petition, provided it concludes that termination is in the public interest. On November 18, 2008, we notified all interested parties to the investigation of our intent to terminate this investigation, and provided them an opportunity to comment on the proposed termination. See Memorandum to the File from Dena Crossland, Case Analyst, through Angelica L. Mendoza, Program Manager, Office 7, dated November 21, 2008. We received no comments from any party to this investigation.

As no party objects to this termination and the Department is not aware of any evidence to the contrary, the Department finds that termination of this investigation is in the public interest. As such, we are terminating this antidumping duty investigation and

will issue instructions directly to U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation of subject merchandise and release all bonds and any cash deposits that have been posted, where applicable.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination and notice are published in accordance with section 734(a) of the Act and 19 CFR 351.207(b).

Dated: November 21, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–28469 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–882

Refined Brown Aluminum Oxide from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from an interested party, the Department of Commerce (the Department) is conducting the 2006–2007 administrative review of the antidumping duty order on refined brown aluminum oxide (RBAO) from the People's Republic of China (PRC). The review covers one exporter, Qingdao Shunxingli Abrasives Co. Ltd. (Qingdao Shunxingli). The period of review (POR) is November 1, 2006, to October 31, 2007.

We have preliminarily determined that sales have been made at prices below normal value by Qingdao Shunxingli. If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries.

We invite interested parties to comment on these preliminary results. Parties who submit comments in this review are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: December 1, 2008.

FOR FURTHER INFORMATION CONTACT: David Goldberger or Kate Johnson, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–4136 or (202) 482–4929, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 2007, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on, inter alia, RBAO from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 72 FR 61859 (November 1, 2007). In response, Fujimi Corporation (Fujimi), an importer of the subject merchandise, timely requested an administrative review of the antidumping duty order on RBAO from the PRC for entries of the subject merchandise during the POR from two PRC producers/exporters: Henan Yilong High and New Materials Co., Ltd. (Henan Yilong), and Qingdao Shunxingli.

On December 27, 2007, the Department initiated a review on Henan Yilong and Qingdao Shunxingli. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 FR 73315 (December 27, 2007).

The Department issued antidumping duty questionnaires to Henan Yilong and Qingdao Shunxingli on January 7, 2008. We received responses to these questionnaires in March 2008. We issued a supplemental questionnaire to Henan Yilong in April 2008 and received a response later that month. We issued supplemental questionnaires to Qingdao Shunxingli in March, May, and July 2008. We received responses to these supplemental questionnaires in April, May, and July 2008, respectively.

On May 23, 2008, Fujimi withdrew its request for review of Henan Yilong and requested that the Department rescind the review with respect to this company. In accordance with 19 CFR 351.213(d)(1), we granted Fujimi's request and rescinded this administrative review with respect to Henan Yilong. In addition, we extended the due date for completion of these preliminary results until not later than December 1, 2008. *See Refined Brown Aluminum Oxide from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review and Extension of Time Limit for Preliminary Results*, 73 FR 38173 (July 3, 2008).

Scope of the Order

The merchandise covered by this order is ground, pulverized or refined artificial corundum, also known as brown aluminum oxide or brown fused alumina, in grit size of 3/8 inch or less. Excluded from the scope of the order is crude artificial corundum in which particles with a diameter greater than 3/8 inch constitute at least 50 percent of the total weight of the entire batch. The scope includes brown artificial corundum in which particles with a diameter greater than 3/8 inch constitute less than 50 percent of the total weight of the batch. The merchandise under investigation is currently classifiable under subheadings 2818.10.20.00 and 2818.10.20.90 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise covered by the order is dispositive.

NME Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non–market–economy (NME) country. In accordance with section 771(18)(C)(i) of the Tariff Act of 1930, as amended (the Act), any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of of Intent to Rescind the 2004/2005 New Shipper Review*, 71 FR 26736, (May 8, 2006); unchanged in *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding has contested such treatment. Accordingly, we have calculated normal value in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates

As explained above, a designation of a country as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Act. Accordingly, there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. *See* Policy Bulletin 05.1 entitled ''Separate Rate Practice and Application of Combination Rates in Antidumping Duty Investigations Involving Non–Market Economy Countries,'' dated April 5, 2005. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) (*Sparklers*), as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

The Department's separate–rate test determines whether the exporters are independent from government control and does not consider, in general, macroeconomic or border–type controls, *e.g.*, export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision–making process at the individual firm level. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From Ukraine*, 62 FR 61754, 61757 (November 19, 1997).

Qingdao Shunxingli provided complete separate–rate information in its responses to our original and supplemental questionnaires. Qingdao Shunxingli is a wholly Chinese–owned company. Therefore, the Department must analyze whether Qingdao Shunxingli can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

Absence of De Jure Control

The Department considers the following de jure criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers* at Comment 1. As discussed below, our analysis shows that the evidence on the record supports a preliminary finding of an absence of *de jure* government control for Qingdao Shunxingli based on each of these factors.

The evidence provided by Qingdao Shunxingli supports a preliminary finding of de jure absence of governmental control based on the following facts: (1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of companies. *See, e.g.*, ''The Company Law of the People's Republic of China,'' submitted as Exhibit A–2 to Qingdao Shunxingli's March 5, 2008, response to Section A of the Department's questionnaire (QRA).

Absence of De Facto Control

Typically, the Department considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or subject to, the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide* at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

With respect to *de facto* control, Qingdao Shunxingli reported that: (1) it independently set prices for sales to the United States through negotiations with customers and these prices are not subject to review by any government organization; (2) it did not coordinate with other exporters or producers to set the price or to determine to which market it will sell subject merchandise; (3) the PRC Chamber of Commerce did not coordinate its export activities; (4) its staff has the authority to contractually bind it to sell subject merchandise; (5) its management is selected without any government control or review; (6) there is no restriction on its use of export revenues; (7) its management ultimately determines the disposition of respective profits, and Qingdao Shunxingli has not had a loss on its export sales in the last two years; and (8) none of its managers is a government official. *See* QRA at pages A–2 – A–11. Furthermore, our analysis of Qingdao Shunxingli's questionnaire responses reveals no other information indicating government control of its export activities. Therefore, based on the information on the record, we preliminarily determine that there is an absence of *de facto* government control with respect to Qingdao Shunxingli's exports.

In summary, the evidence placed on the record of this review by Qingdao Shunxingli demonstrates an absence of *de jure* and *de facto* government control with respect to its exports of the merchandise under review, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide*.

Surrogate Country

When the Department analyzes imports from an NME country, section 773(c)(1) of the Act directs it to base normal value, in most circumstances, on the NME producer's factors of production (FOP), valued in a surrogate market–economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOP, the Department shall use, to the extent possible, the prices or costs of FOP in one or more market–economy countries that are at a level of economic development comparable to that of the NME country and that are significant producers of comparable merchandise. On January 14, 2008, the Department's Office of Policy issued a memorandum identifying India, the Philippines, Colombia and Thailand as being at a level of economic development comparable to the PRC for the POR. *See* Memorandum entitled ''Administrative Review of the Antidumping Order on

Refined Brown Aluminum Oxide from the People's Republic of China (PRC): Request for a List of Surrogate Countries,'' dated January 14, 2008. After consideration of the relevant factors for surrogate country selection, the Department determined that India is the appropriate surrogate country for this review. *See* Memorandum entitled ''Administrative Review of the Antidumping Duty Order on Refined Brown Aluminum Oxide from the People's Republic of China: Selection of a Surrogate Country,'' dated February 12, 2008. The sources of the surrogate factor values are discussed under the ''Normal Value'' section below and in the Memorandum entitled ''Preliminary Results Valuation Memorandum'' (Valuation Memo), dated contemporaneously with this notice.

U.S. Price

A. Export Price

In accordance with section 772(a) of the Act, we based U.S. price on the export price (EP) for sales to the United States made by Qingdao Shunxingli because the first sale to an unaffiliated party was made before the date of importation and the use of constructed EP was not otherwise warranted. We calculated EP for Qingdao Shunxingli based on the prices to unaffiliated purchasers in the United States.

In accordance with section 772(c) of the Act, we deducted from the price to unaffiliated purchasers, where appropriate, foreign inland freight, brokerage and handling, and international freight expenses.

As foreign inland freight and brokerage and handling services were provided by NME service providers, we valued these services using surrogate values. *See* Valuation Memo. For those international freight services that were provided by a market–economy provider and for which Qingdao Shunxingli paid in a market–economy currency, we deducted the actual expenses incurred. For those international freight services that were provided by an NME provider, we valued them using the weighted–average of the international freight expenses charged by market–economy providers, as described in the Valuation Memo.

Normal Value

A. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine the normal value using a FOP methodology if the merchandise is exported from a NME country and the information does not permit the calculation of normal value using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases normal value on the FOP because the presence of government controls on various aspects of NME countries renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part*, 70 FR 39744 (July 11, 2005) (unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2003–2004 Administrative Review and Partial Rescission of Review*, 71 FR 2517 (January 17, 2006)).

The FOP for RBAO include the following elements: (1) quantities of raw materials employed; (2) hours of labor required; (3) amounts of energy and other utilities consumed; (4) representative capital and selling costs; and (5) packing materials. We used the FOP reported by Qingdao Shunxingli for materials, labor, energy, and packing. Where appropriate, we adjusted the surrogate prices by including freight costs to make them delivered prices.

B. FOP Valuation

In accordance with section 773(c) of the Act, we calculated normal value based on the FOP reported by Qingdao Shunxingli for the POR. To calculate normal value, we multiplied the reported per–unit factor–consumption rates by publicly available surrogate values, in accordance with 19 CFR 351.408(c)(1). In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data.

Consistent with the Department's practice, we calculated price–index adjustors to inflate or deflate, as appropriate, surrogate values that are not contemporaneous with the POR using the wholesale price index or equivalent for the subject country. *See, e.g., Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 24943 (May 6, 2008); unchanged in Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 52645 (September 10, 2008). The methodology which we applied in this review is detailed in the Valuation Memo.

We were unable to identify an appropriate surrogate value from India for the crude brown aluminum oxide raw material input. Therefore, we used a weighted–average U.S. price, derived from the data reported in the Defense Logistics Agency FY2000 Annual Report. Our selection of this value is further discussed in the Valuation Memo. The sources and data we used to determine the surrogate values for the other FOP, as well as the surrogate financial ratios for factory overhead, selling, general and administrative expenses (SG&A), and profit, are discussed in detail in the Valuation Memo.

Preliminary Results of the Review

As a result of our review, we preliminarily determine that the following percentage weighted–average dumping margin exists for the period November 1, 2006, through October 31, 2007:

Manufacturer/Exporter	Percent Margin
Qingdao Shunxingli Abrasives Co. Ltd.	54.62

Comments

We will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit publicly available information to value factors no later than 20 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.301(c)(3)(ii). Any interested party may request a hearing within 30 days of the date of publication of this notice. *See* 19 CFR 351.310(c). Interested parties who wish to request a hearing or to participate in a hearing if a hearing is requested must submit a written request to the Assistant Secretary for Import Administration within 30 days after the date of publication of this notice. *See* 19 CFR 351.310(c). Requests should contain the following: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the case and rebuttal briefs. *See* 19 CFR 351.310(c). Case briefs from interested parties may be submitted not later than 30 days after the date of publication of this notice of preliminary results of review. *See* 19 CFR 351.309(c)(1)(ii). Rebuttal briefs from interested parties, limited to the issues raised in the case briefs, may be

submitted not later than five days after the time limit for filing the case briefs. *See* 19 CFR 351.309(d)(1). If requested, any hearing will be held two days after the scheduled date for submission of rebuttal briefs. *See* 19 CFR 351.310(d). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument a statement of the issue, a summary of the arguments not exceeding five pages, and a table of statutes, regulations, and cases cited. *See* 19 CFR 351.309(c)(2).

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any such written briefs or at the hearing, if held, not later than 120 days after the date of publication of this notice. *See* section 751(a)(3)(A) of the Act.

Assessment Rates

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

Pursuant to 19 CFR 351.212(b)(1), we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this review is above *de minimis*. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash–Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of the administrative review for all shipments of RBAO from the PRC entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise exported by Qingdao Shunxingli, the cash–deposit rate will be that established in the final results of review; (2) for previously reviewed or investigated companies not listed above that have separate rates, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) for all other PRC exporters of subject merchandise, which have not been found to be entitled to a separate rate, the cash–deposit rate will be PRC–wide rate of 135.18 percent; and (4) for all non–PRC exporters of subject merchandise, the cash–deposit rate will be the rate applicable to the PRC exporter that supplied that exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and this notice are in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: November 21, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–28458 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-year (''Sunset'') Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating a five-year review (''Sunset Review'') of the antidumping duty orders listed below. The International Trade Commission (''the Commission'') is publishing concurrently with this notice its notice of *Institution of Five-year Review* which covers the same orders.

EFFECTIVE DATE: December 1, 2008.

FOR FURTHER INFORMATION CONTACT: The Department official identified in the Initiation of Review section below at AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Ave., NW, Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders*, 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3 *Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders: Policy Bulletin*, 63 FR 18871 (April 16, 1998).

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating the Sunset Review of the following antidumping duty orders:

DOC Case No.	ITC Case No.	Country	Product	Department Contact
A–351–837	731–TA–1024	Brazil	Prestressed Concrete Steel Wire Strand	Dana Mermelstein (202) 482–1391
A–533–828	731–TA–1025	India	Prestressed Concrete Steel Wire Strand	Dana Mermelstein (202) 482–1391
A–580–852	731–TA–1026	South Korea	Prestressed Concrete Steel Wire Strand	Dana Mermelstein (202) 482–1391
A–201–831	731–TA–1027	Mexico	Prestressed Concrete Steel Wire Strand	Dana Mermelstein (202) 482–1391
A–549–820	731–TA–1028	Thailand	Prestressed Concrete Steel Wire Strand	Dana Mermelstein (202) 482–1391
A–588–068	AA1921–188	Japan	Prestressed Concrete Steel Wire Strand	Dana Mermelstein (202) 482–1391
C–533–829	701–TA–432	India	Prestressed Concrete Steel Wire Strand	Brandon Farlander (202) 482–0182

Filing Information

As a courtesy, we are making information related to Sunset proceedings, including copies of the pertinent statute and Department's regulations, the Department schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's sunset Internet Web site at the following address: http://ia.ita.doc.gov/sunset/.'' All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, service, and certification of documents. These rules can be found at 19 CFR 351.303.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties to apply for access to proprietary information under administrative protective order (''APO'') immediately following publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required from Interested Parties

Domestic interested parties defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b) wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order–specific notice of intent to participate from a domestic interested party, the Department's regulations provide that *all parties* wishing to participate in the Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order–specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews.[1] Please consult the Department's regulations at 19 CFR Part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: November 25, 2008.

Stephen J. Claeys,

Deputy Assistant Secretaryfor AD/CVD Duty Operations.

[FR Doc. E8–28475 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–DS–S

[1] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests to extend that five-day deadline based upon a showing of good cause.

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Rulings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 1, 2008.

SUMMARY: The Department of Commerce (''Department'') hereby publishes a list of scope rulings completed between July 1, 2008, and September 30, 2008. In conjunction with this list, the Department is also publishing a list of requests for scope rulings and anticircumvention determinations pending as of September 30, 2008. We intend to publish future lists after the close of the next calendar quarter.

FOR FURTHER INFORMATION CONTACT: Juanita H. Chen or Hallie Zink, AD/CVD Operations, China/NME Group, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: 202–482–1904 or 202–482–6907, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department's regulations provide that the Secretary will publish in the **Federal Register** a list of scope rulings on a quarterly basis. See 19 C.F.R. 351.225(o). Our most recent notification of scope rulings was published on August 21, 2008. *See Notice of Scope Rulings*, 73 FR 49418 (August 21, 2008). This current notice covers all scope rulings and anticircumvention determinations completed by Import Administration between July 1, 2008, and September 30, 2008, inclusive, and it also lists any scope or anticircumvention inquiries pending as of September 30, 2008. As described below, subsequent lists will follow after the close of each calendar quarter.

Scope Rulings Completed Between July 1, 2008, and September 30, 2008:

Germany

A–428–801: Ball Bearings and Parts Thereof from Germany

Requestor: Petree & Stoudt Associates, Inc.; certain textile–machinery components (model numbers SW4122, SRH1572, SRH3693.1, FR0394, SW2082, SRH1809.1, SRH3694, FR0613,,SW2577, SRH1809, SRH3694.1, FR0726, SW2578, SRH2129.1, SRH3695.1, FR1081, SW3642.X, SRH2129.2, SRH3717, FR1108, SW3937, SRH2255, SRH3898, FR1235, SW3938, SRH2265, SRH3906, FR1387, SW3939, SRH2266, SRH3913, FR1570, SW3966.X, SRH2820, SRH3953, FR1603, SW3982, SRH3055, SRH3956.1, FR1829, SW3995.1, SRH3064.1, SRH3977, FR1927, SW4021–XXX, SRH3100.1, SRH3983, FR1940, SW4040, SRH3366, SRH4009.1, FR1967, SW4053, SRH3419, SRH4009, FR1969, SW4057, SRH3463, SRH4033, FR2006, SW4058.1, SRH3482, SRH4037, FR2623, SW4067, SRH3489, SRH4038, FR2624, SW4100, SRH3500, SRH4042.1, FR2625, SW4107–X, SRH3510, SRH4042 , FR2626, SW4110–X, SRH3522.1, SRH4050, FR2661–10, SW1683, SRH3522, SRH4051, FR3007, OW4106, SRH3530, SRH4052, FR3499, OW0426, SRH3531, SRH4174, FR3669, OW0647, SRH3531.1, SR2523, FR3686, OW2090, SRH3532, SR2583, FR3718, OW2234, SRH3535, SR3951, FR3916.1, OW2787, SRH3540.1, SR3952, FR3916, OW2818.2, SRH3540, SR3998, FR3935, OW2903, SRH3541, SR4091, FR3964, OW3934, SRH3542.1, SR4114, FR3968, OW3958, SRH3542, SR4124, FR3969, OW3958–10, SRH3543, ZL1678.1,

FR3973, OW3959, SRH3545.1, ZL3967, FR3981, OW3959–10, SRH3545, ZL3985, FR4022, OW4068, SRH3552, ZL4005, FR4023, OW4102, SRH3554, ZL4096, FR4045, OW0256, SRH3555, ZL4145, FR4066, SRH0169, SRH3575, ZL4173, FR4080, SRH0170, SRH3601, X3917, FR4097, SRH0233, SRH3603, X3984, FR4099, SRH0744.3, SRH3623, X3984.1, FR4111, SRH1028, SRH3624, X4014, FR4170, SRH1079, SRH3692, X4015, FR4171, SRH1315, SRH3692.1, X4016, SRH1545.3, SRH3693, X4112) are not within the scope of the antidumping duty order; July 16, 2008.

Italy

A–475–703: Granular Polytetrafluoroethylene Resin from Italy

Requestor: Petitioner, E.I. DuPont de Nemours & Company; imports of Polymist[reg] feedstock produced by the respondent Solvay Solexis, Inc. and Solvay Solexis S.p.A. are not within the scope of the antidumping duty order; July 31, 2008.[1]

People's Republic of China

A–570–502: Iron Construction Castings from the People's Republic of China

Requestor: A.Y. McDonald Mfg. Co.; cast iron lids and bases independently sourced from the PRC for its ''Arch Pattern'' and ''Minneapolis Pattern'' curb boxes are not within the scope of the antidumping duty order; July 21, 2008.

A–570–504: Petroleum Wax Candles from the People's Republic of China

Requestor: Sourcing International, LLC; its White Rose Bouquet (HM65853W); Six Roses Bouquet (HM6439R); White Poppies (HM469W–Y); Aloe Vera Plant (HM67053–1); Succulent Flower (HM53460); and Flower Pot Series (HM452R, HM6524–1Y, HM9871W–P, and HM458–1P–Y) novelty candles are not within the scope of the antidumping duty order; September 11, 2008.

A–570–504: Petroleum Wax Candles from the People's Republic of China

Requestor: Sourcing International, LLC; its Yellow Bouquet (HM66022Y); Two Red Floating Lilies (HM12009R); Set of Three Flower Pots (HM9604–APU, HM9604–AR, and HM9604–A4–R); Pink Blossoming Rose (HM9866); Circular Pink Gift Box with Pink Flower (HM65548LP); Circular Pink Gift Box with Yellow Flower (HM6550W); Pink Mum Flower in a Flower Pot (HM9601–AL–R); and Yellow Mum Flower in a Flower Pot (HM9601–ALY–R) novelty candles are not within the scope of the antidumping duty order; September 17, 2008.

A–570–803: Heavy Forged Hand Tools With or Without Handles from the People's Republic of China

Requestor: New Buffalo Corporation; its 4 Ton Electric Log Splitter is not within the scope of the antidumping duty order; September 11, 2008.

A–570–827: Cased Pencils from the People's Republic of China

Requestor: The Smencil Company; pencils made from recycled newspaper packaged in plastic cylinders along with scent applicators, in the ''Smencils Home Kit'' and ''Smencils Mini Kit'' are within the scope of the antidumping duty order; August 21, 2008.

A–570–875: Non–Malleable Cast Iron Pipe Fittings from the People's Republic of China

Requestor: Taco Inc.; the black cast iron flange, green ductile iron flange and cast iron ''Twin Tee'' are within the scope of the antidumping duty order; September 18, 2008.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Best Buy Purchasing LLC; the sealable polyethylene plastic bag (BESTBUY12ADH) is not within the scope of the antidumping order; July 3, 2008.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Bags on the Net; a certain polyethylene bag (HOLIDAYINN–8410) is within the scope of the antidumping order; July 14, 2008.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: The Builders Depot Inc.; the Against All Odds Tee and Jacket Bags (model ιAA01 and model ιAA02) are within the scope of the antidumping duty order; September 2, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Dutailier Group, Inc.; its convertible cribs (infant crib to toddler bed; model numbers 1230C8, 3500C8, 5400C8, 5500C8, and 6200C8) are not within the scope of the antidumping duty order; July 10, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Shermag Inc.; the Three–in-One Cribs (model ι 2056–48, 2110–49, and 2045–48) are not within the scope of the antidumping duty order; July 11, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Fiskars Brands, Inc.; its Allbarrow cart is not within the scope of the antidumping duty order; August 13, 2008.

A–570–894: Certain Tissue Paper Products from the People's Republic of China

Requestor: Walgreen Co.; the tissue paper in its gift bag sets, consisting of one gift bag, one crinkle bow, and one to six sheets of tissue paper, is within the scope of the antidumping duty order; September 19, 2008.

A–570–894: Certain Tissue Paper Products from the People's Republic of China

Requestor: QVC Corporation; the tissue paper in its gift wrap kits, each containing different amounts and combinations of some or all of the following components: gift bags, gift tins, gift boxes, bows, wrapping paper, tissue paper, gift tags, gift cards, gift card pouches, ribbon and stickers, is within the scope of the antidumping duty order; September 19, 2008.

A–570–909: Steel Nails from the People's Republic of China

Requestor: Trackers, Inc.; its color coded steel nails are within the scope of the antidumping duty order; September 15, 2008.

Anticircumvention Determinations Completed Between July 1, 2008, and September 30, 2008:

A–570–894: Certain Tissue Paper Products from the People's Republic of China

Requestor: Seaman Paper Company of Massachusetts, Inc.; imports of tissue paper from Vietnam made out of jumbo rolls of tissue paper from the PRC are circumventing the antidumping duty order; September 19, 2008.

Scope Inquiries Terminated Between July 1, 2008, and September 30, 2008:

None.

Anticircumvention Inquiries Terminated Between July 1, 2008, and September 30, 2008:

None.

[1] The Department intends to reconsider this decision if we find evidence (through the course of future administrative reviews or otherwise) that Polymist[reg] feedstock is being used to make raw polymer or granular polytetrafluoroethylene.

Scope Inquiries Pending as of September 30, 2008:

Germany

A–428–825: Stainless Steel Sheet and Strip in Coils from Germany

Requestor: Almetals, Inc.; whether certain TriClad nickel–clad stainless steel sheet and strip in coils is within the scope of the antidumping duty order; requested May 1, 2008.

Japan

A–588–046: Polychloroprene Rubber from Japan

Requestor: DuPont Performance Elastomers L.L.C; whether solid polychloroprenes that are dipolymers of chloroprene and methacrylic acid are within the scope of the antidumping duty order; requested January 23, 2008; initiated/preliminary ruling March 8, 2008.

A–588–046: Polychloroprene Rubber from Japan

Requestor: DuPont Performance Elastomers L.L.C; whether aqueous dispersions of 2–chlorobutadiene–1,3 homopolymers, where the polymer content of the dispersion is between 55 weight percent and 61 weight percent and the dispersed homopolymer contains less that 10 weight percent of a tetrahydrofuran–insoluble fraction, are within the scope of the antidumping duty order; requested August 4, 2008; initiated/preliminary ruling September 18, 2008.

People's Republic of China

A–570–504: Petroleum Wax Candles from the People's Republic of China

Requestor: Sourcing International, LLC; whether its Red Rose Stem (HM65975W–G); White and Yellow Poppies (HM65895R); Water Lotus (HM52305LB); Spotted Orchid (HM12066); and Bouquet of Pom Pom (HM65833W–G) novelty candles are within the scope of the antidumping duty order; requested September 24, 2008.

A–570–827: Cased Pencils from the People's Republic of China

Requestor: Walgreen Co.; whether the ''ArtSkills Stencil Kit'' is within the scope of the antidumping duty order; requested May 25, 2007; preliminary ruling August 21, 2008.

A–570–827: Cased Pencils from the People's Republic of China

Requestor: Walgreen Co.; whether the ''ArtSkills Draw & Sketch Kit'' is within the scope of the antidumping duty order; requested May 25, 2007.

A–570–864: Pure Magnesium in Granular Form from the People's Republic of China

Requestor: ESM Group Inc.; whether atomized ingots are within the scope of the antidumping duty order; original scope ruling rescinded and vacated April 18, 2007; initiated April 18, 2007; Preliminary Ruling August 27, 2008.

A–570–866: Folding Gift Boxes from the People's Republic of China

Requestor: Footstar; whether certain four boxes for business cards and forms (length x width: 5 x 3.5; 7 x 3.5; 12.125 x 3.5; and 11 x 8.5) are within the scope of the antidumping duty order; requested April 26, 2007.

A–570–866: Folding Gift Boxes from the People's Republic of China

Requestor: Hallmark Cards, Inc.; whether its ''FunZip'' gift presentation is within the scope of the antidumping duty order; requested June 1, 2007.

A–570–882: Refined Brown Aluminum Oxide from the People's Republic of China

Requestor: 3M Company; whether semi–friable aluminum oxide and heat–treated aluminum oxide are within the scope of the antidumping duty order; requested September 19, 2006; initiated January 17, 2007.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Majestic International; whether certain polyethylene gift bags (UPC codes starting with 8–51603- and ending with: 00002–3, 00004–7, 00140–2, 00141–9, 00142–6, 00041–2, 00040–5, 00052–8, 00059–7, 00066–5, 00068–9, 00071–9, 00072–6, 00075–7, 00076–4, 00092–4, 00093–1, 00094–8, 00098–6, 00131–0, 00132–7, 00133–4, 00144–0, 00145–7, 00152–5, 00153–2, 00155–6, 00156–3, 00160–0, 00163–1, 00165–5, 00166–2, 00175–4, 00176–1, 00181–5, 00183–9, 00226–3, 00230–0, 00231–7, 00246–1, 00251–5, 00252–2, 00253–9, 00254–6, 00255–3, 00256–0, 00257–7, 00259–1, 00260–7, 00262–1, 00263–8, 00300–0, 00301–7, 00302–4, 00303–1, 00305–5, 00306–2, 00307–9, 00308–6, 00309–3, 00350–5, 00351–2, 00352–9, 00353–6, 00354–3, 00355–0, 00356–7, 00357–4, 00358–1) are within the scope of the antidumping duty order; requested June 2, 2007; initiated July 22, 2008.

A–570–886: Polyethylene Retail Carrier Bags from the People's Republic of China

Requestor: Rayton Produce Packaging Inc.; whether its promotional bag (model ι F–OPPAPEJZLG) is within the scope of the antidumping duty order; requested November 20, 2007.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Armel Enterprises, Inc.; whether certain children's playroom and accent furniture are within the scope of the antidumping duty order; requested September 24, 2007.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Target Corporation; whether the Shabby Chic secretary desk and mirror are within the scope of the antidumping duty order; requested November 30, 2007.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Zinus, Inc. and Zinus (Xiamen) Inc.; whether its Smartbox mattress support and box spring are within the scope of the antidumping duty order; requested January 22, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Acme Furniture Industry, Inc.; whether its mattress supports (item nos. 2833, 2834, 2835, 2836 and 2837) are within the scope of the antidumping duty order; requested February 26, 2008.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China

Requestor: Stanley Furniture Company, Inc.; whether certain convertible cribs are within the scope of the antidumping duty order; requested August 8, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Northern Tool & Equipment Co.; whether a high–axle torch cart (item ι164771) is within the scope of the antidumping duty order; requested March 27, 2007.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Eastman Outdoors, Inc.; whether its deer cart (model ι 9930) is within the scope of the antidumping duty order; requested October 17, 2007.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: American Lawn Mower Company; whether its Collect–It Garden Waste Remover is within the scope of the antidumping duty order; requested January 24, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Corporate Express Inc.; whether its luggage carts, model

numbers CEB31210 and CEB31490, are within the scope of the antidumping duty order; requested January 31, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Conair Corporation; whether its LadderKart, a hand truck with an integral folding step–ladder, is within the scope of the antidumping duty order; requested September 4, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Central Purchasing, LLC.; whether its welding cart (model number 65939), is within the scope of the antidumping duty order; requested August 22, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Riesenthel Accessories; whether its Carrycruiser shopping cart is within the scope of the antidumping duty order; requested September 2, 2008.

A–570–891: Hand Trucks from the People's Republic of China

Requestor: Ardisam, Inc.; whether its Yukon Tracks Sportsman's Cart (model number AV125), is within the scope of the antidumping duty order; requested September 11, 2008.

A–570–898: Chlorinated Isocyanurates from the People's Republic of China

Requestor: BioLab, Inc.; whether chlorinated isocyanurates originating in the People's Republic of China, that are packaged, tableted, blended with additives, or otherwise further processed in Vietnam before entering the U.S., are within the scope of the antidumping duty order; requested August 15, 2007; initiated March 21, 2008.

A–570–899: Artist Canvas from the People's Republic of China

Requestor: C2F, Inc.; whether framed artist canvas in two forms (i.e., 65% polyester, 35% cotton bulk or 100% cotton bulk) woven in the Republic of Korea and cut and framed in the People's Republic of China are within the scope of the antidumping duty order; requested September 4, 2008.

A–570–901: Lined Paper Products from the People's Republic of China

Requestor: Lakeshore Learning Materials; whether certain printed educational materials, product numbers RR973 and RR974 (Reader's Book Log); GG185 and GG186 (Reader's Response Notebook); GG181 and GG182 (The Writer's Notebook); RR673 and RR674 (My Word Journal); AA185 and AA186 (Mi Diario de Palabras); RR630 and RR631 (Draw & Write Journal); AA786 and AA787 (My First Draw & Write Journal); AA181 and AA182 (My Picture Word Journal); GG324 and GG325 (Writing Prompts Journal); EE441 and EE442 (Daily Math Practice Journal Grades 1 - 3); EE443 and EE444 (Daily Math Practice Journal Grades 4 - 6); EE651 and EE652 (Daily Language Practice, Grades 1–3); EE653 and EE654 (Daily Language Practice Journal, Grades 4 - 6), are within the scope of the antidumping duty order; requested December 7, 2006; initiated May 7, 2007.

A–570–922 and C–570–923: Raw Flexible Magnets from the People's Republic of China

Requestor: Target Corporation; whether certain decorative retail magnets (for model numbers starting with DPCI05319- and ending with: 2052, 2058, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079; and model number DPCI053230152) are within the scope of the antidumping duty order; requested September 9, 2008.

Multiple Countries

A–423–808 and C–423–809: Stainless Steel Plate in Coils from Belgium; A–475–822: Stainless Steel Plate in Coils from Italy; A–580–831: Stainless Steel Plate in Coils from South Korea; A–583–830: Stainless Steel Plate in Coils from Taiwan; A–791–805 and C–791–806: Stainless Steel Plate in Coils from South Africa

Requestor: Ugine & ALZ Belgium N.V.; whether stainless steel products with an actual thickness of less than 4.75 mm, regardless of nominal thickness, are within the scope of the antidumping and countervailing duty orders; requested June 8, 2007; initiated July 23, 2007.

Anticircumvention Rulings Pending as of September 30, 2008:

People's Republic of China

A–570–849: Cut–to-Length Carbon Steel Plate from the People's Republic of China

Requestor: Nucor Corporation, SSAB N.A.D., Evraz Claymont Steel, Evraz Oregon Steel Mills, and ArcelorMittal USA Inc.; whether adding metallurgically and economically insignificant amounts of boron is a minor alteration that circumvents the antidumping duty order; requested August 13, 2008.

A–570–868: Folding Metal Tables and Chairs from the People's Republic of China

Requestor: Meco Corporation; whether the common leg table (a folding metal table affixed with cross bars that enable the legs to fold in pairs) produced in the PRC is a minor alteration that circumvents the antidumping duty order; requested October 31, 2005; initiated June 1, 2006.

A–570–894: Certain Tissue Paper Products from the People's Republic of China

Requestor: Seaman Paper Company of Massachusetts, Inc.; whether imports of tissue paper from Thailand made out of jumbo rolls and sheets of tissue paper from the PRC are circumventing the antidumping duty order; requested September 10, 2008.

Interested parties are invited to comment on the completeness of this list of pending scope and anticircumvention inquiries. Any comments should be submitted to the Deputy Assistant Secretary for AD/CVD Operations, Import Administration, International Trade Administration, 14th Street and Constitution Avenue, N.W., APO/Dockets Unit, Room 1870, Washington, DC 20230.

This notice is published in accordance with 19 CFR 351.225(o).

Dated: November 20, 2008.

Stephen J. Claeys,

Deputy Assistant Secretaryfor Antidumping and Countervailing Duty Operations.

[FR Doc. E8–28459 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XK23

Marine Mammals; File No. 10028

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that Mystic Aquarium, 55 Coogan Boulevard, Mystic, CT 06355 (Dr. Lisa Mazzaro, Principal Investigator) has been issued a permit to obtain stranded, releasable pinnipeds (up to eight otariids and 20 phocids) from the National Marine Mammal Stranding Response Program for the purposes of public display.

ADDRESSES: The application and related documents are available for review

upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East–West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9300; fax (978)281–9394.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Amy Sloan, (301)713–2289.

SUPPLEMENTARY INFORMATION: On August 17, 2007, notice was published in the **Federal Register** (72 FR 46212) that a request for a public display permit to obtain releasable rehabilitated pinnipeds (a maximum of eight otariids and 20 phocids) had been submitted by the above–named organization. Up to six females and two males of each of the following species are requested to be obtained from cooperating rehabilitation centers for the purposes of public display at Mystic Aquarium: California sea lion (*Zalophus californianus*), harbor seal (*Phoca vitulina*), gray seal (*Halichoerus grypus*), harp seal (*Phoca groenlandica*) and hooded seal (*Cystophora cristata*). The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The NOAA environmental review procedure provides that public display permits are generally categorically excluded from the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) requirements to prepare an environmental assessment (EA) or environmental impact statement (EIS). However, because of the public interest and comments on this application during the public comment period, NMFS determined that an EA was warranted. An EA was prepared on the issuance of the proposed permit, resulting in a finding of no significant impact.

Dated: November 24, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–28467 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XM04

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Oversight Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Wednesday, December 17, 2008, at 9 a.m.

ADDRESSES: The meeting will be held at the Sheraton Ferncroft Hotel, 50 Ferncroft Road, Danvers, MA 01923; telephone: (978) 777–2500.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

1. The Groundfish Oversight Committee will meet to continue development of Amendment 16 to the Northeast Multispecies Fishery Management Plan (FMP). Amendment 16 will adjust management measures as necessary to continue stock rebuilding. Committee members will continue to refine management measures for the commercial fishery for both sector and non-sector vessels. Specific details addressed will include effort control measures for non-sector vessels, modifications of the Category B DAS (days-at-sea) program, gear requirements to reduce incidental catches of groundfish species in small-mesh fisheries, and measures to rebuild windowpane flounder. Sector monitoring requirements and other details for sector operations will also be discussed.

2. The committee will also refine accountability measures for both the commercial and recreational components of the fishery.

3. Other elements of the management program may also be discussed. Committee recommendations will be presented to the New England Fishery management Council at a later meeting.

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

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: November 25, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–28403 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL98

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

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

ACTION: Notice of public workshops.

SUMMARY: NMFS announces free Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops to be held in January, February, and March 2009. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. Also, the Protected Species Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and have also been issued shark or

swordfish limited access permits. Additional free workshops will be held in 2009 and announced in the **Federal Register**.

DATES: The Atlantic Shark Identification Workshops will be held January 7, February 11, and March 11, 2009.

The Protected Species Safe Handling, Release, and Identification Workshops will be held January 13, February 25, March 11, and March 18, 2009.

See **SUPPLEMENTARY INFORMATION** for further details.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Manahawkin, NJ; Madeira Beach, FL; and Greenville, NC.

The Protected Species Safe Handling, Release, and Identification Workshops will be held in Wilmington, NC; Warwick, RI; Corpus Christi, TX; and Fort Pierce, FL.

See **SUPPLEMENTARY INFORMATION** for further details on workshop locations.

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson by phone:(727) 824–5399, or by fax: (727) 824–5398.

SUPPLEMENTARY INFORMATION: The workshop schedules, registration information, and a list of frequently asked questions regarding these workshops are posted on the internet at: *http://www.nmfs.noaa.gov/sfa/hms/workshops/*.

Atlantic Shark Identification Workshop

Effective December 31, 2007, an Atlantic shark dealer may not receive, purchase, trade, or barter for Atlantic shark unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit which first receives Atlantic sharks (71 FR 58057; October 2, 2006). Dealers who attend and successfully complete a workshop will be issued a certificate for each place of business that is permitted to receive sharks. The certificate(s) are valid for three years.

Currently permitted dealers may send a proxy to an Atlantic Shark Identification Workshop, however, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit which first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who: is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and fills out dealer reports. As of December 31, 2007, an Atlantic shark dealer may not renew a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location which first receives Atlantic sharks has been submitted with the permit renewal application. The certificate(s) are valid for three years. Additionally, trucks or other conveyances which are extensions of a dealer's place of business must possess a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate. Twelve free Atlantic Shark Identification Workshops were held in 2008.

Workshop Dates, Times, and Locations

1. January 7, 2009, from 9 a.m. – 2 p.m., Ocean County Library – Stafford Branch, 129 North Main Street, Manahawkin, NJ 08050.

2. February 11, 2009, from 9 a.m. – 2 p.m., Madeira Beach City Hall, 300 Municipal Drive, Madeira Beach, FL 33708.

3. March 11, 2009, from 12 p.m. – 5 p.m., Walter L. Stasavich Science and Nature Center, River Park North, 1000 Mumford Road, Greenville, NC 27858.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander by email at *esander@peoplepc.com* or by phone at (386) 852–8588.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following items to the workshop:

Atlantic shark dealer permit holders must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.

Atlantic shark dealer proxies must bring documentation from the shark dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate permit, and proof of identification.

Workshop Objectives

The shark identification workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species–specific dealer–reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Protected Species Safe Handling, Release, and Identification Workshop

Effective January 1, 2007, shark limited access and swordfish limited access permit holders who fish with longline or gillnet gear, must submit a copy of their Protected Species Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057; October 2, 2006). The certificate(s) are valid for three years. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or if the certificate(s) are due to expire in 2009, must attend one of the workshops offered in 2009 to fish with or renew either permit. Additionally, new shark and swordfish limited access permit applicants must attend a Protected Species Safe Handling, Release, and Identification Workshop and must submit a copy of their workshop certificate before such permits will be issued.

In addition to certifying permit holders, all longline and gillnet vessel operators fishing on a vessel issued a limited access swordfish or limited access shark permit are required to attend a Protected Species Safe Handling, Release, and Identification Workshop and receive a certificate. The certificate(s) are valid for three years. Vessels that have been issued a limited access swordfish or limited access shark permit may not fish unless both the vessel owner and operator have valid workshop certificates. Vessel operators must possess on board the vessel valid workshop certificates for both the vessel owner and the operator at all times. Seven free Protected Species Safe Handling, Release, and Identification Workshops were held in 2006, 34 were held in 2007, and 16 were held in 2008.

Workshop Dates, Times, and Locations

1. January 13, 2009, from 9 a.m. – 5 p.m., Hilton Garden Inn at Mayfaire, 6745 Rock Spring Road, Wilmington, NC 28405.

2. February 25, 2009, from 9 a.m. – 5 p.m., Hilton Garden Inn at Providence Airport, 1 Thurber Street, Warwick, RI 02886.

3. March 11, 2009, from 9 a.m. – 5 p.m., Hilton Garden Inn, 6717 South Padre Island Drive, Corpus Christi, TX 78412.

4. March 18, 2009, from 9 a.m. – 5 p.m., Hampton Inn and Suites, 1985 Reynolds Drive, Fort Pierce, FL 34945.

Registration

To register for a scheduled Protected Species Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at (877) 411–4272, 1640 Mason Ave., Daytona Beach, FL 32117.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following items with them to the workshop:

Individual vessel owners must bring a copy of the appropriate permit(s), a copy of the vessel registration or documentation, and proof of identification.

Representatives of a business owned or co–owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable permit(s), and proof of identification.

Vessel operators must bring proof of identification.

Workshop Objectives

The protected species safe handling, release, and identification workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, and smalltooth sawfish. Identification of protected species will also be taught at these workshops in an effort to improve reporting. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal for these workshops is to provide participants the skills needed to reduce the mortality of protected species, which may prevent additional regulations on these fisheries in the future.

Grandfathered Permit Holders

Participants in the industry–sponsored workshops on safe handling and release of sea turtles that were held in Orlando, FL (April 8, 2005) and in New Orleans, LA (June 27, 2005) were issued a NOAA workshop certificate in December 2006 that is valid for three years. These workshop certificates may be expiring in 2009. Vessel owners and operators whose certificates expire prior to permit renewal in 2009 must attend a workshop, successfully complete the course, and obtain a new certificate to renew their limited access shark and limited access swordfish permits. Failure to provide a valid NOAA workshop certificate may result in a permit denial.

Dated: November 21, 2008.

Alan D. Risenhoover

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

[FR Doc. E8–28471 Filed 11–28–08; 8:45 am]

BILLING CODE 3510–22–S

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 09–C0001]

IKEA North American Services, LLC, a Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Federal Hazardous Substances Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally accepted Settlement Agreement with IKEA North American Services, LLC, a corporation, containing a civil penalty of $500,000.00.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by December 16, 2008.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 09–C0001, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 502, Bethesda, Maryland 20814–4408.

FOR FURTHER INFORMATION CONTACT: Belinda V. Bell, Trial Attorney, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7592.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: November 21, 2008.

Todd A. Stevenson,

Secretary.

United States of America Consumer Product Safety Commission

[CPSC Docket No. 09–C0001]

In the Matter of IKEA North America Services, LLC, a Corporation

Settlement Agreement

1. This Settlement Agreement (''Agreement'') is made by and between the staff (''staff'') of the U.S. Consumer Product Safety Commission (''Commission'') and IKEA North America Services, LLC (''IKEA''), a corporation, in accordance with 16 CFR 1118.20 of the Commission's Procedures for Investigations, Inspections, and Inquiries under the Consumer Product Safety Act (''CPSA''). This Agreement and the incorporated attached Order (''Order'') resolve the staffs allegations set forth below.

The Parties

2. The Commission is an independent federal regulatory agency established pursuant to, and responsible for the enforcement of the CPSA, 15 U.S.C. 2051–2089.

3. IKEA is a corporation organized and existing under the laws of the State of Delaware, with its principal corporate office located in Conshohocken, PA.

4. At all times relevant herein, IKEA designed, manufactured and sold outdoor candles, including those that are the subject of the Agreement and Order.

Staff Allegations

5. Between February 2001 and July 2005, IKEA manufactured and sold approximately 133,000 sets of outdoor candles (6 candles per set), under the style names of Angar and Samlas, at IKEA stores in the United States for about $4.00 per set (''candles'' or ''products''). The firm also sold 1.3 million candle sets internationally.

6. The candles are ''consumer product(s)'' and, at all times relevant herein, IKEA was a ''manufacturer,'' and ''retailer'' of ''consumer product(s),'' which were ''distributed in commerce'' as those terms are defined or used in sections 3(a)(5), (8), (11) and (13) of the CPSA, 15 U.S.C. 2052(a)(5), (8), (11) and (13).

7. The candles are defective because: (1) The candle's flame can unexpectedly flare up, causing the entire top surface of the candle to ignite and spread flames beyond the container; (2) even in non-flare up situations, if a consumer attempts to extinguish a burning candle by blowing or dousing it with water, the candle's wax can spatter and burn the consumer's face; and (3) the product fails to provide adequate warning notice regarding the above mentioned hazards. These defects pose fire and burn hazards to consumers.

8. Between July 2001 and March 2006, IKEA received approximately 32 worldwide reports of incidents in which the candles unexpectedly flared up and/or consumers were spattered with hot candle wax. The firm is aware of 13 reports of property damage and at least 12 injuries to consumers.

9. Despite being aware of the information set forth in paragraphs 7 and 8 above, IKEA did not report to the Commission until March 2006, after the Commission had opened its own investigation and requested IKEA to report.

10. Although IKEA had obtained sufficient information to reasonably support the conclusion that the candles contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, it failed to immediately inform the Commission of such defect or risk as required by sections 1 5(b)(3) and (4) of the CPSA, 15 U.S.C. 2064(b)(3) and (4). In failing to do so, IKEA ''knowingly'' violated section l9(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4), as the term ''knowingly'' is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).

11. Pursuant to section 20 of the CPSA, 15 U.S.C. 2069, IKEA is subject to civil penalties for its failure to report as required under section 15(b) of the CPSA, 15 U.S.C. 2064(b).

Response of IKEA

12. IKEA denies the allegations of the staff that the candles contain a defect which could create a substantial product hazard, or create an unreasonable risk of serious injury or death, and denies that it violated the reporting requirements of Section 15(b) of the CPSA, 15 U.S.C. 2064(b).

Agreement of the Parties

13. Under the CPSA, the Commission has jurisdiction over this matter and over IKEA.

14. In settlement of the staff's allegations, IKEA agrees to pay a civil penalty of five hundred thousand dollars ($500,000.00), within twenty (20) calendar days of receiving service of the Commission's Final Order accepting the Agreement. This payment shall be made by check to the order of the United States Treasury.

15. The parties enter the Agreement for settlement purposes only. The Agreement does not constitute an admission by IKEA or a determination by the Commission that IKEA violated the CPSA's reporting requirements.

16. Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written requests not to accept the Agreement within 15 calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(1).

17. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, IKEA knowingly, voluntarily and completely waives any rights it may have in this matter to the following: (i) An administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission as to whether IKEA failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

18. The Commission may publicize the terms of the Agreement and Order.

19. The Agreement and Order shall apply to, and be binding upon IKEA and each of its successors and assigns.

20. The Commission's Order in this matter is issued under the provisions of the CPSA, and a violation of the Order may subject those referenced in paragraph 19 above to appropriate legal action.

21. This Agreement may be used in interpreting the Order. Agreements, understandings, representations, or interpretations apart from those contained in the Agreement and Order may not be used to vary or to contradict their terms.

22. The Agreement shall not be waived, amended, modified, or otherwise altered, without written agreement thereto executed by the party against whom such amendment, modification, alteration, or waiver is sought to be enforced.

23. If, after the effective date hereof, any provision of the Agreement and the order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and Order, such provision shall be fully severable. The balance of the Agreement and Order shall remain in full force and effect, unless the Commission and IKEA agree that severing the provision materially affects the purpose of the Agreement and Order.

IKEA North America Services, LLC

Sept. 19, 2008.

By: Krister Hard af Segerstad,

Manager, Product Safety & Compliance, IKEA North America Services, LLC, 420 Alan Wood Road, Conshohocken, PA 19428.

Sept. 19, 2008.

By: Rob Olson,

Chief Financial Officer, IKEA North America Services, LLC, 420 Alan Wood Road, Conshohocken, PA 19428.

U.S. Consumer Product Safety Commission

Cheryl Falvey,

General Counsel.

Ronald G. Yelenik,

Assistant General Counsel, Division of Compliance, Office of the General Counsel.

Nov. 21, 2008.

By: Belinda V. Bell,

Trial Attorney, Division of Compliance, Office of the General Counsel.

United States of America, Consumer Product Safety Commission.

[CPSC Docket No. 09–C0001]

In the Matter of Ikea North America Services, LLC

Order

Upon consideration of the Settlement Agreement entered into between IKEA North America Services, LLC (''IKEA'') and the U.S. Consumer Product Safety Commission (''Commission'') staff, and the Commission having jurisdiction over the subject matter and over IKEA, and it appearing that the Settlement Agreement and order are in the public interest, it is

Ordered that the Settlement Agreement be, and hereby is, accepted and it is

Further Ordered that IKEA shall pay a civil penalty in the amount of five hundred thousand dollars ($500,000.00), within twenty (20) calendar days of service of the Commission's final Order accepting the Settlement Agreement. The payment shall be made by check payable to the order of the United States Treasury. Upon the failure of IKEA to make the foregoing payment when due, interest on the unpaid amount shall accrue and. be paid by IKEA at the Federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b).

Provisionally accepted and Provisional Order issued on the 21st day of November, 2008.

By Order of the Commission.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E8–28166 Filed 11–28–08; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF EDUCATION

The Historically Black Colleges and Universities Capital Financing Advisory Board

AGENCY: Department of Education. The Historically Black Colleges and Universities Capital Financing Advisory Board.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming open meeting of the Historically Black Colleges and Universities Capital Financing Advisory Board (Board). The notice also describes the functions of the Board. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend.

DATES: Friday, December 12, 2008.

Time: 9 a.m.–3 p.m.

ADDRESSES: U.S. Department of Education, Board Room, 555 New Jersey Avenue, NW., Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Donald E. Watson, Executive Director, Historically Black College and University Capital Financing (HBCU Capital Financing) Program, 1990 K Street, NW., Room 6130, Washington, DC 20006; telephone: (202) 219–7037; fax: (202) 502–7852; e-mail: *donald.watson@ed.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FRS) at 1–800–877–8339, Monday through Friday between the hours of 8 a.m. and 8 p.m., Eastern Standard Time.

SUPPLEMENTARY INFORMATION: The Board is authorized by Title III, Part D, Section 347, of the Higher Education Act of 1965, as amended in 1998 (20 U.S.C. 1066f). The Board is established within the Department of Education to provide advice and counsel to the Secretary and the designated bonding authority as to the most effective and efficient means of implementing construction financing on HBCU campuses and to advise Congress regarding the progress made in implementing the program. Specifically, the Board will provide advice as to the capital needs of HBCUs, how those needs can be met through the program, and what additional steps might be taken to improve the operation and implementation of the construction-financing program.

The purpose of this meeting is to review current program activities, to make administrative and legislative recommendations to the Secretary and the U.S. Congress that address the current capital needs of HBCUs and capital financing issues of HBCUs, and to share additional steps in which the HBCU Capital Financing Program might improve its operation.

Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistance listening devices, or materials in alternative format) should notify Donald Watson at 202–219–7037, no later than December 1, 2008. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

An opportunity for public comment is available on Friday, December 12, 2008, between 2:30 p.m.–3:00 p.m. Those members of the public interested in submitting written comments may do so by submitting them to the attention of Donald Watson, 1990 K Street, NW., Room 6130, Washington DC, by Monday, December 1, 2008.

Records are kept of all Board proceedings and are available for public inspection at the Office of the Historically Black College and University Capital Financing Advisory Board, 1990 K Street, NW., Room 6130, Washington, DC 20006, from the hours of 9 a.m. to 5 p.m., Eastern Standard Time (EST), Monday through Friday.

Electronic Access to This Document: You may 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), on the Internet at the following site: *http://www.ed.gov/news/federegister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: 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 on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Cheryl A. Oldham,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. E8–28444 Filed 11–28–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice Inviting Proposals for Ownership and Operation of the Online English Literacy Portal, ''U.S.A. Learns Web Portal''

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Notice inviting proposals for ownership and operation of the Online English Literacy Portal, ''U.S.A. Learns Web Portal.''

SUMMARY: The President announced, as one of his initiatives to address border security and immigration challenges in the United States, a plan to have the U.S. Department of Education (Department) develop and launch a free, web-based portal to help immigrants learn English to help them expand their opportunities and make effective contributions to American society. To implement the President's plan, the Department's Office of Vocational and Adult Education (OVAE), as authorized by the Adult Education and Family Literacy Act and through a contract, has developed and created the U.S.A. Learns Web Portal, an online learning environment designed for limited English proficient (LEP) adults whose level of English proficiency is at a low level. The portal was launched on November 7, 2008, on the Internet and is available for use by the public at no cost. The portal is available at the following Web address: *http://www.usalearns.org.*

The Department plans to turn over ownership and operation of the portal to one or more entities outside of the Federal Government that would, with its or their own resources, continue the maintenance and upkeep of the portal, make improvements to it, and continue to make the portal available at no cost to the public. Through this notice, we are inviting proposals from entities interested in owning and operating the portal.

DATES: To ensure that your proposal receives consideration, it must be submitted to the Department no later than December 31, 2008. The Department would like to turn over ownership and operation of the portal by or about January 15, 2009.

Address for Submission of Proposals: Interested entities should submit a proposal for owning and operating the portal, addressing the factors and associated criteria outlined in this notice, by an express carrier or by e-mail to: Daniel Miller, Deputy Director, Division of Adult Education & Literacy, Office of Vocational and Adult Education, U.S. Department of Education, 550 12th Street, SW., 11th Floor, Washington, DC 20202–7240, or *Daniel.Miller@ed.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Miller, (202) 245–7731.

SUPPLEMENTARY INFORMATION:

Background

President Bush announced, in August 2007, a series of initiatives to address border security and immigration challenges in the United States. The President's plan consisted of 26 actions designed to secure the borders and to address needed immigration reforms. Action 26 of the plan stated: ''The Department of Education Will Launch A Free, Web-Based Portal To Help Immigrants Learn English, And Expand This Model Over Time. Knowledge of English is the most important component of assimilation. An investment in tools to help new Americans learn English will be repaid many times over in the contributions these immigrants make to our political discourse, economy, and society.'' A fact sheet with information about the President's plan to secure the borders and to address needed immigration reforms, including the plan for a portal is at the following Internet address: *http://www.whitehouse.gov/news/releases/2007/08/20070810.html.*

To fulfill the President's plan, OVAE, through a contract, designed and created the U.S.A. Learns Web Portal (*http://www.usalearns.org*), an online learning environment for LEP adults. This contract and the ensuing project to design and implement the portal are authorized under the Adult Education and Family Literacy Act, Title II of Public Law 105–220, Section 243, National Leadership Activities (20 U.S.C. 9253). The portal was launched on November 7, 2008, on the Internet and is available for use by the public at no cost.

The Department intends, through an appropriate agreement or agreements signed by the Department and the selected entity or entities, setting forth the rights and responsibilities of each party, to transfer ownership and operation of the portal to an entity or entities outside of the Federal Government, which would support the portal with the entity's or entities' own resources. The agreement will include, among other things, a privacy policy that protects the privacy of the users of the portal, and limits the use of data about the users by the entity or entities selected.

The Department is registering the U.S.A. Learns Web Portal trademark, and, as part of the agreement, will also license the use of its trademark to the entity or entities selected. The Department will also license the use of the domain name for the portal to the entity or entities selected, or to one of the entities selected.

The Department believes that the effectiveness of the portal will be enhanced by an outside entity or entities taking responsibility for the portal's ownership and continued operation. We expect to provide the entity or entities selected with information we have gathered on the early use of the portal, including the costs of operation, in order to help it or them maintain, operate, and enhance the portal effectively. We believe that turning over ownership and operation of the portal to an entity or entities outside the Federal Government will provide long-lasting benefits to the intended audience and to the Nation.

Responsibilities of the Selected Entity or Entities

The duties of the portal owner or owners will include, at a minimum: maintaining the portal in at least the same condition in which it was received; making it readily available at all times to the public at no cost; solving any implementation problems to keep the portal running in at least the same condition in which it was received; enhancing the quality of the content made available through the portal; and making improvements to the operation of the portal, as appropriate. A link to additional information on the portal, on such matters as its functionalities, operating standards, and capacity, will be made available in the near future on the Department's Internet Web site at the following address: *http://www.ed.gov/about/offices/list/ovae/pi/AdultEd/index.html.*

Based on these general expectations, an entity interested in acquiring ownership of the portal should submit a proposal that addresses the following key factors, which should demonstrate the organization's commitment to, and ability to facilitate, adult literacy, distance learning, and effective management of the portal:

Key Factors

- A commitment to helping improve adult literacy.
- A substantive interest in the goals of the U.S.A. Learns Web Portal and an expertise in the interests of LEP adults, especially those with low levels of English proficiency, the subgroup that the Department has targeted as likely users of the portal.
- The technological infrastructure and other resources to operate and maintain the U.S.A. Learns Web Portal and make the portal available to the public free of charge.
- Staff expertise in Web site development, maintenance, and on-line instruction.
- A plan to use an advisory committee with appropriate expertise to help the entity administer the portal.

Note: The offeror has significant flexibility in deciding on the composition of the advisory committee.

- Fiscal and management responsibility.

The Department will use the following criteria to evaluate how well the proposals submitted in response to this notice address these factors:

Note: The maximum total score any proposal can receive is 100 points. The maximum score for each criterion is indicated in parentheses below.

Technical Approach (35 points)

- The extent to which the entity that submits a proposal (the ''offeror'') demonstrates a commitment to adult literacy through previous projects and thorough knowledge of the field. (15 points)
- The extent to which the offeror has a thorough understanding of the target population and of how to provide appropriate instructional resources to that target population. (10 points)
- The extent to which the offeror describes a clear vision for the portal and plans for the enhancement and continued operation of U.S.A. Learns Web Portal. (10 points)

Organizational Capacity (30 points)

- The quality of the proposed project personnel, and the extent to which the personnel have the appropriate qualifications, competencies, and experience in the management of this type of portal or related distance learning mechanisms. (15 points)
- The extent to which the offeror has the technological and financial resources to maintain and operate U.S.A. Learns Web Portal and ensure that the portal is made available to the public free of charge. (15 points)

Management Plan (35 points)

• The extent to which the offeror provides a description of its plan for managing the project in a clear and sequential fashion, and the extent to which that plan provides credible evidence that the management of personnel, physical resources, activities, and work production will result in a robust portal with a 99.99 percent ''uptime rate.'' (20 points)

• The quality of the offeror's plans to establish and work with an advisory committee that has appropriate expertise to advise the offeror on its implementation of the project. (5 points)

• The extent to which the time commitments of the offeror's staff are appropriate to operating and maintaining U.S.A. Learns Web Portal. (5 points)

• The extent to which the offeror submitted a summary of a plan to evaluate the use and effectiveness of the portal, so that it can be improved. (5 points)

Other Requirements for the Content of Proposals

Proposals submitted in response to this notice also must include the following information:

• Name, address, and contact information for the entity submitting the proposal.

• Mission statement of the entity.

• Capability statement (must address the key factors and each component of the selection criteria).

• Entity's Web site URL.

• Annual report or similar report on the condition of the entity.

• Description of existing programs owned and operated by the entity that could support the goals of the U.S.A. Learns Web Portal.

• A signed assurance by an appropriate officer of the entity indicating that the entity agrees to own and operate the portal consistent with its proposal and with the purposes and provisions of this notice, and understands that, if it does not do so, the ownership of the portal, all content therein provided by the Department, and all databases needed to operate the portal will revert to the Department, which can award it to another entity or entities in accordance with a notice published in the **Federal Register**. The signed assurance shall acknowledge that the Department shall transfer its specific rights and interest in data and content of the portal. In addition, the assurance shall acknowledge that in the event of any reversion of the portal to the Department, the Department shall possess the rights and interest in data and content of the portal provided by the Department, including all databases needed to operate the portal. In the assurance the entity will also agree to submit semi-annual reports on the operation and use of the portal in such detail as the Department specifies in the agreement that the parties will sign.

Availability of Funds

There are no Federal funds available to support the portal once ownership and operation have been transferred from the Federal Government. It will be the sole responsibility of the selected entity or entities to bear all costs associated with ownership and operation of the portal.

Interests of the Federal Government

The Department will transfer ownership of the portal and its content to the entity or entities selected. The Department will transfer the rights and interest it possesses in data and content transferred to the entity or entities. In addition, as noted elsewhere in this notice, if the entity or entities selected operates the portal in a manner that is not consistent with its or their proposal or proposals and with the purposes and provisions of this notice, or if the entity or entities ceases to operate the portal, the ownership of the portal, all content therein provided by the Department, and all databases needed to operate the portal will revert to the Department, and the entity or entities will not be authorized to operate the portal. Upon such a reversion, the Federal Government shall possess the rights and interest in data and content of the portal originally provided by the Department, including all databases needed to operate the portal. Under these circumstances, the Department may award the ownership of the portal to another entity or entities in accordance with a notice published in the **Federal Register**.

Electronic Access to This Document: 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) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: 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 on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number: 84.191X Adult Education—National Leadership Activities)

Dated: November 25, 2008.

Troy R. Justesen,

Assistant Secretary for Vocational and Adult Education.

[FR Doc. E8–28478 Filed 11–28–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Ultra-Deepwater Advisory Committee

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

This notice announces a meeting of the Ultra-Deepwater Advisory Committee. Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that notice of these meetings be announced in the **Federal Register**.

DATES: Friday, December 19, 2008, 10 a.m. to 12 p.m.

ADDRESSES: *Location:* TMS, Inc., 955 L'Enfant Plaza North, SW., Suite 1500, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, Washington, DC 20585. Phone: 202–586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Ultra-Deepwater Advisory Committee is to provide advice on development and implementation of programs related to ultra-deepwater natural gas and other petroleum resources to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999.

Tentative Agenda:

9:30 a.m.–10 a.m. Registration.

10 a.m.–11:45 a.m. Roll Call; Opening Remarks by the Committee Chair; Remarks by Designated Federal Officer; Member discussion regarding organization and/or establishment of standing subcommittees; Committee vote; Member discussion regarding next steps.

11:45 a.m.–12 p.m. Public Comments.

12 p.m. Adjourn.

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the

Committee will lead the meeting for the orderly conduct of business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the address or telephone number listed above. You must make your request for an oral statement at least 10 business days prior to the meeting, and reasonable provisions will be made to include the presentation on the agenda. Public comment will follow the 5 minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, Room 1G–033, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except federal holidays.

Issued at Washington, DC, on November 24, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–28446 Filed 11–28–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency Information Collection Activities: Proposed Collection; Comment Request.

SUMMARY: The EIA is soliciting comments on the proposed revision and three-year extension to the Form OE–781R ''Report of International Electrical Export/Import Data.''

DATES: Comments must be filed by January 30, 2009. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Mr. Steve Mintz. To ensure receipt of the comments by the due date, submission by FAX (202–586–8008) or e-mail (*steven.mintz@hq.doe.gov*) is recommended. The mailing address is the Office of Electricity Delivery and Energy Reliability, Department of Energy (Mail Code OE–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Alternatively, Mr. Mintz may be contacted by telephone at 202–586–9506.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions (the proposed draft collection) should be directed to Mr. Steve Mintz at the address listed above.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

The Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*) and the DOE Organization Act (42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Also, the EIA will later seek approval for this collection by the Office of Management and Budget (OMB) under Section 3507(a) of the Paperwork Reduction Act of 1995.

The DOE Office of Electricity Delivery and Energy Reliability, which currently has programmatic responsibility, oversees international electricity power flows for reliability and violations of permit standards. They also monitor the levels of electricity imports and exports and issue summary tabulations in a staff Annual Report. Monthly tabulations of these data may be used by the Energy Information Administration. The publications may include: *Annual Energy Outlook, Annual Energy Review, Electric Power Annual, Electric Power Monthly, and Monthly Energy Review.* This information will be kept in the public electronic files and will be available for public copying.

The existing survey was designed for an electric utility industry that was dominated by integrated utilities, operating narrowly within prescribed markets and individually holding complete information on their operations and finances. In that environment, utilities that held Presidential Permits and or Export Authorizations could provide relatively complete information on their activities. The utilities, before restructuring of the power industry, also controlled power lines that largely were dedicated to serving their own customers, so it was appropriate for regulatory concern about reliability of supply to focus on the capacities and uses of individual lines, not systems. That has all changed. The reasons include: the restructuring of the wholesale and transmission markets by the Federal Energy Regulatory Commission (FERC); the entry of a large number of independent marketers into those markets; and the regulatory requirement that entities in the electric power industry keep information on transmission operations separate from their information on marketing. All of that has placed limits on the usefulness of the existing form and collection format.

II. Current Actions

The following changes are being proposed:

The form would collect data on monthly activity, and respondents would file the form monthly using an internet-based electronic data collection and editing system. Monthly data would be filed within 30 days of the end of the reporting month, e.g. October data would be due not later than November 30. (The existing form collects monthly information annually on paper filings.)

The Form OE–781R would be retitled ''Monthly Electricity Imports and Exports Report.''

A new category of respondents is being proposed to report on transmission system operations. That category would cover the independent system operators (ISOs) and regional transmission operators (RTOs). Since much of the physical information on cross-border power flows today is held by ISOs/RTOs and the transmission system managers in the federal power marketing administrations (PMA), they will likely be the principal respondents for questions on flows, capacities, and characteristics of transmission operations.

Purchasers and sellers (including the marketing entities in the PMAs) would respond to questions on the value of the imports and exports (costs and revenues).

The form would be restructured by disaggregating it into two parts and would separately query the U.S. transmission system operators and the U.S. purchasing and selling entities involved in cross-border trade. The separation of transmission and power

marketing functions in the industry today was established by the FERC.

Transmission system operators would report the following: cross-border flows across major transmission interfaces (scheduled, actual, and inadvertent), regional sources and destinations of power, fuel sources of generation (including system-based transactions), the provision of ancillary services, transmission capacity and planned additions, and the characteristics of transmission operations.

Existing survey questions on the cost of imports and exports would be revised to reflect changes in industry structure concerning price setting. New questions would separately collect information on the value of imports and exports in different regional markets that rely on cost-of-service pricing and or market-based pricing. In addition questions covering the total cost of ancillary service along with a general identification of the type's ancillary services would be asked.

For each category of proposed respondents, the survey design would work to minimize respondent burden by focusing on information readily available to those entities.

III. Request for Comments

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of comments.

As a Potential Respondent to the Request for Information

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information to be collected?

C. Are the instructions and definitions clear and sufficient? If not, which instructions need clarification?

D. Can the information be submitted by the respondent by the due date?

E. Public reporting burden for this collection is estimated to average 2 hours per month for each respondent, and 1 hour per response for those reporting new proposed transmission line additions per year. The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate is this estimate?

F. The agency estimates that the only cost to a respondent is for the time it will take to complete the collection. Will a respondent incur any start-up costs for reporting, or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

G. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

H. Does any other Federal, State, or local agency collect similar information? If so, specify the agency, the data element(s), and the methods of collection.

As a Potential User of the Information to be Collected

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information disseminated?

C. Is the information useful at the levels of detail to be collected?

D. For what purpose(s) would the information be used? Be specific.

E. Are there alternate sources for the information and are they useful? If so, what are their weaknesses and/or strengths?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 3507(h)(1) of the Paperwork Reduction Act of 1995, Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*), and the DOE Organization Act (42 U.S.C. 7101 *et seq.*).

Issued in Washington, DC, November 24, 2008.

Stephanie Brown,

Director, Statistics and Methods Group, Energy Information Administration.

[FR Doc. E8–28447 Filed 11–28–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL09–3–000]

Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act; Notice of Agenda for Workshop

November 21, 2008.

As announced in the notice of workshop issued November 12, 2008, Commission staff will convene a workshop with interested persons regarding issues raised in Docket No. PL09–3–000, concerning the petition filed by the Electric Power Supply Association (EPSA). The workshop will be held on December 3, 2008, from 9 a.m. to 12 p.m. EST. The workshop will take place in hearing room 7 at the Federal Energy Regulatory Commission, located at 888 First Street, NE., Washington, DC.

This notice provides more information on the topics to be explored in the workshop. The goal of the workshop is to consider issues involving control and affiliation as they pertain to the Commission's market-based rate requirements under section 205 of the Federal Power Act (FPA) and the requirements of section 203 of the FPA.

In its petition,[1] EPSA asks that the Commission state that investments in publicly-held companies by investors owning less than 20 percent of such companies' voting securities and making filings with the Securities and Exchange Commission (SEC) on Schedule 13G, certifying that the investment is not for the purpose of controlling the company, will not be deemed to convey ''control'' or to result in ''affiliation'' for market-based rate or FPA section 203 purposes. EPSA also seeks confirmation that Commission findings that a given entity does not ''control'' another entity made in the FPA section 203 setting apply equally in the market-based rate setting to affected market-based rate sellers. Finally, EPSA requests that the Commission state that investments by entities upstream of a publicly-held company in entities not otherwise related to the publicly-held company will not be deemed to be within the knowledge and control of the

[1] *See* Petition of the Electric Power Supply Association For Guidance Regarding ''Control'' and ''Affiliation,'' Docket No. EL08–87–000, *re-docketed as* PL09–3–000 (Sept. 2, 2008) (Petition).

publicly-held company's subsidiaries with market-based rate authorization, and, therefore, those market-based rate subsidiaries will not be required to file a notification of change in status or to include generation or inputs to generation owned or controlled by the other entities in future market power analyses.

In light of the issues raised by EPSA, participants are invited to address some or all of the following questions:

1. Should the Commission reconsider its decision in *FPA Section 203 Supplemental Policy Statement,* 120 FERC ¶ 61,060 (2007) not to rely solely on a Schedule 13G filing as evidence of a lack of control and instead to consider the totality of the facts and circumstances on a case-by-case basis? If so, why?

2. How does compliance with the intent to not exercise control for purposes Schedule 13G address the Commission's concerns under section 203 of the FPA and the Commission's market-based rate program?

3. What statutory and policy purposes is a Schedule 13G filing intended to fulfill under the SEC's regulatory program and how do they compare with the statutory and policy purposes of section 203 of the FPA and the Commission's market-based rate program under sections 205 and 206 of the FPA? Are the SEC and this Commission seeking to fulfill fundamentally different goals with respect to an entity's possible exercise of control, such that the Commission's reliance on the SEC's Schedule 13 filing requirements would be insufficient to help protect against the potential exercise of control as relevant to the Commission's concerns under sections 203, 205 and 206 of the FPA? If the answer to the prior question is yes, that reliance on the Schedule 13 filing requirements are insufficient, what if any additional filings or requirements might supplement the Schedule 13 requirements in this regard?

4. What actions can an investor take with respect to the management, operation or policies of a company in which it holds an investment and still be considered eligible to file a Schedule 13G? To what extent could taking any of those actions directly or indirectly in some way affect some aspect of the day-to-day operation of a public utility in which the investor holds an interest, either directly or through a holding company?

5. Using EPSA's hypothetical example shown on page 9 of the Petition, how far upstream should a seller go when determining whether an entity is an affiliate?

6. Using EPSA's hypothetical example shown on page 9 of the Petition, which of the IPPs should be considered to be under common control, and therefore affiliates, under the Commission's regulations?

7. Should a finding under FPA section 203 that an entity does not ''control'' another entity apply equally in the market-based rate setting? Conversely, should a finding under section 203 that an entity does ''control'' another entity necessarily apply equally in the market-based rate setting? If not, under what conditions or circumstances would the Commission have a reasonable basis to conclude that the same finding should not apply in the market-based rate setting?

a. For example, if an upstream owner has been found to not have control for section 203 purposes over two large IPPs in the same relevant market, should the IPPs be required to study one another's generation for purposes of their individual horizontal and vertical market power analyses? Would the IPPs remain unaffiliated?

b. If the upstream owner has control over both IPPs for section 203 purposes, should the IPPs be required to study one another's generation for purposes of their individual horizontal and vertical market power analyses?

8. Should the Commission revise its requirements under FPA section 203 and the market-based rate program, in light of the concern raised by EPSA that electric utilities may not know when their upstream owners acquire ownership interests in other electric utilities? If so, what changes can both address these concerns and still permit the Commission to carry out its responsibilities under sections 203 and 205 of the FPA?

All interested persons are invited to participate in this workshop. Those interested in participating are asked to register no later than November 28, 2008. To register or for additional information, please contact Christina Hayes at (202) 502–6194 or at *christina.hayes@ferc.gov.*

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–28401 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–463–000]

CenterPoint Energy Gas Transmission Company; Notice of Application

November 20, 2008.

Take notice that on August 19, 2008, CenterPoint Energy Gas Transmission Company (CenterPoint), P.O. Box 21734, Shreveport, Louisiana 71151, filed in Docket No. CP08–463–000, an abbreviated application pursuant to section 7 of the Natural Gas Act, seeking authorization (1) to transfer a passive ownership interest in its Line CP–3 and to leaseback Line CP–3 from the passive owner, and (2) to grant CenterPoint certificate authorization to operate a 600-foot non-jurisdictional pipeline and metering facilities that will be leased from the same passive owner as part of its jurisdictional pipeline system.

The application is on file with the Commission and open for public inspection. This application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866)208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this abbreviated application may be directed to Lawrence O. Thomas, Director—Rate & Regulatory, CenterPoint, at (318) 429–2804, P.O. Box 21734, Shreveport, Louisiana 71151.

There are two ways to become involved in the Commission's review of CenterPoint's request. First, any person wishing to obtain legal status by becoming a party to this proceeding should, on or before the comment date listed 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 14 copies of this filing and all subsequent filings made with the

Commission and must mail a copy of all filing to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, other persons do 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 CenterPoint's request. 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 this project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only in support of or in opposition to CenterPoint's request should submit an original and two copies of their comments to the Secretary of the Commission. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the applicant. However, the non-party commenters will not receive copies of all documents filed by other parties or 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 via the Internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Comment Date: November 26, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28298 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13203–000]

FFP Missouri 22, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 20, 2008..

On April 22, 2008, FFP Missouri 22, LLC each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 22 Project, to be located on the Missouri River in Saline, Chariton, and Carroll Counties, Missouri.

The proposed Missouri River 22 Project consists of: (1) 7,560 proposed 20 kilowatt Free Flow generating units having a total installed capacity of 151.2 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The FFP Missouri 22, LLC, project would have an average annual generation of 662.26 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Dan Irvin, FFP Missouri 22, LLC, 69 Bridge Street, Manchester, MA 01944, phone (978) 232–3536.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13203) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28303 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13129–000; Project No. 13143–000; Project No. 13284–000]

NM Hydroelectric Power, LLC, Peterson Machinery Sales, Grand Traverse County and the City of Traverse City, MI; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 20, 2008.

NM Hydroelectric Power, LLC (NMHP), Peterson Machinery Sales (PMS) and jointly by Grand Traverse County and the City of Traverse City, Michigan filed applications, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Sabin Dam and Boardman River Projects Project, to be located on the Boardman River, in Grand Traverse County, Michigan. The proposed project facilities are owned by Traverse City Light and Power Company.

The proposed Sabin Dam and Boardman River Projects:

The proposed Sabin Dam Project by NM Hydroelectric Power, LLC for Project No. 13129 filed on February 27, 2008 would consist of: (1) The existing 200-foot-long, 20-foot-high earthen Sabin Dam; (2) an existing reservoir having a surface area of 40 acres and a storage capacity of 340 acre-feet and normal water surface elevation of 611.9 feet National Geographic Vertical Datum (NGVD); (3) an existing powerhouse containing one new generating unit having an installed capacity of 500 kilowatts; (4) an existing 7-mile-long, 12.5 kilovolt transmission line; and (5) appurtenant facilities. The proposed Sabin Dam Project would have an average annual generation of 2.58 gigawatt-hours..

The proposed Boardman River Project by Peterson Machinery Sales would consist of the following three developments:

Sabin Dam Development

(1) The existing 200-foot-long, 20-foot-high earthen Sabin Dam; (2) an existing reservoir having a surface area of 40 acres and a storage capacity of 340 acre-feet and normal water surface elevation of 613.5 feet National Geographic Vertical Datum (NGVD); (3) an existing powerhouse containing one new generating unit having an installed capacity of 500 kilowatts; (4) an existing 1,000-foot-long, 13.8 kilovolt transmission line; and (5) appurtenant

facilities. The proposed Sabin Dam Development would have an average annual generation of 2.7 gigawatt-hours.

Boardman Dam Development

(1) The existing 650-foot-long, 9-foot-high earthen Boardman Dam; (2) an existing reservoir having a surface area of 103 acres and storage capacity of 1,020 acre-feet and a normal water surface elevation of 659.6 feet NGVD; (3) an existing powerhouse containing one new generating nit having an installed capacity of one megawatt; (4) an existing 500-foot-long, 13.8 kilovolt transmission line; and (5) appurtenant facilities. The proposed Boardman Dam Development would have an average annual generation of 5.5 gigawatt-hours

Brown Bridge Dam Development

(1) The existing 1,600-foot-long, varying in height earth Brown Bridge Dam; (2) an existing reservoir having a surface area of 191 acres having a storage capacity of 1,900 acre-feet and a normal water surface elevation of 797.5 feet NGVD; (3) an existing powerhouse containing two new generating units having a total installed capacity of 675 kilowatts; (4) an existing 2,150-foot-long 13.8 kilovolt transmission line; and (5) appurtenant facilities. The proposed Brown Bridge Dam Development would have an average annual generation of 3 gigawatt-hours.

The proposed Boardman River Project jointly by Grand Traverse County and the City of Traverse City, Michigan would consist of the following three developments:

Sabin Dam Development

(1) The existing 200-foot-long, 20-foot-high earthen Sabin Dam; (2) an existing reservoir having a surface area of 40 acres and a storage capacity of 340 acre-feet and normal water surface elevation of 613.5 feet National Geographic Vertical Datum (NGVD); (3) an existing powerhouse containing one new generating unity having an installed capacity of 500 kilowatts; (4) an existing 1,000-foot-long, 13.8 kilovolt transmission line; and (5) appurtenant facilities. The proposed Sabin Dam Development would have an average annual generation of 2.7 gigawatt-hours.

Boardman Dam Development

(1) The existing 650-foot-long, 9-foot-high earthen Boardman Dam; (2) an existing reservoir having a surface area of 103 acres and storage capacity of 1,020 acre-feet and a normal water surface elevation of 659.6 feet NGVD; (3) an existing powerhouse containing one new generating nit having an installed capacity of one megawatt; (4) an existing 500-foot-long, 13.8 kilovolt transmission line; and (5) appurtenant facilities. The proposed Boardman Dam Development would have an average annual generation of 5.5 gigawatt-hours

Brown Bridge Dam Development

(1) The existing 1,600-foot-long, varying in height earth Brown Bridge Dam; (2) an existing reservoir having a surface area of 191 acres having a storage capacity of 1,900 acre-feet and a normal water surface elevation of 797.5 feet NGVD; (3) an existing powerhouse containing two new generating units having a total installed capacity of 675 kilowatts; (4) an existing 2,150-foot-long 13.8 kilovolt transmission line; and (5) appurtenant facilities. The proposed Brown Bridge Dam Development would have an average annual generation of 3 gigawatt-hours.

Applicants Contact: For NM Hydroelectric Power, LLC: Mr. Timothy Swanson, NM Hydroelectric Power, LLC, 13202 Griffin Run, Carmel, Indiana 46033. (317) 706–1332. For Peterson Machinery Sales: Mr. Charles R. Peterson, Peterson Machinery Sales, 9627 Seth Road, Northport, Michigan, 49670, (231) 386–5724. For Grand Traverse County: Mr. Dennis Aloia, County Administrator, Grand Traverse County, 400 Boardman Avenue, Traverse City, MI 49684, (231) 922–4622. For the City of Traverse City: Mr. R. Ben Bifoss, City Manager, Traverse City, 400 Boardman Avenue, Traverse City, MI 49684, (231) 922–4440.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13129, 13143, or P–13284) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28302 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2312–020]

PPL Great Works, LLC; Penobscot River Restoration Trust; Notice of Application for Transfer of License and Soliciting Comments, Motions To Intervene and Protests

November 20, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Transfer of License.

b. *Project No.:* 2312–020.

c. *Date filed:* November 7, 2008.

d. *Applicants:* PPL Great Works, LLC (transferor), Penobscot River Restoration Trust (transferee).

e. *Name and Location of Project:* The Great Works Project is located on the Penobscot River near the cities of Old Town and Great Works in Penobscot County, Maine.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a—825r.

g. *Applicant Contact:* For the transferor: Jesse A. Dillon, Esq, PPL Maine, LLC, Two North Ninth Street, Allentown, PA 18101, (610) 774–5013.

For the transferee: Laura Rose Day, Executive Director, Penobscot River Restoration Trust, P.O. Box 5695, Augusta, ME 04332, (207) 232-5976.

h. *FERC Contact:* Steven Sachs, (202) 502–8666.

i. *Deadline for filing comments, protests and motions to intervene:* 30 days from notice issuance.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–2312–020) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors

filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor 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.

j. *Description of Application:* Applicants seek Commission approval to transfer the license for the Great Works Project from PPL Great Works, LLC to Penobscot River Restoration Trust.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372 or e-mail *FERCONLINESUPPORT@FERC.GOV.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. 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.

n. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

Any of the above-named documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicants specified in the particular application.

o. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicants. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicants' representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28304 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2403–057; 2721–021]

PPL Maine, LLC; Penobscot River Restoration Trust; Notice of Application for Transfer of License and Soliciting Comments, Motions To Intervene and Protests

November 20, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Transfer of License.

b. *Project Nos.:* 2403–057 Veazie Project. 2721–021 Howland Project.

c. *Date filed:* November 7, 2008.

d. *Applicants:* PPL Maine, LLC (transferor). Penobscot River Restoration Trust (transferee).

e. *Name and Location of Projects:* The Veazie Project is located on the Penobscot River near the city of Veazie in Penobscot County, Maine.

The Howland Project is located on the Piscataquis River near the city of Howland in Penobscot County, Maine.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a—825r.

g. *Applicant Contact:* For the transferor: Jesse A. Dillon, Esq., PPL Maine, LLC, Two North Ninth Street, Allentown, PA 18101, (610) 774–5013.

For the transferee: Laura Rose Day, Executive Director, Penobscot River Restoration Trust, P.O. Box 5695, Augusta, ME 04332, (207) 232–5976.

h. *FERC Contact:* Steven Sachs, (202) 502–8666.

i. *Deadline for filing comments, protests and motions to intervene:* 30 days from notice issuance.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–2403–057 or P–2721–021) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor 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.

j. *Description of Application:* Applicants seek Commission approval to transfer the licenses for the Veazie and Howland Projects from PPL Maine, LLC to Penobscot River Restoration Trust.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372 or e-mail *FERCONLINESUPPORT@FERC.GOV.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *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.

n. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as

applicable, and the Project Number of the particular application to which the filing refers.

Any of the above-named documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicants specified in the particular application.

o. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicants. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicants' representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28305 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–279–000]

Buffalo Ridge I LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 20, 2008.

This is a supplemental notice in the above-referenced proceeding of Buffalo Ridge I LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 22, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28299 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–282–000]

Moraine Wind II LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 20, 2008.

This is a supplemental notice in the above-referenced proceeding of Moraine Wind II LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 22, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28301 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–281–000]

Pebble Springs Wind LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 20, 2008.

This is a supplemental notice in the above-referenced proceeding of Pebble Springs Wind LLC's application for

market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 22, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list.

They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28300 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF08–24–000]

Calais LNG Project Company, LLC; Notice of Intent To Prepare an Environmental Impact Statement for the Calais LNG Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting

November 20, 2008.

The Federal Energy Regulatory Commission (FERC or Commission) is in the process of evaluating the Calais LNG Project planned by Calais LNG Project Company, LLC (Calais). The project would consist of an onshore liquefied natural gas (LNG) import and storage terminal in Washington County, Maine, and about 20.5 miles natural gas sendout pipeline.

As a part of this evaluation, FERC staff will prepare an environmental impact statement (EIS) that will address the environmental impacts of the project. In cooperation with the FERC staff, the U.S. Department of Homeland Security, U.S. Coast Guard (Coast Guard) will assess the maritime safety and security of the project. This Notice of Intent (NOI) announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the planned project. Your input will help determine which issues need to be evaluated in the EIS. Please note that the scoping period will close on December 22, 2008.

Comments regarding this project may be submitted in written form or verbally. Further details on how to submit written comments are provided in the Public Participation section of this NOI. In lieu of or in addition to sending written comments, we invite you to attend the public scoping meeting scheduled as follows:

Date and time	Location
December 4, 2008, 6 p.m..	Washington County Community College—Auditorium, One College Drive, Calais, ME 04619, 207–454–1000.

The Commission will use the EIS in its decision-making process to determine whether to authorize the project. The Coast Guard will assess the safety and security of the Calais LNG Project and issue a Letter of Recommendation. As described above, the FERC staff will hold a public scoping meeting to allow the public to provide input on these assessments. This NOI explains the scoping process that we [1] will use to gather information on the project from the public and interested agencies, and summarizes the process that the Coast Guard will use. Your input will help identify the issues that need to be evaluated in the EIS and in the Coast Guard's safety and security assessment.

The public scoping meeting listed above will be combined with the Coast Guard's public meeting regarding the maritime safety and security of the project. At the meeting, the Coast Guard will discuss: (1) The waterway suitability assessment that it will conduct to determine whether the waterway can safely accommodate the LNG vessel traffic and operation of the planned LNG marine terminal; and (2) the security assessment it will conduct in accordance with the requirements of the Maritime Transportation Security Act. The Coast Guard will not be issuing a separate meeting notice for the maritime safety and security aspects of the project.

The FERC will be the lead federal agency for the preparation of the EIS. The Coast Guard and the U.S. Army Corps of Engineers (Corps) will serve as cooperating agencies during preparation of the EIS. The document will satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA). In addition, with this NOI, we are asking other Federal, State, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the EIS. These agencies may choose to participate once they have evaluated Calais's proposal relative to their responsibilities. Agencies that would like to request cooperating status should follow the instructions for filing comments described later in this NOI. Consultations have already been initiated with the Corps, and other State and/or Federal agencies. Consultations with these and other agencies will continue throughout the project review and permitting period. Corps staff will be in attendance at the scoping meeting.

This NOI is being sent to Federal, State, and local government agencies; elected officials; Canadian officials and agencies; affected landowners; environmental and public interest groups; Indian tribes and regional Native American organizations; other interested parties; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned

[1] "We," "us," and "our" refer to the environmental staff of the FERC's Office of Energy Projects.

project and encourage them to comment on their areas of concern.

If you are a landowner affected by the sendout pipeline receiving this NOI, you may be contacted by a Calais representative about the acquisition of an easement to construct, operate, and maintain the planned project facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the FERC, that approval conveys with it the right of eminent domain for the sendout pipeline. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with federal or state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Planned Project

Calais plans to construct and operate an LNG import terminal and storage facility, and associated natural gas sendout pipeline with a nominal capacity of 1.0 billion standard cubic feet of natural gas per day. The terminal would be located just north of Ford Point, approximately 6 miles southeast of the downtown area of the Town of Calais, on the St. Croix River, in Washington County, Maine.

More specifically, the facilities would consist of:

- A single berth marine LNG terminal, comprising breasting dolphins and mooring dolphins, and an unloading platform affixed to a pier about 1,000 feet long to accommodate LNG vessels ranging in cargo capacity from 120,000 to 170,000 cubic meters (m^3);
- Three cargo unloading arms and one vapor return arm on the pier, with an unloading capacity rate of 12,000 m^3 of LNG per hour;
- Two full-containment LNG storage tanks, each having a capacity of 160,000 m^3;
- Boil-off gas and vapor handling system, and sendout pumps;
- LNG vaporization system to re-vaporize LNG to natural gas;
- Emergency generator and separate uninterruptible power supply system;
- Ancillary terminal facilities, including control building, maintenance building, warehouse, administration building, instrument air shed, electrical buildings, compressor building, marine electrical building/switch room, fire/water pump house, and gate house/security center;
- A sendout meter to provide custody transfer measurement to the pipeline;
- About 20.5 miles of 36-inch-diameter sendout pipeline, extending from the planned LNG terminal to the existing Maritimes & Northeast Pipeline, LLC pipeline system in Princeton, Maine; and
- A hazard monitoring system incorporating combustible gas detectors, low temperature detectors, smoke detectors, and three levels of shut-down controls.

A location map depicting the planned facilities, including its preferred pipeline route and three pipeline alternatives, is attached to this NOI as appendix 1.[2]

The EIS Process

The NEPA requires the Commission to take into account the environmental impacts that could result from an action when it considers whether or not to approve an LNG import terminal or an interstate natural gas pipeline. The FERC will use the EIS to consider the environmental impacts that could result if it issues project authorizations to Calais under sections 3 and 7 of the Natural Gas Act. The NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EIS on the important environmental issues. With this NOI, we are requesting public comments on the scope of the issues to be addressed in the EIS. All comments received will be considered during preparation of the EIS.

In the EIS we will discuss impacts that could occur as a result of the construction, operation, maintenance, and abandonment of the planned project under these general headings:

- Geology and Soils.
- Water Resources.
- Aquatic Resources.
- Vegetation and Wildlife.
- Threatened and Endangered Species.
- Land Use, Recreation, and Visual Resources.
- Cultural Resources.
- Socioeconomics.
- Marine Transportation.
- Air Quality and Noise.
- Reliability and Safety.
- Cumulative Impacts.

In the EIS, we will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on affected resources.

Our independent analysis of the issues will be included in a draft EIS. The draft EIS will be mailed to federal, state, and local government agencies; elected officials; Canadian officials and agencies; affected landowners; environmental and public interest groups; Indian tribes and regional Native American organizations; commentors; other interested parties; local libraries and newspapers; and the FERC's official service list for this proceeding. A 45-day comment period will be allotted for review of the draft EIS. We will consider all comments on the draft EIS and revise the document, as necessary, before issuing a final EIS. We will consider all comments on the final EIS before we make our recommendations to the Commission. To ensure that your comments are considered, please follow the instructions in the Public Participation section of this NOI.

Although no formal application has been filed, the FERC staff has already initiated its NEPA review under its Pre-Filing Process. The purpose of the Pre-Filing Process is to encourage early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. In addition, the Coast Guard, as a cooperating agency under NEPA, has initiated its review of the project as well.

Coast Guard Letter of Recommendation Process

The Coast Guard is responsible for matters related to navigation safety, vessel engineering and safety standards, and all matters pertaining to the safety of facilities or equipment located in or adjacent to navigable waters up to the last valve immediately before the receiving tanks. The Coast Guard also has authority for LNG facility security plan review, approval, and compliance verification as provided in title 33 of the Code of Federal Regulations 105 (33 CFR part 105), and as it pertains to the management of vessel traffic in and around the LNG facility.

Upon receipt of a letter of intent from an owner or operator intending to build a new LNG facility, the Coast Guard Captain of the Port (COTP) conducts an

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available on the Commission's Web site (excluding maps) at the ''e-Library'' link or from the Commission's Public Reference Room or call (202) 502–8371. For instructions on connecting to e-Library refer to the end of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

analysis that results in a Letter of Recommendation issued to the owner or operator and to the state and local governments having jurisdiction, addressing the suitability of the waterway to accommodate LNG vessels. Specifically the Letter of Recommendation addresses the suitability of the waterway based on:

- The physical location and a description of the facility arrangements;
- the LNG vessels' characteristics and the frequency of LNG shipments to the facility;
- charts showing waterway channels and identifying commercial, industrial, environmentally sensitive, and residential area in and adjacent to the waterway used by the LNG vessels en route to the facility (within 25 kilometers [15.5 miles] of the facility);
- density and character of the marine traffic in the waterway;
- locks, bridges, or other manmade obstructions in the waterway;
- depth of water;
- tidal range;
- natural hazards, including reef, rocks, and sandbars;
- underwater pipelines and cables; and
- distance of berthed vessels from the channel, and the width of the channel.

In addition, the Coast Guard will review and approve the facility's operations manual and emergency response plan (33 CFR 127.019), as well as the facility's security plan (33 CFR 105.410). The Coast Guard will also provide input to other federal, state, and local government agencies reviewing the project. Other agencies that must approve the project are the Corps, Maine Department of Environmental Protection, and the Maine Bureau of Parks and Lands.

In order to complete a thorough waterway suitability analysis and fulfill the regulatory mandates cited above, the COTP Sector Northern New England will be conducting a formal risk assessment evaluating the various safety and security aspects associated with the Calais LNG Project. This risk assessment will be accomplished through a series of workshops focusing on the areas of waterways safety, port security, and consequence management, with involvement from a broad cross-section of government and port stakeholders with expertise in each of the respective areas. The workshops will be by invitation only; however, comments received during the public comment period will be considered as input in the risk assessment process.

Currently Identified Environmental Issues

We have already identified issues that we think deserve attention based on a preliminary review of the project area and the planned facility information provided by Calais. This preliminary list of issues, which is presented below, may be revised based on your comments and our continuing analyses.

- Impact of LNG vessel traffic on other Passamaquoddy Bay and St. Croix River users, including fishing and recreational boaters.
- Safety and security issues relating to LNG vessel traffic, including transit through Head Harbor Passage and Western Passage of Passamaquoddy Bay, and the St. Croix River.
- Potential impacts on residents in the project area, including safety issues at the import and storage facility, noise, air quality, and visual resources.
- Project impacts on the Moosehorn National Wildlife Refuge and Saint Croix Island International Park.
- Project impacts on wetlands, vegetation, threatened and endangered species, and wildlife habitat.
- Project impacts on cultural resources.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the planned project. By becoming a commentor, your concerns will be addressed in the EIS and considered by the Commission. Your comments should focus on the potential environmental effects, reasonable alternatives (including alternative facility sites and pipeline routes), and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before December 22, 2008.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number with your submission. The docket number can be found on the front of this NOI. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at (202) 502–8258 or *eFiling@ferc.gov.*

(1) You may file your comments electronically by using the *Quick Comment* feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* A Quick Comment is an easy method for interested persons to submit text-only comments on a project.

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''*Sign up*'' or ''*eRegister.*'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing.''

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

- Label one copy of the comments for the attention of Gas Branch 1, PJ–11.1.
- Reference Docket No. PF08–24–000 on the original and both copies.

The public scoping meeting (date, time, and location listed above) is designed to provide another opportunity to offer comments on the planned project. Interested groups and individuals are encouraged to attend the meeting and to present comments on the safety, security, and environmental issues that they believe should be addressed in the EIS. A transcript of the meeting will be generated so that your comments will be accurately recorded.

Environmental Mailing List

If you wish to remain on the environmental mailing list, please return the attached Mailing List Form (appendix 2). Also, indicate on the form your preference for receiving a paper version in lieu of an electronic version of the EIS on CD–ROM. If you do not return this form or provide comments, we will remove your name from our mailing list.

Additional Information

Once Calais formally files its application with the Commission, you may want to become an ''intervenor,'' which is an official party to the proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a

Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-filing'' link on the Commission's Web site. Please note that you may *not* request intervenor status at this time. You must wait until a formal application is filed with the Commission.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC (3372) or on the FERC Internet Web site (*http://www.ferc.gov*) using the ''eLibrary link.'' Click on the eLibrary link, select ''General Search'' and enter the project docket number excluding the last three digits (i.e., PF08–24) in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance with eLibrary, the eLibrary helpline can be reached at 1–866–208–3676, TTY (202) 502–8659, or by e-mail at *FercOnlineSupport@ferc.gov.* The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

In addition, the FERC offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm.*

Public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Finally, Calais has established an Internet Web site for this project at *http://www.calaislng.com.* The Web site includes a project overview, status, potential impacts and mitigation, and answers to frequently asked questions. You can also request additional information by calling Calais directly at (207) 214–7074 or visiting the Calais Office at 421 Main Street, Calais, ME.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28306 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER07–1372–005]

Midwest Independent Transmission System Operator, Inc.; Notice Shortening Answer Period

November 21, 2008.

On November 20, 2008, the Midwest Independent Transmission System Operator, Inc. (the Midwest ISO) filed a Motion for Extension of Authority and Request for Expedited Consideration, in the above-proceeding (November 20 Motion). In the filing, the Midwest ISO requests an extension of authority to compensate Market Participants through manual redispatch make-whole payment provisions for on-going operational tests associated with the Midwest ISO's proposed Ancillary Services Markets as granted by the Commission's order issued May 7, 2008, in this docket. *Midwest Independent Transmission System Operator, Inc.,* 123 FERC ¶ 61,135 (2008). Included in the filing was a request to shorten the dates for filing answers to the motion.

By this notice, the date for filing answers to the Midwest ISO's November 20 Motion is shortened to and including November 28, 2008.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–28402 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QM09–2–001]

Montana-Dakota Utilities Co.; Notice of Filing

November 20, 2008.

Take notice that on November 19, 2008, the Montana-Dakota Utilities Co. filed an amendment to Attachment A of its October 22, 2008 application.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 22, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28297 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

November 21, 2008.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any

responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Exempt:

Docket No.	File date	Presenter or requester
1. CP07–62–000; CP07–63–000	11–13–08	Hon. Barbara Mikulski.
2. CP08–476–000	11–13–08	Johnny Morgan.
3. Project No. 13164–000	11–19–08	Hon. Susan M. Collins.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–28400 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD09–2–000]

Credit and Capital Issues Affecting the Electric Power Industry; Notice of Technical Conference

November 20, 2008.

Take notice that on January 13, 2009, the Commission will convene a technical conference to discuss issues affecting the electric power industry that result from the current situation in the financial markets. Such issues include both the short-term credit issues such as access to capital for normal business operations and credit practices in short-term markets, as well as the effect on long-term capital financing of infrastructure replacement and new project development. The technical conference is designed to provide the Commission and industry stakeholders with current information about the financial health of electric public utilities, the state of wholesale power markets, and the development of infrastructure.

The technical conference will be held in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All interested persons are invited to attend. The conference is free with no registration. Further notices with detailed information will be issued in advance of the conference.

A free Webcast of this event is available through *http://www.ferc.gov*. Anyone with Internet access who desires to listen to this event can do so by navigating *http://www.ferc.gov*'s Calendar of Events and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the Webcasts and offers the option of listening to the meeting via phone-bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or call 703–993–3100.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about this conference, please contact

Scott Miller, Office of Energy Markets Regulation, Federal Energy Regulatory Commission, (202) 502–8456, *Scott.Miller@ferc.gov*.

Tina Ham, Office of General Counsel—Energy Markets, Federal Energy Regulatory Commission, (202) 502–6224, *Tina.Ham@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28307 Filed 11–28–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2008–0438; FRL–8746–9]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Microbial Rules (Renewal); EPA ICR No. 1895.04, OMB Control No. 2040–0205

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 31, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2008–0438 to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *OW-Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket (28221T), 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725

17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Richard Naylor, Drinking Water Protection Division, Office of Ground Water and Drinking Water (4606M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202.564.3847; fax number: 202.564.3755; e-mail address: *naylor.richard@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 6, 2008 (73 FR 32323), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2008–0438, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: Microbial Rules (Renewal).

ICR numbers: EPA ICR No. 1895.04, OMB Control No. 2040–0205.

ICR Status: This ICR is scheduled to expire on December 31, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Microbial Rules Renewal ICR examines public water system (PWS), primacy agency and EPA burden and costs for recordkeeping and reporting requirements in support of the microbial drinking water regulations. These recordkeeping and reporting requirements are mandatory for compliance with 40 CFR parts 141 and 142. The following microbial regulations are included: Surface Water Treatment Rule, Total Coliform Rule, Interim Enhanced Surface Water Treatment Rule, Filter Backwash Recycling Rule, Long Term 1 Enhanced Surface Water Treatment Rule, Long Term 2 Enhanced Surface Water Treatment Rule, and Ground Water Rule. Future microbial-related rulemakings will be added to this consolidated ICR after the regulations are finalized and the initial, rule-specific, ICRs are due to expire.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.88 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: New and existing public water systems (PWS) and primacy agencies.

Estimated Number of Respondents: 155,750.

Frequency of Response: varies by requirement (i.e., on occasion, monthly, quarterly, semi-annually, annually).

Estimated Total Annual Hour Burden: 10,669,916.

Estimated Total Annual Cost: $554.0 million includes $197.2 million annualized capital or O&M costs.

Changes in the Estimates: There is an increase of 2,045,051 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is primarily due to adjustments to burden based on consultations with drinking water associations and to restructuring adjustments (i.e., incorporation of the burden hours for the Long Term 2 Enhanced Surface Water Treatment Rule and the Ground Water Rule).

Dated: November 24, 2008.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E8–28451 Filed 11–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8747–3]

Protection of Stratospheric Ozone: Request for Applications for Essential Use Allowances for 2010 and 2011

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is requesting applications for essential use allowances for calendar years 2010 and 2011. Essential use allowances provide exemptions from the phaseout on production and import of ozone-depleting substances (ODSs). Essential use allowances must be authorized by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (the Protocol). The U.S. Government will use the applications received in response to this notice as the basis for its nomination of essential uses at the 21st Meeting of the Parties to the Protocol, to be held in 2009.

DATES: Applications for essential use allowances must be submitted to EPA no later than December 31, 2008 in order for the U.S. Government to complete its review and to submit nominations to the United Nations Environment Programme and the Protocol Parties in a timely manner.

ADDRESSES: Send two copies of application materials to: Jennifer Bohman, Stratospheric Protection Division (6205J), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. For applications sent via courier service, use the following direct mailing address: 1310 L Street, NW., Washington, DC, 20005, room 1047A.

Confidentiality: Application materials that are confidential should be submitted under separate cover and be clearly identified as ''trade secret,'' ''proprietary,'' or ''company confidential.'' Information covered by a claim of business confidentiality will be treated in accordance with the procedures for handling information claimed as confidential under 40 CFR part 2, subpart B, and will be disclosed only to the extent and by means of the procedures set forth in that subpart. Please note that data will be presented in aggregate form by the United States as part of the nomination to the Parties. If no claim of confidentiality accompanies the information when it is received by EPA, the information may be made available to the public by EPA without further notice to the company (40 CFR 2.203).

FOR FURTHER INFORMATION CONTACT: Jennifer Bohman at the above address, or by telephone at (202) 343–9548, by fax at (202) 343–2363, or by e-mail at *bohman.jennifer@epa.gov.* General information may be obtained from EPA's stratospheric protection Web site at *http://www.epa.gov/ozone/strathome.html.*

SUPPLEMENTARY INFORMATION:

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I. Background on the Essential Use Nomination Process
II. Information Required for Essential Use Applications for Production or Import of Class I Substances in 2010 and 2011

I. Background on the Essential Use Nomination Process

The Parties to the Protocol agreed during the Fourth Meeting in Copenhagen on November 23–25, 1992, that non-Article 5 Parties (developed countries) would phase out the production and consumption of halons by January 1, 1994, and the production and consumption of other class I substances (under 40 CFR part 82, subpart A), except methyl bromide, by January 1, 1996. The Parties also reached decisions and adopted resolutions on a variety of other matters, including the criteria to be used for allowing ''essential use'' exemptions from the phaseout of production and import of controlled substances. Decision IV/25 of the Fourth Meeting of the Parties details the specific criteria and review process for granting essential use exemptions.

Decision IV/25, paragraph 1(a), states that ''* * * a use of a controlled substance should qualify as 'essential' only if: (i) It is necessary for the health, safety or is critical for the functioning of society (encompassing cultural and intellectual aspects); and (ii) there are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health.'' In addition, the Parties agreed ''that production and consumption, if any, of a controlled substance, for essential uses should be permitted only if: (i) All economically feasible steps have been taken to minimize the essential use and any associated emission of the controlled substance; and (ii) the controlled substance is not available in sufficient quantity and quality from the existing stocks of banked or recycled controlled substances * * * '' Decision XII/2 of the Twelfth Meeting of the Parties states that any CFC metered dose inhaler (MDI) product approved after December 31, 2000, is nonessential unless the product meets the criteria in Decision IV/25, paragraph 1(a).

The first step in obtaining essential use allowances is for the user to consider whether the use of the controlled substance meets the criteria of Decision IV/25. If the essential use request is for an MDI product, the user should also consider whether the product meets the criteria of Decision XII/2. In addition, the user should consult recent and ongoing rulemakings by the Food and Drug Administration (FDA) concerning the essential use determination of various MDI moieties. In particular, users should consider FDA's November 19, 2008 final rulemaking that removes the essential use designation for epinephrine used in MDIs as of December 31, 2011 (73 FR 69532) and FDA's June 11, 2007 proposed rulemaking that proposes removing the essential use designations for flunisolide, triamcinolone, metaproterenol, pirbuterol, albuterol and ipratropium in combination, cromolyn, and nedocromil used in MDIs as of December 31, 2009 (72 FR 32030).

Users requesting essential use allowances for calendar years 2010 and 2011 should send a completed application to EPA on the candidate use. The application should include information that U.S. Government agencies and the Parties to the Protocol can use to evaluate the candidate use according to the criteria in the Decisions described above.

Upon receipt of application, EPA reviews the information and works with other interested Federal agencies to determine whether the candidate use meets the essential use criteria and warrants nomination by the United States for an exemption. In the case of multiple exemption requests for a single use, such as for MDIs, EPA aggregates exemption requests received from individual entities into a single U.S. request. An important part of the EPA review is to ensure that the aggregate request for a particular future year adequately reflects the total market need for CFC MDIs and expected availability of CFC substitutes by that point in time. If the sum of individual requests does not account for such factors, the U.S. Government may adjust the aggregate request to better reflect true market needs.

Nominations submitted by the United States and other Parties are forwarded by the United Nations Ozone Secretariat to the Montreal Protocol's Technical and Economic Assessment Panel (TEAP) and its Medical Technical Options Committee (MTOC), which reviews the submissions and make recommendations to the Parties for essential use exemptions. Those recommendations are then considered by the Parties at their annual meeting for final decision. If the Parties declare a specified use of a controlled substance as essential, and authorize an exemption from the Protocol's production and consumption phaseout, EPA may propose regulatory changes to reflect the decisions by the Parties, but only to the extent such action is consistent with the Clean Air Act. Applicants should be aware that essential use exemptions granted to the United States under the Protocol in recent years have been limited to CFCs for MDIs to treat asthma and chronic obstructive pulmonary disease.

The Parties review nominations for essential use exemptions for the following year and subsequent years. This means that, if nominated, applications submitted in response to today's notice for an exemption in 2010 and 2011 will be considered by the Parties in 2009 for final action. The quantities of controlled substances that are requested in response to this notice, if approved by the Parties to the Montreal Protocol, will then be allocated as essential use allowances to the specific U.S. companies through notice-and-comment rulemaking, to the extent that such allocations are consistent with the Clean Air Act.

II. Information Required for Essential Use Applications for Production or Import of Class I Substances in 2010 and 2011

Through this action, EPA requests applications for essential use exemptions for all class I substances, except methyl bromide, for calendar years 2010 and 2011. This notice is the last opportunity to submit new or revised applications for 2010. This notice is also the first opportunity to submit requests for 2011. Companies will have an opportunity in 2009 to submit new, supplemental, or amended applications for 2011. All requests for exemptions submitted to EPA should present information as requested in the current version of the TEAP *Handbook on Essential Use Nominations,* which was updated in 2005. The handbook is available electronically on the Web at *http://ozone.unep.org/teap/Reports/TEAP_Reports/EUN-Handbook2005.pdf*.

In brief, the TEAP Handbook states that applicants should present information on:

- Role of use in society;
- Alternatives to use;
- Steps to minimize use;
- Recycling and stockpiling;
- Quantity of controlled substances requested; and
- Approval date and indications (for MDIs).

In addition, entities should address the following points to ensure that their applications are clear and complete. First entities that request CFCs for multiple companies should clearly state the amount of CFCs requested for each company. Second, all essential use applications for CFCs should provide a breakdown of the quantity of CFCs necessary for each MDI product to be produced. This detailed breakdown will allow EPA and FDA to make informed decisions regarding the amount of CFCs to be nominated by the U.S. Government for the years 2010 and 2011. Third, all new drug application (NDA) holders for CFC MDI products produced in the United States should submit a complete application for essential use allowances either on their own or in conjunction with their contract filler. In the case where a contract filler produces a portion of an NDA holder's CFC MDIs, the contract filler and the NDA holder should determine the total amount of CFCs necessary to produce the NDA holder's entire product line of CFC MDIs. The NDA holder should provide an estimate of how the CFCs would be split between the contract filler and the NDA holder in the allocation year. This estimate will be used only as a basis for determining the nomination amount, and may be adjusted prior to allocation of essential use allowances. Since the U.S. Government does not forward incomplete or inadequate nominations to the Ozone Secretariat, it is important for applicants to provide all information requested in the Handbook, including comprehensive information pertaining to the research and development of alternative CFC MDI products per Decision VIII/10, para. 1 as specified in the Supplement to Nomination Request (pg. 46). Finally, consistent with Decision XIX/13 taken in September 2007 at the 19th Meeting of the Parties, when requesting essential use CFCs for MDIs, applicants should provide the following information: (1) The company's commitment to the reformulation of the concerned products; (2) the timetable in which each reformulation process may be completed; and (3) evidence that the company is diligently seeking approval of any CFC-free alternative(s) in its domestic and export markets and transitioning those markets away from its CFC products.

The accounting framework matrix in the Handbook (Table IV) entitled ''Reporting Accounting Framework for Essential Uses Other Than Laboratory and Analytical Applications'' requests data for the year 2008 on the amount of ODSs exempted for an essential use, the amount acquired by production, the amount acquired by import and the country(s) of manufacture, the amount on hand at the start of the year, the amount available for use in 2008, the amount used for the essential use, the quantity contained in exported products, the amount destroyed, and the amount on hand at the end of 2008. Because all data necessary for applicants to complete Table IV will not be available until after the control period ends on December 31, 2008, companies should not include this chart with their essential use applications in response to this notice. Instead, companies should report their data as required by 40 CFR 82.13(u)(2) in Section 5 of the report entitled ''Essential Use Allowance Holders and Laboratory Supplier Quarterly Report and Essential Use Allowance Holder Annual Report.'' This form may be found on EPA's Web site at *http://www.epa.gov/ozone/record/downloads/EssentialUse_ClassI.doc*. EPA will then compile companies' responses and complete the U.S Accounting Framework for Essential Uses for submission to the Parties to the Montreal Protocol by the end of January 2009. EPA may also request additional information from companies to support the U.S. nomination using its information gathering authority under Section 114 of the Act.

EPA anticipates that the Parties' review of MDI essential use requests will focus extensively on the United States' progress in phasing out CFC MDIs, including education programs to inform patients and health care providers of the CFC phaseout and the transition to alternatives. Accordingly, applicants are strongly advised to present detailed information on these educational programs, including the scope and cost of such efforts and the medical and patient organizations involved in the work. In addition, EPA expects that Parties will be interested in research and development activities being undertaken by MDI manufacturers to develop and transition to alternative, CFC-free MDI products. To this end, applicants are encouraged to provide detailed information on these efforts. Applicants should submit their exemption requests to EPA as noted in the ''Addresses'' section above.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this notice under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0170.

Dated: November 24, 2008.

Brian J. McLean,

Director, Office of Atmospheric Programs.

[FR Doc. E8–28452 Filed 11–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8747–4]

Science Advisory Board Staff Office; Notification of a Public Teleconference of the Clean Air Scientific Advisory Committee (CASAC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public teleconference of the chartered Clean Air Scientific Advisory Committee (CASAC) to consider and approve the CASAC Panel's draft report regarding its peer review of EPA's *Risk and Exposure Assessment for Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur: First Draft (August 2008)*. The CASAC will also discuss the

Agency's schedule and process for National Ambient Air Quality Standards (NAAQS) review of criteria pollutants with EPA's Office of Air and Radiation and Office (OAR) and Office of Research and Development (ORD).

DATES: The public teleconference will be held on Friday, December 19, 2008 from 12 p.m. to 3 p.m. (Eastern Time).

Location: The public teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the teleconference meeting may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail (202) 343–9867; fax (202) 233–0643; or e-mail at *stallworth.holly@epa.gov.* General information concerning the CASAC can be found on the EPA Web site at *http://www.epa.gov/casac.*

SUPPLEMENTARY INFORMATION:

Background: The Clean Air Scientific Advisory Committee (CASAC) was established under section 109(d)(2) of the Clean Air Act (CAA or Act) (42 U.S.C. 7409) as an independent scientific advisory committee. CASAC provides advice, information and recommendations on the scientific and technical aspects of air quality criteria and national ambient air quality standards (NAAQS) under sections 108 and 109 of the Act. The CASAC is a Federal advisory committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Section 109(d)(1) of the CAA requires that the Agency periodically review and revise, as appropriate, the air quality criteria and the NAAQS for the six ''criteria'' air pollutants, including Nitrogen Oxide (NO_X) and Sulfur Oxides (SO_X). EPA is in the process of reviewing the secondary NAAQS for NO_X and SO_X. Welfare effects as defined in the CAA include, but are not limited to, effects on soils, water, wildlife, vegetation, visibility, weather, and climate, as well as effects on materials, economic values, and personal comfort and well-being. As part of that process, EPA's OAR completed the *Risk and Exposure Assessment (REA) for Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur: First Draft (August 2008).* The CASAC NO_X and SO_X Secondary National Ambient Air Quality Standards (NAAQS) Review Panel held a public meeting on October 1–2, 2008 to conduct a peer review of EPA's first draft REA. The panel discussed its draft letter report on November 19, 2008. The purpose of this conference call is for the chartered CASAC to review and approve the Panel's draft letter. In addition, CASAC will also publicly discuss the entire NAAQS schedule and process with EPA's Office OAR and ORD.

Technical Contacts: Any questions concerning EPA's *Risk and Exposure Assessment for Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur: First Draft* should be directed to Dr. Anne Rea, OAR, at (919) 541–0053 or *rea.anne@epa.gov.*

Availability of Meeting Materials: EPA-*Risk and Exposure Assessment for Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Oxides of Sulfur: First Draft* can be accessed at *http://www.epa.gov/ttn/naaqs/standards/no2so2sec/cr_rea.html.* The Panel's draft letter and the CASAC agenda for the teleconference will be posted in advance of the meeting on the SAB Web site at *http://www.epa.gov/casac.*

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for consideration on the topics included in this advisory activity. *Oral Statements:* To be placed on the public speaker list for the December 19, 2008 teleconference, interested parties should notify Dr. Holly Stallworth, DFO, by e-mail no later than December 12, 2008. Individuals making oral statements will be limited to three minutes per speaker. *Written Statements:* Written statements for the December 19, 2008 teleconference should be received in the SAB Staff Office by December 12, 2008, so that the information may be made available to the CASAC Panel for its consideration prior to this meeting. Written statements should be supplied to the DFO in the following formats: One hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at the phone number or e-mail address noted above, preferably at least ten days prior to the face-to-face meeting, to give EPA as much time as possible to process your request.

Dated: November 24, 2008.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8–28453 Filed 11–28–08; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Advisory Committee was established by Pub. L. 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Wednesday, December 10, 2008 from 9:30 a.m. to 12 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include a briefing of the Advisory Committee members on challenges for 2009, their roles and responsibilities and an ethics briefing.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented at the guard's desk as part of the clearance process into the building, and you may contact Susan Houser to be placed on an attendee list. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 5, 2008, Susan Houser, Room 1273, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3232 or TDD (202) 565–3377.

FOR FURTHER INFORMATION: For further information, contact Susan Houser, Room 1273, 811 Vermont Avenue, NW., Washington, DC 20571, (202) 565–3232.

Kamil P. Cook,

Deputy General Counsel.

[FR Doc. E8–28228 Filed 11–28–08; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Release of Exposure Draft on Estimating the Historical Cost of General Property, Plant, and Equipment

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice of Release of Exposure Draft on Estimating the Historical Cost of General Property, Plant, and Equipment.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. No. 92–463), as amended, and the FASAB Rules of Procedure, as amended in April, 2004, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has released the Exposure Draft on Estimating the Historical Cost of General Property, Plant, and Equipment.

The General Property, Plant, and Equipment Exposure Draft is available on the FASAB home page *http://www.fasab.gov/exposure.html.* Copies can be obtained by contacting FASAB at (202) 512–7350. Respondents are encouraged to comment on any part of the exposure draft. Written comments are requested by January 9, 2009, and should be sent to: Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street, NW., Suite 6814, Mail Stop 6K17V, Washington, DC 20548.

Any interested person may attend the meetings as an observer. Board discussion and reviews are open to the public. GAO Building Security requires advance notice of your attendance. Please notify FASAB of your planned attendance by calling (202) 512–7350 at least one day prior to the respective meeting.

FOR FURTHER INFORMATION, CONTACT: Wendy Payne, Executive Director, 441 G Street, NW., Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. No. 92463.

Dated: November 21, 2008.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. E8–28192 Filed 11–28–08; 8:45 am]

BILLING CODE 1610–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Requirements Being Submitted to OMB for Emergency Review and Approval, Comments Requested

November 24, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collections, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before December 23, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167; and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554, or via Internet at *Cathy.Williams@fcc.gov* and/or *PRA@fcc.gov.* Include in the comments the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918, or via Internet at *Cathy.Williams@fcc.gov,* and/or *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission is requesting emergency OMB processing of the information collection requirements contained in this notice and has requested OMB approval by January 5, 2009.

OMB Control Number: 3060–0027.

Title: Application for Construction Permit for Commercial Broadcast Station.

Form Number: FCC Form 301.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 4,378 respondents; 7,804 responses.

Estimated Time per Response: 1 hour to 5 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 14,808 hours.

Total Annual Cost: $52,580,197.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On November 3, 2008, the Commission adopted a Report and Order, In the Matter of Digital Television Distributed Transmission System Technologies; MB Docket No. 05–312, FCC 08–256 (released Nov. 7, 2008). In this Report and Order, the Commission adopts rules for the use of distributed transmission system (''DTS'') technologies in the digital television (''DTV'') service. *See* 47 CFR

73.626. DTS technology allows stations to employ multiple synchronized transmitters spread around a station's service area, rather than the current single-transmitter approach. Each transmitter would broadcast the station's DTV signal on the same channel, similar to analog TV booster stations but more efficiently. Due to the synchronization of the transmitted signals, DTV receivers should be able to treat the multiple signals as reflections or ''ghosts'' and use ''adaptive equalizer'' circuitry to cancel or combine them to produce a single signal.

Congress has mandated that after February 17, 2009, full-power television broadcast stations must transmit only in digital signals, and may no longer transmit analog signals. Emergency OMB approval is necessary for this collection to allow full-power DTV stations to use DTS technologies to meet their statutory responsibilities and begin operations on their final, post-transition (digital) channels by their construction deadlines. DTS will provide DTV broadcasters with an important tool for providing optimum signal coverage for their viewers. For some broadcasters that are changing channels or transmitting locations for their digital service, DTS may offer the best option for continuing to provide over-the-air service to current analog viewers, as well as for reaching viewers that have historically been unable to receive a good signal due to terrain or other interference.

FCC Form 301 is being revised to accommodate the filing of DTS applications.

OMB Control Number: 3060–0029.

Title: Application for TV Broadcast Station License, Form FCC 302–TV; Application for DTV Broadcast Station License, FCC Form 302–DTV; Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station, FCC Form 340; Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station, FCC Form 349.

Form Number: FCC Forms 302–TV, 302–DTV, 340 and 349.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 4,425 respondents; 6,425 responses.

Estimated Time per Response: 1 hour to 4 hours.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 14,450 hours.

Total Annual Cost: $21,869,625.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority is contained in sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On November 3, 2008, the Commission adopted a Report and Order in the Matter of Digital Television Distributed Transmission System Technologies; MB Docket No. 05–312, FCC 08–256 (released Nov. 7, 2008). In this Report and Order, the Commission adopts rules for the use of distributed transmission system (''DTS'') technologies in the digital television (''DTV'') service. *See* 47 CFR 73.626. DTS technology allows stations to employ multiple synchronized transmitters spread around a station's service area, rather than the current single-transmitter approach. Each transmitter would broadcast the station's DTV signal on the same channel, similar to analog TV booster stations but more efficiently. Due to the synchronization of the transmitted signals, DTV receivers should be able to treat the multiple signals as reflections or ''ghosts'' and use ''adaptive equalizer'' circuitry to cancel or combine them to produce a single signal.

Congress has mandated that after February 17, 2009, full-power television broadcast stations must transmit only in digital signals, and may no longer transmit analog signals. Emergency OMB approval is necessary for this collection to allow full-power DTV stations to use DTS technologies to meet their statutory responsibilities and begin operations on their final, post-transition (digital) channels by their construction deadlines. DTS will provide DTV broadcasters with an important tool for providing optimum signal coverage for their viewers. For some broadcasters that are changing channels or transmitting locations for their digital service, DTS may offer the best option for continuing to provide over-the-air service to current analog viewers, as well as for reaching viewers that have historically been unable to receive a good signal due to terrain or other interference.

FCC Form 340 is being revised to accommodate the filing of DTS applications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–28374 Filed 11–28–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Sunshine Act; Meetings

AGENCY HOLDING THE MEETING: Federal Maritime Commission.

TIME AND DATE: December 3, 2008—10 a.m.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

STATUS: A portion of the meeting will be in Open Session and the remainder of the meeting will be in Closed Session.

MATTERS TO BE CONSIDERED:

Open Session

(1) Docket No. 07–01—APM Terminals North America, Inc. v. Port Authority of NY and NJ and Port Authority of NY and NJ v. Maher Terminals LLC—Request for Extension of Time.

(2) FMC Agreement No. 201198, Marine Terminal Operators of Hampton Roads Discussion Agreement.

Closed Session

(1) Docket No. 04–09/05–03—American Warehousing of New York, Inc. v. The Port Authority of New York and New Jersey.

(2) FMC Agreement No. 201199—Port Fee Services Agreement.

(3) Staff Briefing Regarding Global Economic Downturn and Potential Impact on Stakeholders.

(4) Internal Administrative Practices and Personnel Matters.

CONTACT PERSON FOR MORE INFORMATION: Karen V. Gregory, Secretary, (202) 523–5725.

Karen V. Gregory,

Secretary.

[FR Doc. E8–28556 Filed 11–26–08; 4:15 pm]

BILLING CODE 6730–01–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 also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 26, 2008.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. BMC Bancshares, Inc., Dallas, Texas, to become a bank holding company by acquiring 100 percent of the voting shares of First National Bank–Graford, Graford, Texas.

Board of Governors of the Federal Reserve System, November 25, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–28449 Filed 11–28–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Notice.

SUMMARY: The FTC plans to conduct a consumer study to research alternatives to existing lamp (*i.e.*, light bulb) labeling requirements. This study is part of the Commission's rulemaking proceeding to examine the effectiveness of current light bulb package labeling as directed by Congress. Before conducting this research, the FTC is seeking public comments on the proposed study as part of its compliance with the Paperwork Reduction Act (''PRA'').

DATES: Comments must be received on or before January 30, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Lamp Labeling Study, Project No. P084206'' to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*) — and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential. . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-lampstudy*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-lampstudy*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Lamp Labeling Study, Project No. P084206'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, Attorney, 202-326-2889, or Lemuel Dowdy, Attorney, 202-326-2981, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

SUPPLEMENTARY INFORMATION:

I. Background

In the Energy Independence and Security Act of 2007,[2] Congress directed the FTC to consider the effectiveness of current lamp labeling[3] and alternative

[1] FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[2] *See* Section 321(b) of the Energy Independence and Security Act of 2007 (Pub. L. 110-140 (§ 324(a))).

[3] The FTC's current rule requires disclosure of energy use (in watts), light output (in lumens), and life (in hours) on packaging for most consumer lamp products. The current requirements do not

labeling disclosures. In particular, the Act calls on the Commission to consider whether alternative labeling approaches will help consumers better understand new high-efficiency lamp products and help them choose lamps that meet their needs. As a first step toward fulfilling this mandate, the Commission published an Advance Notice of Proposed Rulemaking on July 18, 2008 (73 FR 40988) that provided background about current labeling rules for lamps, the recent Congressional mandate, the purpose of the FTC labeling requirements, and various labeling considerations. Moreover, in the Notice and at a public roundtable held on September 15, 2008, the Commission sought comment concerning the effectiveness of current labeling requirements, as well as whether potential labeling alternatives would help consumers in their purchasing decisions. Specifically, the Commission asked for comment on whether labeling should address characteristics such as lamp brightness, energy use, operating cost, color temperature, and lamp life.

The Commission also requested that commenters provide consumer research data related to lighting disclosures. However, no commenters submitted or identified any recent, comprehensive consumer research. The Commission, therefore, is planning to conduct a consumer research study to aid in determining what revisions, if any, it should make to existing labeling requirements. This Notice provides a description of that proposed research, an estimate of the burden hours associated with the collection of information for that activity, and an invitation for comment on these issues.

II. FTC's Proposed Consumer Research

The FTC proposes to collect information from consumers to gather data on the effectiveness of current lamp labels and possible alternative label designs.[4] The proposed study will involve a sample of approximately 5,600 respondents who are at least 18 years old and are recent or likely light bulb purchasers.[5] The FTC and its contractor will use a nationwide Internet panel to conduct and administer questions online.[6] As discussed below, the study will involve asking respondents to consider various label variations and explore their labeling preferences, as well as their understanding of relevant lighting concepts.

Label Variations: The study will employ standard consumer survey methodologies, which may include copy testing and choice experiments to explore how different labels impact consumer decision making regarding light bulb products. In the study, respondents will view one of several labels which will be assigned to them randomly. For example, one group will view a label with the current lamp disclosures while another group will view alternative disclosures. Respondents may then answer a series of questions about the characteristics of the products described in the labels and their preferences pertaining to the products. The questionnaire may ask respondents to identify certain product attributes communicated by the labels such as energy use, operating cost, and brightness. In addition, questions may explore whether various labeling disclosures help to impart accurately intended information or inadvertently convey other information (*e.g.*, whether respondents incorrectly interpret certain types of energy use disclosures as indicia of product quality). The questions may also attempt to address whether alternative approaches create confusion with other government programs. For example, the study may explore how various labels impact respondents' ability to identify ENERGY STAR products correctly.

In analyzing the study results, the FTC will conduct a statistical comparison of respondent answers across different test label components. If there are differences in accuracy rates for particular label approaches, the direction and statistical significance of these differences will aid the FTC in assessing whether one type of label design is more comprehensible than alternative designs.

Lighting Concepts and Consumer Preferences: In addition to questions involving different label comparisons, the study will seek information about respondents' understanding of different lighting concepts such as lumens (*i.e.*, light output) and color temperature (*e.g.*, warm white, soft white, etc.). The study will also explore whether respondents believe certain types of information (*e.g.*, operating cost or color temperature) are important in their purchasing decisions. Finally, the study will seek to gauge whether respondents have preferences regarding how certain types of information are communicated (*e.g.*, whether energy use is communicated in operating cost as opposed to watts).

III. Estimated Burden Hours

The Commission estimates that the cumulative total burden hours for the study will be approximately 2,972 hours.[7] This total estimate is derived as follows. First, the FTC plans to conduct a pretest of 25 persons that will take approximately 30 minutes on average per person, resulting in a total of approximately 13 burden hours (25 respondents x 30 minutes). Second, once the pretest is complete, the FTC and its contractor will ask screener questions of approximately 15,000 respondents in order to obtain the FTC's target sample size of 5,600 individuals. The FTC estimates that it will take respondents one minute to respond to the screener questions. Thus, the total burden related to the screener questions will be approximately 250 hours (15,000 respondents x 1 minute). Finally, those respondents that pass the screener questions will answer the entire questionnaire. Using a conservative estimate of 6,500 individuals,[8] the FTC further estimates that participating in the study will require an additional 2,709 hours as a whole (6,500 respondents x 25 minutes). Finally, the cost per respondent should be negligible. Participation is voluntary and will not require start-up, capital, or labor expenditures by respondents.

IV. Request for Comment

As required by Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3501-21, the FTC is providing this opportunity for public comment before requesting the Office of Management and Budget (''OMB'') approval of information collection activities associated with the study.

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impose a uniform disclosure format. Instead, the labeling requirements provide manufacturers flexibility regarding the size, font, and style in which the information is presented. *See* 16 CFR Part 305.

[4] The FTC has contracted with Synovate, Inc., a consumer research firm.

[5] The FTC will pretest the study on 25 individuals to ensure that all questions are easily understood. The pretest participants will be drawn from the sample population. The contractor will identify respondents using any relevant, preexisting data in its Internet panel database and any necessary additional screener questions. The screener questions will help to ensure that the demographic composition of the sample reasonably matches that of the target population. Allowing for non-responses, up to approximately 15,000 respondents will answer screener questions. That number of respondents should enable the FTC to obtain its target sample size of 5,600 individuals.

[6] The FTC expects to study a stratified sample of the adult United States population that is broadly representative of consumer group characteristics (*e.g.*, geographic location, housing characteristics, gender, age, education, and race/ethnicity) based on the most recent Census Bureau's Current Population Survey and Department of Energy's Residential Energy Consumption Survey.

[7] All fractions are rounded up to provide conservative estimates.

[8] Although the target sample is 5,600 individuals, the procedures used by the contractor may result in collection of information from a slightly higher number of individuals.

Under the PRA, federal agencies must obtain OMB approval for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

Specifically, the FTC invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility; (2) the accuracy of the FTC's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information on those who 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. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before January 30, 2009.

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E8–28450 Filed 11–28–08: 8:45 am]

[BILLING CODE 6750–01–S]

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

Trans No.	Acquiring	Acquired	Entities
TRANSACTIONS GRANTED EARLY TERMINATION—11/03/2008			
20081712	General Dynamics Corporation	Permira Europe III L.P. 2	Jet Aviation Holding AG
TRANSACTIONS GRANTED EARLY TERMINATION—11/05/2008			
20090015	eBay Inc.	Bill Me Later	Bill Me Later
20090075	Russell A. Gerdin	Heartland Express, Inc.	Heartland Express, Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—11/07/2008			
20090041	Atlantic Power Corporation	ArcLight Energy Partners Fund I, L.P	Auburndale Holdings, LLC
20090074	Mercury General Corporation	Aon Corporation	AIS Management Corporation
20090084	GlaxoSmithKline plc	Affiris GmbH	Affiris GmbH
20090091	First Reserve Fund XII, L.P	Reliant Energy, Inc.	Reliant Energy, Inc.
20090093	TPF II, L.P.	MACH Gen, LLC	New Covert Generating Company, LLC
TRANSACTIONS GRANTED EARLY TERMINATION—11/07/2008			
20090038	Hewlett-Packard Company	LeftHand Networks, Inc.	LeftHand Networks, Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—11/10/2008			
20081739	Teradyne, Inc.	Eagle Test Systems, Inc	Eagle Test Systems, Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—11/12/2008			
20090081	Biovitrum AB (publ)	Amgen Inc.	Amgen Inc.
20090089	United Technologies Corporation	OCM/GFI Power Opportunities Fund II, L.P	Noresco Acquisition, Inc.
20090094	West Corporation	Silver Lake Partners II, L.P	IPC Information Systems Holdings, Inc.
20090099	Commerzbank AG	Allianz SE	Dresdner Bank AG
TRANSACTIONS GRANTED EARLY TERMINATION—11/13/2008			
20090078	New Mountain Partners III, L.P	Camber Corporation	Camber Corporation

Trans No.	Acquiring	Acquired	Entities
TRANSACTIONS GRANTED EARLY TERMINATION—11/14/2008			
20081781	Aon Corporation	Benfield Group Limited	Benfield Group Limited
20090090	Spectrum Equity Investors IV, L.P	RiskMetrics Group, Inc.	RiskMetrics Group, Inc.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative, or Renee Hallman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580 (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E8–28164 Filed 11–28–08; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New]

Agency Information Collection Request. 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

Proposed Project: Evaluation of the National Bone Health Campaign Pilot Site Project—OMB No. 0990–NEW—Office on Women's Health (OWH)

Abstract: The Office on Women's Health (OWH) is requesting clearance for forms to evaluate the implementation and effectiveness of the revised BodyWorks program; an obesity prevention program targeting parents and girls that highlights behaviors known to improve bone health. Using a technical assistance model, the revised BodyWorks program will be implemented by local coalitions in three pilot sites. Clearance is also requested for forms to assess the success of this technical assistance model.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Parent/Caregiver participant in the Revised BodyWorks program.	Parent/Caregiver Pre test Questionnaire.	171	1	30/60	85.5
	Parent/Caregiver Post test Questionnaire.	153	1	30/60	76.5
	Parent/Caregiver Session Evaluation Forms (10 forms).	153	10	3/60	76.5
Parent/Caregiver Revised BodyWorks program comparison group participant.	Parent/Caregiver Pre test Questionnaire.	63	1	30/60	31.5
	Parent/Caregiver Post test Questionnaire.	50	1	30/60	25
Adolescent participant in the Revised BodyWorks program.	Adolescent Pretest Questionnaire	228	1	30/60	114
	Adolescent Post test Questionnaire	204	1	30/60	102
	Adolescent Session Evaluation Forms (10 forms).	204	10	3/60	102
Adolescent Revised BodyWorks program comparison group participant.	Adolescent Pre test Questionnaire	63	1	30/60	31.5
	Adolescent Post test Questionnaire	50	1	30/60	25
Trainers of the Revised BodyWorks program.	Facilitator Feedback Forms (10 forms).	22	10	5/60	18.3
Coalition leaders, members, and site coordinators.	Coalition Pre test Survey	86	1	20/60	28.7
	Coalition Post test Survey	72	1	30/60	36
Total Hours					752.5

John Teeter,
Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E8–28389 Filed 11–28–08; 8:45 am]
BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Draft Guidance on Important Considerations for When Participation of Human Subjects in Research Is Discontinued

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office for Human Research Protections.

ACTION: Notice.

SUMMARY: The Office for Human Research Protections (OHRP), Office of Public Health and Science, is announcing the availability of a draft guidance document entitled, ''Guidance on Important Considerations for When Participation of Human Subjects in Research is Discontinued,'' and is seeking comment on the draft guidance. The draft guidance document, when finalized, would provide OHRP's first formal guidance on this topic. The draft document, which is available on the OHRP Web site at *http://www.hhs.gov/ohrp/requests/,* is intended primarily for institutional review boards (IRBs), investigators, and funding agencies that may be responsible for the review or oversight of human subject research conducted or supported by the Department of Health and Human Services (HHS). OHRP will consider comments received before issuing the final guidance document.

DATES: Submit written comments by January 30, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled, ''Guidance on Important Considerations for When Participation of Human Subjects in Research is Discontinued,'' to the Division of Policy and Assurances, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–402–2071. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance document.

You may submit comments by any of the following methods:

- *E-mail: discontinueparticipation@hhs.gov.* Include ''Guidance on Discontinuation of Subject Participation'' in the subject line.
- *Fax:* 301–402–2071.
- *Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]:* Michael A. Carome, M.D., Captain, U.S. Public Health Service, OHRP, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852.

Comments received within the public comment period, including any personal information, will be made available to the public upon request.

FOR FURTHER INFORMATION CONTACT: Michael A. Carome, M.D., Captain, U.S. Public Health Service, OHRP, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, 240–453–6900; e-mail *Michael.Carome@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The OHRP, Office of Public Health and Science, is announcing the availability of a draft guidance document entitled, ''Guidance on Important Considerations for When Participation of Human Subjects in Research is Discontinued.'' The draft guidance document, when finalized, would provide OHRP's first formal guidance on this topic. The draft document is intended primarily for IRBs, investigators, and funding agencies that may be responsible for the review or oversight of human subject research conducted or supported by HHS.

The proposed guidance document would apply to non-exempt human subjects research conducted or supported by HHS. It would provide guidance on important considerations for when participation of human subjects in research is discontinued, either because a subject voluntarily chooses to discontinue participation during the course of the research, or because an investigator terminates a subject's participation in the research without regard to the subject's consent. In particular, the proposed guidance addresses the following topics:

(1) What does the word *participation,* as used in HHS regulations at 45 CFR part 46, subpart A, mean?

(2) What does *discontinuation of a subject's participation* in research mean?

(3) The distinction between a *complete* versus a *partial* discontinuation of a subject's participation in research.

(4) Clarification that investigators may continue to analyze already collected individually identifiable private information about a subject even when the subject's participation has been completely discontinued.

(5) Considerations regarding the discontinuation of a subject's participation in emergency research for which the requirements for obtaining informed consent were waived by the IRB.

(6) Clarification that research can continue to involve human subjects even when the participation of all subjects has been completed or discontinued.

(7) Recommendations for documenting the discontinuation of subjects' participation in research.

OHRP notes that the Food and Drug Administration (FDA) is publishing elsewhere in this issue a notice announcing the availability of a final guidance document entitled ''Guidance for Sponsors, Clinical Investigators, and IRBs: Data Retention When Subjects Withdraw from FDA-Regulated Clinical Trials.'' OHRP believes the interpretations provided in the proposed draft guidance are harmonious with those provided in FDA's final guidance document. In particular, FDA's guidance document explains that under applicable FDA law and regulations, data collected on study subjects enrolled in an FDA-regulated clinical trial up to the time of subject withdrawal must remain in the trial database in order for the study to be scientifically valid. Likewise, OHRP's proposed draft guidance clarifies that when a subject informs an investigator of his/her decision to discontinue participation in research, or an investigator decides to terminate a subject's participation regardless of the subject's consent, the investigator may continue to analyze already collected individually identifiable private information about that subject. In addition, OHRP believes that its proposed draft guidance document is consistent with the HIPAA Privacy Rule (45 CFR part 160 and Subparts A and E of 56 CFR part 164), where applicable. The Privacy Rule gives an individual the right to revoke Authorization in writing, except to the extent a covered entity has taken action in reliance on the Authorization. In the context of research, this reliance exception permits the continued use and disclosure of protected health information already obtained pursuant to the Authorization prior to its revocation, to the extent necessary to protect the integrity of the research study.

II. Electronic Access

Persons with access to the Internet may obtain the draft guidance document on OHRP's Web site at *http://www.hhs.gov/ohrp/requests/.*

III. Request for Comments

OHRP is making its draft guidance document available for public comment. OHRP's guidance document will be finalized and issued after the public comments have been considered.

Dated: November 21, 2008.

Melody H. Lin,

Deputy Director, Office for Human Research Protections.

[FR Doc. E8–28369 Filed 11–28–08; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Colorado Regional Health Information Exchange (CORHIO)—Point of Care Exchange System Evaluation: Point of Care Questionnaires and Focus Groups.'' In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by January 30, 2009.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Colorado Regional Health Information Exchange (CORHIO)—Point of Care Exchange System Evaluation: Point of Care Questionnaires and Focus Groups

AHRQ proposes a case study of the point-of-care (POC) clinical exchange system at the Colorado Regional Health Information Exchange (CORHIO). The CORHIO is an AHRQ State and Regional Demonstration Project contract which supports the administrative and technical implementation of an information technology service to provide secure electronic transmission of clinical information between partner health care entities to improve the efficiency, quality, and safety of patient care.

The key element of CORHIO is the POC clinical exchange system, which doctors can use to access information about individual patients as they care for them. The POC clinical exchange system is an Internet-based portal which allows authorized users to log in and request clinical information for a specific patient. The POC clinical exchange system is composed of two functions: The patient search function and the data exchange function. The patient search function is supported by the CORHIO master patient index, which is an index of all the patients that have been seen within a given time period at CORHIO's partner health care organizations (HCOs). The patient search function allows users to enter identifying information for a patient, such as name, date of birth, or medical record number, and searches to determine if the patient has received medical care at one of the partner HCOs. The POC clinical exchange system will then display all potential matching identities available at the CORHIO partner HCOs. Users select the appropriate match, if it exists, and request available data for the selected patient. The data exchange function aggregates and displays the available data from multiple partner HCOs for the selected patient.

This proposed information collection will provide input from clinicians at four participating HCOs regarding the usability of the system and the value of the exchanged Clinical information to inform decision-making, patient disposition and potentially redundant test ordering. Additionally, this case study will provide important information to inform future design and phase implementation of the CORHIO system.

This case study is being conducted pursuant to AHRQ's statutory mandate to conduct and support research, evaluations and initiatives to advance the creation of effective linkages between various sources of health information, including the development of information networks (42 U.S.C. 299b-3(a)(3)).

Method of Collection

This case study includes 2 distinct data collections regarding the POC clinical exchange system:

1. POC Questionnaire—a survey of end-users at three emergency departments (ED) regarding their experiences with the POC clinical exchange system and its effect on patient care. This questionnaire will be used to collect data from the EDs for one week quarterly in 2009 and for the first quarter of 2010.

2. Focus Groups—focus groups with select high- and low-use users of the POC clinical exchange system from each of the three EDs and one Call Center. Focus groups will be conducted at 4 and 8 months after users begin using the POC system.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated burden hours for the respondents' time to participate in this project. The POC questionnaire will be administered to the three participating EDs only, while the focus groups will be held at both the EDs and the one participating call center. The POC questionnaire will be administered quarterly for an entire week at each ED. There are typically two doctors per shift, 21 shifts per week and an average of 25 patients seen by each doctor per shift. One attending physician per shift will respond, resulting in about 525 patient encounters per each ED over a one week period. Since the POC questionnaire will be completed for each patient seen, 525 questionnaires will be completed each quarter, resulting in about 2,100 completed questionnaires per year (4 quarters × 525 per quarter) per ED. The POC questionnaire is estimated to require about two minutes to complete.

However, the POC clinical exchange system will be used for only about 10 percent of the visits. This means that for 90 percent of the visits providers will check off ''Did not use'' and select a reason why they did not use the system, which will take 5 to 10 seconds. The maximum time of two minutes was used for all responses to calculate a conservative estimate of the burden.

The focus groups will be conducted twice a year at each of the four participating facilities and are expected to take one hour or less to complete. The maximum expected time of one hour was used to calculate a conservative estimate of the burden. The total burden hours for all data collections is estimated to be 242 hours.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
POC Questionnaire	3	2,100	2/60	210
Focus Groups	4	8	1	32
Total	7	na	na	242

Exhibit 2 shows the annualized cost burden for the respondent's time to participate in this project. The total cost burden is estimated to be $21,775.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate* ($)	Total cost burden ($)
POC Questionnaire	3	210	92.03	19,326
Focus Groups	4	32	76.53	2,449
Total	7	242	na	21,775

* Based upon the weighted average of the ''registered nurse'' mean and the ''surgeon'' mean of the average wages, May 2007 National Occupational Employment and Wage Estimates, United States, U.S. Department of Labor, Bureau of Labor Statistics. *http://www.bls.gov/oes/current/oes_nat.htm#b29–0000* (accessed Nov. 1, 2008). The ''surgeon'' mean salary was used for the 3 ED respondents and the ''registered nurse'' mean salary was used for the 1 Call Center.

Estimated Annual Costs to the Federal Government

Exhibit 3 shows the total and annualized cost of this two-year project to the federal government. The total cost is $34,730 and includes $7,500 for project development, $8,400 for data collection activities, $6,580 for data processing and analysis, $1,000 for the publication of results and $11,250 for project management.

EXHIBIT 3—ESTIMATED COST

Cost component	Total cost ($)	Annualized cost ($)
Project Development	7,500	3,750
Data Collection Activities	8,400	4,200
Data Processing and Analysis	6,580	3,290
Publication of Results	1,000	500
Project Management	11,250	5,625
Overhead	0	0
Total	34,730	17,365

Request for Comments

In accordance with the above-cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research, quality improvement and information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: November 14, 2008.

Carolyn M. Clancy,

Director.

[FR Doc. E8–28033 Filed 11–28–08; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: State Council on Developmental Disabilities Program Performance Report.

OMB No.: 0980–0172.

Description: A Developmental Disabilities Council Program Performance Report is required by federal statute. Each State Developmental Disabilities Council must submit an annual report for the preceding fiscal year of activities and accomplishments. Information provided

in the Program Performance Report will be used (1) in the preparation of the biennial Report to the President, the Congress, and the National Council on Disabilities and (2) to provide a national perspective on program accomplishments and continuing challenges. This information will also be used to comply with requirements in the Government Performance and Results Act of 1993.

Respondents: State Governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Council on Developmental Disabilities Program Performance Report ..	55	1	138	7,590
Estimated Total Annual Burden Hours:	.....	.....	.....	7,590

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–6974, *Attn:* Desk Officer for the Administration for Children and Families.

Dated: November 24, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–28249 Filed 11–28–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0576]

Guidance for Sponsors, Clinical Investigators, and IRBs; Data Retention When Subjects Withdraw From FDA-Regulated Clinical Trials; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled ''Data Retention When Subjects Withdraw from FDA-Regulated Clinical Trials.'' This guidance clarifies FDA's position that it is critical that data be retained from trial participants who decide to discontinue participation in a clinical study of an investigational product, who are withdrawn by their legally authorized representative, as applicable, or who were discontinued from participation by the clinical investigator. The guidance will be of interest especially to sponsors, clinical investigators, and members of investigational review boards (IRBs).

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov.* See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sara F. Goldkind, Office of Science and Health Coordination/Good Clinical Practice Program (HF–34), Food and Drug Administration, 5600 Fishers Lane, Rockville MD 20857, 301–827–3340.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for sponsors, clinical investigators, and IRBs entitled ''Data Retention When Subjects Withdraw from FDA-Regulated Clinical Trials.'' This guidance clarifies FDA's long-standing position that it is critical that data be retained from individuals who decide to discontinue participation in a clinical study of an investigational product, or who were discontinued from participation by the clinical investigator.

FDA developed this guidance in response to questions from sponsors, clinical investigators, and members of IRBs about previously collected data from subjects who withdraw or are withdrawn from clinical investigations. This guidance describes the regulatory and statutory basis for FDA's position, as well as the supporting ethical and quality standards, and outlines key points regarding the withdrawal of subjects from a clinical investigation. Because data resulting from these clinical investigations is used to support research applications and new product approvals, it is critical that FDA have a complete and accurate data set. If data were to be removed from the study database, the scientific validity of the data and thus FDA's analysis of it could be jeopardized potentially compromising the agency's ability to safeguard the public health.

This Level 1 guidance is being issued for immediate implementation to prevent the potential loss of important clinical trial data. This approach is consistent with FDA's good guidance practices regulation (21 CFR 10.115). If comments are received on this Level 1 guidance, FDA will review the comments and revise the guidance if appropriate. This guidance represents the agency's long-standing policy and current thinking on the retention of data when subjects withdraw from FDA-regulated clinical trials. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations. Interested persons may submit written comments on the guidance to the Division of Dockets Management (see **ADDRESSES**).

Elsewhere in this issue of the **Federal Register**, the Office of Human Research Protections (OHRP) is announcing the availability of a draft guidance document entitled ''Guidance on Important Considerations for When

Participation of Human Subjects in Research Is Discontinued.'' FDA believes the interpretation provided in its guidance is consistent with that provided in OHRP's draft guidance document.

II. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information under the investigational new drug regulation have been approved under OMB Control No. 0910–0014. The collections of information under the investigational device exemptions regulation have been approved under OMB Control No. 0910–0078.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified 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.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/oc/gcp/guidance.html* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: November 5, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–28387 Filed 11–28–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Neural Degeneration, Biophysics and Differentiation.

Date: December 8, 2008.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mary Custer, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892–7850, (301) 435–1164, *custerm@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Cartilage/Musculoskeletal Soft Tissue Biology and Mechanics.

Date: December 8, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: John P. Holden, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, *hoIdenjo@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: Chemoprevention.

Date: December 8, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Zhiqiang Zou, MD, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6190, MSC 7804, Bethesda, MD 20892, 301–451–0132, *zouzhiq@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: Oncology.

Date: December 9, 2008.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mary Bell, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6188, MSC 7804, Bethesda, MD 20892, 301–451–8754, *bellmar@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel LIRR and RIBT Member Conflicts.

Date: December 16–17, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: George M. Barnas, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Neurogenetics, Neurodevelopment and Neurological Disorders.

Date: December 17, 2008.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Vilen A. Movsesyan, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040M, MSC 7806, Bethesda, MD 20892, 301–402–7278, *movsesyanv@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 19, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–28031 Filed 11–28–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Child Health and Human Development Special Emphasis Panel, December 8, 2008, 8 a.m. to December 8, 2008, 5 p.m., Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814 which was published in the **Federal Register** on November 13, 2008, 72 FR 67189.

The meeting location has been changed from the Hyatt Regency Bethesda, Bethesda, Maryland to the National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Bethesda, Maryland. The meeting is closed to the public.

Dated: November 21, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–28395 Filed 11–28–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

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 portions of the meeting devoted to the review and evaluation of journals for potential indexing by the National Library of Medicine will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. Premature disclosure of the titles of the journals as potential titles to be indexed by the National Library of Medicine, the discussions, and the presence of individuals associated with these publications could significantly frustrate the review and evaluation of individual journals.

Name of Committee: Literature Selection Technical Review Committee.

Date: February 26–27, 2009.

Open: February 26, 2009, 9 a.m. to 11 a.m.

Agenda: Administrative reports and program discussion.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 26, 2009, 11 a.m. to 5 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 27, 2009, 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Sheldon Kotzin, MLS, Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Bldg 38/Room 2W06, Bethesda, MD 20894, 301–496–692, *Sheldon_Kotzin@nlm.nih.gov*.

Any interested person may file written comments with the Committee by forwarding the statement to the Contact Person listed on this Notice. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government ID will need to show a photo ID and sign in at the security desk upon entering the building.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, 1–IHS)

Dated: November 20, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy, NIH.

[FR Doc. E8–28204 Filed 11–28–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Proposed Project: GPRA Client Outcomes for the Substance Abuse and Mental Health Services Administration (SAMHSA)—(OMB No. 0930–0208)—Revision

SAMHSA's Center for Substance Abuse Treatment (CSAT) is responsible for collecting data from discretionary services grants and contracts where client outcomes are to be assessed at three points (intake, discharge, and post-intake). SAMHSA's CSAT-funded projects are required to submit these data as a contingency of their award. The analysis of the data also will help determine whether the goal of reducing health and social costs of drug use to the public is being achieved.

The primary purpose of this data collection activity is to meet the reporting requirements of the Government Performance and Results Act (GPRA) by allowing SAMHSA to quantify the effects and accomplishments of SAMHSA's CSAT programs.

CSAT requests approval to increase the number of questions in the instrument due to the agency's need for additional information from its programs to satisfy reporting needs. The additional information needed is the following:

- Co-Occurring disorders screening—Over the years, CSAT has focused attention on co-occurring disorders and has established programs designed specifically for persons with both mental health and substance abuse problems. CSAT wants to make sure that all clients are screened regardless of the types of program they enter in order to get the treatment they need. CSAT has not had a formal way of assessing whether all programs screen clients for co-occurring disorders and consequently, these mental health problems potentially go untreated. CSAT will be able to monitor if clients are screened and for those who screen

positive, monitor their outcomes and activities per the NOMS.

• Veteran Status—Collection of these data will allow CSAT to identify the number of veterans served and the types of services they may receive. Identifying a client's veteran status allows CSAT and the grantees to monitor these clients and explore whether special services or programs are needed to treat them for substance abuse and other related issues. Identification of veteran status will also allow coordination between SAMHSA and other Federal agencies in order to provide a full range of services to veterans. CSAT will also be able to monitor their outcomes and activities per the NOMS.

• HIV Test Status—SAMHSA is committed to addressing the twin epidemics of HIV and substance abuse; the agency has received funding to augment the HIV testing program and hopes to reduce the number of new cases. The goal is for at least 80 percent of the clients to be tested for HIV. The test results give clients and programs an important piece of information needed for their substance abuse treatment plans. With the testing information, CSAT will monitor the numbers of treatment clients who have been tested.

In addition, we will add a response option to an existing item:

• Housing for College Students—Housing stability is one of the NOMs and should be calculated as accurately as possible, particularly for programs that target college students such as Campus SBIRT. There currently is no way to distinguish the housing status of students living on campus from those housed elsewhere. This additional information can be captured by adding a new response option for the existing housing question.

CSAT requests approval to add a grant program to this data collection:

• CSAT will add the Access to Recovery (ATR) grant program to this data collection for the CSAT Government Performance and Results Act (GPRA) Client Outcome Measures for Discretionary Programs instrument. The Voucher Information Form and Voucher Transaction Form (OMB 0930–0266, Expiration Date 5/31/11) will remain under separate data collections. ATR requires the integration of evidence-based practices and a systematic federal scrutiny of outcomes through GPRA. The GPRA focuses on results or outcomes in evaluating the effectiveness of Federal activities and on measuring progress toward achieving national goals and objectives.

The estimated annual response burden for this data collection is provided in the table below:

ESTIMATES OF ANNUALIZED HOUR BURDEN [1]—CSAT GPRA CLIENT OUTCOME MEASURES FOR DISCRETIONARY PROGRAMS

Center/form/respondent type	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Added burden proportion [2]	Total annual burden hours
Clients							
Adolescents	3,900	4	15,600	.35	5,460	.37	2,020
Adults:							
General (non ATR or SBIRT).	28,000	3	84,000	.35	29,400	.37	10,878
ATR	53,333	3	159,999	.35	56,000	.37	20,720
SBIRT [3] Screening Only.	150,618	1	150,618	.13	19,580	0	0
SBIRT Brief Intervention.	27,679	3	83,037	.20	16,607	0	0
SBIRT Brief Tx & Refer to Tx.	9,200	3	27,600	.35	9,660	.37	3,574
Client Subtotal	272,730		520,854		136,707		37,192
Data Extract [4] and Upload							
Adolescent Records	73 grants	53 × 4	212	.18	38		38
Adult Records:							
General (non ATR or SBIRT).	400 grants	70 × 3	210	.18	38		38
ATR Data Extract	53,333	3	160,000	.16	25,600		25,600
ATR Upload [5]	24 grants	3	160,000	1 hr. per 6,000 records.	27		27
SBIRT Screening Only Data Extract.	7 grants	21,517 × 1	21,517	.07	1,506		1,506
SBIRT Brief Intervention Data Extract.	7 grants	3,954 × 3	11,862	.10	1,186		1,186
SBIRT Brief Tx&Refer to Tx Data Extract.	7 grants	1,314 × 3	3,942	.18	710		710
SBIRT Upload [6]	5 grants		171,639	1 hr. per 6,000 records.	29		29
Data Extract and Upload Subtotal.	53,856		529,382		29,134		29,134

ESTIMATES OF ANNUALIZED HOUR BURDEN [1]—CSAT GPRA CLIENT OUTCOME MEASURES FOR DISCRETIONARY PROGRAMS—Continued

Center/form/respondent type	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Added burden proportion [2]	Total annual burden hours
Total	326,586	.....	1,050,236	.....	165,841	.....	66,326

NOTES:
[1] This table represents the maximum additional burden if adult respondents, for the discretionary services programs including ATR, provide three sets of responses/data and if CSAT adolescent respondents provide four sets of responses/data.
[2] Added burden proportion is an adjustment reflecting customary and usual business practices programs engage in (*e.g.*, they already collect the data items).
[3] Screening, Brief Intervention, Treatment and Referral (SBIRT) grant program:
* 150,618 Screening Only (SO) respondents complete section A of the GPRA instrument, all of these items are asked during a customary and usual intake process resulting in zero burden; and
* 27,679 Brief Intervention (BI) respondents complete sections A & B of the GPRA instrument, all of these items are asked during a customary and usual intake process resulting in zero burden; and
* 9,200 Brief Treatment (BT) & Referral to Treatment (RT) respondents complete all sections of the GPRA instrument.
[4] Data Extract by Grants: Grant burden for capturing customary and usual data.
[5] Upload: All 24 ATR grants upload data.
[6] Upload: 5 of the 7 SBIRT grants upload data; the other 2 grants conduct direct data entry.

The estimates in this table reflect the maximum annual burden for currently funded discretionary services programs. The number of clients/participants served in following years is estimated to be the same assuming level funding of the discretionary programs, resulting in the same annual burden estimate for those years.

Written comments and recommendations concerning the proposed information collection should be sent by December 31, 2008 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: November 24, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–28431 Filed 11–28–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Center for Substance Abuse Treatment (CSAT) National Advisory Council on December 11, 2008.

The meeting is open to the public and will include discussion of the Center's policy issues, and current administrative, legislative, and program developments.

Attendance by the public will be limited to space available. Public comments are welcome. Please communicate with the CSAT Council's Designated Federal Official, Ms. Cynthia Graham (see contact information below), to make arrangements to attend, comment or to request special accommodations for persons with disabilities.

Substantive program information, a summary of the meeting, and a roster of Council members may be obtained as soon as possible after the meeting, either by accessing the SAMHSA Committee Web site, *http://www.nac.samhsa.gov/CSAT/csatnac.aspx,* or by contacting Ms. Graham. The transcript for the meeting will also be available on the SAMHSA Committee Web site within three weeks after the meeting.

Committee Name: Substance Abuse and Mental Health Services Administration, CSAT National Advisory Council.

Date/Time/Type: December 11, 2008. From 8:30 a.m.–5 p.m.: Open.

Place: 1 Choke Cherry Road, Sugarloaf and Seneca Conference Rooms, Rockville, Maryland 20857.

Contact: Cynthia Graham, M.S., Designated Federal Official, SAMHSA/CSAT National Advisory Council, 1 Choke Cherry Road, Room 5–1036, Rockville, MD 20857, Telephone: (240) 276–1692.

Fax: (240) 276–1690, E-mail: *cynthia.graham@samhsa.hhs.gov.*

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health, Services Administration.

[FR Doc. E8–28309 Filed 11–28–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention (CSAP) National Advisory Council will meet on December 15, 2008, from 2 p.m. to 3 p.m. via teleconference.

The meeting will include discussion and evaluation of grant applications reviewed by Initial Review Groups. Therefore, the meeting will be closed to the public as determined by the Administrator, SAMHSA, in accordance with Title 5 U.S.C. 552b(c)(6) and 5 U.S.C. App. 2, Section 10(d).

Substantive program information, a summary of the meeting, and a roster of Committee members may be obtained either by accessing the SAMHSA Committee's Web site at *https://www.samhsa.gov/council/csap/csapnac.aspx* as soon as possible after the meeting, or by contacting CSAP National Advisory Council's Designated Federal Official, Ms. Tia Haynes (see contact information below).

Committee Name: Substance Abuse and Mental Health Services Administration Center for Substance Abuse Prevention National Advisory Council.

Date/Time/Type: December 15, 2008, 2 p.m. to 3 p.m.: CLOSED.

Place: 1 Choke Cherry Road, Conference Room 4–1058, Rockville, Maryland 20857.

Contact: Tia Haynes, Designated Federal Official, SAMHSA/CSAP National Advisory Council, 1 Choke Cherry Road, Room 4–1066, Rockville, MD 20857, Telephone: (240) 276–

2436; FAX: (240) 276–2430, E-mail: *tia.haynes@samhsa.hhs.gov.*

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. E8–28310 Filed 11–28–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Published Privacy Impact Assessments on the Web

AGENCY: Privacy Office, DHS.

ACTION: Notice of Publication of Privacy Impact Assessments.

SUMMARY: The Privacy Office of the Department of Homeland Security (DHS) is making available eighteen (18) Privacy Impact Assessments on various programs and systems in the Department. These assessments were approved and published on the Privacy Office's Web site between July 1 and September 30, 2008.

DATES: The Privacy Impact Assessments will be available on the DHS Web site until January 30, 2009, after which they may be obtained by contacting the DHS Privacy Office (contact information below).

FOR FURTHER INFORMATION CONTACT: Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Mail Stop 0550, Washington, DC 20528, or e-mail: *pia@dhs.gov.*

SUPPLEMENTARY INFORMATION: Between July 1 and September 30, 2008, the Chief Privacy Officer of the Department of Homeland Security (DHS) approved and published eighteen (18) Privacy Impact Assessments (PIAs) on the DHS Privacy Office Web site, *http://www.dhs.gov/privacy,* under the link for ''Privacy Impact Assessments.'' These PIAs cover eighteen (18) separate DHS programs. Below is a short summary of those programs, indicating the DHS component responsible for the system, and the date on which the PIA was approved. Additional information can be found on the Web site or by contacting the Privacy Office.

System: United States Visitor and Immigrant Status Indicator Technology Program/Department of Homeland Security and the United Kingdom Border Agency's International Group Visa Services Project.

Component: US–VISIT.

Date of approval: July 1, 2008.

DHS provides the United Kingdom Border Agency's (UKBA) International Group Visa Services (formerly known as UKvisas) with additional information to determine whether visa applicants for entry into the United Kingdom are eligible to obtain a visa or other travel documents according to applicable United Kingdom laws. Accordingly, the United States Visitor and Immigrant Status Indicator Technology (US VISIT) Program will receive biometric and biographic information from UKBA International Group Visa Services about applicants for visas to the United Kingdom and will query those applicants' biometric information against the Automated Biometric Identification System's (IDENT) list of subjects of interest (e.g., ''Subjects of interest'' are people of interest to the U.S. or international law enforcement and/or intelligence agencies because of suspected or confirmed illegal activity). US-VISIT provides UKBA with results from the query, along with, in some cases, details of the analysis supporting the returned results. US–VISIT published this PIA because US–VISIT will receive and share personally identifiable information (PII) with the UKBA.

System: Procedures for Processing Travel Documents at the Border.

Component: Customs and Border Protection.

Date of approval: July 2, 2008.

U.S. Customs and Border Protection (CBP), published this PIA to give notice of its procedures for recording certain border crossing information and validating the travel documents provided by individuals at air, land, and sea ports of entry who are admitted or paroled into the United States. CBP maintains information regarding persons who are admitted or paroled into the United States, and where applicable exit the United States in accordance with the Privacy Act system of records notices for the Border Crossing Information (BCI) and for the Treasury Enforcement Communications System (TECS), which is being revised and will be republished in the future as TECS (no longer an acronym).

As part of processing travelers at the border, CBP accepts different types of documents for purposes of establishing the identity, citizenship, and admissibility of travelers seeking to enter the United States. CBP populates BCI with certain information provided by or on behalf of persons who are admitted, paroled into, or depart the U.S. In addition the information maintained by BCI regarding such persons may be derived from different DHS systems of records, Department of State systems of records, and the systems of other governmental or tribal authorities (including foreign governments). CBP uses this information to validate the travel documentation provided by or on behalf of the individual, make determinations regarding an individual's admissibility, and ensure compliance with all other U.S. laws enforced by CBP at the border.

This PIA explains the information technology and the information flow between BCI, TECS, and other Privacy Act system of records, including the Non-Federal Entity Data System.

System: Operations Center Incident Management System.

Component: Transportation Security Administration.

Date of approval: July 7, 2008.

Under the Aviation and Transportation Security Act (ATSA), the Transportation Security Administration (TSA) has ''responsibility for security in all modes of transportation.'' TSA uses an operations center incident management system called WebEOC to perform incident management, coordination, and situation awareness functions for all modes of transportation. The system stores information that it receives about the following categories of individuals: (1) Individuals who violate, or are suspected of violating transportation security laws, regulations, policies or procedures; (2) individuals whose behavior or suspicious activity resulted in referrals by Ticket Document Checkers (TDC) to Behavior Detection Officer (BDO) or Law Enforcement Officer (LEO) interview (primarily at airports); or (3) individuals whose identity must be verified, or checked against Federal watch lists. Individuals whose identity must be verified includes both those individuals who fail to show acceptable identification documents to compare to boarding documents and law enforcement officials seeking to fly armed. The system also collects and compiles reports from Federal, state, local, tribal, or private sector security officials related to incidents that may pose a threat to transportation or national security. Daily reports will be provided to executives at TSA and DHS to assist in incident and operational response management.

System: RealEyes Project.

Component: Science & Technology.

Date of approval: July 21, 2008.

RealEyes is a research and development project in the DHS Science & Technology Directorate (S&T) that seeks to test the operational

effectiveness and efficiency of streaming video for first responders and law enforcement applications. RealEyes is a prototype software system that would allow first responders and law enforcement officials equipped with Personal Digital Assistants (PDAs) to send and receive live video and geospatial coordinates, view video from fixed or mobile cameras, and receive data (video, photos and text) from a field command post using basic cellular technology. S&T conducted a PIA because a planned phase of technology testing may involve incidentally capturing images of individuals who are not volunteer participants in the research effort. This PIA covers only the activities conducted during the testing phase of the RealEyes project. If the RealEyes technology is deployed into operational use, the DHS Component implementing the technology will be responsible for completing any subsequent privacy assessments of the RealEyes technology and its use.

System: Standoff Explosives Detective Technology Demonstration Program.

Component: Science & Technology.

Date of approval: July 21, 2008.

DHS S&T initiated the Standoff Explosives Detection Technology Demonstration Program (SOTDP) in March 2007. This is a multi-year research and development (R&D) program (through 2013) designed to accelerate the development of explosive countermeasures-standoff technologies, concept of operations, and training to prevent explosive attacks at large public events such as conventions, concerts, sporting events, public celebrations, etc. The purpose of this program is to develop an integrated system of devices to improve security and public safety, while not impacting pedestrian traffic flow or violating personal freedoms and individual privacy. DHS S&T is sponsoring the SOTDP and associated demonstrations in a multi-year R&D initiative. S&T has a program management and oversight role in the project, which includes providing policy direction and input on program requirements. This PIA is being conducted because PII will be collected during the R&D process.

System: First Responder Training System.

Component: Federal Emergency Management Agency.

Date of approval: July 16, 2008.

Federal Emergency Management Agency (FEMA) developed the First Responder Training System (FRTS), FirstResponderTraining.gov. FRTS serves as a central access point to validate, FEMA-approved Weapons of Mass Destruction training and information. FRTS is an internet-based tool used to guarantee the provision of critical training for First Responders. The purpose of this PIA is to ensure the privacy risks associated with the collection of PII are addressed for this new system.

System: Fraud Detection and National Security Data System.

Component: U.S. Citizenship and Immigration Services.

Date of approval: July 29, 2008.

The United States Citizenship and Immigration Services (USCIS) developed the Fraud Detection and National Security Data System (FDNS–DS), a case management system used to record, track, and manage immigration inquiries, investigative referrals, law enforcement requests, and case determinations involving benefit fraud, criminal activity, public safety and national security concerns. The FDNS–DS system is an upgrade of the Fraud Tracking System (FTS). The FTS PIA was published on June 24, 2005.

System: Screening of Passengers by Observation Techniques Program.

Component: Transportation Security Administration.

Date of approval: August 5, 2008.

The Screening of Passengers by Observation Techniques (SPOT) program is a behavior observation and analysis program designed to provide the TSA BDOs with a means of identifying persons who pose or may pose potential transportation security risks by focusing on behaviors indicative of high levels of stress, fear, or deception. The SPOT program is a derivative of other behavioral analysis programs that have been successfully employed by law enforcement and security personnel both in the U.S. and around the world.

System: Person Centric Query Service Supporting Immigration Status Verifiers of the USCIS National Security and Records Verification Directorate/ Verification Division Update.

Component: U.S. Citizenship and Immigration Services.

Date of approval: August 13, 2008.

This is an update to the existing PIA for the USCIS Verification Division, Immigration Status Verifiers' use of the Person Centric Query Service (PCQS), operating through the USCIS Enterprise Service Bus to: (1) expand the PCQS person-search capability, and (2) describe the privacy impact of updating the PCQS by adding access to five additional systems to the PCQS query; ENFORCE Integrated Database, the Executive Office Immigration Review System, the Refugees, Asylum, and Parole System, the TECS Arrival/ Departure Data Query, and the TECS Subject Lookout Search.

System: HR Solutions.

Component: Department-Wide.

Date of approval: August 12, 2008.

The Office of the Chief Human Capital Officer (OCHCO) operates the HR Solutions System. HR Solutions is a newly developed system designed to aid in the administration of the Human Capital Processing of human resources operations and services. OCHCO conducted this PIA because HR Solutions collects and maintains PII.

System: Secure Information Management Service Pilot with Inter-Country Adoptions Update.

Component: U.S. Citizenship and Immigration Services.

Date of approval: August 13, 2008.

USCIS published this update to the PIA for the Secure Information Management Service (SIMS). This update describes the electronic sharing of case management data with the Department of State (DoS) necessary to expedite and improve the processing of inter-country adoption cases. Specifically, the PII will be shared electronically with the DoS to maintain statistics related to inter-country adoption cases.

System: Customer Identity Verification Pilot.

Component: U.S. Citizenship and Immigration Services.

Date of approval: August 15, 2008.

USCIS prepared a PIA for the Customer Identity Verification (CIV) Pilot. The purpose of this pilot is to assess the viability of using fingerprint-based identity verification along with information from previous biometric encounters in the USCIS benefit adjudication process. USCIS will test this capability for a period of approximately four months in an operational environment consisting of four field offices. USCIS will use fingerprint scanners connected to the US–VISIT Program's IDENT to implement the CIV Pilot.

System: Bond Management Information System Web Version.

Component: Immigration and Customs Enforcement.

Date of approval: August 25, 2008.

The Bond Management Information System/Web Version (BMIS Web) is an immigration bond management database used primarily by the Office of Financial Management at U.S. Immigration and Customs Enforcement (ICE). The basic function of BMIS Web is to record and maintain for financial management purposes the immigration bonds that are posted for aliens

involved in removal proceedings. ICE has conducted this PIA because the system collects PII.

System: Computer Linked Application Information Management System.

Component: U.S. Citizenship and Immigration Services.

Date of approval: September 5, 2008.

This PIA analyzes the Computer Linked Application Information Management System (CLAIMS) 4. CLAIMS 4 is a DHS USCIS system for processing Applications for Naturalization. USCIS conducted this PIA to document, analyze, and assess its current practices with respect to the PII it collects, uses, and shares; and to improve its ability to provide appropriate citizenship and immigration status information to users.

System: Benefits Processing of Applicants other than Petitions for Naturalization, Refugee Status, and Asylum.

Component: U.S. Citizenship and Immigration Services.

Date of approval: September 5, 2008.

USCIS receives and adjudicates applications for all United States immigration benefits. This PIA covers the USCIS systems associated with processing all immigration benefits except naturalization, asylum, and refugee status. These systems include the Computer Linked Adjudication Information Management System (CLAIMS 3), the Citizenship and Immigration Services Centralized Oracle Repository, the Interim Case Management System, Integrated Voice Response System, and the Integrated Card Production System. Other USCIS systems involved in the processing of benefits are covered by other PIAs.

System: Document Management and Records Tracking System.

Component: Federal Emergency Management Agency.

Date of approval: September 8, 2008.

Federal Emergency Management Agency (FEMA) developed the Document Management and Records Tracking System (DMARTS). DMARTS is an Enterprise Content Management system that collects PII from claimants to carry out its mission of assisting individuals who apply for disaster assistance benefits. DMARTS will move paper files to an electronic repository. This PIA examines the privacy implications to ensure that adequate privacy considerations and protections have been applied to this electronic framework.

System: Microfilm Digitization Application System.

Component: U.S. Citizenship and Immigration Services.

Date of approval: September 15, 2008.

USCIS Records Division maintains the Microfilm Digitization Application System (MiDAS), which houses 85 million electronic immigration-related records previously stored on microfilm. USCIS conducted this PIA to analyze the privacy impacts associated with the new release of MiDAS that will enable USCIS to (1) Electronically search and retrieve historical immigration-related records, (2) process Web-based requests for these records submitted by Federal, state, and local Government and Public Genealogy Customers, (3) provide case tracking capabilities for USCIS Records Division staff, and (4) provide these records to the law enforcement and intelligence communities.

System: Department of Homeland Security General Contact List.

Component: DHS-Wide.

Date of approval: July 23, 2008.

Many DHS operations and projects collect a minimal amount of contact information in order to distribute information and perform various other administrative tasks. Department Headquarters conducted this PIA because contact lists contain PII. The Department added the following systems to this PIA:

- Science and Technology Attendance Lists
- Science and Technology Private Sector Contact Lists
- Science and Technology Subject-Matter Expert Lists
- Science and Technology Media Contact List
- Transportation Security Administration Intermodal Security Training and Exercise Program (I–STEP) Exercise Information System (EXIS)
- Transportation Security Administration Travel Protocol Office Program

Hugo Teufel III,

Chief Privacy Officer.

[FR Doc. E8–28397 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2007–0042]

Application for the Containerized Cargo Ship ATLANTIC COMPASS, Review for the Inclusion in the Shipboard Technology Evaluation Program; Final Environmental Assessment and Finding of No Significant Impact

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of the Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) that evaluated the potential environmental impacts resulting from accepting the vessel the ATLANTIC COMPASS into the Shipboard Technology Evaluation Program (STEP). Under the STEP, the ATLANTIC COMPASS will be using and testing the Ecochlor™ Inc. Ballast Water Treatment System (BWTS), as the vessel operates in U.S. waters.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, are part of the docket USCG–2007–0042. These documents are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You can also find all docketed documents on the Federal Document Management System at *http://www.regulations.gov*, United States Coast Guard docket number USCG–2007–0042.

You may submit comments identified by docket number USCG–2007–0042 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

To avoid duplication, please use only one of these methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this assessment please contact LCDR Brian Moore at 202–372–1434 or e-mail: *brian.e.moore@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: This document has been tiered off the Programmatic Environmental Assessment (PEA) for STEP dated December 8, 2004 (69 FR 71068, Dec 8,

2004), and was prepared in accordance with the National Environmental Policy Act of 1969 (Section 102 (2)(c)), as implemented by the Council of Environmental Quality regulations (40 CFR parts 1500–1508) and Coast Guard Commandant Instruction M16475.1D. From these documents, the Coast Guard has prepared an FEA and FONSI for accepting the ATLANTIC COMPASS into the STEP.

Response to Comments: The Coast Guard requested comments on the Draft Environmental Assessment (DEA) when the Notice of Availability and Request for Public Comments was published in the **Federal Register** on April 4, 2008 (73 FR 18543, Apr. 4, 2008). The Coast Guard received 31 substantive comments total from 4 agencies. The Coast Guard has responded to all of the comments that were within the scope of the DEA.

One commenter requested a description of the circumstances under which ballast is discharged without any treatment.

These circumstances are described in 33 CFR 151.2030(b). The Coast Guard has determined that in order to keep the FEA concise this background information should not be included in the document.

One commenter asked for clarification regarding the statement ''* * * treatment system is expected to have no impact on water quality, biological resources * * *''. The commenter asked how there could be no impact when residuals (biocides) would be released.

The Coast Guard acknowledges this comment, but disagrees with the inference. This paragraph refers strictly to the effects of the BWT system as it pertains to coastal barrier systems, and, as such, we conclude there will be no impact on water quality as it affects coastal barrier systems. The overall effects of residuals on water quality are discussed elsewhere in the FEA.

One commenter asked under what circumstances a vessel would be granted a safety waiver.

The circumstances in which a safety waiver can be used are described in 33 CFR 151.2030(b). The Coast Guard has determined that in order to keep the FEA concise, this background information should not be included in the FEA.

One commenter requested examples of accuracy and precision related to the target final concentration of the automated system (i.e., does it produce a 5.0 ppm concentration every time or is there some variation involved?).

The Coast Guard has determined that the initial dosage values that have been proposed by the applicant are based solely upon laboratory results using validated Environmental Protection Agency (EPA) methods. The STEP program is intended to provide the sort of detailed information requested by the commenter. As of now, only laboratory values have been established. Gathering actual shipboard examples of dosing parameters is a primary goal of the STEP.

One commenter requested clarification regarding the statement ''* * * that chlorite reacts with metals.'' The commenter asked which metals would cause a reaction and if processes have been developed to assess vessel damage.

The Coast Guard has determined that the clarification of potential for metal reactions with the treatment chemicals is outside the scope of this FEA, which is narrowly focused on the potential for impacts to the environment. The Coast Guard, the ship's owner/operator, classification society, and flag administration are also monitoring the ship's structure under different laws, rules, and regulations.

One commenter asked how long it would take chlorate to decompose and if chlorate and chlorite have an impact on organisms.

The Coast Guard has determined that the degradation rate of chlorate is similar to that of chlorite, but was not included because it is such a small fraction of the degradation products of ClO_2. Both chlorate and chlorite are biocides.

One commenter requested estimated water residency times for the harbors.

The system manufacturer has not provided the Coast Guard with any information about harbor water residency times (for the chemical residuals associated with this system). However, the Coast Guard believes that based on the non-persistent nature of the ClO_2 and the long residence time associated with this vessel's voyages, that the amount of residual available for discharge is negligible and should not present an accumulation hazard.

One commenter requested clarification regarding the statement ''residual chemical levels are thought to be below applicable EPA and state discharge standards.'' The commenter asked if there were any data to support this statement and what the preliminary testing levels and standards were.

The Coast Guard has determined that there are no known state or Federal standards for discharge of ClO_2, or its degradation products, into marine waters. However, the reported discharge concentrations of these residuals are not detected when held beyond five days and up to 1.5 ppm when held between one and two days. These levels are below the levels associated with significant toxicity to aquatic organisms, even before the dilution effects of discharge into unconfined waters.

One commenter asked what sodium sulfate concentrations were produced and if they would be toxic. The commenter also asked if there was any information available regarding sodium sulfate and its effects.

The Coast Guard has determined that sulfates in several forms are common constituents of seawater. The Ecochlor™ system is expected to introduce ~5 ppm sulfate against a background of ~2600 ppm sulfate. The impact of this additional load is expected to be negligible.

One commenter requested that a description of the planktonic communities and potential indirect effects on fisheries should be included in the document. The commenter also suggested including a map of the ports.

The Coast Guard disagrees with the suggestion of including a map of the harbor locations. Each port is part of a major metropolitan area of the same name and easily located on any map, chart or Web mapping service. Information on plankton and fisheries is included in the FEA.

One commenter asked if the chlorite residues from the Ecochlor™ system could impact small marine invertebrates, the food source for the endangered piping plover.

The Coast Guard has consulted with the U.S. Fish and Wildlife Services which has stated that accepting the ATLANTIC COMPASS into the STEP is not likely to adversely affect any listed species including the piping plover, if the ship operates in accordance with its application.

One commenter stated that there was an introduction to Baltimore Harbor, but not Portsmouth Harbor.

The Coast Guard agrees with this comment and has added introductory information about Portsmouth Harbor to the FEA.

One commenter stated that the biological surveys in the section *Benthos, Baltimore Harbor* are out-dated (conducted in 1975 and 1983). The commenter requested that more recent data be provided.

The Coast Guard agrees with this comment and has updated this section.

One commenter stated that the benthic index of biological integrity information seemed out of place. The commenter suggested that the information be removed or described in more detail. The commenter also requested that information about dominant species be included.

The Coast Guard agrees and the section has been simplified to improve readability and consistency with other sections including discussion of dominant species.

One commenter asked if there were any wetlands in Portsmouth harbor.

The Coast Guard has determined that wetlands in Portsmouth harbor are typical for the Chesapeake and that they are described in the FEA.

One commenter asked if there were any planktivorous fish that may be indirectly affected by potential impacts on planktonic communities.

The Coast Guard believes that the analysis of ecosystems conducted in the PEA includes the potential direct and indirect impacts upon all fish species, including plankton eaters. This analysis has concluded that the range of impacts resulting from the preferred alternative runs from not significant to potentially beneficial based on the probability that the BWMS under evaluation may prevent the introduction of non-indigenous species which could have very significant adverse impacts on the ecosystems under study, including plankton eaters.

One commenter asked for the average salinity and turbidity values for the Newark Bay, what levels were considered low for dissolved oxygen and requested that a list of the toxic pollutants in the Chesapeake Bay be included in the document.

The Coast Guard disagrees that the additional water body characterization information requested by the commenter is necessary to make a determination about whether to accept the ATLANTIC COMPASS into the STEP because the Coast Guard has determined that ambient turbidity, dissolved oxygen, and toxic pollutant levels are not relevant to the degradation pathways for the potential treatment residuals. For the same reason, the Coast Guard declines to include a list of toxic pollutants in the Chesapeake Bay in the document.

One commenter stated that the potential impact of chlorite is underestimated and the toxicity of chlorite is not mentioned in the document. The commenter stated that according to *http://www.pesticideinfo.org*, chlorite causes serious sub-lethal effects including carcinogenicity and reproductive, developmental, and neurological toxicity. The commenter also stated that it is inadequate to only examine the LC_{50} of chlorite and that the LC_{50} is too extreme of an endpoint to determine whether or not the biological resources will be impacted.

Due to the non-persistent nature of the chemicals, the Coast Guard believes that all treatment residues will have degraded to levels sufficiently safe for discharge for the purposes of making a decision about STEP acceptance. Physical and chemical analysis of the treated ballast water is a primary goal of the STEP.

One commenter asked for clarification regarding the statement ''the potential impacts from this action will primarily be to the planktonic community''. The commenter stated that out of 13 studies that were listed in Addendum F, only 3 were performed on plankton, and had LC_{50} well below the value for ''compiled toxicity levels'' reported in the text (''The compiled toxicity levels are mostly greater than * * * 75,000 ug/L for chlorite * * *'').

Based on the extended residence times that the biocide will be stored in the vessel ballast tanks, the Coast Guard has determined that all treatment residues will have degraded to levels sufficiently safe for discharge for the purposes of making a decision about STEP acceptance. Physical and chemical analysis of the treated ballast water is a primary goal of the STEP.

One commenter stated that the link for EPA Aquire (Addendum F) was broken, and the previous studies need to be properly referenced. The commenter also stated that the table is not reader friendly, and it is unclear whether the algae species tested were not affected by chlorite exposure because chlorite is not toxic to algae, or because the concentrations administered were low.

The Coast Guard was not able to replicate the difficulty locating the EPA Aquire database. The Coast Guard appreciates the time and expertise the EPA has placed into its toxicity database. However, the Coast Guard is not an appropriate agent for making changes to an EPA work product. The data show that algae are not being affected by chlorite. Since the evaluated dosages include the expected maximum discharge concentrations, the negligible impact conclusion is supported.

One commenter asked how chlorite, chlorate, and chlorine dioxide impact biological resources. The commenter also stated that a discussion of the local planktonic communities should be included in the document.

The Coast Guard has determined that the treatment chemical—chlorine dioxide—and its initial degradation products are toxic to biological organisms. That is why they are proposed for use as ballast water treatments. The applicant has provided bench top data that show the residuals of these biocides are small enough and dilute quickly enough upon discharge from the ship that they are not likely to have a long term or cumulative adverse impact on the receiving water. However, characterization and assessment of the effluent is a principal goal of the STEP and these values will be used to determine further suitability of the BWTS for use in U.S. waters. The use of the pesticide info.org report is not directly relevant as that information is based on human exposures which are not likely to occur since the water will be discharged directly to the sea in industrial harbors.

One commenter asked what the typical port pH values were. The commenter also asked what would cause a drop in pH.

The Coast Guard disagrees that the information requested by the commenter is necessary, because of the *de minimis* volumes on water discharge into the unconfined industrial port waters. Therefore, the requested information is not needed to make a determination whether to accept the ATLANTIC COMPASS into the STEP. Characterization of the effluent is a primary component of the STEP.

One commenter asked for clarification regarding the statement ''* * * the discharge pH will still generally be near neutrality * * * not likely pose a significant negative impact.''

The Coast Guard has determined that the actual impact from a single ship discharging into a harbor is too small to have other than a negligible impact to the harbor itself and no measurable impact on the larger coastal environment.

One commenter asked what the chlorine (gas) emission limits were. The commenter also asked if it was harmful and if testing for Cl_2 will be conducted.

The Coast Guard has determined that none of the degradation pathways for chlorine dioxide include formation of elemental chlorine (Cl_2, a gas at normal temperature); the end product of degradation is chloride ion (Cl^-), a harmless and ubiquitous component of seawater.

One commenter asked if there were any long term impacts from chlorite. The commenter stated that chlorite decomposition appears to take between 70–200 days and that this amount of time and the continuous discharges from the vessel (described as every 35 days for a round trip voyage), may result in a build up of chlorite levels in the harbor depending on circulation patterns.

The applicant has provided bench top data that show the residuals of these biocides are very small and dilute below the no observable effect concentration

level upon discharge from the ship. The Coast Guard has determined that they are not a long term or cumulative hazard on the receiving water because of their non-persistent nature.

One commenter stated that the information found in Appendix E should be discussed in the body of the document. The commenter also stated that the possibility of residual ClO_2 discharge was discussed in the Appendix, but the potential amounts of these discharges should be discussed earlier in the document.

The Coast Guard disagrees with this comment. The specific chemical equations describing the outcome are beyond the scope of the FEA, however, they are provided in the Appendix so that interested parties may verify the conclusions on a scientific basis.

One commenter stated that they did not object to the proposed project, but if this program were to expand, they would recommend review of the environmental assessment by the New Jersey Division of Water Quality (NJDEP). The commenter also stated that if the determination was made that a ship is a fixed pipe discharger, a discharge permit should be required, and reporting requirements should be imposed.

The Coast Guard appreciates the comment and will inform NJDEP of all applicable future STEP vessels.

All of the commenters stated their support and approval for the ATLANTIC COMPASS acceptance into the STEP, and recommended that the application should be granted.

The Coast Guard appreciates all of the comments and support for including the ATLANTIC COMPASS into STEP.

FINAL ENVIRONMENTAL ASSESSMENT: The Final PEA for STEP identified and examined the reasonable alternatives available to evaluate novel ballast water management systems for effectiveness against nonindigenous species (NIS) transportation by ships' ballast water.

The FEA for acceptance of the ATLANTIC COMPASS into the STEP and the subsequent operation of the experimental treatment system analyzed the no action alternative and one action alternative that could fulfill the purpose, and need of identifying suitable technologies capable of preventing the transportation of NIS in ships ballast water. Specifically, the FEA for the ATLANTIC COMPASS acceptance into the STEP is tiered off of the PEA for the STEP, and considers the potential impacts to the environment from the operation of the treatment system on the ATLANTIC COMPASS, by examining the functioning of the system, the operational practices of the vessel, and the potential affects on discharge water quality.

This notice is issued under authority of the National Environmental Policy Act of 1969 (Section 102(2)(c)), as implemented by the Council of Environmental Quality regulations (40 CFR parts 1500–1508) and Coast Guard Commandant Instruction M16475.1D.

Dated: November 21, 2008.

Brian M. Salerno,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Stewardship.

[FR Doc. E8–28470 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2007–0040]

Application for the Cruise Ship CORAL PRINCESS, Review for Inclusion in the Shipboard Technology Evaluation Program; Final Environmental Assessment and Finding of No Significant Impact

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of the Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) that evaluated the potential environmental impacts resulting from accepting the cruise ship CORAL PRINCESS into the Shipboard Technology Evaluation Program (STEP). The CORAL PRINCESS runs four regular cruising routes that include Alaska, California, the Panama Canal, the U.S. Virgin Islands and Florida. Under the STEP, the CORAL PRINCESS will be using and testing the Hyde Marine, INC. Guardian Ballast Water Treatment System, when the vessel operates in U.S. waters.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, are part of the docket USCG–2007–0040. These documents are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You can also find all docketed documents on the Federal Document Management System at *http://www.regulations.gov,* United States Coast Guard docket number USCG–2007–0040.

You may submit comments identified by docket number USCG–2007–0040 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

To avoid duplication, please use only one of these methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this assessment please contact LCDR Brian Moore at 202–372–1434 or e-mail: *brian.e.moore@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: This document has been tiered off the Programmatic Environmental Assessment (PEA) for the STEP dated July 2004 (69 FR 71068, Dec. 8, 2004) and was prepared in accordance with the National Environmental Policy Act of 1969 (Section 102 (2)(c)), as implemented by the Council on Environmental Quality Regulations (40 CFR parts 1500–1508) and Coast Guard Commandant Instruction M16475.1D. From these documents the Coast Guard has prepared a FEA and FONSI for accepting the CORAL PRINCESS into the STEP.

Response to Comments: The Coast Guard requested comments on the Draft Environmental Assessment (DEA) when the Notice of Availability and Request for Public Comments was published on Friday, April 4, 2008 (73 FR 18544, Apr. 4, 2008). The Coast Guard received 19 substantive comments total from 2 agencies. The Coast Guard has responded to all of the comments that were within the scope of DEA.

Both commenters stated their support for the CORAL PRINCESS acceptance into the STEP, and that the application should be granted.

The Coast Guard appreciates the support for including the CORAL PRINCESS into the STEP.

One commenter asked why California and the U.S. Virgin Islands (USVI) were

not included in the assessment as possible discharge ports, while Florida and Alaska were included.

The California port was not included because the FEA only addressed ports where ballast water discharge will take place. The vessel will not discharge ballast water into California State waters. Therefore, no discussion of California ports has been included. The USVI ports were included in the applicable sections of the DEA and FEA.

One commenter asked for clarification regarding Table 2–1. The commenter questioned the allotted number of port arrivals, and stated that a vessel would make significantly more arrivals at those 10 ports.

The Coast Guard agrees with the comment; there may be up to 18 arrivals at any of the ports noted in the DEA and has changed this number accordingly in the FEA. However, this does not mean there would be an associated proportional increase in the amount of treated ballast water (BW) that would be discharged into port. The vessel infrequently takes on BW at any port and on the rare occasions when it does, it typically discharges that water prior to departure. Therefore, the additional number of port visits does not necessarily result in an increase in the amount of water treated with the system or carried to a different port or place and discharged.

One commenter asked if the CORAL PRINCESS would be treating ballast during all ballasting operations from years one through five, and if the testing in the other years will be for operation and maintenance.

The Coast Guard has clarified this issue by adding a summary of the STEP procedures into the introduction of the FEA.

One commenter asked how long it would take a vessel to ballast, and if the filter is backflushed at the end of ballasting. The commenter also asked if the filtered organisms will be returned to their point of uptake.

The Coast Guard has determined that the vessel normally takes on ballast at sea and discharges that ballast also at sea. If and when it does take on ballast at sea (which has historically been small amounts of water), the vessel will move a short distance between the time uptake began to the point at which the filter would begin backflushing. During this time, the Coast Guard believes the vessel will take approximately a half hour to fill a BW tank completely at the ballast water pumping rate (250 m^3/hr). At the vessel's normal operating speeds, (12–22 kts) it will have traveled less than 20 nautical miles in this time.

One commenter requested a list of the State codes for turbidity requirements and interpretations on how the assessment's findings compare to the State code.

The Coast Guard disagrees with the request. In both the PEA and this FEA, the potential impacts due to turbidity were considered and were deemed to be negligible; therefore the additional background information requested would unnecessarily encumber the FEA, detracting from its purpose.

Two comments asked if the 55 microns referred to the length/width of the mesh openings (typical for 55 micron mesh nets), or the diagonal opening. The comments expressed concern that if the length/width is 55 microns, the diagonal length would be approximately 78 microns and this would allow organisms larger than 55 microns to pass through the filter.

The Coast Guard, in reviewing the STEP application package, has determined that the filtration system has an actual opening dimension of 55 microns using stacked filtration discs, rather than the mesh screen type assumed by the comments. With respect to the commenters' other concern, the Coast Guard notes that the initial filtration stage is only the first part of the overall treatment system. The purpose of the experimentation conducted during the vessel's participation in the STEP is to evaluate the efficacy of the entire treatment system in reducing the discharge of organisms.

One commenter asked for clarification regarding the statement ''* * * at 90% UV [Ultraviolet] transmittance in the water.'' The commenter asked if the 90% transmittance is typical of the water that would be taken up at the specific ports described in the assessment. The commenter also expressed that this value would decrease in turbid water, especially in the Alaskan waters that were highly turbid due to glacial melt runoff.

The Coast Guard acknowledges that many source waters may have varying transmittance values. However, the UV treatment occurs after the water has passed through the filtration system, which is intended to remove at least some of the suspended materials which would block UV transmission as well as removing larger organisms. The Coast Guard notes that the point of the experiments is to evaluate the efficacy of the treatment system under the operating conditions experienced by the vessel.

One commenter asked if there was any specific, pertinent information on Alaskan wetlands that should be included in the FEA.

While there is significant information concerning Alaskan wetlands available, the Coast Guard disagrees that the description of sensitive areas in Alaskan waters as presented in the DEA is insufficient to make a decision regarding the STEP acceptance. The vessel will only be visiting areas that it is already visiting and will not be discharging treated water in any such wetland areas.

One commenter asked if any Essential Fish Habitat was within the Port Everglades region.

The available information on Essential Fish Habitat (EFH) shows that the Port Everglades area has the following EFH: Coastal Migratory Pelagics and Coral, Coral Reef, and Live/Hard Bottom Habitat. Based on feedback from the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration the proposed action will have no negative impact to EFH in Port Everglades.

One commenter asked that more detail regarding the area(s) around several of the ports be included.

The Coast Guard has added additional detail to the description of Port Everglades and USVI waters.

One commenter asked how many and what types of invasive species are found around Port Everglades. The commenter also asked if any of these species have been known to cause any environmental or economic harm.

It is not possible to make a definitive statement about exact numbers of invasive species in any given water body. Some notable species have been identified and their economic and environmental harm estimated. This information is readily available through numerous Nonindigenous Species (NIS) focused agency reports and work groups. The Coast Guard disagrees that enumeration of specific invasive species occurring in the relevant ports, and further discussion of the potential risk of transferring those specific species from Florida to other places, is necessary or useful for the purpose of this FEA. Further, the purpose of any ballast water management system being evaluated under the STEP is to prevent the transference of any organisms, whether known to be invasive or not, from one location to another.

One commenter requested a list of NIS and if any of these species have been known to cause any environmental or economic harm.

The Coast Guard has determined that the problem of NIS in U.S. waters is the basis of the STEP, and research on NIS and their impacts is readily available

from numerous sources. This question is outside the scope of the FEA, and in keeping with CEQ regulations for conducting FEAs, the extensive supporting information is not repeated here.

One commenter asked for clarification regarding the statement ''Small percentages of estuarine areas in the ports of interest were rated 'poor' * * *''. The commenter asked if it would be possible to avoid discharging in these areas, or to list which ports have poor light conditions. The commenter also asked what was meant by the description ''small percentages''.

The Coast Guard has determined that the areas that are rated as poor for light conditions are rated so due to the natural ambient condition of glacial till suspended in the water. While it could be possible for the CORAL PRINCESS to restrict its ballasting locations, the Coast Guard disagrees with the need to do so in these or any other areas. The very small volumes of water which could potentially be discharged during operation of the ship's BWMS have been considered and determined negligible. ''Small percentages'' refers to the waters in the immediate vicinity of glacier termini.

One commenter stated that the environmental consequences are generalized across all regions, with little to no specific reference to any of the previously described discharge ports. The commenter asked that specific examples of environmental consequences for the various habitats/ports be provided.

The Coast Guard has determined that the water quality impacts on the ballast water taken aboard the CORAL PRINCESS will be negligible; therefore, generalization of the environmental impacts invalid. The addition of repetitive specific impacts in effected ports would unnecessarily lengthen the FEA. Based on the service history of the CORAL PRINCESS, most ballasting is done at sea and is in small amounts. When harbor water is intentionally pumped aboard for the tests, it will also be discharged at sea following treatment. The proposal does provide for the CORAL PRINCESS to use the Ballast Water Management System as needed and occasionally a need to ballast in a port area may be encountered. However, the Coast Guard considers the potential for any adverse effects from ballasting, filtering, treating with ultraviolet light and discharging relatively small quantities of sea water back to its source to be negligible for all potential discharge locations. As a result of the NEPA process, the only known impacts are a slight beneficial impact on biological resources and socioeconomic resources. Therefore, further describing habitat or location specific impacts is not necessary.

One commenter asked what references and/or data were used to support the conclusions about water quality impacts of the proposed action alternative.

The Coast Guard has used the following rationale for the description of likely impacts of using the system. The ship normally takes on and discharges ballast at sea. In these cases, typically there are fewer organisms in offshore waters compared to estuarine areas, and hence less organic matter to be taken aboard, treated and discharged. Similarly in the cases where the ship may take on and discharge ballast in port, the use of the treatment system should have no measurable adverse effects on the water quality of the ecosystem where the ballast water is discharged.

One commenter asked how nonindigenous species impact low income and minority populations under the no action alternative.

The Coast Guard has determined that an example of a potential impact to a low income or minority population might be that a decline in abundance of a species targeted by subsistence fisheries could occur as a result of the introduction of nonindigenous competitors, predators, or pathogens. Please refer to the STEP Programmatic Environmental Assessment that also evaluated the impacts to low income and minority populations.

Based on the information provided in the DEA, one commenter stated that the STEP program meets their environmental standards, and is not likely to adversely affect federally listed threatened or endangered species under their jurisdiction.

The Coast Guard acknowledges the comment and support for the CORAL PRINCESS and the STEP application.

Final Environmental Assessment: The Final PEA for the STEP identified and examined the reasonable alternatives available to evaluate novel ballast water management systems for effectiveness against NIS transportation by ships' ballast water.

The FEA for acceptance of the CORAL PRINCESS into the STEP, and the subsequent operation of the experimental treatment system, analyzed the no action alternative and one action alternative that could fulfill the purpose and need of gaining valuable scientific information on the system's efficacy and facilitating the development of effective treatment technologies capable of preventing the transportation of NIS in ships' ballast water. Specifically, the FEA for the CORAL PRINCESS acceptance into the STEP is tiered off of the PEA for the STEP, and considers the potential impacts to the environment from the operation of the treatment system on the CORAL PRINCESS by examining the functioning of the system, the operational practices of the vessel, and the potential effects on discharge water quality.

This notice is issued under authority of the National Environmental Policy Act of 1969 (Section 102 (2)(c)), as implemented by the Council of Environmental Quality regulations (40 CFR parts 1500–1508) and Coast Guard Commandant Instruction M16475.1D.

Dated: November 21, 2008.

Brian M. Salerno,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Stewardship.

[FR Doc. E8–28473 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2007–0041]

Application for the Integrated Tug and Barge MOKU PAHU, Review for Inclusion in the Shipboard Technology Evaluation Program; Final Environmental Assessment and Finding of No Significant Impact

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of the Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) that evaluated the potential environmental impacts resulting from accepting the integrated tug and barge MOKU PAHU into the Shipboard Technology Evaluation Program (STEP). Under the STEP, the MOKU PAHU will be using, and testing, the Ecochlor™ Inc. Ballast Water Treatment System (BWTS) as the vessel operates in U.S. waters.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, are part of the docket USCG–2007–0041. These documents are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey

Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You can also find all docketed documents on the Federal Document Management System at *http://www.regulations.gov,* United States Coast Guard docket number USCG–2007–0041.

You may submit comments identified by docket number USCG–2007–0041 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

To avoid duplication, please use only one of these methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this assessment please contact LCDR Brian Moore at 202–372–1434 or e-mail: *brian.e.moore@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: This document has been tiered off the Programmatic Environmental Assessment (PEA) for the STEP dated December 8, 2004 (69 FR 71068, Dec. 8, 2004), and was prepared in accordance with the National Environmental Policy Act of 1969 (Section 102(2)(c)), as implemented by the Council of Environmental Quality regulations (40 CFR parts 1500–1508) and Coast Guard Commandant Instruction M16475.1D. From these documents, the Coast Guard has prepared a FEA and FONSI for accepting the MOKU PAHU into the STEP.

Response to Comments: The Coast Guard requested comments on the Draft Environmental Assessment (DEA) when the Notice of Availability and Request for Public Comments was published in the **Federal Register** on April 4, 2008 (73 FR 18545, Apr. 4, 2008). The Coast Guard received 57 substantive comments from 5 agencies. The Coast Guard has responded to all of the comments that were within the scope of the DEA.

One commenter asked for clarification regarding the statement ''* * * treatment system is expected to have no impact on water quality, biological resources * * *''. The commenter asked how there could be no impacts when older residuals (biocides) will be released. The commenter suggested replacing the word ''no'' impacts with either ''minimal'' or ''negligible'' impacts.

The Coast Guard disagrees with the suggestion the phrase ''no impact'' should be changed. This section deals with coastal barrier systems and is only focused on the effects use of the BWT system may have on coastal barrier systems. The Coast Guard recommends the commenter to section 4.2, Water Quality, of the FEA for discussion of the water quality impacts.

One commenter stated that section 2 should state that if the Ecochlor™ system is denied acceptance into the STEP, the vessel will continue to manage ballast water (BW) through exchange, as safety allows, and species will continue to be discharged.

The Coast Guard disagrees. The PEA and this FEA clearly state that if the Ecochlor™ system is denied acceptance into the STEP the applicant will be subject to all applicable ballast water management regulations.

One commenter asked if a vessel would be free to discharge ballast treated by the experimental system (exchange would not be required), and if this would be in compliance with all Coast Guard ballast water management requirements.

The Coast Guard disagrees that further change is needed. Both in the PEA and in this FEA, under Alternative two, it is clearly stated that STEP acceptance for vessels' ballast operations means under this alternative the regulations provide that the vessel is free to discharge ballast water treated by the experimental treatment system into U.S. waters as operations dictated. The discharge of ballast treated by the system would be in compliance with all Coast Guard ballast management requirements.

One commenter requested a basic diagram displaying the location of the treatment system and/or a diagram of the treatment system.

The Coast Guard agrees that a diagram is helpful for describing the system, and has added one to the FEA.

One commenter asked how much ''sufficient flow'' would be necessary to activate the treatment system. The commenter also asked how long this would take during uptake, and how much ballast water will pass by untreated before treatment begins.

The Coast Guard has determined that specific description of the Ballast Water Management System (BWMS) flow rates and times are not necessary. To address the concern that some water will pass by the treatment cell prior to activation of the chlorine dioxide (ClO_2) dosing system, the system dosage is designed to produce an initial killing action when it is injected into the uptake stream. However, it is also designed to provide a residual biocide effect in the ballast water while it is stored on board in the tanks. As the ClO_2, chlorite, and chlorate degrade during the ballast voyage, continued biocidal effects should be realized. According to lab tests, a period of up to five days is usual before reaching the non-detect level for ClO_2. This residual is believed to be adequate to treat the initial volume of water taken aboard prior to full activation of the treatment system. Verification of this residual efficacy is a primary component of the testing plan. It should also be noted that untreated BW will be discharged. A requirement of the STEP is that the system be used to manage all BW. If the system is inoperable for any reason then compliance with current regulations is required.

One commenter requested examples of the accuracy and precision related to the target final concentration of the automated system (*i.e.*, does it produce a 5.0 ppm concentration every time or is there some variation involved).

The Coast Guard has determined that the initial dosage values that have been proposed by the applicant are based solely upon laboratory results using validated Environmental Protection Agency (EPA) methods. The STEP program is intended to provide the sort of detailed information requested by the commenter. As of now only laboratory values have been established. Physical and chemical analysis of the treated ballast water, as well as gathering actual shipboard data of dosing parameters are primary goals of the STEP. As discussed in the PEA and this FEA, one of the uses of this data collection and analysis effort will be to inform a regulatory framework for a Ballast Water Discharge Standard, which is the subject of a separate rulemaking. At that time, the data from the STEP will be made available in the associated environmental impact statement (EIS).

One commenter asked if salinity contributed to the degradation of ClO_2. The commenter also asked if the salinity levels in the Carquinez Strait are similar to the water in Oakland Harbor.

The Coast Guard has determined that salinity is an inconsequential factor in the ClO_2 degradation process. Data show that the degradation reaction is driven by available oxidation reaction materials—organic compounds such as

cell walls of microorganisms, are highly favored for this reaction. Since salinity is not relevant to the performance of the system under evaluation, the data requested are outside the scope of this project.

One commenter requested experimental support or actual measurements, to support the assumption that any remaining ClO_2 discharged would likely decay quickly, due to the temperature of the receiving waters. The commenter also requested that the definition of ''decay to extinction quickly'' be provided.

The Coast Guard has determined that laboratory and field test results have been presented by the applicant, and were part of the technical review for establishing that the system has a reasonable chance of meeting STEP efficacy requirements. The degradation of ClO_2 to its ultimate fate as chloride is driven largely by the availability of organic matter, but additional degradation energy comes from the ultraviolet component of light as well as heat (available from the receiving seawater). The applicant has provided data which demonstrate the impact of water temperature upon the degradation rates of the treatment chemicals. In most cases, the laboratory data show a decay to the non-detect level of the treatment chemicals to occur within five days. While dilution values can be determined, actual degradation rates for the remaining residuals are not known. However, since none of the biocide residuals are considered to be persistent in the environment, the Coast Guard is confident that their impact once discharged from the vessel will be negligible.

One commenter asked if data was collected to determine chlorite half life for source water or Hawaii receiving water.

The applicant has provided the Coast Guard with treatment efficacy and residual degradation rate data that was collected using source waters from San Francisco Bay. The data show degradation properties similar to those for East Coast waters. The applicant has not proposed, and the Coast Guard is not authorizing, the uptake of Hawaiian water for treatment with the experimental system. Therefore, the effects of treating Hawaiian waters are beyond the scope of this project.

One commenter requested an explanation as to why chlorite dissipates at different rates for Newark and Baltimore at similar temperatures. The commenter also asked if there were EPA standards for chlorite in discharged waters, and if chlorite impacts organisms in a similar manner to chlorine.

The Coast Guard does not have the information requested by the commenter regarding dissipation rates for Newark and Baltimore; however, we do not believe it is necessary for making a decision about STEP acceptance. There are no specific standards for discharge of ClO_2 or its degradation products in marine waters. While both chlorite and chlorine are biocides, chlorite has distinctly different properties than chlorine. Ample information on the toxicity of chlorine is readily available, but is not discussed in this FEA since it is outside the scope of the process under evaluation.

One commenter requested data to demonstrate compliance with applicable discharge standards. The commenter asked if either EPA or the State of Hawaii had established discharge standards for ClO_2 or its degradation products in marine waters. The commenter also asked if there are any lab/land-based tests that show residual concentrations from the Carquinez Strait source water.

The Coast Guard has determined that there are no known state or Federal standards for discharge of ClO_2, or its degradation products into marine waters. There are laboratory data for the degradation rate of ClO2 in water from Carquinez Straits. These results are in line with the values cited from East Coast port water samples.

One commenter asked how much sodium sulfate is produced in the chemical reaction and what kind of impacts (if any) the chemical has on receiving environments.

The Coast Guard has received sulfate concentration data from the applicant. The Ecochlor™ system is expected to introduce ~5 ppm sulfate into the environment. Sulfate is a common constituent of seawater with typical concentrations of ~2600 ppm. The impact of this additional load is expected to be negligible.

One commenter stated that the description of San Francisco Bay's wetlands and wildlife was confusing. They stated that the section on ''Plants and Wetlands'' does not cover any of the information about the bay's wetlands, and that it was unclear why a detailed coverage of the bay's bird species is included. The commenter also asked for a range of water depths in Carquinez Strait.

The Coast Guard disagrees with the commenter's statement that the description for San Francisco Bay is inadequate. The scope of the FEA is to determine potential impacts from use of the BWMS. Since ballast water will be taken onboard, as cargo is off loaded in Crockett, California, regardless of the decision on STEP acceptance, the only possible impact in the San Francisco Bay area is the potential for additional air emission as a result of using the system. Since air emissions were the focus of potential impacts, this FEA placed an emphasis on bird species in the area. The air emissions associated with the use of this system have been thoroughly researched and as a result air quality was dismissed from further consideration. No ballast water, treated or untreated, is carried to or discharged in California. Since this vessel will be taking on ballast water from the dock in Crockett, California, regardless of STEP enrollment, the Coast Guard disagrees that detailed descriptions of water depths in the Carquinez Strait can provide any additional useful information to decisionmakers about the impact of accepting the vessel into the STEP.

One commenter stated that the delta smelt is endangered, not threatened.

The Coast Guard disagrees with this comment. Information provided by the U.S. Fish and Wildlife Service (FWS) indicates the species is listed as threatened, and that the service has been petitioned to reclassify the species as endangered, but this process is not complete.

One commenter asked if there was any Essential Fish Habitat (EFH) specific to the Carquinez Strait area.

The Coast Guard refers the commenter to section 3.1.1 of the DEA where the EFH of the greater San Francisco Bay was identified. Because of other formatting changes however, this information is now in Section 3.2.1 of the FEA.

One commenter asked if there were any other important invertebrates not associated with coral reefs.

There are other important invertebrates not associated with coral reefs. The Coast Guard has taken into account in the FEA potential impacts on numerous organisms. The STEP is designed to protect all organisms from threats posed by nonindigenous species (NIS) introduced via BW.

One commenter asked how many of the FWS listed species are aquatic, and how many are marine.

The Coast Guard has updated the section in question. Of the known introduced species, 343 are marine aquatic. Further, three threatened and endangered listed organisms are marine aquatic species.

One commenter asked how many native macroalgal species there are in Hawaii in comparison to the 19 NIS listed in this document. The commenter

also asked what native benthic species are being out-competed.

The Coast Guard acknowledges these questions, but disagrees that the requested information is necessary to make a decision about STEP acceptance. The purpose of the National Invasive Species Act (NISA), and by extension STEP, is to protect indigenous species from the threats posed by NIS.

One commenter asked if there was additional information available from the San Francisco Bay Regional Water Quality Control Board for the water quality description section of the FEA.

Absent a specific concern, the Coast Guard disagrees that further description of the San Francisco Bay area is necessary to make a decision about STEP acceptance. However, the commenter is directed to the Web site for the San Francisco Bay Regional Water Quality Control Board for additional information: *http://www.swrcb.ca.gov/rwqcb2.*

One commenter requested the salinity range of the Carquinez Strait. The commenter also asked if there were any outfalls near the C&H refinery that could affect water drawn into ballast tanks.

While it is unclear what specific concern is being addressed by the comment, the Coast Guard does not believe that the requested information is necessary to make a decision about STEP acceptance. Data provided by the applicant indicate that salinity values do not influence the biocide characteristics, which are of interest to the STEP. Data on specific outfalls near the dock used by the vessel were not provided. However, if the concern is that the vessel could be moving poor quality water from California to another location, the vessel will do that regardless of STEP acceptance. If the concern is that the poor quality water may have a detrimental effect upon the treatment efficacy, answering that question is precisely the purpose of the STEP.

One commenter stated that the first two sentences in section 3.2.2 ''Hawaii'', contradict each other. The commenter asked for determination if surface runoff affects the quality of coastal water.

The Coast Guard disagrees that the paragraph is inconsistent. While water quality is deemed good by the cited source, the Coast Guard agrees with the State of Hawaii's statement acknowledging that threats to maintaining coastal water quality include polluted surface runoff.

One commenter asked what the chlorophyll (Chl) concentrations were. The commenter also asked what the standard Chl concentrations were.

The requested information is beyond the scope of the FEA. The questions address the characterization of the environment by the State of Hawaii and the requested increased detail is not necessary for evaluating the potential effects of operating the BWMS on the vessel.

One commenter asked for clarification regarding the statement ''* * * chlorine dioxide quickly breaks down in air * * *''. The commenter asked what the chlorine gas breaks down into, and what the effects of these breakdown products were. The commenter also asked what effects might be expected to the crew, especially in enclosed areas exposed to these gases repeatedly over time.

None of the degradation pathways for chlorine dioxide include formation of elemental chlorine (Cl_2, a gas at normal temperature); the end product of degradation is chloride ion (Cl–), a harmless and ubiquitous component of seawater. Safety of the crew is paramount and has been addressed in section 4.3.2. of the FEA. Further, the safety aspects of the BWMS have been thoroughly vetted by appropriate authorities, to include, Coast Guard, Class society, and corporate management.

One commenter stated that the potential impact of chlorite appears underestimated in the DEA, and the toxicity of chlorite was not mentioned in the document. The commenter stated that according to *http://www.pesticideinfo.org* chlorite causes serious sublethal effects including carcinogenicity, and reproductive, developmental, and neurological toxicity. The commenter suggested that it is inadequate to only examine the LC_{50} of chlorite, because LC_{50} is too extreme of an endpoint to determine whether or not the biological resources will be impacted. The commenter also suggested that the EPA compiled toxicity data does not adequately represent the target.

Based on the extended residence times that the biocide will be stored in the vessel ballast tanks, the Coast Guard believes that all treatment residues will have degraded to levels sufficiently safe for discharge for the purposes of making a decision about STEP acceptance. Physical and chemical analysis of the treated ballast water, as well as gathering actual shipboard data, are primary goals of the STEP.

One commenter stated that the link for the EPA Aquire (Addendum F) was broken, and that these previous studies need to be properly referenced. The commenter also stated the table is not reader friendly, and it is unclear whether the algae species tested were not affected by chlorite exposure because chlorite is not toxic to algae, or because the concentrations administered were too low. The commenter recommended that the table should be amended to include the administered concentrations, so concentrations can be compared to the other listed studies.

The Coast Guard was not able to replicate the difficulty locating or opening the EPA Aquire database. As users of the data the Coast Guard is not the appropriate agents for making changes to an EPA work product. The determination to include the vessel with the proposed treatment system is supported by the data showing that ambient algae are not likely to be affected by chlorite residuals in the concentrations presented by the applicant. At planned dosing concentrations chlorite is toxic to algae and that is why it is used to sterilize the ship's ballast water. However, based on the degradation rates shown from the laboratory studies, the chlorite concentration levels expected at time of discharge are believed to be too low to have an adverse affect on ambient algae. Since the evaluated dosages include the expected maximum discharge concentrations, the negligible impact conclusion is supported. The administered concentrations are in section 4 of the FEA and Appendix E. The values presented there can be compared with the values listed in the EPA table (Appendix F).

One commenter requested clarification regarding the statement ''* * * highly organic environments * * *''. The commenter suggested that it was unclear whether dissolved organic material or particulate, organic material or both is being referenced.

The Coast Guard has reviewed the data provided by the applicant regarding the source water quality, the characterization of which is summarized in the FEA. Whether organic material is dissolved or particulate, it plays a role in the degradation of the biocide.

One commenter stated that both of these semi-closed harbors (especially Kahului in Hawaii), are likely to have long residency periods. The commenter asked if there was any information available regarding the residency times of the water in these harbors.

The system manufacturer has not provided the Coast Guard with any information about harbor water residency times (for the chemical residuals associated with this system). However, the Coast Guard believes that based on the non-persistent nature of the ClO_2 and the long residence time

associated with this vessel's voyages, that the amount of residual available for discharge is negligible and should not present an accumulation hazard.

One commenter requested further information regarding the local planktonic communities. The commenter also asked which of the planktivorous species belong to this group and if there were any important fish that would be impacted.

The Coast Guard agrees with this comment and has expanded the environmental characterization of Hawaii to include more discussion of plankton in the two cited harbors.

One commenter stated that the discharges can potentially have chlorite concentrations (1–3ppm) six times greater than the LC_{50} for two of the test organisms, *Daphnia* and *Americamysis* (>0.5 ppm). The commenter also stated that the *Daphnia* is a freshwater organism, but could the results of the *Americamysis* tests represent potential impacts of local organisms in these harbors.

The Coast Guard has determined that characterization of actual discharge concentrations of treatment residuals is a primary component of the STEP. If actual values exceed what has been provided from the laboratory test results, a further evaluation of use of the system will be undertaken and revision or disenrollment in the STEP may be necessary.

One commenter asked if the two species *Daphnia* and *Americamysis* could be representative of a larger group of animals that may be negatively impacted by chlorite, if those species happened to be present at the point of discharge.

The Coast Guard has used the EPA data to make the negligible impact decision based upon the lack of toxicity on the most sensitive plankton species once a dilution value of 12 percent (whole effluent toxicity) is achieved. This value is expected to be reached virtually instantaneously upon discharge of the water from the vessel regardless of what the residual concentration value was.

One commenter stated that whether the BWTS is used or not, the total organic content of the San Francisco Bay's water would be much greater than that of open ocean water (if an exchange were conducted instead). The commenter also asked how the killing of the organisms removes the organic content of the water.

Absent a specific request for further detail, the Coast Guard believes that the document is sufficient for the intended purpose. The settling of killed organisms to the bottom of the ballast tanks, as stated in section 4.2.2, may result in less organic material being discharged than would occur if the untreated organisms were still swimming about in the water column.

One commenter asked what the difference in pH was between the typical Carquinez Strait water and the water found in the two Hawaiian harbors. The commenter also asked what causes the drop in pH (by <0.6 units) and why is it said to happen ''sometimes'' and not all of the time?

The specific detail requested in both questions is not known by the Coast Guard and was deemed unnecessary based on the type of activity involved and the de minimis volume of seawater being transferred and discharged into the harbor. The effects of using the experimental system onboard a ship and the potential for fostering corrosion in the ballast tanks is of specific interest to the applicant and will be closely monitored. Further, the vessel would be discharging water whose origin was outside the harbor regardless of the method of ballast water management used.

One commenter stated that the sentence '' * * * the discharge pH will still generally be near neutrality * * * not likely pose a significant negative impact.'', was misleading. The commenter stated that the discharged water would still be neutral, does not mean that it will not likely pose a negative impact. The commenter stated that the neutrality of the water has nothing to do with whether a particular organism adapted to a specific pH range will be affected; the relative change of the pH is what is important, especially when dealing with corals.

The Coast Guard disagrees that this sentence is misleading. The discharge of the small quantities of water is not likely to have any impacts on those organisms even in the most immediate vicinity of the vessels discharge outlet during ballast water discharge. The dilution effects of mixing ballast water with ambient seawater will be nearly instantaneous. The vessel will only be discharging adjacent to a man-made shipping pier within the confines of a dredged and maintained shipping channel. Any potential impacts associated with the proposed action will be vastly overwhelmed by these regular maintenance practices, which are described in section 3.2.2.

One commenter asked that a citation be included for the phrase ''existing research indicates levels of chemicals are negligible * * *''.

The applicant's initial laboratory testing provided with their application, shows that the chemical levels will be negligible (Nautilus 2007). Physical and chemical analysis of the treated ballast water, as well as gathering actual shipboard function data, are primary goals of the STEP.

One commenter asked if chlorine dioxide breaks down in air into chlorine gas.

The Coast Guard has determined that none of the breakdown pathways for chlorine dioxide in air result in formation of elemental chlorine (Nautilus 2007).

One commenter stated that there was no prior explanation of the term ''type-approval'' and that the word should either be explained or altered.

The Coast Guard has clarified the meaning of the phrase.

One commenter stated that it would be useful to have a description of how experimental trials during the voyage will be evaluated and compared to laboratory efficacy trials. The commenter recommended including a more detailed description of what will be collected and how efficacy will be measured in the FEA.

The Coast Guard disagrees with this comment. The request is outside of the scope of the FEA. A brief synopsis of the PEA has been added to the introduction section of this FEA. However, in the interest of keeping the FEA readable and of use for Federal decisionmakers in evaluating the action of accepting or denying the application into the STEP, the Coast Guard has left the goals and process of testing in the referenced documents. Further discussion of the test plan is available in the USCG Navigation and Vessel Inspection Circular 01–04.

One commenter stated that nutrients may affect efficacy of the treatment technology. The commenter recommended that the FEA include a more thorough description of the methodology that will be used for monitoring efficacy of the treatment technology across gradients of organic matter load within the ballast tanks. The commenter also recommended adding a section that will address evaluating technology performance under increasing levels of organic matter.

The Coast Guard has determined that the test plan is designed to ''challenge'' the treatment system as aggressively as possible, with the thought being that all other values of organic content would then be below this challenge level. The manufacturer is acutely interested in determining feedback mechanisms for regulating dose control and setting target dosage for the production version of this prototype system. That is beyond the scope of the STEP, but would be a primary element of a system type

approval evaluation should the company decide to move forward with this system.

One commenter stated that Appendix F provided species and life stages that were included in chlorine dioxide toxicity testing; however, it was not clear if these species are residents of the Carquinez, San Pablo Bay, or the greater San Francisco Bay. The commenter recommended updating the appendices with more current toxicology results on species that will be encountered at source water locations.

The Coast Guard agrees that a source specific evaluation is the ideal data to move forward with the evaluation of this prototype. The manufacturer was contacted to provide laboratory data of ClO_2 efficacy on water samples from water taken at Crockett, California, and that data has been incorporated into the FEA. Appendix F is from the EPA and it is not the Coast Guard's place to update it. Shipboard Technology Evaluation Program testing will determine toxicology results for species that will be encountered in the source water.

One commenter requested greater detail regarding the manual shut down process for the Ecochlor™ Inc. systems. The commenter stated that there was no remote control for the system, so providing more detail on how the system will be shut down if there is a mechanical failure would be useful.

These elements are a standard part of Coast Guard oversight of commercial vessels and their installed machinery. The system is designed and installed in accordance with all applicable regulations for electrical, hazardous materials handling, and storage and piping safety. Additionally, it has been inspected by USCG inspectors for compliance with safety regulations as well as inspectors for the company's classification society for conformance with class safety rules. Further detail in this document is considered beyond the scope of the FEA.

One commenter requested more detail regarding the proven shipboard practices for the use and safe handling procedures for ClO_2, especially in light of spill protocols in the case of a full discharge.

The system does not store any ClO_2 at any time. Therefore, no spill of the chemical is possible. The ClO_2 is only generated at the immediate time of treatment within the reactor compartment of the treatment system. It is produced in small quantities and at low concentration so there is little risk of harm even in the event of a failure of the reactor. The system has been evaluated by independent safety oversight experts at the USCG and the ship's classification society for just such contingencies.

One commenter stated that there was no reference in the document regarding the possibility of taking up source water in Hawaii and then discharging it in California waters. The commenter felt that it was necessary to test the Ecochlor™ system on Hawaiian organisms that could be taken into the ballast tanks.

The Coast Guard disagrees with this expansion of the scope of the assessment. The STEP applicant has applied under the established and dedicated shipping pattern of hauling sugar from Hawaii to California and returning in ballast to Hawaii. If the applicant desires to utilize the vessel in modified service, they must submit a revised application to the Coast Guard for review and supplemental assessment.

One commenter asked how the concentration of the ''dilute chlorine dioxide (ClO_2) solution'' is derived. The commenter noted that previous studies indicated that this level was sufficient to achieve the desired treatment in Hawaiian waters, without adverse effects to marine fauna. The commenter also stated that the water quality should be cited.

The Coast Guard disagrees with this comment. The review of the scientific basis of the applicant's test plan is outside the scope of this FEA. However, the studies used to determine the dosage were reviewed and the basis for at least a starting dosage is agreed with by water treatment and marine biological and botanical experts.

One commenter asked if any attempts were made to monitor the ballast water once it left the ship, in order to assess water quality and potential impacts on marine fauna.

The Coast Guard has determined that the test plan does not call for monitoring outside the ship. Ballast water will be sampled immediately before discharge and treatment efficacy and residual levels of disinfectant will be quantified.

One commenter stated to minimize environmental impacts this material [ClO_2] should be flushed out in mid-ocean away from coastal environments. The commenter also stated that the complete exchange of ballast water in mid-ocean will further avoid likelihood of any transport of invasive/non-indigenous species into sensitive coastal harbors.

The Coast Guard disagrees with this comment. The use of a treatment system is meant as an improvement upon the efficacy of mid ocean exchange. The replacement of Ballast Water Exchange with use of a BWMS is the primary incentive for ships to participate in the STEP. Requiring BWE after treatment is contrary to the purposes of the STEP as defined in the PEA.

One commenter stated that studies, completed or currently underway, to document the number and quantity of invasive species that are being transported to Hawaii should be documented. The commenter stated that the key baseline information should be included in the FEA.

The Coast Guard has determined that this comment is outside the scope of the FEA. Since the MOKU PAHU is only one of several vessels calling on these Hawaiian ports, a determination has been made that the effects of the use of a BWMS on any one ship in reducing the overall introduction of NIS via BW will be negligible. Therefore, comparing total rates of introductions before and after this single STEP project is unlikely to detect any significant differences. The creation of a State of Hawaii baseline would not be appropriate to this STEP application because the purpose of the STEP is to determine the efficacy of a single BWMS on a single vessel. The Coast Guard supports other protective agencies' efforts to combat the threats to U.S. waters posed by NIS.

One commenter stated that the limited diversity of corals is better explained by the geographic remoteness of the islands and lack of direct current flow from the Indo-Pacific hub.

The Coast Guard appreciates the expertise of the local agency and has amended the text to more accurately reflect the origin of Hawaiian corals.

One commenter stated that in the main Hawaiian Islands most of the coral reefs lie in State waters, not Federal. The commenter also asked that the statement ''* * * The main Hawaiian Islands contain * * *'' be omitted or revised.

The Coast Guard appreciates the expertise of the local agency and has amended the text to more accurately reflect the characterization of Hawaiian coral.

One commenter stated that the un-referenced description of coral reefs along Maui's north coast (at the bottom of page 3–3), is incorrect. The commenter stated that monitoring sites within 5–6 km of Kahului Harbor may not be well developed in terms of geomorphologocal structure, but they do have extensive coral cover which is two times higher than state average (Jokiel, P.L., Brown, E.K., Friedlander, A.M., Rodgers, S.K., Smith, W.R., 2004. Hawaii coral reef assessment and monitoring program: Spatial patterns

and temporal dynamics in coral reef communities. Pac Sci 58, 159–174).

The Coast Guard appreciates the expertise of the local agency and has amended the text to more accurately reflect the characterization of Hawaiian coral.

One commenter asked what fisheries and migratory seabirds (and their current status) occur in the two harbors that might be impacted on page 3–4 and 3–5.

Based on the logic noted in the Consequences section, there will be at most an indirect negligible impact to birds as a result of the use of this system. The Coast Guard disagrees that further detail than that which is provided is necessary for making a STEP enrollment decision.

One commenter stated that the text regarding test results in section 2.2.1 of the FEA should read, ''Laboratory studies have revealed that chlorite has a half-life of up to 30.3 days at 20 °C in Newark, and 10.5 days at 20 °C in Baltimore waters.'' The commenter stated that by these numbers, it would take approximately 200 days in Newark to achieve a 99 percent decomposition of chlorite, and it could take up to 70 days in Baltimore waters for chlorite to decompose by 99 percent.

The Coast Guard agrees with this comment and thanks the commenter for their input. The language in the section has been changed to make it clear that the section is referring to laboratory tests. Further, we have included data from the fate and effect study, also provided by the technology vendor into the environmental considerations in this FEA.

All of the commenters stated their support and approval for the MOKU PAHU acceptance into the STEP, and recommended that the application should be granted.

The Coast Guard appreciates all of the comments and support for including the MOKU PAHU into the STEP.

Final Environmental Assessment: The PEA for STEP identified and examined the reasonable alternatives available to evaluate novel ballast water management systems for effectiveness against NIS transportation by ships' ballast water.

This FEA for acceptance of the MOKU PAHU into the STEP and the subsequent operation of the experimental treatment system analyzed the no action alternative and one action alternative that could fulfill the purpose, and need of identifying suitable technologies capable of preventing the transportation of NIS in ships ballast water. Specifically, the FEA for the MOKU PAHU acceptance into the STEP is tiered off of the PEA for the STEP, and considers the potential impacts to the environment from the operation of the treatment system on the MOKU PAHU, by examining the functioning of the system, the operational practices of the vessel, and the potential affects on discharge water quality.

This notice is issued under authority of the National Environmental Policy Act of 1969 (Section 102(2)(c)), as implemented by the Council of Environmental Quality regulations (40 CFR parts 1500–1508) and Coast Guard Commandant Instruction M16475.1D.

Dated: November 21, 2008.

Brian M. Salerno,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Stewardship.

[FR Doc. E8–28474 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2008–0126]

Application for the Tank Ship S/R AMERICAN PROGRESS, Review for the Inclusion in the Shipboard Technology Evaluation Program; Draft Environmental Assessment

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability and request for public comments.

SUMMARY: The Coast Guard announces the availability of the Draft Environmental Assessment (DEA) for the tank ship S/R AMERICAN PROGRESS. The DEA describes the S/R AMERICAN PROGRESS' application for the Shipboard Technology Evaluation Program (STEP) Ballast Water Management System (BWMS) demonstration initiative. The DEA for the S/R AMERICAN PROGRESS also addresses effects on the human and natural environments from installing, testing, and using the Severn Trent De Nora BalPure™ ballast water treatment system as the vessel operates in U.S. waters.

DATES: Comments and related materials must either be submitted to our online docket via *http://www.regulations.gov* on or before December 31, 2008, or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2008–0126 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

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

FOR FURTHER INFORMATION CONTACT: If you have questions on the Draft Environmental Assessment (DEA) please contact LCDR Brian Moore, telephone 202–372–1434 or e-mail: *brian.e.moore@uscg.mil.* If you have questions on viewing or submitting material to the docket, please call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to submit comments and related materials about the Draft Environmental Assessment (DEA) described in this notice. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2008–0126) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2008–0126'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic

filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing the comments and DEA: To view the comments and DEA go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert USCG–2008–0126 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. 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 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

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

Public Meetings

We do not intend to hold any public meetings in association with this DEA.

Background and Purpose

In the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as reauthorized, and as amended by the National Invasive Species Act of 1996, Public Law 101–646 and Public Law 104–332, respectively, Congress directed the Coast Guard to prevent introduction of aquatic nonindigenous species from ballast water discharged by ships (16 U.S.C. 4711). To achieve this objective, the Coast Guard wrote new regulations in 33 CFR 151, subparts C and D (58 FR 18330, Apr. 8, 1993, and 69 FR 44952, Jul. 28, 2004, respectively).

On December 8, 2004, the Coast Guard published a notice in the **Federal Register** (69 FR 71068, Dec. 8, 2004), announcing its Shipboard Technology Evaluation Program (STEP) for experimental shipboard ballast water treatment systems. The program goal is to promote development of alternatives to ballast water exchange as a means of preventing invasive species from entering U.S. waters through ships' ballast water. The comments we received support testing prototype treatment equipment and developing effective and practicable standards for approving this equipment.

In accordance with the National Environmental Policy Act of 1969 (Section 102(2)(c)), as implemented by the Council of Environmental Quality regulations in 40 CFR parts 1500–1508, and Coast Guard Commandant Instruction M16475.1D, ''National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts'', the Coast Guard prepared a Programmatic Environmental Assessment (PEA) for the STEP to evaluate the environmental impacts from installing and operating a limited number of prototype ballast water treatment systems (69 FR 71068, Dec. 8, 2004). The PEA can be found in docket USCG–2001–9267. That PEA addresses potential effects to the natural and human environments including fish, marine mammals, invertebrates, microorganisms and plankton, submerged and emergent species, threatened and endangered species, and essential fish habitat. It also requires each system to be evaluated for localized affects on the ports and waterways where a vessel involved in the program operates.

We request your comments on the potential impacts of installing, using, and testing the Severn Trent De Nora BalPure™ Ballast Water Treatment System on the tank ship S/R AMERICAN PROGRESS, as analyzed in the DEA. We also request your comments on sources of data, reference material, or other information not included in the DEA. Your comments will be considered in preparing a Final Environmental Assessment for the S/R AMERICAN PROGRESS.

Dated: November 21, 2008.

Brian M. Salerno,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Stewardship.

[FR Doc. E8–28463 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2008–N0207; 1265000010137–S3]

James Campbell and Pearl Harbor National Wildlife Refuges, Oahu, HI

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare a comprehensive conservation plan and environmental assessment; announcement of public open house meetings; and request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) for the James Campbell and Pearl Harbor National Wildlife Refuges (refuges). We will also prepare an environmental assessment (EA) to evaluate the effects of various CCP alternatives. This notice also announces two public open house meetings; see **SUPPLEMENTARY INFORMATION** for the details. Both refuges are located on the island of O'ahu, HI. We furnish this notice in compliance with CCP policy to advise other agencies and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

DATES: Please provide written comments by January 15, 2009. We will hold two public open house meetings to begin the CCP planning process; see **SUPPLEMENTARY INFORMATION** for date, time, and location.

ADDRESSES: Send your written comments or requests for more information by any of the following methods.

U.S. Mail: Sylvia Pelizza, Refuge Manager, O'ahu National Wildlife Refuge Complex, 66–590 Kamehameha Highway, Hale'iwa, HI 96712.

Fax: (808) 637–3578.

E-mail: *FW1PlanningComments@fws.gov.* Include ''James Campbell and Pearl Harbor Refuges'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Sylvia Pelizza, Refuge Manager, phone (808) 637–6330.

SUPPLEMENTARY INFORMATION: With this notice, we initiate the CCP planning process for the James Campbell and Pearl Harbor Refuges located on the island of Oahu, HI.

Background

The CCP Planning Process

The National Wildlife Refuge System Administration Act of 1966 (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), requires us to develop a CCP for each national wildlife refuge. The purpose of developing a CCP is to provide a refuge manager a 15-year plan for achieving refuge purposes, and contributing toward the mission of the National Wildlife Refuge System consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies.

In addition to outlining broad management direction for conserving wildlife and habitats, CCPs identify wildlife-dependent recreational opportunities compatible with each refuge's establishing purposes and the mission of the National Wildlife Refuge System, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

The Service will prepare an EA to evaluate the environmental effects of CCP alternatives in accordance with the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*); NEPA Regulations (40 CFR parts 1500–1508); other Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Each unit of the National Wildlife Refuge System is established for specific purposes. We use a refuge's purposes to develop and prioritize its management goals and objectives within the National Wildlife Refuge System's mission. The CCP planning process provides opportunities for the public to participate in evaluating our management goals and objectives for conserving important wildlife habitat while providing for wildlife-dependent recreation opportunities that are compatible with a refuge's establishing purposes and the mission of the National Wildlife Refuge System.

Public Involvement

We will conduct the CCP planning process for the refuges in a manner that will provide participation opportunities for the public; other Federal, State, and local government agencies; Native Hawaiian organizations; and other interested parties. We request your input regarding issues, concerns, ideas, and suggestions important to you and the future management of the James Campbell and Pearl Harbor Refuges.

An Overview of the Refuges

The James Campbell and Pearl Harbor Refuges are part of the larger O'ahu National Wildlife Refuge Complex. Both refuges encompass two or more units. A brief summary of each refuge and their units, and the habitat each unit contains, follows.

James Campbell Refuge

The James Campbell Refuge is located near O'ahu's North Shore, the northern most point on the island, it contains two wetland units, the Ki'i and Punamanō Units. It was established in 1976 for the purpose of providing habitat for Hawai'i's four endangered waterbirds, the Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, and Hawaiian duck.

The Ki'i Unit is a 126-acre remnant of a much larger historic marsh system, and the 134-acre Punamaño Unit is a natural spring-fed marsh. Both units are managed to protect and provide habitat for Hawaii's endangered waterbirds. Habitats found on these units include open water, freshwater marsh, mudflat, grassland, and shrubland.

The James Campbell Expansion Act of 2005 (Pub. L. 109–225), expanded the refuge's boundary to approximately 1,100 acres, incorporating additional wetland acreage, and the last remaining intact coastal dune system on O'ahu. The purpose of this expansion is to: Permanently protect an ecologically intact unit; provide habitat for migratory shorebirds, waterfowl, seabirds, endangered and native plant species, endangered Hawaiian monk seals, and green turtles; allow increased wildlife-dependent public uses; and assist with reducing flood damage to the refuge and local community.

The James Campbell Refuge contains one of the largest concentrations of wetland birds in Hawai'i. It is an important breeding, feeding, and resting area for the Hawaiian stilt, Hawaiian coot, and Hawaiian moorhen. The Hawaiian duck is also found here. In addition, the refuge supports significant numbers of migrating and wintering bristle-thighed curlews. The refuge provides a strategic landfall for migratory birds coming from Alaska, Siberia, and Asia. It also supports a substantial variety of migratory waterfowl, shorebirds, and other wetland birds. Although these migratory populations are small by continental standards, they represent some of the largest concentrations in Hawai'i and the Pacific Ocean. A total of 117 bird species has been documented on the refuge. The refuge is closed to general public access, however, guided tours and grade school educational programs are periodically offered.

Pearl Harbor Refuge

The Pearl Harbor Refuge is located on the southern coast of the island of O'ahu and encompasses three units. Two wetland units, Honouliuli and Waiawa, are located on the shores of Pearl Harbor. The Kalaeloa Unit is a coastal upland unit located on O'ahu's southwestern point, on a portion of the decommissioned Barbers Point Naval Air Station.

All units were established to protect and provide habitat for endangered species. The 37-acre Honouliuli Unit and the 25-acre Waiawa Unit were established in 1972 as mitigation for construction of the Honolulu International Airport's Reef Runway, to protect and enhance habitat for endangered Hawaiian waterbirds. In addition, these refuge units support a variety of migratory waterfowl, shorebirds, and other wetland birds. Although small by continental standards, these units contain some of the largest concentrations of wetland birds found in Hawai'i and the Pacific Ocean.

The 38-acre Kalaeloa Unit was transferred in fee title to the Service from the U.S. Navy in 2001, to protect and enhance habitat for the endangered 'Ewa hinahina plant. This unit contains the largest remnant stand of 'Ewa hinahina, and a reintroduced population of the endangered 'akoko plant. The Kalaeloa Unit also contains a unique microhabitat called anchialine pools or sinkholes which support unique insects, plants, and animals including two imperiled species of native shrimp.

Preliminary Issues, Concerns, and Opportunities

We have identified preliminary issues, concerns, and opportunities that we may address in the CCP, including—methods for protecting the refuges' resources for the long term while providing high quality opportunities for wildlife-dependent recreation; wildlife and habitat management; inholdings acquisition; visitor services management; historic and cultural resources protection; floodwater management; and facilities maintenance. During public scoping we may identify additional issues.

Public Open House Meetings

Two public open house meetings will be held to provide information on the CCP and receive public comments. Opportunities for additional public input will be announced throughout the planning process. Details on the upcoming public meetings follow.

1. December 9, 2008, 6:30 p.m. to 8:30 p.m., Leeward Community College, 96–045 Ala Ike, General Technology Bldg., Room 105, Pearl City, HI.
2. December 11, 2008, 6:30 p.m. to 8:30 p.m., Kahuku Community Center, 56–576 Kamehameha Highway, Kahuku, HI.

Public Availability of Comments

Before including your address, phone number, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

We will make all comments part of the official public record. We will handle requests for such comments in accordance with the Freedom of Information Act, NEPA, and Service and Departmental policies and procedures.

Dated: November 24, 2008.

David J. Wesley,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. E8–28416 Filed 11–28–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-EA-2008-N0243; 97000-5612-0000 FY 2008]

Tribal Wildlife Grants; Implementation Guidelines

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice to request public comments on the current implementation of Tribal Wildlife Grants Program and proposed changes to the program.

SUMMARY: We, the Fish and Wildlife Service, propose to change our implementation guidelines for the Tribal Wildlife Grants (TWG) program. The program helps tribal agencies maintain and enhance sustainable, healthy populations of fish and wildlife, as well as the habitats that support them. The TWG program also supports the rich Native American cultural and spiritual heritage associated with fish and wildlife, as well as hunting, fishing, trapping, wildlife observation, conservation, and conservation education. If finalized, these proposed changes would help the TWG program support tribal agencies address new challenges such as global climate change, urban sprawl, implementing landscape-level conservation planning, and a society that is increasingly disconnected from the natural environment, while ensuring sound administration and oversight of TWG funds and activities in accordance with core values and applicable laws, policies, and regulations. We seek public comment on our proposed changes. Current information about the TWG program is located at *http://www.fws.gov/nativeamerican/grants.html.*

DATES: To ensure consideration, we must receive your written comments by March 2, 2009 at the U.S. mail or e-mail address under **ADDRESSES**.

ADDRESSES: Native American Liaison, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MS 330, Arlington, VA 22203; *TWG_COMMENT@FWS.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: Pat Durham, (703) 358-1728.

SUPPLEMENTARY INFORMATION:

I. Background

In 2003, we launched two competitive grant programs for federally recognized Indian Tribes: the Tribal Wildlife Grants (TWG) program and the Tribal Landowner Incentive Program (TLIP). To date, we have provided more than $51 million to 167 Indian Tribes for 288 projects through TWG. Although TLIP has not been funded in the most recent fiscal years, TWG has become an important and highly successful component of our continually expanding effort to partner with tribal governments.

II. Implementation Guidelines: Current Administrative Guidelines and Proposed Changes

As the administrator of the TWG program, the Service's Office of the Native American Liaison (NAL) is seeking comments from the public on the current implementation of the TWG program and proposed changes to the program. The goals of this public dialogue are to continue to improve the program's effectiveness and efficiency in the following general areas:

- Efficient and consistent administration. We will ensure sound administration and oversight of TWG funds and activities in accordance with core values and applicable laws, policies, and regulations.
- Management of fish, wildlife, and their habitats. The TWG program helps tribal agencies to maintain and enhance sustainable, healthy populations of fish and wildlife, as well as the habitats that support them.
- Utilization of fish, wildlife, and their habitats. The TWG program helps tribal agencies to support the rich Native American cultural and spiritual heritage associated with fish and wildlife, as well as hunting, fishing, trapping, wildlife observation, conservation, and conservation education.
- New challenges and opportunities. To address global climate change, urban sprawl and a society that is increasingly disconnected from the natural environment, and to implement landscape-level conservation planning, the TWG program will support tribal agencies in efforts to connect people with nature, address the impacts of climate change, and strengthen and expand partnerships.

We are seeking comments and input on the following five sections:

1. Current administrative guidance.
2. Proposed changes to current administrative guidance.
3. New challenges and opportunities.
4. Proposed performance measures.
5. Additional comments.

At the beginning of each comment you submit, please tell us the section/subsection number(s) to which your comment pertains.

Section 1. Current Administrative Guidance

1.1. Who Can Apply for TWG Funding?

Federally recognized tribal governments listed in ''Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs,'' which the Bureau of Indian Affairs published in the **Federal Register** on April 4, 2008 (73 FR 18553), are eligible to apply for TWG funding. Tribal organizations and other entities may participate as sub-grantees or contractors to federally recognized Tribes.

1.2. What Types of Projects May Receive Funding?

1.2.1. Eligible projects include those to develop and implement programs for the benefit of tribal wildlife and their habitat, including species of Native American cultural or traditional importance and species that are not hunted or fished. Activities may include, but are not limited to, planning for wildlife and habitat conservation, fish and wildlife conservation and management actions, fish and wildlife–related laboratory and field research, natural history studies, habitat mapping, field surveys and population monitoring, habitat preservation, conservation easements, and public education that is relevant to the project.

1.2.2. We are interested in tribal priorities, concerns, and approaches to the emerging science and potential impacts of climate change and implementing landscape-level conservation planning. Should climate change impacts be considered in the ranking criteria for proposals? If so, we welcome suggestions on how to consider climate change in the context of tribal priorities.

1.2.3. TWG funds can be used for environmental review, habitat evaluation, permit review (e.g., Section 404 under the Clean Water Act), and

other environmental compliance activities, provided they are directly related to the TWG project and are discussed in the budget narrative/table. Although TWG funds cannot be used to conduct activities to comply with a federal Biological Opinion or with a permit (e.g., mitigation responsibilities) for another program or project, they can be used to implement conservation recommendations.

1.2.4. Projects may be proposed on lands other than those lands that are held in tribal trust status only if an enforceable contract with the landowner is submitted with the proposal. The contract must authorize permission to the grantee to conduct the proposed activities.

1.3. When Are Proposals Due?

Generally, the request-for-proposals period will open the first business day in May and close on the first business day in September of each year. Proposals must be received by the appropriate Regional Office with a postmark no later than the first business day in September. Addresses for your submissions are provided in Section III (List of Native American Liaisons) of this notice.

1.4. How Can the Fish and Wildlife Service Help Tribes Plan and Implement a Project?

The Service may assist Tribes in planning or implementing projects. Through a number of Service programs, we offer expertise to assist Tribes in planning and implementing projects. For information on how the Service may be able to assist, contact the Native American Liaison (NAL) in the appropriate Regional Office. Information is also available from the Service's Internet site at *http://www.fws.gov/nativeamerican/*. In addition, many other Federal, State, or tribal agencies, as well as conservation organizations, work closely with Tribes and may be able to assist with planning and implementing a project.

1.5. How Will Proposals Be Selected?

The Regional NAL will screen proposals for eligibility and will coordinate the regional ranking process according to nationally uniform ranking criteria. Top regionally ranked proposals will be recommended to the Service Director for funding. A national panel will review and rank remaining proposals and provide its recommendations to the Service Director. The Director will make the final determination for grant approval.

1.6. When Do Grantees Address Federal Environmental Compliance Issues?

Addressing the requirements of the National Environmental Policy Act, the National Historic Preservation Act, Clean Water Act, the Endangered Species Act, and other applicable authorities can be quite involved, and is therefore not part of the TWG application. The Regional NAL will coordinate the applicable process after proposals have been selected. Although these compliance requirements may delay the availability of funds to awardees, proposals that are not selected are not subjected to such additional administrative processes.

Section 2. Proposed Changes to Current Administrative Guidance

Section 2 proposes several changes to the current TWG program administrative guidance.

2.1. Limitations on Project Proposals.

Projects funded under TWG have historically not been held to a specific operational time period. The practice of allowing unrestricted carryover is helpful to some of our partner Tribes in completing multi-year projects, because, once projects have been selected; they are not subject to competing for funds after the initial year of that project for its agreed-upon duration.

An unintended result of this practice is that TWG funds may remain unused for several years. Also, there is currently no restriction on how many open grants a partner Tribe may have. Some partner Tribes have continued to submit new proposals even though these Tribes already have TWG project(s) that have been selected for funding but not yet initiated. In the interest of fiscal accountability and efficient use of federally appropriated funds, we are proposing the following changes:

2.1.1. Limit the Number of Concurrently Open Grants.

Restrict proposal applications in any given grant cycle to Tribes that have no more than one open TWG. If a Tribe has more than one open TWG during the request for proposals for a given fiscal year, that tribe would be ineligible to submit a new proposal for that same grant cycle. This change would prevent the practice of holding project funds for future use while continuing to apply for additional funds.

2.1.2. Limit the Duration of Grant Projects.

Institute a 1–year restriction on all grant projects from the date that all Federal compliance measures have been satisfied and the formal letter of agreement has been signed for each grant. Extensions may be granted by the Service when necessary to accommodate unforeseen or unaccounted for delays in the execution of a grant. This change would help to focus projects on specific accomplishments and establish a pattern that more closely coincides with the Federal appropriations process.

2.1.3. Lower the Funding Cap.

Reduce the current $200,000 maximum allowable proposal request. Currently, we receive about 120 proposals each TWG cycle, of which we are able to select between 30 and 35 percent for funding at current appropriation levels. A lower maximum grant proposal of $150,000 would increase both the number of selected proposals and the number of Tribes receiving TWG, and would discourage less-efficient multi-year proposals.

2.2. Small Grants.

The Service may institute a Small Grants segment of TWG.

2.2.1. Small Grants.

Grant proposals for less than $25,000 could be limited to projects that require little pre-agreement work, minimize application requirements, and address a set of targeted activities. We are seeking comment on the pros and cons of utilizing a portion of TWG funds as a small grant program.

2.2.2. Matching Requirements for Small Grants.

When grant applicants contribute their resources to a project, commitment to that project is demonstrated and its cost/benefit ratio is enhanced. If a small grants component of TWG were instituted, should a non-Federal cost-share commitment be a required part of the application? If so, what minimum percentage of the total requested federal funds through TWG is appropriate: 25 percent; 50 percent; 100 percent; or other?

2.3 TWG Proposals

2.3.1. Matching Requirements for TWG.

Matching (in-kind) funds are currently not required in a TWG proposal, although projects that choose to include them may score higher in the ranking process. When grant applicants contribute their resources to a project, commitment to that project is demonstrated and its cost/benefit ratio is enhanced. Should a non-Federal cost-share commitment be a required part of the TWG application? If so, what minimum percentage of the total requested federal funds through TWG is

appropriate: 25 percent; 50 percent; 100 percent; or other?

2.3.2. Capacity Building.

TWG defines Capacity Building as those activities and actions that support the long-term ability of tribal agencies to manage fish and wildlife resources and their habitats, including but not limited to the enhancement of in-house expertise; development of baseline information such as species lists, population dynamics, habitat mapping, etc.; development of long-term partnerships; development and implementation of conservation and restoration management plans; establishment of permanent facilities for fish and wildlife such as hatcheries, laboratories, enclosures, etc.; acquisition of necessary equipment; enhancement of regulatory authority; and gaining recognition as a participant in local, regional, or national natural resources management and conservation issues.

Designed to encourage and support the development of new tribal fish and wildlife management initiatives and partnerships, capacity building is a significant component of the TWG proposal scoring criteria. From a national perspective, capacity building has been successful, but we want to gain the insights of individual Tribes regarding the importance of capacity building in the proposal scoring criteria.

Section 3. New Challenges and Opportunities.

Despite the success of TWG, tribal wildlife resources will continue to confront new challenges. Tribal agencies must address issues such as limited financial resources, global climate change, implementing landscape-level conservation planning, urban sprawl and encroachment, and a society that is increasingly disconnected from the natural environment.

The processes and partnerships that have been established through the successful implementation of TWG provide the Service and our tribal partners an effective mechanism for helping to address these challenges. We are seeking innovative ways to use TWG to address these important issues in Indian Country. Below is a list of FWS challenges and opportunities. Please comment on these challenges and opportunities or provide alternative ones.

3.1. Connecting People with Nature.

The TWG Program should take positive steps to encourage and nurture interest in the natural world. Reconnecting people with nature through hunting and fishing activities and educational opportunities is gaining in importance, considering the downward trends of participation in hunting, fishing, and boating, and the fact that those persons who participate in these activities are the primary financial contributors to wildlife and habitat conservation in the United States.

3.2. Address Climate Change.

Climate change has the potential to alter native and managed habitats significantly, to increase the likelihood of species extinctions, to stress native and non-native wildlife populations, and to affect how people are able to use fish and wildlife resources. Anticipating and responding to the limitations and opportunities resulting from projected climate change in particular areas will be a unique challenge for all fish and wildlife agencies.

3.3. Strengthening and Expanding Partnerships.

The success of the TWG Program has been due in large part to the effective partnerships between tribal agencies and the Service. Continuing this success and achieving the intended outcomes will require that these partnerships are maintained and strengthened. In addition, trends in climate change and the public's connection to nature pose challenges, but they also present opportunities to build more and better support for conservation through existing and new partners.

Section 4. Proposed Performance Measures.

We have a responsibility to the American public and congress to be accountable for the program's activities and actions, including our expenditure of public funds through TWG. In order to report TWG accomplishments in a meaningful way, we must identify what goals are intended (see 4.1, TWG goals) and what measures contribute to those goals (see 4.2, Proposed Measures). Reporting is a critical component in maintaining and strengthening the established partnerships between the Tribes and the Service. Section 4.2 contains a comprehensive list of possible measures: We would like to identify four or five of these measures to use to begin quantifying the benefits of TWG. Please let us know which measures you think are most important and would be most effective and efficient for tribal governments and the Service to use to determine the program's success.

4.1. TWG Goals

4.1.1. Efficient and Consistent Administration.

This goal supports the Service's priority to maintain fiscal and administrative integrity and accountability to the public, and as required by law, OMB circular A-87 and the President's Management Agenda.

The TWG program will ensure sound administration and oversight of program funds and activities in accordance with core values and applicable laws, regulations, and policies.

4.1.2. Acknowledge the Special Political Status of Indian Tribes.

This goal supports the Service's priority of working with others towards conservation at the landscape level.

The Service will ensure that Service employees recognize and understand the government-to-government relationship due federally recognized Indian tribal governments and will implement TWG accordingly.

4.1.3. Management of Fish, Wildlife, and their Habitats.

This goal supports migratory bird conservation and management, achieving recovery and preventing extinction of threatened and endangered species, and management of aquatic species identified in the National Fish Habitat Action Plan and other trust species.

The TWG program will help tribal agencies to maintain and enhance sustainable, healthy populations of fish, wildlife, and the habitats to support them with a special emphasis on the priorities that our tribal partners share with the Service.

4.1.4. Utilization of Fish, Wildlife, and their Habitats.

This goal supports the Service's priority of working with others towards conservation at the landscape level, conservation and management of migratory birds, management of aquatic species identified in the National Fish Habitat Action Plan and other trust species, and ensuring the future of conservation by connecting people with nature.

The TWG program will help tribal agencies to support the rich cultural and spiritual heritage of Native Americans associated with fish and wildlife, as well as traditional uses of fish and wildlife and their habitats such as hunting, fishing, trapping, wildlife observation, conservation, and conservation education.

4.1.5. Address the Future Conservation Challenges of Indian Tribes.

This goal supports the Service's priority of working with Indian tribal governments.

The TWG program will support the efforts of tribal governments to address the challenges of limited financial resources, global climate change, urban sprawl and encroachment, and a society that is increasingly disconnected from the natural environment.

4.2. Proposed Measures

In establishing measures to report the effectiveness of TWG, it is important to consider the ease by which the information is, and can be gathered and compiled for reporting purposes. A best-case scenario will enable the Service to capture data that are generated automatically in the established activities and actions inherent to the administration and implementation of TWG projects.

4.2.1. Efficient and Consistent Administration.

Annually report the percentage of open grants in which all fiscal reporting documents are submitted by required due dates.

4.2.2. Acknowledge the Special Status of Indian Tribes.

Annually report the number of Service employees who have received training on the special status of federally recognized Indian tribal governments.

4.2.3. Management of Fish, Wildlife, and their Habitats.

A. Annually report the number of riparian (stream/shoreline) miles managed or protected to maintain desired conditions, including miles managed or protected through partnerships, as specified in management plans or agreements through the TWG.

B. Annually report the number of wetland, upland, and marine and coastal acres restored, including acres restored through partnerships, as specified in management plans or agreements through the TWG.

C. Annually report the number of upland acres restored, including acres restored through partnerships, as specified in management plans or agreements through the TWG.

D. Annually report the number of upland acres enhanced/restored through the TWG.

E. Annually report the number of coastal and marine acres restored, including acres restored through partnerships, as specified in management plans or agreements through the TWG.

F. Annually report the number of upland acres managed or protected to maintain desired condition, including acres managed or protected through partnerships, as specified in management plans or agreements through the TWG.

G. Report an annual list of threatened or endangered species stabilized or improved through the TWG.

H. Annually report the number of acres contaminated with invasive plant species that are managed through the TWG.

I. Report an annual list of invasive animal species that are managed through the TWG.

J. Annually report the percent of planned tasks implemented for tribal fish and wildlife conservation as prescribed by management plans or agreements through the TWG.

4.2.4. Utilization of Fish, Wildlife, and their Habitats.

To measure how the TWG program helps tribal agencies support the rich cultural and spiritual heritage of Native Americans associated with fish and wildlife, as well as traditional uses of fish and wildlife and their habitats, such as hunting, fishing, trapping, wildlife observation, conservation, and conservation education.

A. Report an annual list of fish and wildlife species and their habitats that are protected under new tribal ordinance or management plans as a result of TWG projects and are of special Native American cultural or religious concern.

B. Report an annual list of fish and wildlife species populations that are enhanced or stabilized as a result of TWG projects and are of special Native American cultural or religious concern.

4.2.5. Address the Future Conservation Challenges of Indian Tribes.

A. Annually report the number of TWG project activities or products implemented to address the long-term effects of global climate change affecting Indian Tribes.

B. Annually report personnel development, partnerships, and institutional consistency.

C. Annually report the number of individuals participating in TWG project activities that engage them in outdoor education and related activities.

Section 5. Additional Comments.

In addition to the specific items above, the Service encourages any additional comments, criticisms, and recommendations regarding TWG that will improve its effectiveness and efficiency.

III. List of Native American Liaisons

Service Region	States where the project will occur	Regional Native American Liaison & phone number	Where to send your project proposal
Region 1	Hawaii, Idaho, Oregon, and Washington	Pat Gonzales-Rogers (503) 231-6123	U.S. Fish and Wildlife Service Native American Liaison Eastside Federal Complex 911 N.E. 11th Avenue Portland, OR 97232-4181
Region 2	Arizona, New Mexico, Oklahoma, and Texas	Joe Early (505) 248-6602	U.S. Fish and Wildlife Service Native American Liaison 500 Gold Avenue, SW P.O. Box 1306 Albuquerque, NM 87103-1306
Region 3	Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin	John Leonard (612) 713-5108	U.S. Fish and Wildlife Service Native American Liaison 1 Federal Drive Fort Snelling, MN 55111-4080

Service Region	States where the project will occur	Regional Native American Liaison & phone number	Where to send your project proposal
Region 4	Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee	Jeffrey Fleming (404) 679-7287	U.S. Fish and Wildlife Service ARD External Affairs 1875 Century Blvd. Atlanta, GA 30345
Region 5	Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington D.C., and West Virginia	DJ Monette (413) 253-8662	U.S. Fish and Wildlife Service Native American Liaison 300 Westgate Center Drive Hadley, MA 01035-9589
Region 6	Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming	Kim Greenwood (303) 236-4575	U.S. Fish and Wildlife Service Tribal Liaison P.O. Box 25486 Denver CO 80225
Region 7	Alaska	Sue Detwiler (907) 786-3868	U.S. Fish and Wildlife Service Native American Liaison 1011 East Tudor Road Anchorage, AK 99503-6199
Region 8	California, Nevada and the Klamath Basin	David Wooten (916) 414-6576	Tribal Partnerships Specialist Habitat Restoration Division 2800 Cottage Way, Rm W-2606 Sacramento, CA 95825

Dated: November 14, 2008

Lyle Laverty

Assistant Secretary for Fish and Wildlife and Parks

[FR Doc. E8–28341 Filed 11–28–08; 8:45 am]

BILLING CODE 4310-55-S

DEPARTMENT OF THE INTERIOR

National Park Service

White-Tailed Deer Management Plan, Draft Environmental Impact Statement, Valley Forge National Historical Park, Pennsylvania

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Availability of the Draft Environmental Impact Statement for the White-tailed Deer Management Plan, Valley Forge National Historical Park.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, theNational Park Service (NPS) announces the availability of the Draft Environmental Impact Statement (DEIS) for the White-tailed Deer Management Plan for Valley Forge National Historical Park, Pennsylvania. The purpose of the DEIS is to evaluate a range of alternatives for establishing a white-tailed deer management plan that supports forest regeneration and provides for long-term protection, preservation, and restoration of native vegetation and other natural and cultural resources. The DEIS evaluates four alternatives for managing white-tailed deer in the park. Alternatives for response to chronic wasting disease (CWD) have been integrated into each deer management alternative to address the elevated risk of disease in proximity to the park and because of the efficiencies and cost savings associated with incorporating CWD response into the deer management plan. The DEIS describes and analyzes the environmental impacts of three action alternatives and the no-action alternative. When approved, the plan will guide deer management actions over the next 15 years.

DATES: The NPS invites comments regarding the DEIS from the public. Comments will be accepted for a period of 60 days from the date the Environmental Protection Agency publishes the Notice of Availability in the **Federal Register**. In addition, the NPS intends to conduct public meetings. Please check local newspapers, the park's Web site, *http://www.nps.gov/vafo,* or contact the name listed below to find out when and where the meetings will be held.

ADDRESSES: Information will be available for public review and comment online through the Planning, Environment, and Public Comment (PEPC) Web site at *http://parkplanning.nps.gov,* or available on CD. Once on the PEPC Web site, select ''Valley Forge National Historical Park'' in order to access the DEIS. A limited number of hard copies will be made available at the Valley Forge National Historical Park Visitor Center located at the intersection of North Gulph Road and Route 23 and at the Lower Providence Community Library (50 Parkiane Drive, Eagleville, PA 19403–1171), Tredyffrin Public Library (582 Upper Gulph Road, Strafford-Wayne, PA 19087–2052), Phoenixville Public Library (183 Second Avenue, Phoenixville, PA 19460), and Montgomery County-Norristown Public Library (1001 Powell Street, Norristown, PA 19401). You may request a hardcopy by contacting Kristina M. Heister at the phone or address provided below.

If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to: Superintendent, Valley Forge National Historical Park, 1400 North Outer Line Drive, King of Prussia, Pennsylvania 19406. You may also comment via the Internet at *http://parkplanning.nps.gov.* If you do not receive confirmation from that system that we have received your Internet message, contact us directly at 610–783–1008. During the public meetings, the

NPS will accept written comments as well as provide for verbal comments to be recorded.

Comments will be analyzed and responded to within the Final Environmental Impact Statement for the White-tailed Deer Management Plan. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you 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.

FOR FURTHER INFORMATION CONTACT: Kristina M. Heister, Natural Resource Manager, Valley Forge National Historical Park, 1400 North Outer Line Drive, King of Prussia, PA 19406, (610) 783–1008.

SUPPLEMENTARY INFORMATION: Development of the Environmental Impact Statement for the White-tailed Deer Management Plan for Valley Forge National Historical Park was initiated in 2006, pursuant to the 2006 House Appropriations Report (HR 109–465): ''The public has been patient as the NPS has worked through its process in regard to management of the over-abundance of white-tailed deer at the park. Within existing funds, NPS is directed to begin the environmental impact statement for deer management. The Committee expects that the plan will be funded fully so that it can be completed in fiscal year 2008. The Committee further expects that implementation of the selected action will begin immediately upon signing of the Record of Decision.''

The DEIS evaluates four alternatives for managing white-tailed deer in the park. The document describes and analyzes the environmental impacts of three action alternatives and the no-action alternative.

Alternatives: Alternative A (no action) would continue the existing deer management activities of monitoring deer population size and vegetation, small scale fencing of selected vegetation, removal of deer killed on roadways, public education, coordination with the Pennsylvania Game Commission, and continuation of limited CWD surveillance; no new deer management actions would be implemented.

Alternative B would combine several non-lethal actions, including large-scale rotational fencing of 10% to 15% of the park's forested area and reproductive control of does to gradually reduce deer population in the park. Chronic wasting disease surveillance would include live testing (via tonsillar biopsy) and removal of CWD-positive individuals.

Under Alternative C, qualified federal employees or contractors would directly reduce the deer population in the park through sharpshooting and through capture and euthanasia, where appropriate. CWD response would include rapid reduction of the deer population to the target deer density and the potential for a one-time reduction action to not less than 10 deer per square mile through sharpshooting and through capture and euthanasia. These actions would be taken for the purposes of assessing disease presence, prevalence, and distribution. These actions may also minimize the likelihood of CWD becoming established, minimize the likelihood of amplification and spread if the disease is introduced, and promote elimination of CWD, if possible.

Alternative D (NPS Preferred Alternative) would combine actions of Alternative C to directly reduce the deer population with reproductive control of does as under Alternative B to maintain population levels. CWD response actions would be the same as described for Alternative C.

Dated: September 29, 2008.

Dennis R. Reidenbach,

Regional Director, Northeast Region, National Park Service.

[FR Doc. E8–28439 Filed 11–28–08; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Boston Harbor Islands National Recreation Area Advisory Council; Notice of Public Meeting

AGENCY: Department of the Interior, National Park Service, Boston Harbor Islands National Recreation Area.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that a meeting of the Boston Harbor Islands National Recreation Area Advisory Council will be held on Wednesday, December 3, 2008, at 4 p.m. to 6 p.m. at National Park Service, 408 Atlantic Avenue, 2nd floor Conference Room, Boston, MA 02110.

This will be a quarterly meeting of the Council. The agenda will include a report from the council's steering committee, the park's draft 2016 strategic plan, preparations for the council's annual meeting in March, report from the Superintendent, and public comment.

The meeting will be open to the public. Any person may file with the Superintendent a written statement concerning the matters to be discussed. Persons who wish to file a written statement at the meeting or who want further information concerning the meeting may contact Superintendent Bruce Jacobson at (617) 223–8667.

DATES: December 3, 2008 at 4 p.m.

ADDRESSES: National Park Service, 408 Atlantic Avenue, 2nd floor Conference Room, Boston, MA 02110.

FOR FURTHER INFORMATION CONTACT: Superintendent Bruce Jacobson, (617) 223–8667.

SUPPLEMENTARY INFORMATION: The Advisory Council was appointed by the Director of National Park Service pursuant to Public Law 104–333. The 28 members represent business, educational/cultural, community and environmental entities; municipalities surrounding Boston Harbor; Boston Harbor advocates; and Native American interests. The purpose of the Council is to advise and make recommendations to the Boston Harbor Islands Partnership with respect to the development and implementation of a management plan and the operations of the Boston Harbor Islands NRA.

Dated: November 5, 2008.

Bruce Jacobson,

Superintendent, Boston Harbor Islands NRA.

[FR Doc. E8–28417 Filed 11–28–08; 8:45 am]

BILLING CODE 4310–70–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–752 (Second Review)]

Crawfish Tail Meat From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on crawfish tail meat from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Background

The Commission instituted this review on July 1, 2008 (73 FR 37489) and determined on October 6, 2008 that it would conduct an expedited review (73 FR 62318, October 20, 2008).

The Commission transmitted its determination in this review to the Secretary of Commerce on November 25, 2008. The views of the Commission are contained in USITC Publication 4047 (November 2008), entitled *Crawfish Tail Meat from China: Investigation No. 731–TA–752 (Second Review).*

By order of the Commission.

Issued: November 25, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–28410 Filed 11–28–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–432 and 731–TA–1024–1028 (Review) and AA1921–188 (Third Review)]

Prestressed Concrete Steel Wire Strand From Brazil, India, Japan, Korea, Mexico, and Thailand

AGENCY: United States International Trade Commission.

ACTION: Institution of five-year reviews concerning the countervailing duty order on prestressed concrete steel wire strand from India and antidumping duty orders on prestressed concrete steel wire strand from Brazil, India, Japan, Korea, Mexico, and Thailand.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the countervailing duty order on prestressed concrete steel wire strand from India and the antidumping duty orders on prestressed concrete steel wire strand from Brazil, India, Japan, Korea, Mexico, and Thailand would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission;[1] to be assured of consideration, the deadline for responses is January 20, 2009. Comments on the adequacy of responses may be filed with the Commission by February 13, 2009. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* December 1, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), 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 these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—On December 8, 1978, the Department of the Treasury issued an antidumping finding on imports of prestressed concrete steel wire strand from Japan (43 FR 57599). Following five-year reviews by Commerce and the Commission, effective February 3, 1999, Commerce issued a continuation of the antidumping duty order on imports of prestressed concrete steel wire strand from Japan (64 FR 40554, July 27, 1999). Following second five-year reviews by Commerce and the Commission, effective June 25, 2004, Commerce issued a continuation of the antidumping duty order on imports of prestressed concrete steel wire strand from Japan (69 FR 35584). On January 28, 2004, the Department of Commerce issued antidumping duty orders on imports of prestressed concrete steel wire strand from Brazil, India, Korea, Mexico, and Thailand (69 FR 4109–4113). On February 4, 2004, the Department of Commerce issued a countervailing duty order on imports of prestressed concrete steel wire strand from India (69 FR 5319). The Commission is now conducting a third review of the antidumping duty order concerning Japan and a first review of the orders concerning Brazil, India, Korea, Mexico, and Thailand to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Countries* in these reviews are Brazil, India, Japan, Korea, Mexico, and Thailand.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the Subject Merchandise. In its expedited first and second five-year reviews of the antidumping duty order concerning Japan, the Commission found that the appropriate definition of the Domestic Like Product was the same as Commerce's scope: all steel wire strand, other than alloy steel, not galvanized, which has been stress-relieved and is suitable for use in prestressed concrete. The Commission did not make a like product determination per se in its original determination concerning Japan. In its original determinations concerning Brazil, India, Korea, Mexico, and Thailand, the Commission found the Domestic Like Product to be all prestressed concrete steel wire strand co-extensive with Commerce's scope, that is, steel strand produced from wire of non-stainless, non-galvanized steel that is suitable for use in prestressed concrete (both pre-tensioned and post-tensioned) applications and that encompasses covered and uncovered strand and all types, grades, and diameters of prestressed concrete steel wire strand.

(4) The *Domestic Industry* is the U.S. producers as a whole of the Domestic Like Product, or those producers whose collective output of the Domestic Like Product constitutes a major proportion of the total domestic production of the product. In its original determination and its expedited first and second reviews of the antidumping duty order concerning Japan, the Commission

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 09–5–192, expiration date June 30, 2011. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

defined the Domestic Industry as all producers of prestressed concrete steel wire strand. Likewise, in its original determinations concerning Brazil, India, Korea, Mexico, and Thailand, the Commission found the Domestic Industry to be all producers of prestressed concrete steel wire strand. The Commission also determined that plastic coating did not constitute sufficient production-related activity to qualify coaters as members of the domestic industry producing prestressed concrete steel wire strand.

(5) The *Order Date* is the date that the antidumping and countervailing duty orders under review became effective. In the review concerning the antidumping duty order on prestressed concrete steel wire strand from Japan, the Order Date is December 8, 1978. In the reviews concerning the antidumping duty orders on prestressed concrete steel wire strand from Brazil, India, Korea, Mexico, and Thailand, the Order Date is January 28, 2004. In the review concerning the countervailing duty order on prestressed concrete steel wire strand from India, the Order Date is February 4, 2004.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the Subject Merchandise into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list.—Persons, including industrial users of the Subject Merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official recently has advised that a five-year review is no longer considered the ''same particular matter'' as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are no longer required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 20, 2009. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is February 13, 2009. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information to be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export Subject Merchandise from more than one Subject Country; or produce Subject Merchandise in more than one Subject Country, you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent Subject Country. As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and e-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the Domestic Like Product, a U.S. union or worker group, a U.S. importer of the Subject Merchandise, a foreign producer or exporter of the Subject Merchandise, a U.S. or foreign trade or business

association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the Domestic Industry in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of Subject Merchandise on the Domestic Industry.

(5) A list of all known and currently operating U.S. producers of the Domestic Like Product. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the Subject Merchandise and producers of the Subject Merchandise in each Subject Country that currently export or have exported Subject Merchandise to the United States or other countries after 2002.

(7) If you are a U.S. producer of the Domestic Like Product, provide the following information on your firm's operations on that product during calendar year 2007 (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the Domestic Like Product accounted for by your firm's(s') production;

(b) The quantity and value of U.S. commercial shipments of the Domestic Like Product produced in your U.S. plant(s); and

(c) The quantity and value of U.S. internal consumption/company transfers of the Domestic Like Product produced in your U.S. plant(s).

(8) If you are a U.S. importer or a trade/business association of U.S. importers of the Subject Merchandise from the Subject Country(ies), provide the following information on your firm's(s') operations on that product during calendar year 2007 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of Subject Merchandise from each Subject Country accounted for by your firm's(s') imports;

(b) The quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of Subject Merchandise imported from each Subject Country; and

(c) The quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of Subject Merchandise imported from each Subject Country.

(9) If you are a producer, an exporter, or a trade/business association of producers or exporters of the Subject Merchandise in the Subject Country(ies), provide the following information on your firm's(s') operations on that product during calendar year 2007 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of Subject Merchandise in each Subject Country accounted for by your firm's(s') production; and

(b) The quantity and value of your firm's(s') exports to the United States of Subject Merchandise and, if known, an estimate of the percentage of total exports to the United States of Subject Merchandise from each Subject Country accounted for by your firm's(s') exports.

(10) Identify significant changes, if any, in the supply and demand conditions or business cycle for the Domestic Like Product that have occurred in the United States or in the market for the Subject Merchandise in each Subject Country after 2002, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the Domestic Like Product produced in the United States, Subject Merchandise produced in each Subject Country, and such merchandise from other countries.

(11) (Optional) A statement of whether you agree with the above definitions of the Domestic Like Product and Domestic Industry; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 25, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–28409 Filed 11–28–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–394–A & 399–A (Second Review) (Remand)]

Ball Bearings From Japan and the United Kingdom

AGENCY: United States International Trade Commission.

ACTION: Notice of stay of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the stay of its remand proceedings in the Commission's five-year reviews of the antidumping duty orders on ball bearings from Japan and the United Kingdom.

DATES: *Effective Date:* November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Russell Duncan, Office of Investigations, telephone 202–708–4727, or David Goldfine, Office of General Counsel, telephone 202–708–5452, 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 of investigation Nos. 731–TA–394–A & 399–A may be viewed on the Commission's electronic docket (''EDIS'') at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In June 2006, the Commission determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonable foreseeable time. The Commission's determinations for Japan and the United Kingdom were appealed to the Court of International Trade. On September 9, 2008, the Court issued a decision remanding the matter to the Commission for further proceedings. *NSK* v. *United States*, Slip Op. 08–95 (Ct. Int'l Trade, Sept. 9, 2008). In its opinion, the Court issued an order instructing the Commission to (1) ''conduct a *Bratsk* analysis of non-subject imports as outlined in this opinion;''(2) ''reassess supply conditions within the domestic industry,'' *i.e.*, the industry's restructuring efforts during the period of review, and (3) ''reexamine its findings with regard to likely impact and its decision to cumulate imports from the United Kingdom in light of changes in its determinations that may result as a consequence of the foregoing remand instructions.'' The Commission initiated its remand proceeding on October 8, 2008.

On September 18, 2008, the U.S. Court of Appeals for the Federal Circuit issued its opinion in *Mittal Steel Point Lisas, Ltd.* v. *United States* (Ct. No. 2007–1552), which clarified and limited its holding in *Bratsk Aluminium Smelter* v. *United States,* 444 F.3d 1369 (Fed. Cir. 2006). On October 9, 2008, the Commission filed a motion for reconsideration with the Court of International Trade (''CIT''), requesting that the CIT reconsider its decision in light of the Federal Circuit's analysis in *Mittal.* As part of that motion, the Commission also requested the CIT to issue a stay of its remand proceeding pending the Court's disposition of the motion for reconsideration. Defendant-Intervenor The Timken Company (''Timken'') filed a similar motion for reconsideration and a motion to stay the remand proceeding.

On October 29, 2008, the CIT granted the motions of the Commission and Timken and ordered a stay of the Commission's remand proceeding. In that Order, the CIT also directed that the stay shall remain in effect until the Court has ruled on the pending motions for reconsideration.

Accordingly, the remand proceedings in this matter are hereby stayed pending further order.

By order of the Commission.

Issued: November 24, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–28392 Filed 11–28–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–986 and 987 (Review)]

Ferrovanadium From China and South Africa

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty orders on ferrovanadium from China and South Africa would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on December 3, 2007 (72 FR 67962) and determined on March 7, 2008 that it would conduct full reviews (73 FR 14484, March 18, 2008). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on July 8, 2008 (73 FR 39040). The hearing was held in Washington, DC, on October 7, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on November 24, 2008.

The views of the Commission are contained in USITC Publication 4046 (November 2008), entitled *Ferrovanadium from China and South Africa: Investigation Nos. 731–TA–986–987 (Review).*

By order of the Commission.

Issued: November 24, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–28393 Filed 11–28–08; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1013 (Review)]

Saccharin From China

AGENCY: United States International Trade Commission.

ACTION: Scheduling of a full five-year review concerning the antidumping duty order on saccharin from China.

SUMMARY: The Commission hereby gives notice of the scheduling of a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty order on saccharin from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Cynthia Trainor (202–205–3354), 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 review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—On September 10, 2008, the Commission determined that responses to its notice of institution of the subject five-year review were such that a full review pursuant to section 751(c)(5) of the Act should proceed (73 FR 53444, September 16, 2008). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the review and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

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 this review available to authorized applicants under the APO issued in the review, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the review will be placed in the nonpublic record on March 9, 2009, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on March 26, 2009, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 20, 2009. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 24, 2009, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is March 18, 2009. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is April 7, 2009; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before April 7, 2009. On April 29, 2009, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before May 1, 2009, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (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: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.
Issued: November 24, 2008.

William R. Bishop,
Acting Secretary to the Commission.

[FR Doc. E8–28391 Filed 11–28–08; 8:45 am]
BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Bureau of Justice Statistics; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Proposed Collection; Clinical Indicators of Sexual Violence in Custody.

The Department of Justice (DOJ), Bureau of Justice Statistics, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 186, page 55133 on September 24, 2008, allowing for a 30-day period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 31, 2008. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or

associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Paul Guerino, Statistician, Bureau of Justice Statistics, 810 Seventh Street, NW., Washington, DC 20531 (phone 202–307–0349).

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New data collection.

(2) *Title of the Form/Collection:* Clinical Indicators of Sexual Violence in Custody.

(3) *Agency form number, if any, and the applicable component of the U.S. Department of Justice sponsoring the collection:* Form numbers not available at this time. The Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice is the sponsor for the collection.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: State, Local, or Tribal Government. *Other:* Federal Government, Business or other for-profit, Not-for-profit institutions. The work under this clearance will be used to create a pilot surveillance system to collect clinical indicators of sexual violence among inmates in response to the Prison Rape Elimination Act of 2003 (Pub. L. 108–79).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 35 health providers will spend approximately 10 minutes on average completing the surveillance form for each inmate exhibiting clinical indicators of sexual violence. Over a 12-month period, jail health providers are each expected to spend a total of 630 minutes completing surveillance forms and prison health providers are each expected to spend a total of 330 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 383 total burden hours associated with this collection.

If additional information is required, contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 24, 2008.

Lynn Bryant,

Department Deputy Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–28454 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Amended Consent Decree Under the Clean Water Act (CWA)

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on November 20, 2008, a proposed Amended Consent Decree in *United States and Commonwealth of Kentucky* v. *the Louisville and Jefferson County Metropolitan Sewer District* (MSD) Civil Action No. 3:08–CV–0068–CRS, was lodged with the United States District Court for the Western District of Kentucky, Louisville Division.

The Amended Consent Decree represents the settlement of claims brought by the United States and Commonwealth pursuant to the Clean Water Act (CWA). The complaint contained claims seeking injunctive relief and the recovery of a civil penalty in connection with wastewater treatment facilities owned and operated by MSD. The Amended Consent Decree, which incorporates, amends and supercedes the previous Consent Decree entered by the Court on August 12, 2005, requires MSD to undertake action necessary to achieve compliance with its National Pollution Discharge Elimination System (NPDES) permits, eliminate bypasses, conduct comprehensively monitoring and reporting with respect to its sewer operations, and pay a penalty of $230,000. The Amended Consent Decree also requires MSD to undertake a stream restoration project, as a Supplemental Environmental Project.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Amended Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and Commonwealth of Kentucky* v. *The Louisville and Jefferson County Sewer District*, DOJ # 90–5–1–1–08254/1. The Amended Consent Decree may be examined at U.S. EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, Atlanta, Georgia 30303. During the public comment period, the Amended Consent Decree, may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Amended Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Amended Consent Decree Library, please enclose a check in the amount of $23.50 (for the Consent Decree only and $90.75 for the Amended Consent Decree and all exhibits thereto) (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–28383 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Global Universal Design Commission, Inc.

Notice is hereby given that, on October 20, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993,

15 U.S.C. 4301 *et seq.* (''the Act''), Global Universal Design Commission, Inc. (''GUDC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the name and principal place of business of the standards development organization is: Global Universal Design Commission, Inc., Syracuse, New York. The nature and scope of GUDC's standards development activities are: To develop and promote the understanding and use of universal design. Universal design seeks to increase the usability, safety and health of the built environment to support social inclusion of a diverse population in all aspects of society. Universal design is an approach to the design of products and environment which treats all people equally and does not call special attention to the needs of a particular class of people. GUDC seeks to develop universal design standards through a consensus process that will increase choices and accommodate a wide range of preferences and needs, to the greatest extent possible, without the need for adaptation, retrofitting, or specialized design.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–28193 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 29, 2008, and published in the **Federal Register** on August 6, 2008 (73 FR 45784), Cambridge Isotope Lab, 50 Frontage Road, Andover, Massachusetts 01810, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Morphine (9300), a basic class of controlled substance listed in schedule II.

The company plans to utilize small quantities of the listed controlled substance in the preparation of analytical standards.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cambridge Isotope Lab to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Cambridge Isotope Lab to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: November 21, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–28432 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–NEW]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day Notice of new collection: Methodological research to support the redesign of the National Crime Victimization Survey (NCVS).

The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until January 30, 2009. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Katrina Baum, Statistician, Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, 810 7th Street, NW., Washington, DC 20531, or facsimile (202) 307–1463.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This information

(1) *Type of information collection:* New collection.

(2) *Title of the Form/Collection:* Methodological research to support the redesign of the National Crime Victimization Survey (NCVS).

(3) *Agency form number, if any, and the applicable component of the department sponsoring the collection:* Form numbers not available for generic clearance, Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract. Primary:* Persons ages 12 or older in sampled households in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* Approximately 43,180 persons ages 12 or older will be interviewed for some aspect of the redesign research. The average length of interview will vary by the type of interview conducted. Completing the crime screener and abbreviated incident report is estimated to take 15 minutes, while a cognitive interview for improving recall using event history calendars may take 2 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total respondent burden is approximately 13,260 hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, United States Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 25, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–28477 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0184]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day Notice of Information Collection Under Review: School Crime Supplement (SCS) to the National Crime Victimization Survey (NCVS).

The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 186, page 55134 on September 24, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 31, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) *Type of information collection:* Reinstatement, without change, of a previously approved collection for which approval has expired.

(2) *Title of the Form/Collection:* School Crime Supplement (SCS) to the National Crime Victimization Survey.

(3) *Agency form number, if any, and the applicable component of the department sponsoring the collection:* SCS–1. Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract. Primary:* Persons ages 12 to 18 in NCVS sampled households in the United States. The School Crime Supplement (SCS) to the National Crime Victimization Survey collects, analyzes, publishes, and disseminates statistics on the prevalence, economic cost, and consequences of identity theft on victims.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* Approximately 9,445 persons ages 12 to 18 will complete an SCS interview. We estimate the average length of the ITS interview for these individuals will be 0.167 hours (10 minutes).

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total respondent burden is approximately 1,577 hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 24, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–28390 Filed 11–28–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Assistant Secretary for Policy; Retiree Health Policy

AGENCY: Office of the Assistant Secretary for Policy, DOL.

ACTION: Request for information.

SUMMARY: This document requests information from the public to assist the Department of Labor in studying and understanding the role of Voluntary Employees' Beneficiary Associations in providing health and welfare benefits to retired workers in the United States.

DATES: Written or electronic responses must be submitted to the Department of Labor on or before December 31, 2008.

Responses: To facilitate the receipt and processing of responses, OASP encourages interested persons to submit their responses electronically to *http://www.regulations.gov.* Persons submitting responses electronically should not submit paper copies. Persons interested in submitting written responses on paper should send or deliver their responses (preferably, at least three copies) to the Office of the Assistant Secretary for Policy, Frances Perkins Building, 200 Constitution Avenue, NW., Room S–2312, Washington, DC 20210. All written responses will be available to the public, without change, online at _____.

FOR FURTHER INFORMATION CONTACT: Kathleen Franks, Office of the Assistant Secretary for Policy, Room S–2312, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693–5959. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

An important goal of the Department of Labor (the Department or DOL) is to advance the public's knowledge and understanding of retirement savings and health benefits and their critical importance to the future well-being of workers and their families. The Employee Benefits Research Institute

(EBRI), a major industry funded research group, recently reported in its 2008 *Retirement Confidence Survey* (RCS), that health care costs have become an important issue for retirees, with almost half of retirees saying they have spent more than expected on health care expenses.[1] The EBRI survey found that 34 percent of all workers now expect to have access to employer-sponsored health insurance in retirement, down 8 percentage points from 2007. The survey also found that, although 41 percent of retirees say they currently have access to health insurance through a former employer, many employers are eliminating health care coverage for future retirees. A key policy question, therefore, is how to better help employers and employees prepare for post-retirement health care costs.

In 1928, the Internal Revenue Code (the Code) was amended to provide tax-exempt status for a Voluntary Employees' Beneficiary Association (VEBA). VEBAs are one way that employers can fund and pay for welfare benefits for their employees. The federal government primarily regulates VEBAs through the Code, U.S. Department of the Treasury (Treasury) regulations, and DOL regulations related to the Employee Retirement Income Security Act (ERISA). Section 501(c)(9) of the Code defines a VEBA as an association organized to pay life, sick, accident, and similar benefits to members or their dependents, or designated beneficiaries. Typically established as a trust, the VEBA uses its assets to pay eligible benefits under a plan. Employer contributions to a VEBA for retiree health coverage may be excludable from an employee's gross income under section 106 of the Code. Retiree health benefits paid from a VEBA are generally excludable from retirees' gross income under section 105(b) of the Code and a VEBA's income is generally exempt from taxation.[2] To qualify as a VEBA, an association must meet, among other requirements, the following requirements under Section 501(c) (9) of the Code and Treasury regulations at 26 CFR Section 1.501(c) (9)–1:

(a) It must be an employees' association;

(b) Membership in the association must be voluntary;[3]

(c) The organization must provide for payment of life, sick, accident, or other benefits to its members or their dependents or designated beneficiaries, and substantially all of its operations must be in furtherance of providing such benefits; and

(d) No part of the net earnings of the organization may inure, by other than by the payment of benefits referred to in paragraph (c) above, to the benefit of any private shareholder or individual.

The membership of a Section 501(c)(9) VEBA must consist of individuals who are employees with an employment-related common bond. This common bond may be a common employer or affiliated employers, coverage under one or more collective bargaining agreements, membership in a labor union, or membership in one or more locals of a national or international labor union. Thus, a VEBA can fund benefits for employees and retirees of a single employer or, in certain cases, for a group of employers.

A trust does not satisfy the requirements for VEBA status under Section 501(c)(9) of the Code unless it gives timely notice to the Internal Revenue Service (IRS) that it is applying for recognition of such status,[4] and receives such recognition from IRS. In addition, a VEBA must meet certain nondiscrimination requirements under Section 505 of the Code, unless it is part of a plan maintained pursuant to a collective bargaining agreement and the plan was the subject of good faith bargaining between employee representatives and employers.[5]

B. Laws Regulating VEBAs

A VEBA that is part of a private sector employee welfare benefit plan must also adhere to the fiduciary, annual reporting, disclosure and other requirements of ERISA, which are administered by the Department's Employee Benefit Security Administration (EBSA). Persons responsible for investment and management of the VEBA's assets are fiduciaries, and must comply with ERISA's general prudence and prohibited transaction provisions. The employee welfare benefit plans funded by a VEBA generally must also file an annual Form 5500 financial report. If the plan has 100 or more participants, the annual report must include an audit report prepared by an independent qualified public accountant.

Pursuant to ERISA's annual reporting requirements, the audit report must comply with American Institute of Certified Public Accountants (AICPA), Statement of Position (SOP) 92–6, *Accounting and Reporting by Health and Welfare Benefit Plans,* which governs employee benefit plan's accounting for post-retirement benefits other than pensions. SOP 92–6 was issued in August 1992 and generally became effective for single-employer plans for plan years beginning after December 15, 1992.[6] Employer accounting for postretirement benefits other than pensions must comply with Financial Accounting Standard Number 106 (FAS 106), Employers' Accounting for Postretirement Benefits Other Than Pensions. FAS 106 was issued in December 1990 and became mandatory for most employers for fiscal years beginning after December 15, 1992.[7]

ERISA does not impose an explicit requirement on employers or on unions to fund VEBAs, nor does it outline any rules for determining what a ''proper'' level of funding for a VEBA would be. Rather, employer contributions to VEBAs are generally made either on a contractual basis or at the employer's discretion.[8] Some VEBAs are established based on a collective bargaining agreement requiring the employer to make a substantial initial payment and then much smaller, if any,

[1] See EBRI Issue Brief No. 316, *The 2008 Retirement Confidence Survey: Americans Much More Worried about Retirement, Health Costs a Big Concern* (April 2008), available at *http://www.ebri.org.*

[2] However, a VEBA's income, including income on amounts set aside for post-retirement medical benefits, might be subject to unrelated business income tax. See sections 511 and 512 of the Code and Treasury regulations at 26 CFR 1.512(a)–5T, Q&A–3. Finally, the Code provides guidance regarding the type of health benefits that may be received by employees and retirees on a tax-free basis.

[3] Although membership in a VEBA must be voluntary for the participating employees, an association is considered voluntary although membership is required of all employees, provided that the employees do not incur a detriment (for example, in the form of deductions from pay) as a result of membership in the association. Nor will an employer be deemed to have imposed involuntary membership on an employee if membership is required as the result of a collective bargaining agreement or as an incident of membership in a labor organization.

[4] IRS Form 1024 is used for this purpose. See 26 CFR 1.501(a)–1(a)(2), 1.505(c)–1T.

[5] For other rules regarding VEBAs, see generally 26 CFR 1.501(c)(9)–2 through 1.501(c)(9)–9.

[6] SOP 92–6 was subsequently amended by Statement of Position 01–02, issued in April 2001. SOP 01–02 clarifies some of the disclosures required by SOP 92–6.

[7] FAS 106 was amended by the issuance of FAS 132, *Employers' Disclosures about Pensions and Other Postretirement Benefits,* issued in February 1998, which revised employers' disclosures about pension and other postretirement benefit plans.

[8] Sections 419 and 419A of the Code, which set forth specific rules regarding the amount and timing of employer deductions for contributions to VEBAs and other welfare benefit funds, were enacted in DEFRA, in response to concerns with abuses of VEBAs and other welfare benefit funds. DEFRA also added Code section 512(a)(3), which contains special rules for computing the unrelated business taxable income of a VEBA, and section 4976, which provides for an excise tax on certain benefits paid from welfare benefit funds (including VEBAs) and on reversions to the benefit of the employer of any portion of a welfare benefit fund.

additional payments thereafter. These funds are invested, and some combination of the initial assets and the returns on the investments are then used to pay benefits over time. Naturally, the size of the initial payment, the returns on the investments, and the level of benefits provided will have major impacts on the VEBA's ability to pay for benefits over the long-term.

Depending on the purpose of a VEBA with fixed initial assets, the fiduciaries charged with administering the employee welfare benefit plan may be faced with difficult choices. Unless the VEBA's investment returns cover all the costs incurred by the VEBA for payment of benefits and administration, the assets of the VEBA will diminish over time, and eventually the VEBA may be unable to continue to pay the plan benefits. Thus, depending on its level of initial funding, a plan funded solely through a diminishing-asset VEBA faces a potential trade-off between the level of health benefits secured by the VEBA and the length of time that the plan will be able to continue to provide benefits. This could result in conflicting interests between older participants, who may be primarily interested in maximizing the value of short-term benefits, and younger participants, who may have a greater interest in maximizing the number of years that the plan is able to provide benefits. When considering this trade-off, plan participants should be aware that, even in an apparently well-funded VEBA, investment risks and other cost factors may affect the VEBA's financial condition and may, in some cases, necessitate that plan benefits be substantially reduced.

C. The Department's Observations on VEBAs

The Department has observed that employers, particularly large employers with unionized workforces, are increasingly exploring the financial, tax and accounting advantages of transferring retiree health liabilities to a stand-alone VEBA not managed or controlled by the employer. Most notably, recent agreements between several automobile manufacturers and the United Auto Workers (UAW) union have called for the establishment of stand-alone VEBAs to fund retiree health care liabilities. These VEBAs were formed pursuant to settlements resolving long-standing disputes between the UAW and the auto makers regarding the extent to which the auto makers had a legal obligation to continue to provide health care benefits to retired workers. The settlements call for the new VEBAs to be funded with tens of billions of dollars in assets transferred from the automobile manufacturers. Both the investment strategies for the VEBAs and the level of benefits paid by the plans funded through the VEBAs will be set by an eleven member board of which five are appointed by the UAW, and the other six individuals selected initially by the judge approving the settlement. Under the terms of the settlement agreement, a candidate for a vacancy among the six non-UAW-selected board positions would be selected by a favorable vote of nine of the existing board members with arbitration available in the event of deadlock, giving the UAW-selected members substantial control over the process.

The Department reviewed documents that were publicly disclosed during the litigation and discussed the formation of the VEBAs with the parties. Some of the specific concerns raised by the Department were whether the investment expectations that had been used to calculate the VEBAs' longevity were set at unrealistically high levels, and whether the projected cost of providing benefits was set too low. The Department was also concerned that the plan documents did not provide the trustees with any guidance on how, in the exercise of their fiduciary duties, they should resolve the inherent conflict of interest between older workers, who might prefer higher benefit levels even if those higher benefits exhaust the VEBAs more quickly, and younger workers, who might prefer somewhat lower benefits if that meant that the benefits would be available over a longer period of time. As a result of these discussions, the parties agreed to make available to the beneficiaries and other interested members of the public more financial information about the VEBAs, including more information about the various financial and actuarial assumptions behind the VEBAs. The parties also agreed to a modification in the trust agreement governing the VEBAs to clarify the intent of the parties and provide guidance to the fiduciary Committee members that ''[i]n exercising its authority over benefit design, the Committee shall be guided by the principle that the Plans should provide substantial health benefits for the duration of the lives of all participants and beneficiaries.''

The Department is interested in learning whether broader changes in the labor market may result in changes in retiree health plan offerings and how VEBAs can play a role in accommodating those changes. Examples of these changes may include the aging of the labor force and increasing number of retirees, the increasing concentration of employment in the service sector, and changes in skill, productivity, and compensation patterns. The labor market may be affected by increases in the cost and utilization of health care, and by global competition facing plan sponsors. Changes in the labor markets, including effects on retirement ages, labor force participation, career patterns, and the way in which workers are compensated, may ultimately affect group and individual health insurance markets, government programs, and the demand for health care goods and services.

Recent regulatory changes which will allow employers to coordinate retiree health benefits with Medicare for Medicare-eligible retirees may also spur interest in how plans funded by VEBAs can be used to provide retirees health care coverage that ''bridges'' the gap between retirement and eligibility for Medicare or cover additional expenses not covered by Medicare. Specifically, a final rule published by the Equal Employment Opportunity Commission (EEOC) in December 2007 permits employers to create, adopt or maintain a wide range of retiree health plan designs that provide different coverage for retirees age 65 and over without violating the Age Discrimination in Employment Act. The rule also allows unions to negotiate for health benefits that coordinate with Medicare.[9]

Finally, the Department is aware of recent research on VEBAs that has highlighted the benefits from VEBAs to employers and employees, and that suggests that VEBAs may be a desirable option for them. One recent study, by the Segal Company, entitled *Study of Retiree Health VEBAs,* examined 25 stand-alone VEBAs in the manufacturing, retail or transportation industries (Segal Study).[10] According to the Segal Study, VEBAs can provide security for current and future retirees by setting aside funds for retiree benefits that cannot be used for other corporate purposes. It also noted that VEBAs are a vehicle for an employer to remove FAS 106 liability from its financial statements, and that employers can fund the trust through a variety of mechanisms, including cash, company

[9] See EEOC Final Rule under 29 CFR Parts 1625 and 1627 on Age Discrimination in Employment Act and Retiree Health Benefits, 72 Fed. Reg. 72938 (Dec. 26, 2007).

[10] *http://www.segalco.com/publications/surveysandstudies/2008VEBAs.pdf.* For another synopsis of the Segal Study, see Wohl, *Under the Hood: After Acceptance from UAW, VEBAs Get a Closer Look,* Employee Benefits News (March 2008) (available at *ebn.benefitnews.com/asset/article/547851/under-hood-after-acceptance-uaw-vebas.html?pg=*).

stock, or other assets. The Segal Study further pointed out that VEBAs may allow unions and retirees more input into benefit levels and contributions because they may have seats on the VEBA's board of trustees or other governing body. On the other hand, the Segal Study suggested that it is not possible for VEBAs to guarantee a set level of benefits far into the future, or to provide retirees with protection from investment risk, because the financial condition of the trust may be adversely affected by unpredictable risks, downturns in the market, or health care cost increases.

Another study, the Mercer *2007 National Survey of Employer-Sponsored Health Plans* (Mercer Study), found that among employers with 500 or more employees that offer retiree health insurance, 11 percent use a VEBA to fund it, and an additional 5 percent are considering using one. The Mercer Study also determined that VEBA use is most common among the largest retiree health sponsors (28 percent of those with 10,000 or more employees) and those in the transportation-communications-utilities industry group (38 percent), followed by the financial services (19 percent) and manufacturing (13 percent) industry groups.[11]

Finally, a recent paper by Aaron Bernstein entitled *''Can VEBAs Alleviate Retiree Health Care Problems?,''* published as part of the Harvard Law School Pensions and Capital Stewardship Project Labor and Worklife Program, examined VEBAs in the context of declining retiree health coverage and discussed the ways that VEBAs could help union and nonunion employees in both the private and public sector.[12]

D. Request for Information

The purpose of this notice is to obtain information to assist the Department in studying and understanding the role of VEBAs in providing health and welfare benefits to retired workers in the United States. In order to assist interested parties in responding, this document contains a list of specific areas of interest. The Department recognizes that these areas of interest may not address all relevant issues. Accordingly, interested parties are invited to submit comments on other issues that they believe are pertinent.

1. What economic and demographic forces are driving changes in retiree health plan offerings and VEBA use?

2. What are the consequences to employees, employers, and the public of increasing VEBA use by employers to fund retiree health benefits?

3. Is there a need for changes in ERISA or in the Department's ERISA regulations to better govern the administration of VEBAs?

4. Should VEBAs that are larger, whether in terms of assets, number of beneficiaries, or both, be subject to different regulatory requirements than smaller VEBAs?

5. Aside from the general fiduciary obligations imposed by ERISA, should other requirements be imposed on VEBA governance structure to better protect the economic interests of participants?

6. Should plan documents for VEBAs be required to provide fiduciaries guidelines on benefit payments to help the fiduciaries resolve any conflicts of interest that may develop between participants at different life cycle stages?

7. Should the law require that participants in plans funded by VEBAs must be provided with actuarial information indicating the potential range of benefits the plan is likely to be able to provide, taking into account potential future benefits, investment returns, and changes in the cost of health benefits?

Leon R. Sequeira,

Assistant Secretary for Policy.

[FR Doc. E8–28325 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–23–P

[11] See *http://www.mercer.com/referencecontent.jhtml?idContent=1287790*

[12] The article is available at: *http://www.law.harvard.edu/programs/lwp/occasionalpapers_Ap9_.*

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W–63,957]

Phillips Plastics Corporation, Precision Decorating Facility, Including On-Site Leased Workers From Manpower, Medford, WI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 31, 2008, applicable to workers of Phillips Plastics Corporation, Precision Decorating Facility, Medford, Wisconsin. The notice was published in the **Federal Register** on November 13, 2008 (73 FR 67209).

At the request of the State agency and the petitioners, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of interior automotive plastics (*i.e.* automotive radio faceplates, heater control faceplates and buttons and window switches).

New information shows that workers leased from Manpower were employed on-site at the Medford, Wisconsin location of Phillips Plastics Corporation, Precision Decorating Facility. The Department has determined that these workers were sufficiently under the control of Phillips Plastics Corporation, Precision Decorating Facility to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Manpower working on-site at the Medford, Wisconsin location of the subject firm.

The intent of the Department's certification is to include all workers employed at Phillips Plastics Corporation, Precision Decorating Facility, Medford, Wisconsin who were adversely affected by increased imports of interior automotive plastics (*i.e.*, automotive radio faceplates, heater control faceplates and buttons and wind switches).

The amended notice applicable to TA–W–63,957 is hereby issued as follows:

''All workers of Phillips Plastics Corporation, Precision Decorating Facility, including on-site leased workers from Manpower, Medford, Wisconsin, who became totally or partially separated from employment on or after July 27, 2007, through October 31, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28360 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,034]

Regina Behar Enterprises, Inc., Including On-Site Leased Workers From Alphastaff, Miami Lakes, FL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 21, 2008, applicable to workers of Regina Behar Enterprises, Inc., Miami Lakes, Florida. The notice was published in the **Federal Register** on November 10, 2008 (73 FR 66676).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of men's and women's custom shirts.

New information shows that workers leased from Alphastaff were employed on-site at the Miami Lakes, Florida location of Regina Behar Enterprises, Inc. The Department has determined that these workers were sufficiently under the control of Regina Behar Enterprises, Inc. to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Alphastaff working on-site at the Miami Lakes, Florida location of the subject firm.

The intent of the Department's certification is to include all workers employed at Regina Behar Enterprises, Inc., Miami Lakes, Florida who were adversely affected by increased imports of men's and women's custom shirts.

The amended notice applicable to TA–W–64,034 is hereby issued as follows:

''All workers of Regina Behar Enterprises, Inc., including on-site leased workers from Alphastaff, Miami Lakes, Florida, who became totally or partially separated from employment on or after September 8, 2007, through October 21, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 19th day of November 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28361 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,151A]

Casey Tool & Machine Co. Inc., 1550 Douglas Drive and 815 Reasor Road, Including On-Site Leased Workers From Westaff, Charleston, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 22, 2008, applicable to workers of Casey Tool & Machine Co. Inc., Charleston, Illinois. The notice was published in the **Federal Register** on November 10, 2008 (73 FR 66676).

At the request of a petitioner, the Department reviewed the certification for workers of the subject firm. The workers of the firm are engaged in the production of residential and commercial lighting.

The Department is amending the certification to clarify that the firm operates at two locations in Charleston, Illinois and utilizes leasing agency staff. The workers at 1550 Douglas Drive provide purchasing and IT support, while workers at 815 Reasor Road are engaged in activities related to the production of commercial lighting. Furthermore, the worker group at Casey Tool & Machine Co. Inc., 815 Reasor Road, Charleston, Illinois, includes on-site leased workers from Westaff.

The amended notice applicable to TA–W–64,151A is hereby issued as follows:

''All workers of Casey Machine & Tool Co. Inc., 1550 Douglas Drive and 815 Reasor Road, including on-site leased workers from Westaff, Charleston, Illinois, who became totally or partially separated from employment on or after September 30, 2007 through October 22, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed in Washington, DC, this 20th day of November 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28364 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,993]

Guardian Automotive, a Subsidiary of Guardian Industries Corporation, Including On-Site Leased Workers From Kelly Services and Manpower Services, LaGrange, GA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Negative Determination Regarding Eligibility To Apply for Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and a Negative Determination Regarding Eligibility to Apply for Alternative Trade Adjustment Assistance on March 26, 2007, applicable to workers of Guardian Automotive, a subsidiary of Guardian Industries Corporation, including on-site leased workers from Kelly Services, LaGrange, Georgia. The notice was published in the **Federal Register** on April 10, 2007 (72 FR 17936).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of automotive trim.

New information shows that in August 2008, the subject firm switched its on-site leased worker contract from Kelly Services to Manpower Services. The Department has determined that workers leased from Manpower Services were sufficiently under the control of Guardian Automotive, a subsidiary of Guardian Industries Corporation to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Manpower Services working on-site at the LaGrange, Georgia location of the subject firm.

The intent of the Department's certification is to include all workers employed at Guardian Automotive, a subsidiary of Guardian Industries Corporation, LaGrange, Georgia who are secondarily affected.

The amended notice applicable to TA-W–60,993 is hereby issued as follows:

''All workers of Guardian Automotive, a subsidiary of Guardian Industries Corporation, including on-site leased workers of Kelly Services and Manpower Services, LaGrange, Georgia, who became totally or partially separated from employment on or after February 14, 2006, through March 26, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

I further determine that all workers of Guardian Automotive, a subsidiary of Guardian Industries Corporation, including on-site leased workers from Kelly Services and Manpower Services, LaGrange, Georgia, are denied eligibility to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 20th day of November 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28353 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of *November 10 through November 14, 2008.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.* , conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–64,211; Tarkett Alabama, Inc., NAFCO Div., Florence, AL: October 10, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,078; Tyco Electronics Corporation, Global Application Tooling Division, Harrisburg, PA: September 18, 2007.

TA–W–64,177; Louis Hornick and Company, Inc., Haverstraw, NY: September 26, 2007.

TA–W–63,399; Kik Custom Products, Inc., On-Site Wkrs from Qualified Resource International, Cumberland, RI: May 12, 2007.

TA–W–64,062; Valspar Coatings, General Industrial Division, Jackson, TN: August 29, 2007.

TA–W–64,066; Mid South Electronics, Inc., East Gadsden, AL: August 22, 2007.

TA–W–64,102; Wellman, Inc., Palmetto Plant,Darlington, SC: May 4, 2008.

TA–W–64,247; Guilford Performance Textiles, GMI Holding Corp, Fuquay-Varina, NC: October 17, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,010A; Blue Water Automotive Systems, Inc., St. Clair, MI: September 8, 2007.

TA–W–64,010B; Blue Water Automotive Systems, Inc., St. Clair, MI: September 8, 2007.

TA–W–64,010C; Blue Water Automotive Systems, Inc., Port Huron, MI: September 8, 2007.

TA–W–64,010D; Blue Water Automotive Systems, Inc., St. Clair, MI: September 8, 2007.

TA–W–64,010E; Blue Water Automotive Systems, Inc., Caro, MI: September 8, 2007.

TA–W–64,010; Blue Water Automotive Systems, Inc., Marysville, MI: September 8, 2007.

TA–W–64,031; Gates Corporation, North American Power Transmission Division, Jefferson, NC: September 5, 2007.

TA–W–64,197; Avid Medical Products, Formerly Known as Horizon Medical, Flextronics Medical, Santa Ana, CA: October 9, 2007.

TA–W–64,268; Eagle Ottawa LLC, Waterloo, IA: October 22, 2007.

TA–W–64,300; U.S. Marine Bayliner, Brunswick Boat Division, Pipestone, MN: October 28, 2007

TA–W–64,351; Dura Automotive Systems, Inc., HCN Cable Division, Hannibal, MO: October 18, 2008.

TA–W–63,952; Intel Corporation, Fab 11, Rio Rancho, NM: August 20, 2007.

TA–W–63,985; Cooper Standard Automotive, Noise, Vibration and Harshness Div., Auburn, IN: October 7, 2008.

TA–W–64,125; GE Healthcare Bioscience BioProess Corp., Biopharma Instruments, Aerotek, Connections, etc, Somerset, NJ: September 26, 2007.

TA–W–64,152; McClatchy Newspapers, Inc., dba The Sacramento Bee, AD Central Department, Sacramento, CA: September 22, 2007.

TA–W–64,236; Shop Vac Endicott, Endicott, NY: October 16, 2007.

TA–W–64,248; Freudenberg Nonwovens, Industrial and Interlining Division, Durham, NC: October 17, 2007.

TA–W–64,371; SMI Bell Manufacturing, dba SML Bekk,

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,156; Boise Cascade, LLC, Kettle Falls, WA: October 1, 2007.

TA–W–64,323; Hoover Universal, dba Johnson Controls, Inc., Jefferson City, MO: October 29, 2007.

TA–W–64,325; Yorozu Automotive Mississippi, Inc., Vicksburg, MS: October 31, 2007.

TA–W–63,892; Display Pack, Inc., Leased Wkrs Staffing, Inc., Formerly known as Axios, Inc., Grand Rapids, MI: August 12, 2007.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified. The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–64,211; Tarkett Alabama, Inc., NAFCO Div., Florence, AL.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TAW–63,582; Power Packer Automotive, A Division of Actuant Corporation, Glendale, WI.

TAW–63,922; Kongsberg Automotive, Inc., Selmer,TN.

TAW–64,097; EcoWater Systems LLC, A Subsidiary of the Marmon Group, Woodbury, MN.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

None.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of *November 10 through November 14, 2008.* Copies of these determinations are available for inspection in Room C–5311, U.S.

Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: November 21, 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28351 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,438]

Chrysler LLC, St. Louis South Assembly Division, Including On-Site Leased Workers From HAAS TCM, Inc., Fenton, MO; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 14, 2007, applicable to workers of Chrysler LLC, St. Louis South Assembly Division, Fenton, Missouri. The notice was published in the **Federal Register** on December 31, 2007 (72 FR 74343).

At the request of the petitioner, the Department reviewed the certification for workers of the subject firm. The workers assemble Chrysler Town and Country mini-van, and the Dodge Grand Caravan mini-van.

New information shows that workers leased workers from HAAS TCM, Inc. were employed on-site at the Fenton, Missouri location of Chrysler LLC, St. Louis South Assembly Division. The Department has determined that these workers were sufficiently under the control of Chrysler LLC, St. Louis South Assembly Division to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from HAAS TCM, Inc. working on-site at the Fenton, Missouri location of the subject firm.

The intent of the Department's certification is to include all workers employed at Chrysler LLC, St. Louis South Assembly Division, Fenton, Missouri who were adversely affected by increased imports of Chrysler Town and Country mini-van and the Dodge Grand Caravan mini-van.

The amended notice applicable to TA–W–62,438 is hereby issued as follows:

''All workers of Chrysler LLC, St. Louis South Assembly Division, including on-site leased workers from HAAS TCM, Inc., Fenton, Missouri, who became totally or partially separated from employment on or after November 7, 2006, through December 14, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28354 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,052]

Chrysler LLC, St. Louis North Assembly Plant, Including On-Site Leased Workers From HAAS TCM, Inc., Fenton, MO; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on April 14, 2008, applicable to workers of Chrysler LLC, St. Louis North Assembly Plant, Fenton, Missouri. The notice was published in the **Federal Register** on May 2, 2008 (73 FR 24317).

At the request of the petitioner, the Department reviewed the certification for workers of the subject firm. The workers assemble Dodge Ram full-sized pickup trucks.

New information shows that leased workers from HAAS TCM, Inc., were employed on-site at the Fenton, Missouri, location of Chrysler LLC, St. Louis North Assembly Plant. The Department has determined that these workers were sufficiently under the control of Chrysler LLC, St. Louis North Assembly Plant, to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from HAAS TCM, Inc., working on-site at the Fenton, Missouri, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Chrysler LLC, St. Louis North Assembly Plant, Fenton, Missouri, who were adversely affected by increased imports of Dodge Ram full-sized pickup trucks.

The amended notice applicable to TA–W–63,052 is hereby issued as follows:

''All workers of Chrysler LLC, St. Louis North Assembly Plant, including on-site leased workers from HAAS TCM, Inc., Fenton, Missouri, who became totally or partially separated from employment on or after March 18, 2007, through April 14, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28355 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,521]

Daltile, Incorporated, a Subsidiary of Mohawk Industries, DTG Tile Corp./Dal-Elit, Dallas, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on July 28, 2008, applicable to workers of Daltile, Incorporated, a subsidiary of Mohawk Industries, Dallas, Texas. The notice was published in the **Federal Register** on August 12, 2008 (73 FR 46922).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of ceramic tiles.

New information provided to the Department shows that some of the workers wages at the subject firm are being reported under the Unemployment Insurance (UI) tax account for DTG Tile Corp./Dal-Elit LP.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Daltile, Incorporated, a subsidiary of Mohawk Industries who were adversely affected by increased imports of ceramic tiles.

The amended notice applicable to TA–W–63,521 is hereby issued as follows:

''All workers of Daltile, Incorporated, a subsidiary of Mohawk Industries, DTG Tile Corp./Dal-Elit LP, Dallas, Texas, who became totally or partially separated from employment on or after June 10, 2007, through July 28, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28357 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,064]

Delphi Corportion, Automotive Holdings Group, Including On-Site Leased Workers from 850 Managed Services, Inc., d/b/a Tac Automotive Worldwide Companies, Columbus, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 19, 2006, applicable to workers of Delphi Corporation, Automotive Holdings Group, Columbus, Ohio. The notice was published in the **Federal Register** on November 6, 2006 (71 FR 65004).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of automotive components (specifically latches, strikers, door modules and power products).

New information shows that workers leased from 850 Managed Services, d/b/a/ TAC Automotive Worldwide Companies were employed on-site at the Columbus, Ohio location of Delphi Corporation, Automotive Holdings Group. The Department has determined that these workers were sufficiently under the control of Delphi Corporation, Automotive Holdings Group to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from 850 Managed Services, Inc., d/b/a TAC Automotive Worldwide Companies working on-site at the Columbus, Ohio location of the subject firm.

The intent of the Department's certification is to include all workers employed at Delphi Corporation, Automotive Holdings Group, Columbus, Ohio who were adversely affected by a shift in production of automotive components (specifically latches, strikers, door modules and power products) to Mexico.

The amended notice applicable to TA–W–60,064 is hereby issued as follows:

''All workers of Delphi Corporation, Automotive Holdings Group, including on-site leased workers from 850 Managed Services, Inc., d/b/a TAC Automotive Worldwide Companies, Columbus, Ohio, who became totally or partially separated from employment on or after September 11, 2005, through October 19, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 20th day of November 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28352 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,207]

Delphi Corporation, Electronics and Safety Division, Including On-Site Leased Workers From Bartech, Manpower Professional and TRC (Transportation Research Center, Inc.), Vandalia, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 22, 2008, applicable to workers of Delphi Corporation, Electronics and Safety Division, Vandalia, Ohio. The notice was published in the **Federal Register** on November 10, 2008 (73 FR 66676).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of door modules, instrument panels, airbags, steering wheels, and power products.

New information shows that workers leased from Bartech, Manpower Professional and TRC (Transportation Research Center, Inc.) were employed on-site at the Vandalia, Ohio location of Delphi Corporation, Electronics and Safety Division. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Bartech, Manpower Professional and TRC (Transportation Research Center, Inc.) working on-site at the Vandalia, Ohio location of the subject firm.

The intent of the Department's certification is to include all workers employed at Delphi Corporation, Electronics and Safety Division who were adversely affected by increased imports following a shift in production of door modules, instrument panels, airbags steering wheels and power products to Mexico.

The amended notice applicable to TA–W–64,207 is hereby issued as follows:

''All workers of Delphi Corporation, Electronics and Safety Division, including on-site leased workers from Bartech, Manpower Professional and TRC (Transportation Research Center, Inc.), Vandalia, Ohio, who became totally or partially separated from employment on or after September 24, 2007, through October 22, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28350 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,723]

General Motors Corporation, GMNA Powertrain—Massena, Including On-Site Leased Workers From Aerotek, Inc., Knights Facilities Management, IS One, APC Worforce, Securitas Security Services, The Bas Tech Group, Maxsys Usa, Inc., Adroit Software & Consulting, Inc. and Acro Service Corp., Massena, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 3, 2008, applicable to workers of General Motors Corporation, GMNA Powertrain—Massena, Massena, New York. The notice was published in the **Federal Register** on September 18, 2008 (73 FR 54174).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of aluminum castings for engines.

New information shows that workers leased from the above mentioned firms were employed on-site at the Massena, New York location of General Motors Corporation, GMNA Powertrain—Massena. The Department has determined that these workers were sufficiently under the control of General Motors Corporation, GMNA Powertrain—Massena to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from the above mentioned firms working on-site at the Massena, New York location of the subject firm.

The intent of the Department's certification is to include all workers employed at General Motors Corporation, GMNA Powertrain—Massena, Massena, New York who qualify as secondarily affected by increased imports of aluminum castings for engines.

The amended notice applicable to TA–W–63,723 is hereby issued as follows:

''All workers of General Motors Corporation, GMNA Powertrain—Massena, including on-site leased workers from Aerotek, Inc., Knights Facilities Management, IS One, APC Workforce, Securitas Security Services, The Bas Tech Group, Maxsys USA, Inc., Adroit Software & Consulting, Inc., Acro Service Corp., Massena, New York, who became totally or partially separated from employment on or after July 16, 2007, through September 3, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28358 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,096B]

Hickory Hardware, Administration Division, Including On-Site Leased Workers From Aerotek, Nashville, TN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on November 3, 2008, applicable to workers of Hickory Hardware, Administration Division, Nashville, Tennessee. The notice will be published soon in the **Federal Register**.

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers provide administrative support for the production of casters at the subject firm.

New information shows that workers leased from Aerotek were employed on-site at the Nashville, Tennessee location of Hickory Hardware, Administration Division. The Department has determined that these workers were sufficiently under the control of Hickory Hardware, Administration Division to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Aerotek working on-site at the Nashville, Tennessee location of the subject firm.

The intent of the Department's certification is to include all workers employed at Hickory Hardware, Administration Division, Nashville, Tennessee who were adversely affected by increased imports of casters.

The amended notice applicable to TA–W–64,096B is hereby issued as follows:

''All workers of Hickory Hardware, Administration Division, including on-site leased workers from Aerotek, Nashville, Tennessee, who became totally or partially separated from employment on or after September 22, 2007, through November 3, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 19th day of November 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28362 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,132]

JDS Uniphase, Including On-Site Leased Workers From Job Store Staffing Solutions and Spherion, Louisville, CO; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and

Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 28, 2008, applicable to workers of JDS Uniphase, including on-site leased workers of Job Store Staffing Solutions, Louisville, Colorado. The notice was published in the **Federal Register** on November 13, 2008 (73 FR 67209).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of optical transceivers.

New information shows that workers leased from Spherion were employed on-site at the Louisville, Colorado location of JDS Uniphase. The Department has determined that these workers were sufficiently under the control of JDS Uniphase to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Spherion working on-site at the Louisville, Colorado location of the subject firm.

The intent of the Department's certification is to include all workers employed at JDS Uniphase, Louisville, Colorado who were adversely affected by increased imports and a shift in production of optical transceivers to China.

The amended notice applicable to TA–W–64,132 is hereby issued as follows:

''All workers of JDS Uniphase, including on-leased workers of Job Store Staffing Solutions and Spherion, Louisville, Colorado, who became totally or partially separated from employment on or after September 26, 2007, through October 28, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 18th day of November 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28363 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,854]

Cassens Transport, Inc., Fenton, MO; Notice of Negative Determination Regarding Application for Reconsideration

By application received on October 29, 2008, the petitioners requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on September 16, 2008 and published in the **Federal Register** on October 3, 2008 (73 FR 57682).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Cassens Transport, Inc., Fenton, Missouri was based on the finding that the worker group does not produce an article within the meaning of Section 222 of the Trade Act of 1974.

The petitioners contend that the Department erred in its interpretation of work performed at the subject facility and convey that even though the subject firm provided services to the customer, this customer relies on the subject firm for ''shipping/relocating newly assembled vehicles'' and ''maintaining correct shipping destinations.''

The petitioners alleged that because the subject firm provided services to a customer who produces automobiles and which might be import impacted; workers of the subject firm should be eligible for Trade Adjustment Assistance.

The nature of the work involved is not an issue in ascertaining whether the petitioning workers are eligible for trade adjustment assistance, but whether they produced an article within the meaning of section 222 of the Trade Act of 1974. The fact that workers of the subject firm performed services for customers, which produces articles, does not imply production of an article within the meaning of Section 222.

The investigation revealed that the workers of Cassens Transport, Inc., Fenton, Missouri performed motor vehicle transportation for an unaffiliated firm and did not support production at any affiliated facility. These functions, as described above, are not considered production of an article within the meaning of Section 222 of the Trade Act of 1974.

The petitioners also reference case TA–W–61,059 and state that because workers in that case were certified eligible for TAA, workers of the subject firm should be certified eligible for TAA. The review of the above mentioned case revealed that workers of CPC Local Cartage were employed on-site of the certified production facility. In this case, however, workers of Cassens Transport, Inc., Fenton, Missouri are not employed on-site of a certified production facility.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 19th day of November 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28359 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,420B; TA–W–63,420C]

Bernhardt Furniture Company, Plant 6/11, Including On-Site Leased Workers of the Mulberry Group and Accuforce Staffing Services, Lenoir, NC; Bernhardt Furniture Company, Plant 9, Shelby, NC; Notice of Revised Determination on Remand

On October 7, 2008, the U.S. Court of International Trade granted the Department of Labor's motion for voluntary remand for further investigation in *Former Employees of Bernhardt Furniture Company* v. *United States,* Court No. 08–00271.

A petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) was filed by a company official on behalf of workers and former workers of Bernhardt Furniture Company (subject firm), Bernhardt Corporate Office, Lenoir, North Carolina (TA–W–63,420), Bernhardt Central Warehouse, Lenoir, North Carolina (TA–W–63,420A), Plant 6/11, Lenoir, North Carolina (TA–W–63,420B), Plant 9, Shelby, North Carolina (TA–W–63,420C), and Plant 10, Cherryville, North Carolina (TA–W–63,420D).

Workers covered by TA–W–63,420 are engaged in activities in support of company production and related operations. Workers covered by TA–W–63,420A are engaged in distribution operations. Plant 6/11 (TA–W–63,420B), Plant 9 (TA–W–63,420C), and Plant 10 (TA–W–63,420D) comprise the Upholstered Furniture Department. Workers at these three facilities produce upholstered furniture and are not separately identifiable by product line.

On June 13, 2008, the Department issued a determination certifying workers and former workers at Plant 10, Cherryville, North Carolina (TA–W–63,420D), based on increased reliance on imports by the subject firm, and denying certification to workers and former workers at the other locations (TA–W–63,420, TA–W–63,420A, TA–W–63,420B, and TA–W–63,420C). The Department's Notice of Determination was published in the **Federal Register** on June 27, 2008 (73 FR 36576).

On July 17, 2008, a petitioner requested administrative reconsideration on behalf of workers and former workers of Bernhardt Furniture Company, Bernhardt Central Warehouse, Lenoir, North Carolina (TA–W–63,420A). On August 1, 2008, the Department issued a Notice of Negative Determination Regarding Application for Reconsideration applicable to the worker group covered by TA–W–63,420A. The Department's Notice was published in the **Federal Register** on August 7, 2008 (73 FR 46040).

No request for administrative reconsideration was filed on behalf of worker groups covered by TA–W–63,420B or TA–W–63,420C.

By letter dated August 15, 2008, a subject firm official requested that the U.S. Court of International Trade (USCIT) review the negative determinations applicable to TA–W–63,420B (Plant 6/11) and TA–W–63,420C (Plant 9).

The Department's negative determination applicable to the worker groups covered by TA–W–63,420B and TA–W–63,420C was based on the Department's findings that, for each location, the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974. Significant number or proportion of the workers in a firm, or appropriate subdivision thereof, means at least three workers with a workforce of fewer than 50 workers or five percent of the workers with a workforce over 50 workers.

In the complaint, the Plaintiff stated that the three facilities that comprise the Upholstered Furniture Department—Plants 6/11, 9, and 10—''operate as one continuous production operation'' and provided new information regarding sales and production at the Upholstered Furniture Department. The complaint also included documentation that indicated that the subject firm did separate or threaten to separate a significant number or proportion of workers at Plant 6/11 and Plant 9.

To apply for TAA, the group eligibility requirements under Section 222(a) of the Trade Act of 1974, as amended, must be met. The group eligibility requirements can be satisfied in either one of two ways:

I. Section (a)(2)(A)—

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; *and*

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; *and*

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B)—

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; *and*

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; *and*

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States; *or*

2. The country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; *or*

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

During the remand investigation, the Department carefully reviewed previously-submitted material and new information provided by the subject firm regarding employment levels at Plant 6/11 and Plant 9, the number of workers threatened with separation at each location, sales and production levels of the Upholstered Furniture Department, and import of articles like or directly competitive with upholstered furniture produced by the subject worker groups during the relevant period.

Upon further review of these facts, the Department has determined that, during the relevant period, the subject firm did separate or threaten to separate a significant number or proportion of workers at Plant 6/11 and Plant 9; that sales and production of upholstered furniture at Plant 6/11 and Plant 9 declined; and that the subject firm increased its reliance on imports of articles like or directly competitive with those produced at Plant 6/11 and Plant 9. Therefore, the Department determines that the worker groups covered by TA–W–63, 420B and TA–W–63, 420C have met the criteria set forth in Section 222(a)(2)(A).

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department herein presents the results of its investigation regarding certification of the subject worker groups' eligibility to apply for ATAA.

The Department has determined in this case that the group eligibility requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the facts developed in the remand investigation, I determine that there was a separation or threat of separation of a significant number or proportion of workers at Plant 6/11, Lenoir, North Carolina, and Plant 9, Shelby, North Carolina, that there were sales and production declines of upholstered furniture at Plant 6/11, Lenoir, North Carolina, and Plant 9, Shelby, North Carolina, and that increased imports of articles like or directly competitive with upholstered furniture produced by the subject worker groups contributed importantly to the decline in sales and production of upholstered furniture and worker separations at Plant 6/11, Lenoir, North Carolina, and Plant 9, Shelby, North Carolina.

In accordance with the provisions of the Act, I make the following certification:

''All workers of Bernhardt Furniture Company, Plant 6/11, Lenoir, North Carolina, including on-site leased workers of the Mulberry Group and Accuforce Staffing Services, (TA–W–63, 420B), and Plant 9, Shelby, North Carolina (TA–W–63, 420C), who became totally or partially separated from employment on or after May 20, 2007, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC this 20th day of November 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–28356 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[SGA/DFA–PY–08–09]

Solicitation for Grant Applications (SGA)

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice: Amendment to SGA/DFA–PY–08–09.

SUMMARY: The Employment and Training Administration published a document in the **Federal Register** on November 17, 2008, announcing the availability of funds and solicitation for grant applications (SGA) for Local Young Offender Planning Grants, State/Local Juvenile Offender Implementation Grants and an Intermediary Juvenile Reentry Grant. This notice is an amendment to the SGA and it amends under ''Part I—Overall Funding Opportunity Description'' and ''Part IV—Application and Submission Information, Section C, ''Submission Date, Times, and Addresses''.

FOR FURTHER INFORMATION CONTACT: Chari Magruder, Grant Officer, Division of Federal Assistance, at (202) 693–3313.

SUPPLEMENTARY INFORMATION CORRECTION: In the **Federal Register** of November 17, 2008 in FR Doc. E8–27151. On page 67885, under the heading, ''Part I—Overall Funding Opportunity Description,'' specifically under paragraph 7 is corrected to read: ''The goal of the intermediary reentry grant is to allow an organization to design and implement a model program for serving returning juvenile offenders in four cities across the country as well as four cities in the same state.'' On page 67888, under the heading, ''Part IV—Application and Submission Information, Section C, Submission Date, Times, and Addresses,'' specifically under paragraph 1 is corrected to read: ''Applications submitted electronically through Grants.gov must be successfully submitted at *http://www.grants.gov* no later than 5 p.m. (Eastern Time) on December 18, 2008, and subsequently validated by Grants.gov.''

DATES: *Effective Date:* This notice is effective December 1, 2008.

Signed at Washington, DC, this 24th of November 2008.

Chari Magruder,

Grant Officer.

[FR Doc. E8–28349 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Employment and Training Administration

Planning Guidance and Instructions for Submission of the Strategic State Plan and Plan Modifications for Title I of the Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act

AGENCY: Employment and Training Administration.

ACTION: Notice.

SUMMARY: The purpose of this notice is to provide interested parties with the planning guidance for use by states in submitting their Strategic State Plans for Title I of the Workforce Investment Act of 1998 and the Wagner-Peyser Act as well as Plan modifications. The Planning Guidance provides a framework for the collaboration of governors, local elected officials, businesses and other partners to continue the development of workforce investment systems that address customer needs, deliver integrated user-friendly services, and are accountable to the customers and the public.

FOR FURTHER INFORMATION CONTACT: Ms. Gay Gilbert, Administrator, Office of Workforce Investment, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–4231, Washington, DC 20210. Telephone: (202) 693–3980 (voice) (this is not a toll free number) or (202) 693–7755 (TTY).

SUPPLEMENTARY INFORMATION:

State Planning Guidance and Instructions for Title I of the Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act

OMB Control Number: 1205–0398.
Expiration Date: Nov. 30, 2011.

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Statement of Purpose

The purpose of this document is to provide planning guidelines to States and localities for the development of the Strategic State Plan for title I of the Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act (hereinafter referred to as the State Plan.) The State Plan is required in order for States to receive formula allotments under the Act. The information required in the State Plan is requested in order to meet the information requirements of the Act and/or to demonstrate compliance with WIA, the WIA regulations including 29 CFR 37, the Wagner-Peyser Act, and the Wagner-Peyser Act regulations.

Background

The State Planning Guidance and Instructions provide a framework for collaboration between governors, local elected officials, businesses and other partners to design and build workforce investment systems that address customer needs; deliver integrated, user-friendly services; and are accountable to the customers and the public. The document is organized in two distinct parts. Part I provides strategic guidance from a national perspective and communicates the current goals and strategic direction for the workforce investment system. Part II provides the actual format and guidance related to content for submission of the State Plan.

As one of its primary roles, the U.S. Department of Labor (DOL) provides leadership and guidance to support a system that not only meets the objectives of title I of WIA, but also enables State and local partners to have the flexibility to design systems and deliver services in a manner that achieves the goals for WIA based on their particular needs.

Part I. National Strategic Direction

Part I communicates national direction and strategic priorities for the workforce investment system.

The U.S. economy and its labor markets are undergoing changes of historic proportion. Globalization has forced change in every region in the country and impacted every aspect of our economy. While global competition is typically seen as a national challenge, the front lines of the battlefield are regional, where businesses create competitive advantage by collaborating with researchers, entrepreneurs, and government entities. That advantage stems from the ability to transform new ideas and knowledge into advanced, high-quality products or services—in other words, to innovate. Those regions that will be most successful will connect three key elements: Talent, infrastructure, and investment. In particular, they will connect workforce skills and lifelong learning strategies; regional infrastructure and economic development strategies; and investment and entrepreneurship strategies. Entrepreneurship plays a critical role in fueling innovation, as entrepreneurs account for more than half of all technological innovation which powers America's competitiveness.

Maintaining America's competitive position in the global economy requires a workforce with postsecondary education credentials, the capacity to work in a high-technology environment, and the opportunity to engage in lifelong learning to keep pace with change. Preparing workers to be part of such a workforce is the role of our system. The Employment and Training Administration (ETA) envisions that the workforce investment system will operate as a talent development system; it is no longer defined only as a job training system. A talent development system not only meets the needs of industry, but contributes to economic prosperity by collaborating with economic development to identify emerging industries that it can help foster and grow. Its vision is an educated and prepared workforce that is able to compete in the global economy.

Broadly, the Federal strategic priorities for the workforce investment system for this planning cycle include:

- Building a demand-driven system within a regional economic development context;
- Implementing system reform, with streamlined governance and alignment of economic and workforce development regions;
- Enhancing an integrated service delivery system that focuses on functions and services rather than programs or funding streams;
- Advancing a vision for serving youth most in need;
- Expanding the workforce information system as the foundation for strategic planning and career guidance;
- Strengthening partnerships with faith-based and community organizations;
- Increasing the use of flexibility provisions in WIA to design innovative programs that fuel regional economic competitiveness and create employment opportunities for career seeker customers; and
- Utilizing an integrated and enhanced performance accountability system.

A. Demand-Driven Workforce Investment System Within a Regional Economic Development Context

In today's economy, the workforce investment system has an opportunity to play a critical role in fueling competitiveness by developing talent—one of the three key requirements for innovation. To become a dynamic catalyst, the workforce investment system must evolve beyond its current configuration and status. Ideally, the system will be positioned to respond to a variety of economic conditions with talent development strategies that range from retrofitting an economy in an area where an entire industry is being reengineered, to building new industries from the ground up, and to building an entrepreneurial culture that fosters job creation.

The challenge for the workforce investment system is to become agile enough to serve an economy driven by innovation, recognizing the reality that approximately two-thirds of all new jobs are created by small businesses. Jobs in today's economy increasingly hinge on specialized skills, as 90 percent of the fastest growing jobs require education and training past high school.

Therefore, it is imperative that the system continue its transformation as a catalyst in reshaping talent development strategies in support of regional economic competitiveness. While the workforce investment system has implemented a number of key strategies to become increasingly demand-driven, new strategies are needed in the workforce investment system to drive regional economic growth. The workforce investment system must transform to be relevant in the 21st

century economy. Elements of transformation include:

(1) The workforce investment system operates as a talent development system; it is no longer defined as a job training system. Its goal is an educated and prepared workforce—on a U.S. or global standard.

(2) Workforce investment system formula funds are transformed, providing significantly increased opportunity for postsecondary education for lifelong learning aligned with the region's talent development strategy.

(3) The workforce investment system no longer operates as an array of siloed programs and services.

(4) Workforce Investment Boards are structured and operate on a regional basis and are composed of regional strategic partners who drive investments by aligning spending with a regional economic vision for talent development.

(5) Economic and workforce development activities within regions are aligned, leading to the adoption of common and innovative policies across the workforce, education, and economic development systems and structures that support talent development and the regional economy.

(6) The workforce investment system is agile enough to serve the innovation economy, recognizing the reality that two-thirds of all new jobs are created by small businesses.

(7) The workforce investment system actively collaborates with economic development, business, and education partners to gather and analyze a wide array of current and real-time workforce and economic data in order to create new knowledge about regional economies and support strategic planning, routinely track economic conditions, measure outcomes, and benchmark economic competitiveness in the global marketplace.

B. System Reform and Increased Focus on Workforce Education and Training

The needs of the 21st century labor market are radically different from what we have known in the past, and for which most workers are currently trained. As a result, the American economy is facing a shortage of skilled workers which necessitates a talent development system that cultivates an educated and prepared workforce committed to lifelong learning. The following strategies can help advance an essential culture of lifelong learning:

- K–12 and alternative education curricula must be designed to academically prepare students to successfully move into postsecondary education as well as prepare students for success in the workplace through a range of strategies.
- Educational strategies for adult learners must offer more entry and exit points in recognition that students will need to earn and learn simultaneously. Such strategies may need to approach education and career progression incrementally rather than on one continuous path to a specific degree with the aim of moving the learner to the workplace. This is particularly essential for incumbent workers who need lifelong education to remain in economically self-sustaining jobs.
- New education models are needed to support the development of cross-disciplinary learning that matches the expanding number of cross-functional competencies and skill sets that are needed on the job.

States have multiple ways to drive system transformation and integration through policies, required practices, and investment of State set-aside funds, among others. There are a number of key areas the State may consider addressing in its Strategic Plan to respond to the current challenges of maintaining a competitive advantage and ensuring a prepared and educated workforce. These key areas may include, but are not limited to, the following:

- Aligning economic and workforce development strategies and facilitating the adoption of common and innovative policies across the workforce, education, and economic development systems and structures that support talent development in a regional economy;
- Reorganizing governance structures to operate on a regional basis and in a way that reduces administrative costs, streamlines service delivery systems, and increases flexibility to address the needs of State and regional economies;
- Promoting the engagement of strategic partners who drive investments in economic regions and align spending within a regional economic vision for talent development;
- Using State set-aside funds to respond more efficiently to economic trends and shocks, enabling State and Local Workforce Investment Boards greater agility;
- Increasing use of system resources for training through targeted policies such as setting a specific percentage of WIA funding that must be devoted to training and transforming the use of WIA formula funds to postsecondary education and lifelong learning opportunities aligned with the region's talent development strategy;
- Promoting the use of Registered Apprenticeship as an important talent development strategy and a critical postsecondary education, employment and training opportunity as part of the suite of options offered through the workforce investment system;
- Developing statewide polices to guide the use of assessments of individuals to enhance service delivery for business and job seekers; and
- Developing comprehensive, user-friendly economic data and skills information to enable informed decisions by the system, and its customers and partners.

C. Enhanced Integration Through the One-Stop Delivery System With Improved Service Delivery and Increased Efficiencies

The workforce investment system, as currently constituted, struggles to meet the challenges of educating and training a workforce that is prepared to compete in today's economy. This is partly due to the lack of integration, which causes too much money to be spent on competing bureaucracies, overhead costs, and unnecessary infrastructure, and not enough on meaningful skills training that leads to job growth and economic prosperity. The ultimate objective is a workforce investment system that eliminates duplicative costs for physical infrastructure, information systems, and administrative and managerial personnel; this will enable the system to devote scarce resources to more efficiently and effectively implement talent development strategies across multiple programs.

In addition to infrastructure integration, integrated service delivery remains essential to a demand-driven workforce investment system that effectively serves businesses and individuals. The workforce investment system must operate as a seamless system functionally organized around service delivery rather than an array of separate programs with separate processes. The objective is for ''customers'' to be seen as customers of the workforce investment system, not of a particular program. This goal is particularly important when focusing on targeted populations such as veterans, individuals with disabilities, military spouses, migrant and seasonal farmworkers, older workers, and others. All of these populations need access to all of the services in a One-Stop Career Center.

Achieving the goal of integrated service delivery requires strong State leadership to overcome administrative challenges and to foster a policy environment conducive to the integration of funding, facilities, and service delivery. The WIA State planning process offers a vehicle for the

governor and State Workforce Investment Board to set forth policy expectations for integration and to help eliminate obstacles.

D. A Vision for Serving Youth Most In Need

Currently, there are nearly four million youth who are not in school, do not have a diploma, and are not working. Over 30 percent of our youth are dropping out of high school nationally, and the number is closer to 50 percent in many urban areas. In an attempt to address this problem, DOL has developed a Youth Vision which proposes that the workforce investment system serve the neediest youth: Youth aging out of foster care, those involved with the juvenile justice system, children of incarcerated parents, migrant youth, Native American youth, and youth with disabilities. Transforming the system to meet this objective requires that the current capacity, knowledge, and models in the workforce investment system be strengthened. Transformation is also necessary if the system is to meet new performance expectations and the specific performance measures for out-of-school youth literacy and numeracy gains, diploma attainment, and transition to postsecondary education.

Governors must continue to provide strong leadership in advancing the vision for serving youth most in need. States should expand upon existing efforts by aligning resources to address barriers and challenges and increase opportunities to access postsecondary education. States are encouraged to expand their cross-agency partnerships to ensure the right set of agencies:

- Are represented in the development of a coordinated strategic plan;
- Build upon State-level collaborative efforts by conducting strategic planning sessions to better understand the range of issues that impact their ability to serve the neediest youth;
- Develop a comprehensive understanding of resources that are available in the State for serving the neediest youth;
- Conduct analyses that identify where gaps in services and resource coordination exist; and
- Develop new strategies for serving the neediest youth through jointly funded solicitations.

States should also engage employers and civic leaders to identify demand-driven workforce solutions that address the unique challenges that out-of-school youth present. This includes building the capacity of the workforce investment system to provide services to these youth in a business solutions environment by identifying replicable models and innovative business solutions which connect secondary and postsecondary education, businesses and industry associations, and the workforce investment system.

Recognizing the critical need to reconnect out-of-school youth with high quality educational opportunities, the Youth Vision emphasizes the development of academically rigorous alternative education pathways. WIA-funded Youth programs should serve as a catalyst for increasing both the quality and quantity of alternative learning environments and connecting out-of-school youth with secondary and postsecondary educational opportunities and high-growth employment opportunities. A system for serving out-of-school youth should include high quality educational programs that will meet the learning styles and needs of youth who need to be reconnected to educational opportunities.

E. Increased Economic and Workforce Information Data Integration and Analysis

ETA reaffirms and strengthens its message about the centrality of workforce information for the workforce investment system leaders, and their economic development, business, and education partners. To be successful in its new role as a catalyst for leading talent development, the workforce investment system needs to actively collaborate with its partners to gather and analyze a wide array of current and real-time workforce and economic data in order to compile new knowledge about regional economies and support strategic planning, routinely track economic conditions, measure outcomes, and benchmark economic competitiveness in the global marketplace.

Not only is workforce information critical to support decisions of the national State and local political leadership, economic developers, business and industry, investors, and educators and to drive the investments of the workforce investment system, it is also a fundamental tool for guidance counselors, students, job seekers, and workers. The provision of workforce information in an economic context, through easy-to-use electronic tools, will empower customers in career planning and lifelong learning required by today's dynamic global economy.

Fulfilling the mandate for leadership in workforce and economic information can only occur by embracing a wide array of data sources, greater integration of the data, more complex analysis, new strategies for making it available to strategic partners engaged in developing regional economic agendas and talent development strategies. Accomplishing this requires collaboration among the owners of the data and developing methods to leverage public and private resources to produce the economic and workforce intelligence needed in a regional economy.

F. Effective Utilization of Faith-Based and Community Organizations

In every community, including those facing high poverty rates and other serious challenges, there are faith-based and community organizations (FBCOs) working to improve their community. These organizations can be valuable partners for the workforce investment system. DOL encourages States to build and strengthen both monetary and non-monetary partnerships with FBCOs.

These partnerships can strengthen participant outcomes by expanding access to services that complement those provided by the One-Stop Career Center, including job readiness and life skills training and niche and specialized services. These partnerships can also create new ''points of access'' to the One-Stop's electronic tools and job search assistance in many struggling communities.

Two distinct activities are critical to utilizing fully the complementary strengths of FBCOs. First, States must ensure compliance with the DOL's equal treatment regulations 29 CFR 2, subpart D. Compliance includes taking the administrative steps necessary to create a ''level playing field'' for all organizations willing to join with the government in service, including faith-based groups and other non-traditional community partners.

Second, States should actively cultivate FBCO partnerships to expand the reach of the workforce investment system and to improve outcomes for participants, including high-need individuals.

G. Increased Use of Flexibility Provisions in WIA

To fuel regional economic competitiveness and create employment opportunities for workers, States should exercise their authority to design and implement innovative strategies. States should take advantage of flexibility provisions under current legislative authority, including waivers and work-flex, to tailor service delivery and program design to fit the unique characteristics of their workforce areas.

The State planning process is a vehicle for identifying waiver opportunities and formally requesting

waivers, including extensions of approved waivers, in concert with overall strategic planning. States are strongly encouraged to think about flexibility in broad terms and to utilize the flexibility provided by WIA to advance their strategic goals. States have received waivers in multiple program areas, during this and the previous five-year planning cycle, that have allowed them to implement a wide range of innovations to transform their workforce investment systems. States have received waivers that:

- Increase training opportunities by permitting the use of a portion of local area formula funds or funds reserved for rapid response activities to provide incumbent worker training.
- Decrease the amount that small and medium-sized businesses need to invest in order to take advantage of WIA's provision for customized and on-the-job training.
- Allow States to choose the most appropriate mix of youth services needed within each local and regional economy.

DOL provides technical assistance on waivers and work-flex and provides information on the waiver strategies States have utilized to date.

H. An Integrated and Enhanced Performance Accountability System That Provides Improved System Results

In an effective accountability system, a clear link exists between the State's program and service delivery design and the results achieved. Further, the performance information should be available and easily understood by all customers, stakeholders, and operators of the workforce investment system.

While great strides have been made in our reporting system in recent years, the accountability outcomes for the workforce investment system have not yet reached all goals. In addition, the various reporting requirements for the multiple programs operated by the workforce investment system impede the integrated service delivery system required for the demand-driven workforce investment systems that support regional economic competitiveness. To address this issue, DOL has implemented a set of common performance measures for many of its workforce programs, including WIA title IB, the Wagner-Peyser Act, and the Trade Adjustment Assistance Act. The common measures allow DOL to clearly state the core purposes of all the programs operated by the workforce investment system—helping people find jobs; stay employed; and improve earnings.

The common measures are the foundation of DOL's evolving performance accountability system. DOL continues to collect from States and grantees other information on program activities, participants, and outcomes necessary for program management, including data that support the existing WIA performance measures that are required to convey full and accurate information on the performance of workforce programs to policymakers and stakeholders.

Part II. State Planning Instructions

A. Plan Development Process

WIA gives States and local areas a unique opportunity to develop employment and training systems tailored specifically to State and local area needs. Since the State Plan is only as effective as the partnerships that operationalize it, it should represent a collaborative process among State and local elected officials, Boards and partners (including economic development, education, and private sector partners) to create a shared understanding of the State's workforce investment needs, a shared vision of how the workforce investment system can be designed to meet those needs, and agreement on the key strategies to attain this vision. This type of collaborative planning at all stages—from the initial planning discussions through drafting the State Plan document—will enable the State Plan to both drive local system improvements and allow room for strategies tailored to local needs. Plan development must also include an opportunity for stakeholder and public review and comment.

Describe in one page or less the process for developing the State Plan

1. Include (a) a discussion of the involvement of the governor and the State Board in the development of the Plan, and (b) a description of the manner in which the State Board collaborated with economic development, education, the business community and other interested parties in the development of the State Plan. (§ 112(b)(1).)

2. Include a description of the process the State used to make the Plan available to the public and the outcome of the State's review of the resulting public comments. (§§ 111(g), 112(b)(9).)

B. Plan Submission Requirements

1. Requirements for Submission and Points of Contact

WIA State Plans must have an original signature of the governor, and the name of the governor must be typed below or above the signature. States can meet this requirement by completing the signature page provided in Attachment A of this Guidance, entitled Program Administration Designees and Plan Signatures, which includes a space for the governor to sign and certify that the State will operate the WIA and Wagner-Peyser Act programs in accordance with the Plan.

The designated Federal Coordinator for the review and approval process is Janet Sten, E-mail: *Sten.Janet@dol.gov;* phone: 202–693–3045.

2. Submission Options—Electronic, CD–ROM or Hard Copy Format

States have the option to submit State Plans in an electronic, hard copy, or CD–ROM format. DOL encourages States to submit State Plans in electronic format to reduce the reporting and processing burden and to ensure timely receipt by the Department.

a. Electronic Submission. States can submit a State Plan electronically either by posting it on an Internet Web site that is accessible to the Department or by transmitting it through E-mail to the Department. State Plan certifications with electronic signatures are acceptable. If a State chooses not to use an electronic signature, then the signature page (Attachment A) must be submitted in hard copy.

i. Posting State Plans on an Internet Web Site. Under this option, a State should post its State Plan on an Internet Web site; inform the Federal Coordinator and the appropriate ETA Regional Administrator (as listed in Attachment D) through electronic mail of the URL and the location of the document on the Web site; provide contact information in the event of problems with accessing the Web site; and certify that no changes will be made to the version of the State Plan posted on the Web site after it has been submitted to the Department, unless the Department gives prior approval for such changes.

ii. Transmitting State Plans by E-Mail. States submitting their Plan by electronic mail should send it to *WIA.PLAN@DOL.GOV* with a copy sent to the appropriate ETA Regional Administrator (as listed in Attachment D). If a State chooses to submit its State Plan by transmitting it through electronic mail, the State must submit it in Microsoft Word or PDF format.

b. Hard Copy or CD–ROM Submission. States choosing to submit a hard copy should submit one copy of the Plan with an original signature to the appropriate ETA Regional Administrator (as listed in Attachment

D), and one copy to Janet Sten, the Federal Coordinator for Plan Review and Approval.

Division of Workforce System Support, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–4231, Washington, DC 20210, ATTN: Janet Sten.

States submitting a State Plan on CD–ROM should submit one copy of the Plan to Janet Sten, the Federal Coordinator for Plan Review and Approval, and one copy to the appropriate ETA Regional Administrator (as listed in Attachment D). If the State Plan on the CD–ROM does not include the signature of the governor on the signature page, the State must submit separately an electronic signature or a signature page in hard copy. Plans submitted on a CD–ROM must be in Microsoft Word or PDF format.

3. Receipt Confirmation

The Federal Coordinator, without regard to which option the State uses for submission, will confirm receipt of the State Plan within two business days of receipt and indicate the date for the start of the review period. When a State submits an incomplete State Plan, the period for review will not start until all required components of the State Plan have been received.

C. Department of Labor Review and Approval

State Plans will be reviewed in accordance with 20 CFR 661.220(e), which provides that the Secretary must approve all State Plans within 90 days of their submission, unless the Secretary determines in writing that: (1) the State Plan is inconsistent with the provisions of title I of WIA or the WIA regulations, including 29 CFR 37; or (2) the portion of the State Plan impacting the Wagner-Peyser Act Plan does not satisfy the criteria for approval in section 8(d) of the Wagner-Peyser Act or the Wagner-Peyser Act regulations at 20 CFR 652.

ETA will advise the State by letter, as soon as possible, that the State Plan is approved or disapproved. If the State Plan is not approved, ETA will clearly indicate the reasons for disapproval and specify what additional information is required or what action needs to be taken for the State Plan to be approved.

D. Negotiated Performance Indicators

WIA allows considerable flexibility in system design and service delivery, in exchange for both accountability for a key set of outcomes and improving those outcomes over time. To accomplish this, the Secretary of Labor and the governor of each State must reach agreement on the State's negotiated performance levels for the core indicators of performance, and for customer satisfaction indicators of employers' and participants' satisfaction. These levels of performance become the basis for sanctions for failed performance and, with additional performance levels for WIA title II Adult Education and Family Literacy Act programs and Carl D. Perkins Career and Technical Education Act of 2006 programs, the basis for incentive grants.

At a minimum, the State Plan should include proposed performance goals for WIA and Wagner-Peyser Act programs for each of the performance indicators for each program year covered by the Plan. While the State Plan is under review, the ETA Regional Administrator and the State will discuss the performance levels, and negotiate on them as appropriate. The Department expects States to enter into preliminary discussions with the Local Workforce Investment Boards and the ETA Regional Administrators before submitting the State Plan. States are expected to come to the negotiating table with support from their Local Workforce Investment Boards for the proposed performance goals. Entering into preliminary discussions prior to Plan submission will maximize the time available to States, local areas, and the Department to develop a shared set of goals. ETA Regional Administrators will coordinate with other DOL program administrators, including the Veterans' Employment and Training Service (VETS) Regional Administrators, to assure comprehensive Departmental participation.

States should note that the proposed levels of performance are subject to public review and comment requirements. States that have completed negotiations with ETA should include their agreed-upon levels of performance for each program year covered by the Plan for the WIA and Wagner-Peyser Act programs.

In cases where final agreement on performance goals is reached after the State Plan is submitted to ETA for review and approval, but before ETA approval of the State Plan, the letter advising the States of approval of the State Plan will include ETA's approval of the agreed-upon goals.

In cases where final agreement on performance goals has not been reached until after the State Plan has been approved, the ETA Regional Administrator's letter advising the State of the agreed-upon goals will constitute a modification to the State Plan. For subsequent revisions to performance goals during the life of the State Plan, the ETA Regional Administrator's letter advising the State of the agreed upon goals will also constitute a modification to the State Plan. The State must ensure that the agreed-upon goals are included in the State's official copy of the State Plan, and that any published State Plan, on the State's Web site or through other forums, includes the agreed-upon goals. ETA will incorporate these performance goals into the Regional and National Office copies of the State's Plan.

E. Modifications to State Plans

Modifications may be needed in any number of areas to keep the State Plan a viable, living document over its life span. WIA regulations permit States to modify their Plan at any time and 20 CFR 652.212 and 661.230 outline the circumstances under which modifications must be submitted. Modifications are required when:

(1) Changes in Federal or State law or policy substantially change the assumptions upon which the Plan is based.

(2) There are changes in the statewide vision, strategies, policies, performance indicators, the methodology used to determine local allocation of funds, reorganizations which change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State Board or alternative entity and similar substantial changes to the State's workforce investment system.

(3) The State has failed to meet performance goals, and must adjust service strategies.

The regulations, at 20 CFR 652.212, which relate to the Wagner-Peyser Act portions of the Plan, also require modifications when there is any reorganization of the State agency designated to deliver services under the Wagner-Peyser Act, any change in service delivery strategy, any change in levels of performance when performance goals are not met, or any change in services delivered by State merit-staff employees.

In general, it is substantial changes to the Strategic State Plan that require a modification under the regulations, *i.e.*, any change that significantly impacts the operation of the State's workforce investment system.

Modifications to the State Plan are subject to the same public review and comment requirements that apply to the development of the original State Plan. States wishing to submit a State Plan modifications should follow the submission guidelines listed in Section B, ''Plan Submission Requirements.''

States should direct any questions about the need to submit a Plan modification to the appropriate ETA Regional Administrator (as listed in Attachment D).

F. Inquiries

General inquiries about the State Planning Guidance and Instructions may be directed to Janet Sten, the Federal Coordinator for Plan Review and Approval. She may be contacted by E-mail at *Sten.Janet@dol.gov* or by phone at 202–693–3045. Inquiries about specific State issues should be directed to the appropriate ETA Regional Administrator (as listed in Attachment D).

State Plan Contents

I. State Vision. Describe the governor's vision for a statewide workforce investment system. Provide a summary articulating the governor's vision for utilizing the resources of the workforce investment system in support of the State's economic development that address the issues and questions below. States are encouraged to attach more detailed documents to expand upon any aspect of the summary response if available. (§ 112(a) and (b)(4)(A–C).)

A. What are the State's economic development goals for attracting, retaining and growing business and industry within the State? (§ 112(a) and (b)(4)(A–C).)

B. Given that a skilled workforce is a key to the economic success of every business, what is the governor's vision for maximizing and leveraging the broad array of Federal and State resources available for workforce investment flowing through the State's cabinet agencies and/or education agencies in order to ensure a skilled workforce for the State's business and industry? (§ 112(a) and (b)(4)(A–C).)

C. Given the continuously changing skill needs that business and industry have as a result of innovation and new technology, what is the Governor's vision for ensuring a continuum of education and training opportunities that support a skilled workforce? (§ 112(a) and (b)(4)(A–C).)

D. What is the governor's vision for bringing together the key players in workforce development including business and industry, economic development, education, and the workforce investment system to continuously identify the workforce challenges facing the State and to develop innovative strategies and solutions that effectively leverage resources to address those challenges? (§ 112(b)(10).)

E. What is the governor's vision for ensuring that every youth has the opportunity for developing and achieving career goals through education and workforce training, including the youth most in need of assistance, such as out-of-school youth, homeless youth, youth in foster care, youth aging out of foster care, youth offenders, children of incarcerated parents, migrant and seasonal farmworker youth, youth with disabilities, and other youth at risk? (§ 112(b)(18)(A.)

II. State Workforce Investment Priorities. Identify the governor's key workforce investment priorities for the State's workforce investment system and how each will lead to actualizing the governor's vision for workforce and economic development. (§§ 111(d)(2) and 112(a).)

III. State Governance Structure (§ 112(b)(8)(A).)

A. Organization of State Agencies

1. Provide an organizational chart that delineates the relationship to the governor of the agencies involved in the workforce investment system, including education and economic development and the required and optional One-Stop partner programs managed by each agency.

2. In a narrative describe how the agencies involved in the workforce investment system interrelate on workforce, economic development, and education issues and the respective lines of authority.

B. State Workforce Investment Board (§ 112(b)(1).)

1. Describe the organization and structure of the State Board. (§ 111.)

2. Identify the organizations or entities represented on the State Board. If you are using an alternative entity which does not contain all the members required under section 111(b)(1) of WIA, describe how each of the entities required under this section will be involved in planning and implementing the State's workforce investment system as envisioned in WIA. How is the alternative entity achieving the State's WIA goals? (§§ 111(a-c), 111(e), and 112(b)(1).)

3. Describe the process your State used to identify your State Board members. How did you select Board members, including business representatives, who have optimum policy-making authority and who represent diverse regions of the State as required under WIA? (20 CFR 661.200).)

4. Describe how the Board's membership enables you to achieve your vision as described above. (§§ 111(a-c) and 112(b)(1).)

5. Describe how the Board carries out its functions as required in section 111(d) of WIA and 20 CFR 661.205. Include functions the Board has assumed that are in addition to those required. Identify any functions required in section 111(d) of WIA that the Board does not perform and explain why.

6. How will the State Board ensure that the public (including people with disabilities) has access to Board meetings and information regarding State Board activities, including membership and meeting minutes? (20 CFR 661.205).

7. Identify the circumstances which constitute a conflict of interest for any State or Local Workforce Investment Board member or the entity that s/he represents, and any matter that would provide a financial benefit to that member or his or her immediate family. (§§ 111(f), 112(b)(13), and 117(g).)

8. What resources does the State provide the Board to carry out its functions (*e.g.*, staff, funding, etc.)?

C. State Agencies and State Board Collaboration and Communication. (§ 112(b)(8)(A).)

1. Describe the steps the State will take to improve operational collaboration of the workforce investment activities and other related activities and programs outlined in section 112(b)(8)(A) of WIA, at both the State and local level (*e.g.*, joint activities, memoranda of understanding, planned mergers, coordinated policies, etc.). How will the State Board and agencies eliminate any existing State-level barriers to coordination? (§§ 111(d)(2) and 112(b)(8)(A).)

2. Describe the lines of communication established by the governor to ensure open and effective sharing of information among the State agencies responsible for implementing the vision for the workforce investment system and between the State agencies and the State Workforce Investment Board.

3. Describe the lines of communication and mechanisms established by the governor to ensure timely and effective sharing of information between the State agencies/State Board and local workforce investment areas and Local Boards. Include types of regularly issued guidance and how Federal guidance is disseminated to Local Boards and One-Stop Career Centers. (§ 112(b)(1).)

4. Describe any cross-cutting organizations or bodies at the State level designed to guide and inform an integrated vision for serving youth in the State within the context of workforce investment, social services,

juvenile justice, and education. Describe the membership of such bodies and the functions and responsibilities in establishing priorities and services for youth. How is the State promoting a collaborative cross-agency approach for both policy development and service delivery at the local level for youth? (§ 112(b)(18)(A).)

IV. Economic and Labor Market Analysis. (§ 112(b)(4)): As a foundation for this Plan and to inform the strategic investments and strategies that flow from this Plan, provide a detailed analysis of the State's economy, the labor pool, and the labor market context. Elements of the analysis should include the following:

A. What is the current makeup of the State's economic base by industry?

B. What industries and occupations are projected to grow and/or decline in the short term and over the next decade?

C. In what industries and occupations is there a demand for skilled workers and available jobs, both today and projected over the next decade? Estimate projected demand.

D. What jobs/occupations are most critical to the State's economy?

E. What are the skill needs for the available, critical and projected jobs?

F. What are the current and projected demographics of the available labor pool (including the incumbent workforce) both now and over the next decade?

G. Is the State experiencing any ''in migration'' or ''out migration'' of workers that impact the labor pool?

H. Based on an analysis of both the projected demand for skills and the available and projected labor pool, what skill gaps is the State experiencing today and what skill gaps are projected over the next decade?

I. Based on an analysis of the economy and the labor market, what workforce development issues has the State identified?

J. What workforce development issues has the State prioritized as being most critical to its economic health and growth?

V. Overarching State Strategies

A. Identify how the State will use WIA title I funds to leverage other Federal, State, local, and private resources in order to maximize the effectiveness of such resources and to expand the participation of business, employees, and individuals in the statewide workforce investment system? (§ 112(b)(10).)

B. What strategies are in place to address the national strategic direction discussed in Part I of this guidance, the governor's priorities, and the workforce development issues identified through the analysis of the State's economy and labor market? (§ 112(b)(4)(D) and 112(a).)

C. Based on the State's economic and labor market analysis, what strategies has the State implemented or planned to implement to target industries and occupations within the State that are high-growth, high-demand, and vital to the State's economy? (§ 112(a) and 112(b)(4)(A).) The State may want to consider:

1. Industries projected to add a substantial number of new jobs to the economy; or

2. Industries that have a significant impact on the overall economy; or

3. Industries that impact the growth of other industries; or

4. Industries that are being transformed by technology and innovation that require new skill sets for workers; or

5. Industries that are new and emerging and are expected to grow.

D. What strategies are in place to promote and develop on-going and sustained strategic partnerships that include business and industry, economic development, the workforce investment system, and education partners (K–12, community colleges and others) for the purpose of continuously identifying workforce challenges and developing solutions to targeted industries' workforce challenges? (§ 112(b)(8).)

E. What State strategies are in place to ensure that sufficient system resources are being spent to support training of individuals in high-growth, high-demand industries? (§ 112(b)(17)(A)(i) and 112(b)(4)(A).)

F. What workforce strategies does the State have to support the creation, sustainability, and growth of small businesses and support for the workforce needs of small businesses as part of the State's economic strategy? (§ 112(b)(4)(A) and 112(b)(17)(A)(i).)

G. How are the funds reserved for statewide activities used to incentivize the entities that make up the State's workforce investment system at the State and local levels to achieve the governor's vision and address the national strategic direction identified in Part I of this guidance? (§ 112(a).)

H. Describe the State's strategies to promote collaboration between the workforce investment system, education, human services, juvenile justice, and other systems to better serve youth that are most in need and have significant barriers to employment, and to successfully connect them to education and training opportunities that lead to successful employment. (§ 112(b)(18)(A).)

I. Describe the State's strategies to identify State laws, regulations, policies that impede successful achievement of workforce development goals and strategies to change or modify them. (§ 112(b)(2).)

J. Describe how the State will take advantage of the flexibility provisions in WIA for waivers and the option to obtain approval as a workflex State pursuant to § 189(i) and § 192.

VI. Major State Policies and Requirements. Describe major State policies and requirements that have been established to direct and support the development of a statewide workforce investment system not described elsewhere in this Plan as outlined below. (§ 112(b)(2).)

A. What State policies and systems are in place or planned to support common data collection and reporting processes, information management, integrated service delivery, and performance management? (§§ 111(d)(2) and 112(b)(8)(B).)

B. What State policies are in place that promote efficient use of administrative resources such as requiring more co-location and fewer affiliate sites in local One-Stop systems to eliminate duplicative facility and operational costs or requiring a single administrative structure at the local level to support Local Boards and to be the fiscal agent for WIA funds to avoid duplicative administrative costs that could otherwise be used for service delivery and training? The State may include administrative cost controls, plans, reductions, and targets for reductions if it has established them. (§§ 111(d)(2) and 112(b)(8)(A).)

C. What State policies are in place to promote universal access and consistency of service statewide? (§ 112(b)(2).)

D. What policies support a demand-driven approach to workforce development, as described in Part I, ''Demand-Driven Workforce Investment System—such as training on the economy and labor market data for Local Board and One-Stop Career Center staff? (§ 112(b)(4) and 112(b)(17)(A)(iv).)

E. What policies are in place to ensure that the resources available through the Federal and/or State Registered Apprenticeship programs and the Job Corps are fully integrated with the State's One-Stop delivery system? (§ 112)(b)(17)(A)(iv).)

VII. Integration of One-Stop Service Delivery. Describe the actions the State has taken to ensure an integrated One-Stop service delivery system statewide. (§§ 112(b)(14) and 121).)

A. What State policies and procedures are in place to ensure the quality of

service delivery through One-Stop Career Centers such as development of minimum guidelines for operating comprehensive One-Stop Career Centers, competencies for One-Stop Career Center staff or development of a certification process for One-Stop Career Centers? (§ 112(b)(14).)

B. What policies or guidance has the State issued to support maximum integration of service delivery through the One-Stop delivery system for both business customers and individual customers? (§ 112(b)(14).)

C. What actions has the State taken to promote identifying One-Stop infrastructure costs and developing models or strategies for local use that support integration? (§ 112(b)(14).)

D. How does the State use the funds reserved for statewide activities pursuant to § 129(b)(2)(B) and 134(a)(2)(B)(v) to assist in the establishment and operation of One-Stop delivery systems? (§ 112(b)(14).)

E. How does the State ensure the full array of services and staff in the One-Stop delivery system support human capital solutions for businesses and individual customers broadly? (§ 112(b)(14).)

VIII. Administration and Oversight of Local Workforce Investment System

A. Local Area Designations

1. Identify the State's designated local workforce investment areas and the date of the most recent area designation, including whether the State is currently re-designating local areas. (§§ 112(b)(5).)

2. Include a description of the process used to designate such areas. Describe how the State considered the extent to which such local areas are consistent with labor market areas: geographic areas served by local and intermediate education agencies, post-secondary education institutions and area career and technical education schools; and all other criteria identified in section 116(a)(1) in establishing area boundaries, to assure coordinated planning. Describe the State Board's role, including all recommendations made on local designation requests pursuant to section 116(a)(4). (§§ 112(b)(5) and 116(a)(1).)

3. Describe the appeals process used by the State to hear appeals of local area designations referred to in §§ 112(b)(5) and 116(a)(5).

B. Local Workforce Investment Boards—Identify the criteria the State has established to be used by the Chief Elected Official(s) in the local areas for the appointment of Local Board members based on the requirements of section 117. (§§ 112(b)(6), 117(b).)

C. How will the State build the capacity of Local Boards to develop and manage a high performing local workforce investment system? (§§ 111(d)(2) and 112(b)(14).)

D. Local Planning Process (§ 112(b)(2) and 20 CFR 661.350(a)(13))—Describe the State mandated requirements for local workforce areas' strategic planning, and the assistance the State provides to local areas to facilitate this process, including:

1. What oversight of the local planning process is provided, including receipt and review of plans and negotiation of performance agreements?

2. How does the Local Plan approval process ensure that Local Plans are consistent with State performance goals and State strategic direction?

Regional Planning (§§ 112(b)(2) and 116(c).)

1. Describe any intra-State or inter-State regions and their corresponding performance measures.

2. Include a discussion of the purpose of these designations and the activities (such as regional planning, information sharing and/or coordination activities) that will occur to help improve performance. For example, regional planning efforts could result in the sharing of labor market information or in the coordination of transportation and support services across the boundaries of local areas.

3. For inter-State regions (if applicable), describe the roles of the respective governors and State and Local Boards.

E. Allocation Formulas (§ 112(b)(12).)

1. If applicable, describe the methods and factors (including weights assigned to each factor) the State will use to distribute funds to local areas for the thirty percent discretionary formula Adult employment and training funds and Youth funds pursuant to §§ 128(b)(3)(B) and 133(b)(3)(B).

2. Describe how the allocation methods and factors help ensure that funds are distributed equitably throughout the State and that there will be no significant shifts in funding levels to a local area on a year-to-year basis.

3. Describe the State's allocation formula for dislocated worker funds under § 133(b)(2)(B).

4. Describe how the individuals and entities on the State Board were involved in the development of the methods and factors, and how the State consulted with Chief Elected Officials in local areas throughout the State in determining such distribution.

F. Provider Selection Policies (§§ 112(b)(17)(A)(iii), 122, and 134(d)(2)(F).)

1. Identify the State policies and procedures, to be applied by local areas, for determining eligibility of local level training providers, how performance information will be used to determine continuing eligibility and the agency responsible for carrying out these activities.

2. Describe how the State solicited recommendations from Local Boards and training providers and interested members of the public, including representatives of business and labor organizations, in the development of these policies and procedures.

3. Describe how the State will update and expand the State's eligible training provider list to ensure it has the most current list of providers to meet the training needs of customers.

4. Describe the procedures the governor has established for providers of training services to appeal a denial of eligibility by the Local Board or the designated State agency, a termination of eligibility or other action by the Board or agency, or a denial of eligibility by a One-Stop operator. Such procedures must include the opportunity for a hearing and time limits to ensure prompt resolution.

5. Describe the competitive and non-competitive processes that will be used at the State level to award grants and contracts for activities under title I of WIA, including how potential bidders are being made aware of the availability of grants and contracts. (§ 112(b)(16).)

6. Identify the criteria to be used by Local Boards in awarding grants for Youth activities, including criteria that the governor and Local Boards will use to identify effective and ineffective Youth activities and providers of such activities. (§ 112(b)(18)(B).)

G. One-Stop Policies (§ 112(d)(14).)

1. Describe how the services provided by each of the required and optional One-Stop partners will be coordinated and made available through the One-Stop system. (§ 112(b)(8)(A).)

2. Describe how the State helps local areas identify areas needing improvement and how technical assistance will be provided.

3. Identify any additional State mandated One-Stop partners (such as Temporary Aid to Needy Families (TANF) or Food Stamp Employment and Training) and how their programs and services are integrated into the One-Stop Career Centers.

H. Oversight/Monitoring Process—Describe the monitoring and oversight criteria and procedures the State utilizes to move the system toward the State's vision and achieve the goals identified above, such as the use of mystery

shoppers, performance agreements. (§ 112(b)(14).)

I. Grievance Procedures. Attach a copy of the State's grievance procedures for participants and other affected parties (including service providers.) (§§ 122(g) and 181(c).)

J. Describe the following State policies or procedures that have been developed to facilitate effective local workforce investment systems (§§ 112(b)(17)(A) and 112(b)(2)):

1. State guidelines for the selection of One-Stop providers by Local Boards;

2. Procedures to resolve impasse situations at the local level in developing memoranda of understanding (MOUs) to ensure full participation of all required partners in the One-Stop delivery system;

3. Criteria by which the State will determine if Local Boards can run programs in-house;

4. Performance information that on-the-job training and customized training providers must provide;

5. Reallocation policies;

6. State policies for approving local requests for authority to transfer funds between the Adult and Dislocated Worker funding streams at the local level;

7. Policies related to displaced homemakers, nontraditional training for low-income individuals, older workers, low-income individuals, disabled individuals and others with multiple barriers to employment and training;

8. If the State did not delegate this responsibility to Local Boards, provide the State's definition regarding the sixth Youth eligibility criterion at section 101(13)(C)(iv) (''an individual who requires additional assistance to complete an educational program, or to secure and hold employment''). (§§ 112(b)(18)(A) and 20 CFR 664.210).)

IX. Service Delivery—Describe the approaches the State will use to provide direction and support to Local Boards and the One-Stop Career Center delivery system on the strategic priorities to guide investments, structure business engagement, and inform service delivery approaches for all customers. (§ 112(b)(17)(A)) Activities could include:

A. One-Stop Service Delivery Strategies: (§§ 112(b)(2) and 111(d)(2).)

1. How will the services provided by each of the required and optional One-Stop partners be coordinated and made available through the One-Stop system? (§ 112(b)(8)(A).)

2. How are Youth formula programs funded under § 128(b)(2)(A) integrated in the One-Stop system?

3. What minimum service delivery requirements does the State mandate in a comprehensive One-Stop Career Center or an affiliate site?

4. What tools and products has the State developed to support service delivery in all One-Stop Career Centers statewide?

5. What models/templates/approaches does the State recommend and/or mandate for service delivery in the One-Stop Career Centers? For example, do all One-Stop Career Centers have a uniform method of organizing their service delivery to business customers? Is there a common individual assessment process utilized in every One-Stop Career Center? Are all One-Stop Career Centers required to have a resource center that is open to anyone?

B. Workforce Information—A fundamental component of a demand-driven workforce investment system is the integration and application of the best available State and local workforce information including, but not limited to, economic data, labor market information, Census data, private sources of workforce information produced by trade associations and others, educational data, job vacancy surveys, transactional data from job boards, and information obtained directly from businesses. (§§ 111(d)(8), 112(b)(1), and 134(d)(2)(E).)

1. Describe how the State will integrate workforce information into its planning and decision making at the State and local level, including State and Local Boards, One-Stop operations, and case manager guidance.

2. Describe the approach the State will use to disseminate accurate and timely workforce information to businesses, job seekers, and employment counselors, in easy to use formats that are readily accessible within One-Stop Career Centers and at remote locations such as libraries, schools, worksites, and at home.

3. Describe how the activities funded through ETA's Workforce Information Grants to the State are aligned with other workforce activities to ensure that the investments in core products and services support the State's overall strategic direction for workforce investment.

4. Describe how State workforce information products and tools are coordinated with the national electronic workforce information tools including America's Career Information Network and Career Voyages.

C. Adults and Dislocated Workers

1. Core Services. (§ 112(b)(17)(a)(i).)

a. Describe State strategies and policies to ensure adults and dislocated workers have universal access to the minimum required core services as described in § 134(d)(2).

b. Describe how the State will ensure the three-tiered service delivery strategy for labor exchange services for job seekers and employers authorized by the Wagner-Peyser Act includes: (1) Self-service, (2) facilitated self-help service, and (3) staff-assisted service, and is accessible and available to all customers at the local level.

c. Describe how the State will integrate resources provided under the Wagner-Peyser Act and WIA title I for adults and dislocated workers as well as resources provided by required One-Stop partner programs, to deliver core services.

2. Intensive Services. (§ 112(b)(17)(a)(i).) Describe State strategies and policies to ensure adults and dislocated workers who meet the criteria in § 134(d)(3)(A) receive intensive services as defined.

3. Training Services. (§ 112(b)(17)(A)(i).)

a. Describe the governor's vision for increasing training access and opportunities for individuals including the investment of WIA title I funds and the leveraging of other funds and resources.

b. Individual Training Accounts (ITAs):

i. What policy direction has the State provided for ITAs?

ii. Describe innovative training strategies used by the State to fill skills gaps. Include in the discussion the State's efforts to leverage additional resources to maximize the use of ITAs through partnerships with business, education (in particular, community and technical colleges), economic development agencies, and industry associations and how business and industry involvement is used to drive this strategy.

iii. Discuss the State's plan for committing all or part of WIA title I funds to training opportunities in high-growth, high-demand, and economically vital occupations.

iv. Describe the State's policy for limiting ITAs (*e.g.*, dollar amount or duration).

v. Describe the State's current or planned use of WIA title I funds for the provision of training through Registered Apprenticeship.

vi. Identify State policies that permit the use of WIA title I financial assistance to employ or train participants in religious activities when the assistance is provided indirectly, such as through an ITA. (29 CFR 37.6(f); 20 CFR 667.266 and 667.275.)

c. Eligible Training Provider List. Describe the State's process for providing broad customer access to the statewide list of eligible training

providers and their performance information including at every One-Stop Career Center. (§ 112(b)(17)(A)(iii).)

d. On-the-Job (OJT) and Customized Training (§§ 112(b)(17)(A)(i) and 134(b).). Based on the outline below, describe the State's major directions, policies and requirements related to OJT and customized training.

i. Describe the governor's vision for increasing training opportunities to individuals through the specific delivery vehicles of OJT and customized training.

ii. Describe how the State:

- Identifies OJT and customized training opportunities;
- Markets OJT and customized training as an incentive to untapped employer pools including new business to the State and employer groups;
- Partners with high-growth, high-demand industries and economically vital industries to develop potential OJT and customized training strategies;
- Taps business partners to help drive the demand-driven strategy through joint planning, competency and curriculum development, and determining appropriate lengths of training; and
- Leverages other resources through education, economic development and industry associations to support OJT and customized training ventures.

4. Service to Specific Populations. (§ 112(b)(17)(A)(iv).)

a. Describe the State's strategies to ensure that the full range of employment and training programs and services delivered through the State's One-Stop delivery system are accessible to and will meet the needs of dislocated workers, displaced homemakers, low-income individuals, migrant and seasonal farmworkers, women, minorities, individuals training for non-traditional employment, veterans, public assistance recipients and individuals with multiple barriers to employment (including older individuals, limited English proficiency (LEP) individuals, and people with disabilities).

b. Describe the reemployment services the State provides to unemployment insurance claimants and the Worker Profiling services provided to claimants identified as most likely to exhaust their unemployment insurance benefits in accordance with section 3(c)(3) of the Wagner-Peyser Act.

c. Describe how the State administers the unemployment insurance work test and how feedback requirements (under section 7(a)(3)(F) of the Wagner-Peyser Act) for all UI claimants are met.

d. Describe the State's strategy for integrating and aligning services to dislocated workers provided through the WIA rapid response, WIA Dislocated Worker, and Trade Adjustment Assistance (TAA) programs. Does the State have a policy supporting co-enrollment for WIA and TAA?

e. How is the State's workforce investment system working collaboratively with business and industry and the education community to develop strategies to overcome barriers to skill achievement and employment experienced by the populations listed in paragraph (a.) above and to ensure they are being identified as a critical pipeline of workers?

f. Describe how the State will ensure that the full array of One-Stop services is available to individuals with disabilities and that the services are fully accessible.

g. Describe the role Local Veterans' Employment Representative/Disabled Veteran's Outreach Program (LVER/DVOP) staff have in the One-Stop delivery system. How will the State ensure adherence to the legislative requirements for veterans' employment program staff? How will services under this Plan take into consideration the agreement reached between the Secretary and the State regarding veterans' employment programs? (§§ 112(b)(7), 112(b)(17)((B), and 322; 38 U.S.C. Chapter 41; and 20 CFR 1001.120).)

h. DOL regulations at 29 CFR 37 require all recipients of Federal financial assistance from DOL to provide meaningful access to LEP individuals. Federal financial assistance includes grants, training, equipment usage, donations of surplus property, and other assistance. The regulations also apply to sub-recipients when Federal DOL funds are passed through from one recipient to a sub-recipient. Describe how the State will ensure access to services through the State's One-Stop delivery system by persons with limited English proficiency and how the State will meet the requirements of ETA Training and Employment Guidance Letter (TEGL) 26–02 (May 29, 2003), which provides guidance on methods of complying with the Federal rule.

i. Describe the State's strategies to enhance and integrate service delivery through the One-Stop delivery system for migrant and seasonal farmworkers and agricultural employers. How will the State ensure that migrant and seasonal farmworkers have equal access to employment opportunities through the State's One-Stop delivery system? Include the number of migrant and seasonal farmworkers the State anticipates reaching annually through outreach to increase their ability to access core, intensive, and training services in the One-Stop Career Center System.

5. Priority of Service

a. What procedures and criteria are in place under 20 CFR 663.600 for the governor and appropriate Local Boards to direct One-Stop operators to give priority of service to public assistance recipients and other low-income individuals for intensive and training services if funds allocated to a local area for adult employment and training activities are determined to be limited? (§§ 112(b)(17)(A)(iv) and 134(d)(4)(E).)

b. What policies and strategies does the State have in place to ensure that, pursuant to the Jobs for Veterans Act (Pub. L. 107–288) (38 U.S.C. 4215), that priority of service is provided to veterans (and certain spouses) who otherwise meet the eligibility requirements for all employment and training programs funded by DOL, in accordance with the provisions of Training and Employment Guidance Letter (TEGL) 5–03 (September 16, 2003)?

D. Rapid Response. Describe how your State provides Rapid Response services with the funds reserved under section 133(a)(2). (§ 112(b)(17)(A)(ii).)

1. Identify the entity responsible for providing Rapid Response services. Describe how Rapid Response activities involve Local Boards and Chief Elected Officials. If Rapid Response activities are shared between the State and local areas, describe the functions of each and how funds are allocated to the local areas.

2. Describe the process involved in carrying out Rapid Response activities.

a. What methods are involved in receiving notice of impending layoffs (include WARN Act notice as well as other sources)?

b. What efforts does the Rapid Response team make to ensure that Rapid Response services are provided, whenever possible, prior to layoff date, onsite at the company, and on company time?

c. What services are included in Rapid Response activities? Does the Rapid Response team provide workshops or other activities in addition to general informational services to affected workers? How do you determine what services will be provided for a particular layoff (including layoffs that may be trade-affected)?

3. How does the State ensure a seamless transition between Rapid Response services and One-Stop activities for affected workers?

4. Describe how Rapid Response functions as a business service. Include whether Rapid Response partners with economic development agencies to connect employees from companies undergoing layoffs to similar companies that are growing and need skilled workers. How does Rapid Response promote the full range of services available to help companies in all stages of the economic cycle, not just those available during layoffs. How does the State promote Rapid Response as a positive, proactive, business-friendly service, rather than only as a reactive service?

5. In what other partnerships does Rapid Response engage to expand the range and quality of services available to companies and affected workers and to develop an effective early layoff warning network?

6. What systems does the Rapid Response team use to track its activities? Does the State have a comprehensive, integrated Management Information System that includes Rapid Response, Trade Act programs, National Emergency Grants, and One-Stop activities?

7. Are Rapid Response funds used for other activities not described above; *e.g.*, the provision of additional assistance to local areas that experience increased workers or unemployed individuals due to dislocation events?

E. Youth. ETA's strategic vision identifies youth most in need—such as youth who are out-of-school youth, at-risk, in foster care or aging out of foster care, offenders, children of incarcerated parents, homeless youth, and migrant and seasonal farmworker youth—as those most in need of service. State programs and services should take a comprehensive approach to serving these youth, including basic skills remediation, helping youth stay in or return to school, employment, internships, help with attaining a high school diploma or GED, post-secondary career and technical education training, Registered Apprenticeship, and enrollment in community and four-year colleges. (§ 112(b)(18).)

1. Describe the State's strategy for providing comprehensive, integrated services to eligible youth, including those most in need as described above. Include any State requirements and activities to assist youth who have special needs or barriers to employment, including those who are pregnant, parenting, or have disabilities. Include how the State will coordinate across State agencies responsible for workforce investment, foster care, education, human services, juvenile justice, and other relevant resources as part of the strategy. (§ 112(b)(18).)

2. Describe how coordination with Job Corps and other youth programs will occur. (§ 112(b)(18)(C).)

3. How does the State plan to utilize the funds reserved for statewide activities to support the State's vision for serving youth? Examples of activities that would be appropriate investments of these funds include:

a. Utilizing the funds to promote cross agency collaboration;

b. demonstrating cross-cutting models of service delivery;

c. developing new models of alternative education leading to employment; or

d. developing demand-driven models with business and industry working collaboratively with the workforce investment system and education partners to develop strategies for bringing these youth successfully into the workforce pipeline with the right skills.

4. Describe in general how the State will meet the Act's provisions regarding Youth program design. (§§ 112(b)(18) and 129(c).)

F. Business Services. (§§ 112(a) and 112(b)(2).) Provide a brief description of the types of services the State offers to businesses, and strategies to improve services to employers, including a description of how the State intends to:

1. Determine the employer needs in the local areas and on a statewide basis.

2. Integrate business services, including Wagner-Peyser Act services, to employers through the One-Stop delivery system.

3. Streamline administration of Federal tax credit programs within the One-Stop system to maximize employer participation. (20 CFR 652.3(b), § 112(b)(17)(A)(i).)

G. Innovative Service Delivery Strategies. Describe innovative service delivery strategies the State has or is planning to undertake to maximize resources, increase service levels, improve service quality, achieve better integration or meet other key State goals. Include in the description the initiative's general design, anticipated outcomes, partners involved and funds leveraged (*e.g.*, title I formula, statewide reserve, employer contributions, education funds, non-WIA State funds). (§ 112(b)(17)(A).)

H. Strategies for Faith-based and Community Organizations. Reaching those most in need is a fundamental element of the demand-driven system's goal to increase the pipeline of needed workers while meeting the training and employment needs of those most at risk. Faith-based and community organizations provide unique opportunities for the workforce investment system to access this pool of workers and meet the needs of business and industry. (§ 112(b)(17)(i).)

1. Describe those activities to be undertaken to:

a. Increase the opportunities for participation of faith-based and community organizations as committed and active partners in the One-Stop delivery system; and

b. expand the access of faith-based and community organizations' clients and customers to the services offered by the One-Stop Career Centers in the State.

2. Outline those action steps designed to strengthen State collaboration efforts with local workforce investment areas in conducting outreach campaigns to educate faith-based and community organizations about the attributes and objectives of the demand-driven workforce investment system.

3. Indicate how these resources can be strategically and effectively leveraged in the State's workforce investment areas to help meet the objectives of the Workforce Investment Act.

X. State Administration

A. What technology infrastructure and/or management information systems does the State have in place to support the State and local workforce investment activities such as a One-Stop operating system designed to facilitate case management and service delivery across programs, a State job matching system, web-based self service tools for customers, fiscal management systems, etc.? (§§ 111(d)(2), 112(b)(1), and 112(b)(8)(B).)

B. Describe the State's plan for use of the funds reserved for statewide activities under WIA § 128 (a)(1).

C. Performance Management and Accountability.

Improved performance and accountability for customer-focused results are central features of WIA. To improve, States need not only reporting systems in place to collect data and track outcomes based on service delivery, but also performance management and accountability systems to analyze the information and modify strategies to improve performance. (See Training and Employment Guidance Letter (TEGL) 17–05, Common Measures Policy for the Employment and Training Administration's (ETA) Performance Accountability System and Related Performance Issues, issued February 17, 2006.) In this section, describe how the State measures the success of its strategies in achieving its goals, and

how the State uses these data to continuously improve the system.

1. Describe the State's performance accountability system, including any State-system measures and the State's performance goals established with local areas. Identify the performance indicators and goals the State has established to track its progress toward meeting its strategic goals and implementing its vision for the workforce investment system. For each of the core indicators, explain how the State worked with Local Boards to determine the level of the performance goals. Include a discussion of how the levels compare with the State's previous outcomes as well as with the State-adjusted levels of performance established for other States (if available), taking into account differences in economic conditions, the characteristics of participants when they entered the program and the services to be provided. Include a description of how the levels will help the State achieve continuous improvement over the life of the Plan. (§§ 112(b)(3) and 136(b)(3).)

2. Describe any targeted applicant groups, such as TANF recipients, veterans, ex-offenders, and migrant and seasonal farmworkers, under WIA title I, the Wagner-Peyser Act or title 38 Chapters 41 and 42 (Veterans Employment and Training Programs) that the State tracks. (§§ 111(d)(2), 112(b)(3) and 136(b)(2)(C).)

3. Identify any performance outcomes or measures in addition to those prescribed by WIA and what process the State is using to track and report them.

4. Describe the State's common data system and reporting processes in place to track progress. Describe what performance information will be collected from the various One-Stop partners (beyond that required by DOL), use of quarterly wage records, and how the statewide system will have access to the information needed to continuously improve. (§ 112(b)(8)(B).)

5. Describe any actions the governor and State Board will take to ensure collaboration with key partners and continuous improvement of the statewide workforce investment system. (§§ 111(d)(2) and112(b)(1).)

6. How do the State and Local Boards evaluate performance? What corrective actions (including sanctions and technical assistance) will the State take if performance does not meet expectations? How will the State and Local Boards use the review process to reinforce the strategic direction of the system? (§§ 111(d)(2), 112(b)(1), and 112(b)(3).)

7. Include a proposed level for each performance measure for each program year covered by the Plan. While the Plan is under review, the State will negotiate with the respective ETA Regional Administrator to set the appropriate levels. States must identify the performance indicators required under section 136, and, for each indicator, the State must develop an objective and quantifiable performance goal for each program year. States are encouraged to address how the performance goals for local workforce investment areas and training providers will help them attain their statewide performance goals. (§§ 112(b)(3) and 136.)

D. Administrative Provisions

1. Provide a description of the process for appeals of local area non-designation referred to in § 116(a)(5).

2. Describe the steps taken by the State to ensure compliance with the non-discrimination requirements outlined in § 188.

XI. Assurances

1. The State assures that it will establish, in accordance with section 184 of the Workforce Investment Act, fiscal control and fund accounting procedures that may be necessary to ensure the proper disbursement of, and accounting for, funds paid to the State through the allotments made under sections 127 and 132. (§ 112(b)(11).)

2. The State assures that it will comply with section 184(a)(6), which requires the governor to, every two years, certify to the Secretary, that—

a. the State has implemented the uniform administrative requirements referred to in section 184(a)(3);

b. the State has annually monitored local areas to ensure compliance with the uniform administrative requirements as required under section 184(a)(4); and

c. the State has taken appropriate action to secure compliance with section 184 (a)(3) pursuant to section 184(a)(5). (§ 184(a)(6).)

3. The State assures that the Adult and Youth funds received under the Workforce Investment Act will be distributed equitably throughout the State, and that no local areas will suffer significant shifts in funding from year to year during the period covered by this Plan. (§ 112(b)(12)(B).)

4. The State assures that veterans will be afforded employment and training activities authorized in section 134 of the Workforce Investment Act, and the activities authorized in chapters 41 and 42 of title 38 U.S. code. The State assures that it will comply with the veterans priority established in the Jobs for Veterans Act. (38 U.S.C. 4215).)

5. The State assures that the governor shall, once every two years, certify one Local Board for each local area in the State. (§ 117(c)(2).)

6. The State assures that it will comply with the confidentiality requirements of section 136(f)(3).

7. The State assures that no funds received under the Workforce Investment Act will be used to assist, promote, or deter union organizing. (§ 181(b)(7).)

8. The State assures that it will comply with the nondiscrimination provisions of section 188, including an assurance that a Methods of Administration has been developed and implemented (§ 188.)

9. The State assures that it will collect and maintain data necessary to show compliance with the nondiscrimination provisions of section 188. (§ 185.).

10. The State assures that it will comply with the grant procedures prescribed by the Secretary (pursuant to the authority at section 189(c) of the Act) which are necessary to enter into grant agreements for the allocation and payment of funds under the Act. The procedures and agreements will be provided to the State by the ETA Office of Grants and Contract Management and will specify the required terms and conditions and assurances and certifications, including, but not limited to, the following:

- General Administrative Requirements:
  - 29 CFR 97—Uniform Administrative Requirements for State and Local Governments (as amended by the Act)
  - 29 CFR 96 (as amended by OMB Circular A–133) —Single Audit Act
  - OMB Circular A–87—Cost Principles (as amended by the Act)
- Assurances and Certifications:
  - SF 424 B—Assurances for Non-construction Programs
  - 29 CFR 37—Nondiscrimination and Equal Opportunity Assurance (and regulation) 29 CFR 37.20
  - 29 CFR 93—Certification Regarding Lobbying (and regulation)
  - 29 CFR 98—Drug Free Workplace and Debarment and Suspension Certifications (and regulation)
- Special Clauses/Provisions:

Other special assurances or provisions as may be required under Federal law or policy, including specific appropriations legislation, the Workforce Investment Act, or subsequent Executive or Congressional mandates.

11. The State certifies that the Wagner-Peyser Act Plan, which is part of this document, has been certified by the State Employment Security Administrator.

12. The State certifies that veterans' services provided with Wagner-Peyser

Act funds will be in compliance with 38 U.S.C. Chapter 41 and 20 CFR 1001.

13. The State certifies that Wagner-Peyser Act-funded labor exchange activities will be provided by merit-based public employees in accordance with DOL regulations.

14. The State assures that it will comply with the MSFW significant office requirements in accordance with 20 CFR 653.

15. The State certifies it has developed this Plan in consultation with local elected officials, Local Workforce Boards, the business community, labor organizations and other partners.

16. As a condition to the award of financial assistance from the Department of Labor under title I of WIA, the grant applicant assures that it will comply fully with the nondiscrimination and equal opportunity provisions of the following laws:

○ Section 188 of the Workforce Investment Act of 1998 (WIA), which prohibits discrimination against all individuals in the United States on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and against beneficiaries on the basis of either citizenship/status as a lawfully admitted immigrant authorized to work in the United States or participation in any WIA title I-financially assisted program or activity;

○ Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the bases of race, color and national origin;

○ Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities;

○ The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age; and

○ Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination on the basis of sex in educational programs.

The grant applicant also assures that it will comply with 29 CFR 37 and all other regulations implementing the laws listed above. This assurance applies to the grant applicant's operation of the WIA title I-financially assisted program or activity, and to all agreements the grant applicant makes to carry out the WIA title I-financially assisted program or activity. The grant applicant understands that the United States has the right to seek judicial enforcement of this assurance.

17. The State assures that funds will be spent in accordance with the Workforce Investment Act and the Wagner-Peyser Act and their regulations, written Department of Labor guidance implementing these laws, and all other applicable Federal and State laws and regulations.

OMB Burden Statement

These reporting instructions have been approved under the Paperwork Reduction Act of 1995. Persons are not required to respond to this collection of information unless it displays a valid OMB control number. Public reporting burden for this collection of information includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Submission is required by the Workforce Investment Act Section 112(a). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the attention of Janet Sten at the U.S. Department of Labor, Office of Workforce Investment, Room C–4510, 200 Constitution Ave., NW., Washington, DC 20210.

Attachment A

Program Administration Designees and Plan Signatures

Name of WIA Title I Grant Recipient Agency: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
E-mail Address: _____
Name of State WIA Title I Administrative Agency (if different from the Grant Recipient): _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
E-mail Address: _____
Name of WIA Title I Signatory Official: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
E-mail Address: _____
Name of WIA Title I Liaison: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
E-mail Address: _____
Name of Wagner-Peyser Act Grant Recipient/State Employment Security Agency: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
E-mail Address: _____
Name and Title of State Employment Security Administrator (Signatory Official): _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
E-mail Address: _____

As the governor, I certify that for the State/Commonwealth of _____, the agencies and officials designated above have been duly designated to represent the State/Commonwealth in the capacities indicated for the Workforce Investment Act, title I, and Wagner-Peyser Act grant programs. Subsequent changes in the designation of officials will be provided to the U.S. Department of Labor as such changes occur.

I further certify that we will operate our Workforce Investment Act and Wagner-Peyser Act programs in accordance with this Plan and the assurances herein.

Typed Name of Governor _____
Signature of Governor _____
Date _____

Attachment B

Optional Table for State Performance Indicators and Goals

WIA requirement at section 136(b)	Previous year performance	Performance goal
Adults:		
Entered Employment Rate		
Employment Retention Rate		
Average Six-Months Earnings		
Certificate Rate		
Dislocated Workers:		
Entered Employment Rate		
Employment Retention Rate		

WIA requirement at section 136(b)	Previous year performance	Performance goal
Average Six-Months Earnings		
Certificate Rate		
Youth Aged 19–21:		
Entered Employment Rate		
Employment Retention Rate		
Six-Months Earnings Change		
Certificate Rate		
Youth 14–18:		
Skill Attainment Rate		
Diploma or Equivalent Attainment Rate		
Retention Rate		
Youth Common Measures[1]:		
Placement in Employment or Education		
Attainment of a Degree or Certificate		
Literacy and Numeracy Gains		
Participant Customer Satisfaction		
Employer Customer Satisfaction		
Additional State-Established Measures		

[1] Goals are negotiated for these measures by states reporting common performance measure outcomes only.

Attachment C

Local Planning Guidance for Single Workforce Investment Area States

I. Local Plan Submission

Section 118 of the Workforce Investment Act requires that the Board of each local workforce investment area, in partnership with the appropriate Chief Elected Official, develop and submit a comprehensive Local Plan for activities under title I of WIA to the governor for his or her approval. In States where there is only one local workforce investment area, the governor serves as both the State and local Chief Elected Official. In this case, the State must submit both the State and Local Plans to DOL for review and approval. States may (1) submit their Local Plan as an attachment to the State Plan or (2) include these elements within their State Plan, and reference them in an attachment.

The State Planning Guidance and Instructions on Plan modifications and the Plan approval process applies to a single workforce investment area Local Plan for the State, with one addition: DOL will approve a Local Plan within ninety days of submission, unless it is inconsistent with the Act and its implementing regulations, or deficiencies in activities carried out under the Act have been identified and the State has not made acceptable progress in implementing corrective measures. (§ 112(c).)

II. Plan Content

In the case of single workforce investment area States, much of the Local Plan information required by section 118 of WIA will be contained in the State Plan. At a minimum, single workforce investment area Local Plans for the State shall contain the additional information described below, and any other information that the governor may require. For each of the questions, if the answers vary in different areas of the State, please describe those differences.

A. Plan Development Process

1. Describe the process for developing the Local Plan. Describe the process and timeline used to provide an opportunity for public comment, including how local Chief Elected Officials, representatives of businesses and labor organizations, and other appropriate partners provided input into the development of the Local Plan, prior to the submission of the Plan. (§ 118(b)(7).)

2. Include with the Local Plan any comments that represent disagreement with the Plan. (§ 118(c)(3).)

B. Services

1. Describe the One-Stop system(s) that will be established in the State. Describe how the system(s) will ensure the continuous improvement of eligible providers of services and ensure that such providers meet the employment and training needs of employers, workers and job seekers throughout the State. Describe the process for the selection of One-Stop operator(s), including the competitive process used or the consortium partners. (§ 118(b)(2)(A).)

2. Describe and assess the type and availability of Youth activities, including an identification of successful providers of such activities. (§ 118(b)(6).)

C. System Infrastructure

1. Identify the entity responsible for the disbursal of grant funds, as determined by the governor. Describe how funding for areas within the State will occur. Provide a description of the relationship between the State and within-State areas regarding the sharing of costs where co-location occurs. (§ 118(b)(8).)

2. Describe the competitive process to be used to award the grants and contracts in the State for WIA title I activities. (§ 118(b)(9).)

Attachment D

ETA Regional Administrators

April 2008

Region 1—Boston
Grace Kilbane, Regional Administrator, U.S. Department of Labor, JFK Building, Room E–350, Boston, MA 02203, Phone: 617–788–0170, Fax: 617–788–0101, E-mail: *Kilbane.Grace@dol.gov*.

Region 2—Philadelphia
Lenita Jacobs-Simmons, Regional Administrator, U.S. Department of Labor, The Curtis Center, 170 South Independence Mall West, Suite 825 East, Philadelphia, PA 19106–3315, Phone: 215–861–5205, Fax: 215–861–5260, E-mail: *Jacobs-Simmons.Lenita@dol.gov*.

Region 3—Atlanta
Helen N. Parker, Regional Administrator, U.S. Department of Labor, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, S.W., Room 6M12, Atlanta, Georgia 30303, Phone: 404–302–5300, Fax: 404–302–5382, E-mail: *Parker.Helen@dol.gov*.

Region 4—Dallas
Joseph C. Juarez, Regional Administrator, U.S. Department of Labor, A. Maceo Smith Federal Building, 525 S. Griffin Street, Room 317, Dallas, Texas 75202, Phone: 972–850–4600, Fax: 972–850–4605, E-mail: *Juarez.Joseph@dol.gov*.

Region 5—Chicago

Byron Zuidema, Regional Administrator, U.S. Department of Labor, John Kluczynski Building, 230 S. Dearborn Street, Room 638, Chicago, IL 60604, Phone: 312–596–5400, Fax: 312–596–5401, E-mail: *Zuidema.Byron@dol.gov*.

Region 6—San Francisco

Richard Trigg, Regional Administrator, U.S. Department of Labor, George W. Bush Federal Building, 90 7th Street, Suite 17–300, San Francisco, California 94103–1516, Phone: 415–625–7900, Fax: 415–625–7903, E-mail: *Trigg.Richard@dol.gov*.

Dated: November 24, 2008.

Gay M. Gilbert,

Administrator, Office of Workforce Investment, Employment and Training Administration.

[FR Doc. E8–28404 Filed 11–28–08; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[08–095]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, 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: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Dr. Walter Kit, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Dr. Walter Kit, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JE0000, Washington, DC 20546, (202) 358–1350, *Walter.Kit-1@nasa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The information is used by NASA to effectively maintain an appropriate internal control system for grants and cooperative agreements with institutions of higher education and other non-profit organizations, and to comply with statutory requirements, e.g., Chief Financial Officer's Act, on the accountability of Federal funds.

II. Method of Collection

Electronic funds transfer is used for payment under Treasury guidance. In addition, NASA encourages the use of computer technology and is participating in Federal efforts to extend the use of information technology to more Government processes via the Internet.

III. Data

Title: Financial Monitoring and Control—Grants and Cooperative Agreements.

OMB Number: 2700–0049.

Type of Review: Extension of Currently Approved Collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 1172.

Estimated Number of Responses per Respondent: 41.

Estimated Time per Response: 6 hours.

Estimated Total Annual Burden Hours: 291,326 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Dr. Walter Kit,

NASA Clearance Officer.

[FR Doc. E8–28433 Filed 11–28–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (08–096)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, 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: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Dr. Walter Kit, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Dr. Walter Kit, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JE0000, Washington, DC 20546, (202) 358–1350, *Walter.Kit-1@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The information will be used by the Office of External Relations for export control oversight as well as by the NASA headquarters Office of Security and Program Protection (OSPP) to help fulfill its responsibilities for facilitating business visits and assignments that support U.S. national interests and NASA's international program interests and operational requirements.

II. Method of Collection

Respondents provide information for specific data fields. Data are provided via hard copy or electronic mail to a NASA representatives who transfers the information into a database (attached is a printout of the current NASA security database entry form). To insure data security, access to the electronic data entry form is limited to approved NASA civil servants or contract employees. Thus, direct data entry by respondents is impossible. Original copies of support documents are required and downloaded and attached to each visit request for archive purpose or auditing.

III. Data

Title: Foreign National Clearance Request to Visit NASA Facilities.

OMB Number: 2700–0122.

Type of review: Extension of Currently Approved Collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 12400.

Estimated Number of Responses per Respondent: 1.

Estimated Time per Response: 0.5 hour.

Estimated Total Annual Burden Hours: 6200 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Walter Kit,

NASA Clearance Officer.

[FR Doc. E8–28434 Filed 11–28–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10 a.m., Tuesday, December 2, 2008.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Personnel Matter. Closed pursuant to Exemptions (2) and (6).

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Board Secretary.

[FR Doc. E8–28503 Filed 11–26–08; 11:15 am]

BILLING CODE 7535–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of December 1, 8, 15, 22, 29, 2008; January 5, 2009.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of December 1, 2008

There are no meetings scheduled for the week of December 1, 2008.

Week of December 8, 2008—Tentative

Tuesday, December 9, 2008

9:25 a.m.—Affirmation Session (Public Meeting) (Tentative) a. Final Rule—Power Reactor Security Requirements (RIN 3150–AG63) (Tentative).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

9:30 a.m.—Briefing on Equal Employment Opportunity (EEO) and Small Business Programs (Public Meeting) (Contact: Sandy Talley, 301–415–8059).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Thursday, December 11, 2008

9:30 a.m.—Briefing on Uranium Recovery—Part 1 (Public Meeting).

1:30 p.m.—Briefing on Uranium Recovery—Part 2 (Public Meeting) (Contact for both parts: Dominick Orlando, 301–415–6749).

Both parts of this meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Friday, December 12, 2008

9:30 a.m.—Discussion of Management Issues (Closed—Ex. 2).

Week of December 15, 2008—Tentative

Monday, December 15, 2008

1 p.m.—Discussion of Management Issues (Closed—Ex. 2).

Wednesday, December 17, 2008

2 p.m.—Briefing on Threat Environment Assessment (Closed—Ex. 1).

Week of December 22, 2008—Tentative

There are no meetings scheduled for the week of December 22, 2008.

Week of December 29, 2008—Tentative

There are no meetings scheduled for the week of December 29, 2008.

Week of January 5, 2009—Tentative

There are no meetings scheduled for the week of January 5, 2009.

* * * * *

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

Additional Information

Affirmation of ''Final Rule—Power Reactor Security Requirements (RIN 3150–AG63)'' previously scheduled on Monday, December 1, 2008, at 12:55 p.m. has been rescheduled tentatively on Tuesday, December 9, 2008 at 9:25 a.m.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *darlene.wright@nrc.gov.*

Dated: November 25, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. E8–28557 Filed 11–26–08; 4:15 pm]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

PBGC Flat Premium Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of flat premium rates.

SUMMARY: This notice informs the public of the PBGC flat premium rates for premium payment years beginning in 2009. These rates can be derived from information published elsewhere but are published in this notice for the convenience of the public.

DATES: The flat premium rates apply to premium payment years beginning in 2009.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Pension plans covered by Title IV must pay premiums to PBGC. Section 4006 of ERISA deals with premium rates.

The Deficit Reduction Act of 2005 (Pub. L. 109–171) (DRA 2005) amended section 4006 of ERISA. DRA 2005 changed the per-participant flat premium rate for plan years beginning in 2006 from $19 to $30 for single-employer plans and from $2.60 to $8 for multiemployer plans and provided for inflation adjustments to the flat rates for future years. The adjustments are based on changes in the national average wage index as defined in section 209(k)(1) of the Social Security Act, with a two-year lag—for example, for 2009, the 2006 index is compared to the baseline (the 2004 index). The provisions were written in such a way that the premium rate can never go down; if the change in the national average wage index is negative, the premium rate remains the same as in the preceding year. Also, premium rates are rounded to the nearest whole dollar.

The baseline national average wage index, the 2004 index, was $35,648.55. The 2007 index was $40,405.48. The ratio of the 2007 index to the 2004 index is 1.133440. Multiplying this ratio by $30.00 gives $34.00. Multiplying the ratio by $8.00 gives $9.07, which rounds to $9.00. Thus, the 2009 flat premium rates for PBGC's two insurance programs will be $34.00 per participant for single-employer plans and $9.00 per participant for multiemployer plans.

The PBGC will publish the flat premium rates annually for the convenience of the public.

Issued in Washington, DC, on this *21st* day of November 2008.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. E8–28411 Filed 11–28–08; 8:45 am]

BILLING CODE 7709–01–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB Control No. 3206–0215; RI 25–49]

Proposed Information Collection; Request for Comments on an Existing Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of an existing information collection. This information collection, ''Verification of Full-Time School Attendance'' (OMB Control No. 3206–0215; form RI 25–49), is used to verify that adult student annuitants are entitled to payments. OPM must confirm that a full-time enrollment has been maintained.

Comments are particularly invited on whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility; whether our estimate of the public burden of this collection is accurate and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond through use of the appropriate technological collection techniques or other forms of information technology.

Approximately 10,000 RI 25–49 forms are completed annually. This form will take approximately 60 minutes to complete. The annual estimated burden is 10,000 hours.

For copies of this proposal, contact Cyrus S. Benson by telephone at (202) 606–4808, by FAX (202) 606–0910, or by e-mail at *Cyrus.Benson@opm.gov.* Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days of the date of this publication.

ADDRESSES: *Send or deliver comments to:* Ronald W. Melton, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500.

For information regarding Administrative Coordination contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4H28, Washington, DC 20415, (202) 606–0623.

Office of Personnel Management.

Howard Weizmann,

Deputy Director.

[FR Doc. E8–28441 Filed 11–28–08; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB Control No. 3206–0141; OPM Form 2809]

Proposed Information Collection; Request for Comments on an Existing Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of an existing information collection. This information collection, ''Health Benefits Election Form'' (OMB Control No. 3206–0141; OPM Form 2809), is used by annuitants and former spouses to elect, cancel, suspend, or change health benefits enrollment during periods other than open season.

Comments are particularly invited on: whether this information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility; whether our estimate of the

public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

There are approximately 30,000 changes to health benefits coverage per year. Of these, 20,000 are submitted on OPM Form 2809 and 10,000 verbally or in written correspondence. Each form takes approximately 45 minutes to complete; data collection by telephone or mail takes approximately 10 minutes. The annual burden for the form is 15,000 hours; the burden not using the form is 1,667 hours. The total burden is 16,667 hours.

For copies of this proposal, contact Cyrus S. Benson on (202) 606–4808, FAX (202) 606–0910 or via E-mail to *Cyrus.Benson@opm.gov.* Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—Ronald W. Melton, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500.

For Information Regarding Administrative Coordination—Contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, (202) 606–0623.

Office of Personnel Management.

Howard Weizmann,

Deputy Director.

[FR Doc. E8–28442 Filed 11–28–08; 8:45 am]

BILLING CODE 6325–38–P

RAILROAD RETIREMENT BOARD

Actuarial Advisory Committee With Respect to the Railroad Retirement Account; Notice of Public Meeting

Notice is hereby given in accordance with Public Law 92–463 that the Actuarial Advisory Committee will hold a meeting on December 16, 2008, at 12:30 p.m. at the office of the Chief Actuary of the U.S. Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, on the conduct of the 24th Actuarial Valuation of the Railroad Retirement System. The agenda for this meeting will include a discussion of the assumptions to be used in the 24th Actuarial Valuation. A report containing recommended assumptions and the experience on which the recommendations are based will have been sent by the Chief Actuary to the Committee before the meeting.

The meeting will be open to the public. Persons wishing to submit written statements or make oral presentations should address their communications or notices to the RRB Actuarial Advisory Committee, c/o Chief Actuary, U.S. Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092.

Dated: November 20, 2008.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. E8–28440 Filed 11–28–08; 8:45 am]

BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17f–2, SEC File No. 270–233, OMB Control No. 3235–0223.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17f–2 (17 CFR 270.17f–2) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a–1) is entitled: ''Custody of Investments by Registered Management Investment Company.'' Rule 17f–2 establishes safeguards for arrangements in which a registered management investment company (''fund'') is deemed to maintain custody of its own assets, such as when the fund maintains its assets in a facility that provides safekeeping but not custodial services. The rule includes several recordkeeping or reporting requirements. The fund's directors must prepare a resolution designating not more than five fund officers or responsible employees who may have access to the fund's assets. The designated access persons (two or more of whom must act jointly when handling fund assets) must prepare a written notation providing certain information about each deposit or withdrawal of fund assets, and must transmit the notation to another officer or director designated by the directors. Independent public accountants must verify the fund's assets at least three times a year and two of the examinations must be unscheduled.

The requirement that directors designate access persons is intended to ensure that directors evaluate the trustworthiness of insiders who handle fund assets. The requirements that access persons act jointly in handling fund assets, prepare a written notation of each transaction, and transmit the notation to another designated person are intended to reduce the risk of misappropriation of fund assets by access persons, and to ensure that adequate records are prepared, reviewed by a responsible third person, and available for examination by the Commission's examination staff. The requirement that auditors verify fund assets without notice twice each year is intended to provide an additional deterrent to the misappropriation of fund assets and to detect any irregularities.

The Commission staff estimates that each fund makes 941 responses and spends and average of 271 hours annually in complying with the rule's requirements.[1] Commission staff estimates that on an annual basis it takes: (i) 0.5 hours of fund accounting personnel at a total cost of $75.50 to draft director resolutions;[2] (ii) 0.5 hours of the fund's board of directors at a total cost of $1000 to adopt the resolution; (iii) 263 hours for the fund's accounting personnel at a total cost of $60,864 to prepare written notations of transactions;[3] and (iv) 7 hours for the fund's accounting personnel at a total cost of $1057 to assist the independent public accountants when they perform

[1] The 941 responses are: 1 (one) response to draft and adopt the resolution and 940 notations. Estimates of the number of hours are based on conversations with individuals in the mutual fund industry. The actual number of hours may vary significantly depending on individual fund assets.

[2] This estimate is based on the following calculation: 0.5 (burden hours per fund) × $151 (fund senior accountant's hourly rate) = $75.50.

[3] Respondents estimated that each fund makes 941 responses on an annual basis and spent a total of 0.28 hours per response. The fund personnel involved are Fund Payable Manager ($156 hourly rate), Fund Operations Manager ($252 hourly rate) and Fund Accounting Manager ($285 hourly rate). The weighted hourly rate of these personnel is $231. The estimated cost of preparing notations is based on the following calculation: 941 × 0.28 × $231 = $60,863.88.

verifications of fund assets.[4] Approximately 300 funds rely upon rule 17f–2 annually.[5] Thus, the total annual hour burden for rule 17f–2 is estimated to be 81,300 hours.[6] Based on the total costs per fund listed above, the total cost of the Rule 17f–2's collection of information requirements is estimated to be $18.9 million.[7]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by rule 17f–2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. 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 control number.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

[4] This estimate is based on the following calculation: 7 × $151 (fund senior accountant hourly rate) = $1057.

[5] Based on a review of Form N–17f–2 filings in 2007, the Commission staff estimates that 300 funds relied on rule 17f–2 in 2007.

[6] This estimate is based on the following calculation: 300 (funds) × 271 (total annual hourly burden per fund) = 81,300 hours for rule. The annual burden for rule 17f–2 does not include time spent preparing Form N–17f–2. The burden for Form N–17f–2 is included in a separate collection of information.

[7] This estimate is based on the following calculation: $62,996.50 (total annual cost per fund) × 300 funds = $18,898,950.

Dated: November 20, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28418 Filed 11–28–08; 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 Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–17f–2; SEC File No. 270–317; OMB Control No. 3235–0360.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form N–17f–2 (17 CFR 274.220) under the Act is entitled ''Certificate of Accounting of Securities and Similar Investments in the Custody of Management Investment Companies.'' Form N–17f–2 is the cover sheet for the accountant examination certificates filed under rule 17f–2 (17 CFR 270.17f–2) by registered management investment companies (''funds'') maintaining custody of securities or other investments. Form N–17f–2 facilitates the filing of the accountant's examination certificates prepared under rule 17f–2. The use of the form allows the certificates to be filed electronically, and increases the accessibility of the examination certificates to both the Commission's examination staff and interested investors by ensuring that the certificates are filed under the proper Commission file number and the correct name of a fund.

Commission staff estimates that on an annual basis it takes: (i) On average 1.25 hours of fund accounting personnel at a total cost of $188.75 to prepare each Form N–17f–2;[1] and (ii) .75 hours of clerical time at a total cost of $48.75 to file the Form N–17f–2 with the Commission.[2] Approximately 300 funds currently file Form N–17f–2 with the Commission, and each fund is required to make three filings annually for a total annual hourly burden per fund of approximately 6 hours at a total cost of $712.50. The total annual hour burden for Form N–17f–2 is therefore estimated to be approximately 1800 hours. Based on the total annual costs per fund listed above, the total cost of Form N–17f–2's collection of information requirements is estimated to be approximately $213,750.[3]

[1] This estimate is based on the following calculation: 1.25 x $151 (fund senior accountant's hourly rate) = $188.75.

[2] This estimate is based on the following calculation: 75 x $65 (secretary hourly rate) = $48.75.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by Form N–17f–2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. 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 control number.

The Commission requests written comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: November 20, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28427 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

[3] This estimate is based on the following calculation: 300 funds x $712.50 (total annual cost per fund) = $213,750.

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:
Form N–2; SEC File No. 270–21; OMB Control No. 3235–0026.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

The title for the collection of information is ''Form N–2 (17 CFR 239.14 and 274.11a–1) under the Securities Act of 1933 and under the Investment Company Act of 1940, Registration Statement of Closed-End Management Investment Companies.'' Form N–2 is the form used by closed-end management investment companies (''closed-end funds'') to register as investment companies under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'') and to register their securities under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (''Securities Act''). The primary purpose of the registration process is to provide disclosure of financial and other information to investors and potential investors for the purpose of evaluating an investment in a security. Form N–2 also permits closed-end funds to provide investors with a prospectus containing information required in a registration statement prior to the sale or at the time of confirmation of delivery of securities. The form also may be used by the Commission in its regulatory review, inspection, and policy-making roles.

The Commission estimates that there are 140 initial registration statements and 60 post-effective amendments to initial registration statements filed on Form N–2 annually and that the average number of portfolios referenced in each initial filing and post-effective amendment is 1. The Commission further estimates that the hour burden for preparing and filing a post-effective amendment on Form N–2 is 116.5 hours per portfolio. The total annual hour burden for preparing and filing post-effective amendments is 6,990 hours (60 post-effective amendments x 1 portfolios x 116.5 hours per portfolio). The estimated annual hour burden for preparing and filing initial registration statements is 79,478 hours (140 initial registration statements x 1 portfolios x 567.7 hours per portfolio). The total annual hour burden for Form N–2, therefore, is estimated to be 86,468 hours (6,990 hours + 79,478 hours).

The information collection requirements imposed by Form N–2 are mandatory. Responses to the collection of information will not be kept confidential. 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 control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 17, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28428 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59003; File No. 4–574]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing of Proposed Plan for the Allocation of Regulatory Responsibilities Between the International Securities Exchange, LLC and the Financial Industry Regulatory Authority, Inc.

November 24, 2008.

Pursuant to Section 17(d) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 17d–2 thereunder,[2] notice is hereby given that on November 21, 2008, the International Securities Exchange, LLC (''ISE'') and the Financial Industry Regulatory Authority, Inc. (''FINRA'') (together with the ISE, the ''Parties'') filed with the Securities and Exchange Commission (''Commission'') a plan for the allocation of regulatory responsibilities (the ''17d–2 Plan''). The Commission is publishing this notice to solicit comments on the 17d–2 Plan from interested persons.

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or registered national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. Proposed Plan

On August 22, 2008, ISE Holdings, Inc., the parent of ISE, agreed to acquire an equity interest in Direct Edge Holdings LLC (''Direct Edge'') by contributing cash and the ISE's equities trading facility, ISE Stock Exchange, LLC (''ISE Stock''). After such transaction, (1) Direct Edge, though a subsidiary, will own and operate ISE Stock as a facility [11] of ISE and (2) ISE Holdings will have a 31.54% equity interest in Direct Edge, which wholly owns and operates an Electronic Access Member of the ISE, Direct Edge ECN LLC (''DE ECN''). DE ECN currently routes, and will continue to route, orders into ISE Stock. Recognizing that the Commission has previously expressed concern regarding (1) the potential for conflicts of interest in instances where an exchange is affiliated with one of its members, and (2) the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis the other non-affiliated members, the ISE submitted a proposed rule change to amend ISE Rule 312 to permit the proposed affiliation subject to several conditions and limitations, including that a condition that the Exchange shall enter into a plan with a non-affiliated self-regulatory organization to regulate and oversee the activities of DE ECN, pursuant to Rule 17d–2 under the Act.[12]

On November 21, 2008, the Parties submitted the 17d–2 Plan for review by the Commission. The text of the 17d–2 Plan, which is separate from the agreement made pursuant to Rule 17d–2 of the Act between FINRA and ISE entered into on December 20, 2006, delineates regulatory responsibilities between the Parties, including responsibility for ISE rules, with respect to DE ECN, which is a common member. Included in the 17d–2 Plan is an attachment (''ISE Certification of Common Rules,'' referred to herein as the ''Certification'') that lists every ISE rule and the federal securities laws and rules and regulations thereunder for which, under the 17d–2 Plan, the FINRA would bear responsibility for overseeing and enforcing with respect to DE ECN. In particular, under the 17d–2 Plan, FINRA would assume examination and enforcement responsibility relating to compliance by DE ECN and persons associated therewith, with the rules of ISE that are substantially similar to the rules of FINRA (''Common Rules''), as well as any provisions of the federal securities laws and the rules and regulations thereunder delineated in the Certification.[13] Under the 17d–2 Plan, ISE would retain full responsibility for surveillance, examination, investigation, and enforcement with respect to trading activities or practices involving ISE's own marketplace; registration pursuant to its unique rules (i.e., non-common rules); its duties as a Designated Examining Authority pursuant to Rule 17d–1 under the Act; and any rules that are not substantially similar to the rules of FINRA, except for ISE rules for any ISE member that operates as a facility,[14] acts as an inbound router for the ISE, and is a member of the ISE and FINRA (''Inbound Router Member'').[15] For purposes of the proposed 17d–2 Plan, DE ECN would qualify as the sole Inbound Router Member. Accordingly, FINRA would be allocated regulatory responsibility for DE ECN.

The text of the 17d–2 Plan is as follows:

Agreement Between Financial Industry Regulatory Authority, Inc. and International Securities Exchange LLC Pursuant to Rule 17d–2 Under the Securities Exchange Act of 1934

This Agreement, by and between the Financial Industry Regulatory Authority, Inc. (''FINRA'') and the International Securities Exchange LLC (''ISE''), is made this 21st day of November, 2008 (the ''Agreement''), pursuant to Section 17(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') and Rule 17d–2 thereunder which permits agreements between self-regulatory organizations to allocate regulatory responsibility to eliminate regulatory duplication. FINRA and ISE may be referred to individually as a ''party'' and together as the ''parties.''

Whereas, ISE desires to eliminate conflicts of interest that would exist if ISE were to regulate Direct Edge ECN LLC (''DE ECN''), an affiliate and member of ISE, which operates two order delivery electronic communication networks (''ECNs'') that route inbound orders to ISE.

Whereas, ISE and FINRA desire to reduce duplication in the examination of their Dual Members (as defined herein); and

Whereas, FINRA and ISE desire to execute an agreement covering such subjects pursuant to the provisions of Rule 17d–2 under the Exchange Act and to file such agreement with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') for its approval.

Now, therefore, in consideration of the mutual covenants contained hereinafter, FINRA and ISE hereby agree as follows:

1. Definitions. Unless otherwise defined in this Agreement or the context otherwise requires, the terms used in this Agreement shall have the same meaning as they have under the Exchange Act and the rules and regulations thereunder. As used in this Agreement, the following terms shall have the following meanings:

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Section 3(a)(2) of the Act (defining ''facility''). 15 USC 78c(a)(2).

[12] *See* Securities Exchange Act Release No. 58918 (November 7, 2008), 73 FR 67909 (November 17, 2008).

[13] *See* paragraph 2 of the 17d–2 plan. The Commission notes that there are currently no federal securities law rules listed on the Certification.

[14] *See* Section 3(a)(2) of the Act (defining ''facility''). 15 USC 78c(a)(2).

[15] Apparent violations of such ISE rules by any Inbound Router Member will be processed by, and enforcement proceedings will be conducted by, the FINRA. *See* paragraphs 2(d) and 5 of the 17d–2 Plan. As of the date of this Agreement, Direct Edge ECN LLC is the only Inbound Router Member.

(a) *''ISE Rules''* or *''FINRA Rules''* shall mean the rules of the ISE or FINRA, respectively, as the rules of an exchange or association are defined in Exchange Act Section 3(a)(27).

(b) *''Common Rules''* shall mean the ISE Rules that are substantially similar to the applicable FINRA Rules in that examination for compliance with such rules would not require FINRA to develop one or more new examination standards, modules, procedures, or criteria in order to analyze the application of the rule, or a Dual Member's activity, conduct, or output in relation to such rule; provided, however, Common Rules shall not include the application of the SEC, ISE or FINRA rules as they pertain to violations of insider trading activities, which is covered by a separate 17d–2 Agreement by and among the American Stock Exchange, LLC, BATS Exchange, Inc., Boston Stock Exchange, Inc., CBOE Stock Exchange, LLC, Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange, LLC, NYSE Arca Inc., NYSE Regulation, Inc., and Philadelphia Stock Exchange, Inc. approved by the Commission on October 17, 2008.

(c) *''Dual Members''* shall mean those ISE members that are also members of FINRA and the associated persons therewith, but for purposes of this Agreement is limited to DE ECN and its associated persons.

(d) *''Effective Date''* shall have the meaning set forth in paragraph 13.

(e) *''Enforcement Responsibilities''* shall mean the conduct of appropriate proceedings, in accordance with the FINRA Code of Procedure (the Rule 9000 Series) and other applicable FINRA procedural rules, to determine whether violations of pertinent laws, rules or regulations have occurred, and if such violations are deemed to have occurred, the imposition of appropriate sanctions as specified under the FINRA's Code of Procedure and sanctions guidelines.

(f) *''Regulatory Responsibilities''* shall mean the examination responsibilities and Enforcement Responsibilities relating to compliance by the Dual Members with the Common Rules and the provisions of the Exchange Act and the rules and regulations thereunder, and other applicable laws, rules and regulations, each as set forth on *Exhibit 1* attached hereto.

2. Regulatory and Enforcement Responsibilities. FINRA shall assume Regulatory Responsibilities and Enforcement Responsibilities for DE ECN, which is a Dual Member. Attached as Exhibit 1 to this Agreement and made part hereof, ISE furnished FINRA with a current list of Common Rules and certified to FINRA that such rules are substantially similar to the corresponding FINRA rule (the ''Certification''). FINRA hereby agrees that the rules listed in the Certification are Common Rules as defined in this Agreement. Each year following the Effective Date of this Agreement, or more frequently if required by changes in either the rules of ISE or FINRA, ISE shall submit an updated list of Common Rules to FINRA for review which shall add ISE Rules not included in the current list of Common Rules that qualify as Common Rules as defined in this Agreement; delete ISE Rules included in the current list of Common Rules that no longer qualify as Common Rules as defined in this Agreement; and confirm that the remaining rules on the current list of Common Rules continue to be ISE Rules that qualify as Common Rules as defined in this Agreement. Within 30 days of receipt of such updated list, FINRA shall confirm in writing whether the rules listed in any updated list are Common Rules as defined in this Agreement.

Notwithstanding anything herein to the contrary, it is explicitly understood that the term ''Regulatory Responsibilities'' does not include, and ISE shall retain full responsibility for (unless otherwise addressed by separate agreement or rule) (collectively, the ''Retained Responsibilities'') the following:

(a) Surveillance, examination, investigation and enforcement with respect to trading activities or practices involving ISE's own marketplace, including without limitation ISE's rules relating to the rights and obligations of market makers;

(b) Registration pursuant to its applicable rules of associated persons (i.e., registration rules that are not Common Rules);

(c) Discharge of its duties and obligations as a Designated Examining Authority pursuant to Rule 17d–1 under the Exchange Act; and

(d) Any ISE Rules that are not Common Rules, except for ISE Rules for any ISE member that operates as a facility (as defined in Section 3(a)(2) of the Exchange Act), acts as an inbound router for the ISE and is a member of the ISE and FINRA (''Inbound Router Member'') as provided in paragraph 5. As of the date of this Agreement, Direct Edge ECN LLC is the only Inbound Router Member.

3. No Charge. There shall be no charge to ISE by FINRA for performing the Regulatory Responsibilities and Enforcement Responsibilities under this Agreement except as hereinafter provided. FINRA shall provide ISE with ninety (90) days advance written notice in the event FINRA decides to impose any charges to ISE for performing the Regulatory Responsibilities under this Agreement. If FINRA determines to impose a charge, ISE shall have the right at the time of the imposition of such charge to terminate this Agreement; provided, however, that FINRA's Regulatory Responsibilities under this Agreement shall continue until the Commission approves the termination of this Agreement.

4. Reassignment of Regulatory Responsibilities. Notwithstanding any provision hereof, this Agreement shall be subject to any statute, or any rule or order of the Commission, or industry agreement, restructuring the regulatory framework of the securities industry or reassigning Regulatory Responsibilities between self-regulatory organizations. To the extent such action is inconsistent with this Agreement, such action shall supersede the provisions hereof to the extent necessary for them to be properly effectuated and the provisions hereof in that respect shall be null and void.

5. Notification of Violations.

(a) In the event that FINRA becomes aware of apparent violations of any ISE Rules, which are not listed as Common Rules, discovered pursuant to the performance of the Regulatory Responsibilities assumed hereunder, FINRA shall notify ISE of those apparent violations for such response as ISE deems appropriate. With respect to apparent violations of any ISE Rules by any Inbound Router Members, FINRA shall not make referrals to ISE pursuant to this paragraph 5. Such apparent violations shall be processed by, and enforcement proceedings in respect thereto will be conducted by, FINRA as provided in this Agreement.

(b) In the event that ISE becomes aware of apparent violations of any Common Rules, discovered pursuant to the performance of the Retained Responsibilities, ISE shall notify FINRA of those apparent violations and such matters shall be handled by FINRA as provided in this Agreement.

(c) Apparent violations of Common Rules, FINRA Rules, federal securities laws, and rules and regulations thereunder, shall be processed by, and enforcement proceedings in respect thereto shall be conducted by FINRA as provided hereinbefore; provided, however, that in the event a Dual Member is the subject of an investigation relating to a transaction on ISE, ISE may in its discretion assume

concurrent jurisdiction and responsibility.

(d) Each party agrees to make available promptly all files, records and witnesses necessary to assist the other in its investigation or proceedings.

6. Continued Assistance.

(a) FINRA shall make available to ISE all information obtained by FINRA in the performance by it of the Regulatory Responsibilities hereunder in respect to the Inbound Router Members subject to this Agreement. In particular, and not in limitation of the foregoing, FINRA shall furnish ISE any information it obtains about Inbound Router Members which reflects adversely on their financial condition. ISE shall make available to FINRA any information coming to its attention that reflects adversely on the financial condition of Inbound Router Members or indicates possible violations of applicable laws, rules or regulations by such firms.

(b) The parties agree that documents or information shared shall be held in confidence, and used only for the purposes of carrying out their respective regulatory obligations. Neither party shall assert regulatory or other privileges as against the other with respect to documents or information that is required to be shared pursuant to this Agreement.

(c) The sharing of documents or information between the parties pursuant to this Agreement shall not be deemed a waiver as against third parties of regulatory or other privileges relating to the discovery of documents or information.

7. Statutory Disqualifications. When FINRA becomes aware of a statutory disqualification as defined in the Exchange Act with respect to an Inbound Router Member, FINRA shall determine pursuant to Sections 15A(g) and/or Section 6(c) of the Exchange Act the acceptability or continued applicability of the person to whom such disqualification applies and keep ISE advised of its actions in this regard for such subsequent proceedings as ISE may initiate.

8. Branch Office Information. FINRA shall also be responsible for processing and, if required, acting upon all requests for the opening, address changes, and terminations of branch offices by Inbound Router Members and any other applications required of Inbound Router Members with respect to the Common Rules as they may be amended from time to time. Upon request, FINRA shall advise ISE of the opening, address change and termination of branch and main offices of Inbound Router Members and the names of such branch office managers.

9. Customer Complaints. ISE shall forward to FINRA copies of all customer complaints involving Inbound Router Members received by ISE relating to FINRA's Regulatory Responsibilities under this Agreement. It shall be FINRA's responsibility to review and take appropriate action in respect to such complaints.

10. Advertising. FINRA shall assume responsibility to review the advertising of Inbound Router Members subject to the Agreement, provided that such material is filed with FINRA in accordance with FINRA's filing procedures and is accompanied with any applicable filing fees set forth in FINRA Rules. Such review shall be made in accordance with then applicable FINRA Rules and interpretations. The advertising of Inbound Router Members shall be subject only to compliance with appropriate FINRA Rules and interpretations.

11. No Restrictions on Regulatory Action. Nothing contained in this Agreement shall restrict or in any way encumber the right of either party to conduct its own independent or concurrent investigation, examination or enforcement proceeding of or against Inbound Router Members, as either party, in its sole discretion, shall deem appropriate or necessary.

12. Termination. This Agreement shall terminate on the earlier of (a) the date on which DE ECN ceases operations as a facility of ISE, or (b) the date on which the Commission approves termination of this Agreement after one (1) year's written notice by ISE or FINRA to the other party or such shorter period as may be agreed to by the parties, except as provided in paragraph 3.

13. Effective Date. This Agreement shall be effective upon approval of the Commission.

14. Arbitration. In the event of a dispute between the parties as to the operation of this Agreement, ISE and FINRA hereby agree that any such dispute shall be settled by arbitration in Washington, DC in accordance with the rules of the American Arbitration Association then in effect, or such other procedures as the parties may mutually agree upon. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Each party acknowledges that the timely and complete performance of its obligations pursuant to this Agreement is critical to the business and operations of the other party. In the event of a dispute between the parties, the parties shall continue to perform their respective obligations under this Agreement in good faith during the resolution of such dispute unless and until this Agreement is terminated in accordance with its provisions. Nothing in this Section 14 shall interfere with a party's right to terminate this Agreement as set forth herein.

15. Separate Agreement. This Agreement is wholly separate from the Agreement made pursuant to Rule 17d–2 of the Securities Exchange Act of 1934 between Financial Industry Regulatory Authority, Inc. and the International Securities Exchange LLC entered into on December 20, 2006, and as may be amended from time to time.

16. Amendment. This Agreement may be amended in writing duly approved by each party. All such amendments must be filed with and approved by the Commission before they become effective.

17. Limitation of Liability. Neither FINRA nor ISE nor any of their respective directors, governors, officers or employees shall be liable to the other party to this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibilities as provided hereby or for the failure to provide any such responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or the other of FINRA or ISE and caused by the willful misconduct of the other party or their respective directors, governors, officers or employees. No warranties, express or implied, are made by FINRA or ISE with respect to any of the responsibilities to be performed by each of them hereunder.

18. Relief from Responsibility. Pursuant to Sections 17(d)(1)(A) and 19(g) of the Exchange Act and Rule 17d–2 thereunder, FINRA and ISE join in requesting the Commission, upon its approval of this Agreement or any part thereof, to relieve ISE of any and all responsibilities with respect to matters allocated to FINRA pursuant to this Agreement; provided, however, that this Agreement shall not be effective until the Effective Date.

19. Severability. Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.

20. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and such counterparts together shall constitute one and the same instrument.

Exhibit 1

ISE Certification of Common Rules

ISE hereby certifies that the requirements contained in the rules listed below for ISE are identical to, or substantially similar to, the comparable FINRA (NASD) Rules identified.

ISE Rule(s)	FINRA (NASD) Rule(s)
408. Prevention of the Misuse of Material, Nonpublic Information	NASD Rule 3010(a)(2) Supervision *.
409. Disciplinary Action	NASD Rule 3070(a)(1) and (a)(10) Reporting Requirements.
604. Continuing Education for Registered Persons	NASD Rule 1120 Continuing Education Requirements.
622. Transfer of Accounts	NASD Rule 11870 Customer Account Transfer Contracts.
624. Brokers' Blanket Bonds	NASD Rule 3020 Fidelity Bonds.
626. Telephone Solicitation	NASD Rule 2212 Telemarketing.
1400. Maintenance, Retention, and Furnishing of Books, Records and Other Information.	NASD Rule 3110(a) Books and Records—Requirements *.
2114. Doing Business with the Public [1]	NASD Rules 2310 Recommendations to Customers (Suitability); 2320 Best Execution and Interpositioning; 2330 Customers' Securities or Funds; 2340 Customer Account Statements; 2341 Margin Disclosure Statement; 2350 Broker/Dealer Conduct on the Premises of Financial Institutions; 2360 Approval Procedures for Day-Trading Accounts; 2361 Day-Trading Risk Disclosure Statement; 2370 Borrowing From or Lending to Customers.

[1] In connection with the approval of ISE Rule 2114, the Commission noted that since the ISE is requiring Equity EAMs that do business with the public to become members of FINRA, those ISE members are required to comply with FINRA (NASD) rules that govern the practice of members when doing business with the public. The Commission noted that, among other things, these members would be obligated to comply with these listed FINRA (NASD) Rules. See Exchange Act Release No. 54401 (September 1, 2006), 71 FR 53483 (September 11, 2006) (Order Granting Accelerated Approval of SR–ISE–2006–53).

* FINRA shall not have any Regulatory Responsibilities under this Agreement for these rules as they pertain to violations of insider trading activities, which is covered by a separate 17d–2 Agreement by and among the American Stock Exchange, LLC, BATS Exchange, Inc. Boston Stock Exchange, Inc., CBOE Stock Exchange, LLC, Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange, LLC, NYSE Arca Inc., NYSE Regulation, Inc., and Philadelphia Stock Exchange, Inc. as approved by the Commission on October 17, 2008.

* * * * *

III. Date of Effectiveness of the Proposed Plan and Timing for Commission Action

Pursuant to Section 17(d)(1) of the Act [16] and Rule 17d–2 thereunder,[17] on or after December 22, 2008, the Commission may, by written notice, declare the plan submitted by ISE and FINRA, File No. 4–574, to be effective if the Commission finds that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among self-regulatory organizations, or to remove impediments to and foster the development of the national market system and a national system for the clearance and settlement of securities transactions and in conformity with the factors set forth in Section 17(d) of the Act.

IV. Solicitation of Comments

In order to assist the Commission in determining whether to approve the 17d–2 Plan and to relieve ISE of the responsibilities which would be assigned to FINRA, interested persons are invited to submit written data, views, and arguments concerning the foregoing. 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 e-mail to *rule-comments@sec.gov.* Please include File Number 4–574 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 4–574. This file number should be included on the subject line if e-mail 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/other.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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the ISE and FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–574 and should be submitted on or before December 22, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28381 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78q(d)(1).

[17] 17 CFR 240.17d–2.

[18] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58996; File No. SR–BSE–2008–55]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. To Temporarily Increase the Number of Additional Quarterly Option Series in Exchange-Traded Fund Share Options That May Be Listed on the Boston Options Exchange Facility

November 21, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2008, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b-4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule 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 IV, Section 6 (Series of Options Contracts Open for Trading), Supplemental Material .04, of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to temporarily increase the number of additional Quarterly Options Series (''QOS'') in exchange-traded fund share (''ETF'') options from sixty (60) to one hundred (100) that may be added by BOX. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqtrader.com/Trader.aspx?id=Boston_Stock_Exchange*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposed rule change is based on a similar proposal by the Chicago Board Options Exchange, Incorporated (''CBOE'').[5]

A pilot program (the ''Pilot Program'') on BOX currently permits the listing and trading of QOS.[6] The purpose of this proposed rule change is to temporarily increase the number of additional QOS in ETF options from sixty (60) to one hundred (100) that may be added by BOX. To effect this change, the Exchange is proposing to add new subparagraph (h) to Supplemental Material .04.

Because of the current, unprecedented market conditions, demand from market participants exists to add lower priced strikes for certain of the QOS. However, currently under Supplemental Material .04, BOX cannot honor this demand because the maximum number of additional series, sixty (60), has already been listed. These strikes which are currently in demand are much lower than those currently listed for which there is open interest.

The Exchange is therefore seeking to temporarily increase the number of additional QOS that may be added to one hundred (100). The increase of additional series would be permitted immediately for expiration months currently listed and for expiration months added throughout the last quarter of 2008, including the new expiration month added after December 2008 expiration. The Exchange believes that this proposal is reasonable and will allow for more efficient risk management. The Exchange believes that this proposal will facilitate the functioning of the BOX market and will not harm investors or the public interest.

The Exchange believes that user demand and the recent downward price movements in the underlying ETFs warrants a temporary increase in the number of strikes for all QOS in ETF options. BOX currently lists QOS in five (5) ETFs: (1) Nasdaq-100 Index Tracking Stock (''QQQQ''); (2) iShares Russell 2000 Index Fund (''IWM''); (3) DIAMONDS Trust, Series 1 (''DIA''); (4) Standard and Poor's Depositary Receipts/SPDRs (''SPY''); and (5) Energy Select SPDR (''XLE''). The chart below provides the historical closing prices of these ETFs over the past several months:

ETF	10/27/2008	10/13/2008	10/6/2008	9/30/2008	8/29/2008	7/31/2008
QQQQ	28.69	35.13	34.86	38.91	46.12	45.46
IWM	44.86	56.98	59.72	68	73.87	71.32
DIA	80.26	95.03	99.9	108.36	115.45	113.7
SPY	83.95	101.35	104.72	115.99	128.79	126.83
XLE	40.86	50.55	54.89	63.3	74.65	74.4

The additional series will enable BOX to list in-demand, lower priced strikes.

BOX represents that it has the necessary systems capacity to support the new options series that will result from this proposal. Further, as proposed, the Exchange notes that these series would temporarily become part of the Pilot Program and will be considered by the Commission when the Exchange seeks to renew or make permanent the Pilot Program in the future. In addition, the Exchange states that in the event that current market volatility continues, it may seek to continue (through a rule filing) the time period during which the additional

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 58887 (October 30, 2008), 73 FR 66083 (November 6, 2008) (SR–CBOE–2008–111).

[6] The term ''Quarterly Options Series'' is defined in the BOX Rules as a series in an options class that is approved for listing and trading on the Exchange in which the series is opened for trading on any business day and that expires at the close of business on the last business day of a calendar quarter.

series proposed by this filing may be added.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[7] in general, and Section 6(b)(5) of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the current proposed rule change is responsive to the current, unprecedented market conditions, is limited in scope as to QOS in ETF options and as to time, and the proposed additional new series can be added without presenting capacity problems.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (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[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest because such waiver will enable the Exchange to better meet customer demand in light of recent increased volatility in the marketplace.[11] Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–BSE–2008–55 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-BSE–2008–55. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BSE–2008–55 and should be submitted on or before December 22, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28421 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission deems this requirement to be met.

[11] 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).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59006; File No. SR–NYSEALTR–2008–08]

Self-Regulatory Organizations; NYSE Alternext US LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Listing and Trading of Managed Fund Share Options

November 24, 2008.

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 November 19, 2008, NYSE Alternext US LLC (''NYSE Alternext'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise Commentary .06 to Rule 915 to enable the listing and trading of options on Managed Fund Shares. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to revise Commentary .06 to NYSE Alternext Rule 915 to enable the listing and trading of options on managed fund shares (''Managed Fund Shares'') that are listed and traded on a national securities exchange and are considered to be an ''NMS Stock'' (as defined in Rule 600 of Regulation NMS under the Securities and Exchange Act of 1934 (the ''Act'')).

Managed Fund Shares are represent an interest in a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity.[3] Unlike traditional exchange traded funds, Managed Fund Shares are actively managed. Managed Fund Shares, although, based upon a publicly disclosed portfolio of securities, each trade as a single exchange-listed equity security.

Accordingly, rules pertaining to the listing and trading of standard equity options will apply to Managed Fund Shares.

Listing Criteria

The Exchange will consider listing and trading options on Managed Fund Shares provided the Managed Fund Shares that meet (1) the criteria for underlying securities set forth in NYSE Alternext Rule 915(a)[4] and (b) and Commentary .01 to Rule 915[5] or (2) the Managed Fund Shares are available for creation and redemption each business day as set forth in Commentary .06(a)(ii) to Rule 915.

The Exchange proposes that Managed Fund Shares deemed appropriate for options trading represent an interest in an open-end management investment company or similar entity, as described below:

• *Managed Fund Shares* are securities that represents an interest in an Investment Company organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (''NAV''), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV.

For the purposes of Commentary .06(iv) to NYSE Alternext Rule 915, Managed Fund Shares are a class of exchange-traded fund shares that are actively managed as defined in NYSE Alternext Equities Rule 1000B(b)(1).[6]

Continued Listing Requirements

Options on Managed Fund Shares will be subject to all Exchange rules governing the trading of equity options and furthermore, the rules pertaining to position and exercise limits[7] or margin[8] shall apply. The current continuing or maintenance listing standards for options traded on NYSE Alternext will continue to apply.

The Exchange will utilize its existing surveillance procedures applicable to options on exchange traded funds (which will include Managed Fund Shares) to monitor trading. In addition, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Managed Fund Shares, including adequate comprehensive surveillance sharing agreements (''CSSA'') with markets trading in non-U.S. components,[9] as applicable. Also, the Exchange may obtain trading information via the Intermarket Surveillance Group (''ISG'')[10] from other exchanges who are members or affiliates of the ISG. NYSE Alternext represents that these procedures will be adequate to properly monitor Exchange trading of options on these the securities and to deter and detect violations of Exchange rules.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[11] of the Act, in general, and furthers the objectives of Section 6(b)(5),[12] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rules applicable to trading pursuant to

[3] *See* Securities Exchange Act Release No. 57514 (March 17, 2008), 73 FR 15230 (March 21, 2008)(Amex File No. SR–Amex–2008–02)(order approving the listing and trading of Managed Fund Shares, generally, and the listing and trading specifically of shares of the Bear Stearns Current Yield Fund).

[4] *See* NYSE Alternext Rule 915(a) which states that the underlying securities shall be duly registered and be an ''NMS Stock'' as defined in Rule 600 of Regulation NMS under the Act.

[5] *See* Commentary .01(1) through (3) to NYSE Alternext Rule 915 which sets forth minimum requirements for the underlying security which include, but are not limited to, 7,000,000 underlying shares, 2,000 shareholders, and trading volume of 2,400,000 shares over the preceding twelve months.

[6] *See supra* note 3.

[7] Pursuant to NYSE Alternext Rule 904(a)(i), Managed Fund Shares are subject to the same position limits applicable to options on stocks and Exchange-Traded Fund Shares. NYSE Alternext Rule 905 stipulates that exercise limits for options on stocks and other securities, including Managed Fund Shares, shall be the same as the position limits applicable under NYSE Alternext Rule 904.

[8] *See* NYSE Alternext Equities Rule 462 regarding margin requirements.

[9] *See* Commentary .06(b) to Rule 915, the Exchange's rule governing the applicable CSSA requirements for options on exchange-traded funds. We note that any non-U.S. component securities (including fixed-income) in an index or portfolio of securities on which the Fund Shares are based that are not subject to comprehensive surveillance agreements may in the aggregate represent an amount equal to 50% of the weight of the index or portfolio.

[10] A complete list of the current members of the ISG, is available at *http://www.isgportal.org*.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

generic listing and trading criteria, together with the Exchange's surveillance procedures applicable to trading in the securities covered by the proposed rules, serve to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEALTR–2008–08 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–NYSEALTR–2008–08. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEALTR–2008–08 and should be submitted on or before December 22, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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 [13] and, in particular, the requirements of Section 6 of the Act.[14] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[15] which requires, among other things, that the rules of a national securities exchange be designed 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.

Listing and Trading of Options on Managed Fund Shares

As set out above, the Exchange's proposed rules include requirements regarding initial and continued listing standards, the creation/redemption process for Managed Fund Shares, and trading halts. Managed Fund Shares must be traded through a national securities exchange or through the facilities of a national securities association, and must be ''NMS stock'' as defined under Rule 600 of Regulation NMS.[16]

The Commission notes that, pursuant to Commentary .06(a) to NYSE Alternext Rule 915 and Commentary .07 to NYSE Alternext Rule 916, Managed Fund Shares will be subject to the initial and continuing eligibility standards for underlying securities provided in Alternext Rule 915 and 916, as applicable. In particular, to be options eligible, a Managed Fund Share must either meet the criteria and guidelines for underlying securities set forth in Commentary .01 to NYSE Alternext Rule 915, or alternately, the Managed Fund Share must be available for creation or redemption each business day in cash or in kind from the investment company, issuing trust, commodity pool or other entity at a price related to the NAV. In addition, the investment company, issuing trust, commodity pool or other entity shall provide that Managed Fund Shares may be created even though some or all of the securities and/or cash needed to be deposited have not been received by the unit investment trust or the management investment company, provided the authorized creation participant has undertaken to deliver the Managed Fund Shares and/or cash as soon as possible and such undertaking has been secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the fund which underlies the option as described in the prospectus of the Managed Fund Share.

To continue to be eligible to underlie options, the Managed Fund Share must remain an NMS stock listed on a national securities exchange. The Exchange will also consider the suspension of opening transactions in any series of options of the class covering Managed Fund Shares where the Managed Fund Share does not satisfy the requirements set out in Commentary .07 to NYSE Alternext Rule 916. These include: (1) In the case of options on Managed Fund Shares approved pursuant to paragraph (b) under Commentary .06 to NYSE Alternext Rule 915, compliance with paragraphs (1) through (7) of Commentary .01 to NYSE Alternext Rule 916; (2) following the initial twelve-month period, beginning upon the commencement of trading of the Managed Fund Shares on a national securities exchange and being defined as an ''NMS stock'', there are fewer than 50 record and/or beneficial holders of such Managed Fund Shares for 30 or more consecutive trading days; (3) the value of the index or portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts, options on physical commodities and/or Financial Instruments and Money Market Instruments on which the Managed Fund Shares are based is no longer calculated or available. In addition, the Exchange retains discretion to suspend opening transactions in options on

[13] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(5).

[16] 17 CFR 242.600(b)(47).

Managed Fund Shares where conditions make further dealings in such options inadvisable.

Furthermore, the Exchange represented that options on Managed Fund Shares will be subject to all Exchange rules governing the trading of equity options and that the rules pertaining to position and exercise limits [17] or margin [18] shall apply as well.

Surveillance

The Commission notes that the Exchange has represented that it will utilize its existing surveillance procedures applicable to options on exchange traded funds, which would include Managed Fund Shares, to monitor trading. In addition, the Exchange would implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Managed Fund Shares, including adequate comprehensive surveillance sharing agreements (''CSSA'') with markets trading in non-U.S. components,[19] as applicable. Also, the Exchange may obtain trading information via the Intermarket Surveillance Group (''ISG'') [20] from other exchanges who are members or affiliates of the ISG. The Exchange represented that it believes that these procedures will be adequate to properly monitor Exchange trading of options on these the securities and to deter and detect violations of Exchange rules. This order is based on these representations.

Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[21] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission notes this proposed rule change is substantively identical to that of NYSE Arca, Inc. being concurrently approved today, which was published for a 21-day comment period and generated no comments.[22] The Commission does not believe that this proposal raise any new regulatory issues. Therefore, the Commission believes that accelerating approval of this proposal should benefit investors by permitting, without undue delay, options on Managed Fund Shares to trade on NYSE Alternext.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–NYSEALTR–2008–08) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28425 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

[17] *See* NYSE Alternext Rules 904(a)(i) and 905.

[18] *See* NYSE Alternext Rule 462.

[19] *See* Commentary .06(b) to NYSE Alternext Rule 915, *supra*, note 9.

[20] A complete list of the current members of the ISG, is available at *http://www.isgportal.org.*

[21] 15 U.S.C. 78s(b)(2).

[22] *See* Exchange Act Release No. 58799 (October 16, 2008), 73 FR 63534 (October 24, 2008) (SR–NYSEArca–2008–108).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59004; File No. SR–NYSEArca–2008–108]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Revising NYSE Arca Rule 5.3 To Enable the Listing and Trading of Options on Managed Fund Shares

November 24, 2008.

On October 9, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 [2] thereunder to amend NYSE Arca Rule to list and trade options on Managed Fund Shares. The proposed rule change was published for comment in the **Federal Register** on October 24, 2008 for a 21-day comment period.[3] The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

Managed Fund Shares represent an interest in a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity. Unlike traditional exchange traded funds Managed Fund Shares are actively managed. Managed Fund Shares, although based upon a publicly disclosed portfolio of securities, each trade as a single exchange-listed equity security. Accordingly, rules pertaining to the listing and trading of standard equity options would apply to Managed Fund Shares.

After careful consideration, 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 [4] and, in particular, the requirements of Section 6 of the Act.[5] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires, among other things, that the rules of a national securities exchange be designed 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.

Listing and Trading of Options on Managed Fund Shares

As set out more fully in the Exchange's notice of its proposal, NYSE Arca's proposed rules include requirements regarding initial and continued listing standards, the creation/redemption process for Managed Fund Shares, and trading halts. Managed Fund Shares must be traded through a national securities exchange or through the facilities of a national securities association, and must be ''NMS stock'' as defined under Rule 600 of Regulation NMS.[7]

The Commission notes that, pursuant to NYSE Arca Rules 5.3(g)(1) and 5.4(k), Managed Fund Shares will be subject to the initial and continuing eligibility standards for underlying securities provided in NYSE Arca Rules 5.3 and 5.4, as applicable. In particular, to be options eligible, a Managed Fund Share must either meet the criteria and guidelines for underlying securities set forth in NYSE Arca Rule 5.3(a) and (b), or alternately, the Managed Fund Share must be must be available for creation or redemption each business day in cash or in kind from or through the issuing trust, investment company, commodity pool or other issuer at a price related to the net asset value. In addition, the issuing trust, investment company, commodity pool, or other issuer is obligated to issue Managed Fund Shares in a specified aggregate number even though some or all of the investment assets needed to be deposited have not been received by the issuing trust, investment company, commodity pool,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58799 (October 16, 2008), 73 FR 63534.

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 17 CFR 242.600(b)(47).

or other issuer, provided the authorized creation participant has undertaken to deliver the investment assets as soon as possible and such undertaking has been secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer of the Managed Fund Shares which underlie the option as described in the Managed Fund Shares' prospectus.

To continue to be eligible to underlie options, the Managed Fund Share must remain an NMS stock listed on a national securities exchange. The Exchange will also consider the suspension of opening transactions in any series of options of the class covering Managed Fund Shares where the Managed Fund Share does not satisfy the requirements set out in NYSE Arca Rule 5.4(k). These include: (1) Continued compliance with paragraphs 1 through 4 of NYSE Arca Rule 5.4(b) in the case of options on Managed Fund Shares approved pursuant to Rule 5.3(g)(1)(A); (2) in the case of options on Managed Fund Shares approved pursuant to Rule 5.3(g)(1)(B), following the initial twelve-month period, beginning upon the commencement of trading of the Managed Fund Shares on a national securities exchange and being defined as an ''NMS stock'', there are fewer than 50 record and/or beneficial holders of such Managed Fund Shares for 30 or more consecutive trading days; (3) the value of the index or portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts, options on physical commodities and/or Financial Instruments and Money Market Instruments on which the Managed Fund Shares are based is no longer calculated or available. In addition, the Exchange retains discretion to suspend opening transactions in options on Managed Fund Shares where conditions make further dealings in such options inadvisable.

Furthermore, the Exchange represented that options on Managed Fund Shares will be subject to all Exchange rules governing the trading of equity options and that the rules pertaining to position and exercise limits [8] or margin [9] shall apply as well.

Surveillance

The Commission notes that the Exchange has represented that it will utilize its existing surveillance procedures applicable to options on exchange traded funds, which would include Managed Fund Shares, to monitor trading. In addition, the Exchange would implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Managed Fund Shares, including adequate comprehensive surveillance sharing agreements (''CSSA'') with markets trading in non-U.S. components,[10] as applicable. Also, the Exchange may obtain trading information via the Intermarket Surveillance Group (''ISG'') [11] from other exchanges who are members or affiliates of the ISG. The Exchange represented that it believes that these procedures will be adequate to properly monitor Exchange trading of options on these securities and to deter and detect violations of Exchange rules. This order is based on these representations.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–NYSEArca–2008–108) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28423 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

[8] Pursuant to NYSE Arca Rule 6.8, Commentary .05 and .06, Managed Fund Shares are subject to the same position limits applicable to options on stocks and Exchange-Traded Fund Shares. NYSE Arca Rule 6.9 stipulates that exercise limits for options on stocks and other securities, including Managed Fund Shares, shall be the same as the position limits applicable under NYSE Arca Rule 6.8.

[9] *See* NYSE Arca Rules 4.15(a)–4.16(d), the Exchange's rules governing margin.

[10] *See* NYSE Arca Rule 5.3(g)(2), the Exchange's rule governing the applicable CSSA requirements for options on exchange-traded funds.

[11] A complete list of the current members of the ISG, is available at *http://www.isgportal.org.*

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59005; File No. SR–CBOE–2008–113]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Amending CBOE Rule 5.3 To Enable the Listing and Trading of Options on Managed Fund Shares

November 24, 2008.

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 November 18, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise Rule 5.3 to enable the listing and trading on the Exchange of options on Managed Fund Shares. The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposed rule change is based on a proposal by NYSE Arca, Inc. (''NYSE Arca'').[3] The purpose of the proposed rule change is to revise CBOE Rule 5.3 to enable the listing and trading of options on managed fund shares (''Managed Fund Shares'') that are listed and traded on a national securities exchange and are considered to be an ''NMS Stock'' (as defined in Rule 600 of Regulation NMS under the Act). Managed Fund Shares represent an interest in a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity. Unlike traditional exchange traded funds (referred to as ''Units'' in Rule 5.3), Managed Fund Shares are actively managed. Managed Fund Shares, although, based upon a publicly disclosed portfolio of securities, each trade as a single exchange-listed equity security. Accordingly, rules pertaining to the listing and trading of standard equity options will apply to Managed Fund Shares.

Listing Criteria

The Exchange will consider listing and trading options on Managed Fund Shares provided the Managed Fund Shares meet (1) the criteria for underlying securities set forth in Rule 5.3(a)[4] and Interpretation and Policy .01 to Rule 5.3,[5] or (2) the Managed Fund Shares are available for creation and redemption each business day as set forth in Interpretations and Policy .06(E) to Rule 5.3.

The Exchange proposes that Managed Fund Shares deemed appropriate for options trading represent an interest in an open-end management investment company or similar entity, as described below:

• *Managed Fund Shares* are securities that represents an interest in a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (''NAV''), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV.

Continued Listing Requirements

Options on Managed Fund Shares will be subject to all Exchange rules governing the trading of equity options and furthermore, the rules pertaining to position and exercise limits[6] or margin[7] shall apply. The current continuing or maintenance listing standards for options traded on CBOE will continue to apply.

The Exchange will utilize its existing surveillance procedures applicable to options on exchange traded funds (which will include Managed Fund Shares) to monitor trading. In addition, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Managed Fund Shares, including adequate comprehensive surveillance sharing agreements (''CSSA'') with markets trading in non-U.S. components,[8] as applicable. Also, the Exchange may obtain trading information via the Intermarket Surveillance Group (''ISG'')[9] from other exchanges who are members or affiliates of the ISG. CBOE represents that these procedures will be adequate to properly monitor Exchange trading of options on these the securities and to deter and detect violations of Exchange rules.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[10] of the Act, in general, and furthers the objectives of Section 6(b)(5),[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rules applicable to trading pursuant to generic listing and trading criteria, together with the Exchange's surveillance procedures applicable to trading in the securities covered by the proposed rules, serve to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. 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 e-mail to *rule–comments@sec.gov.* Please include File Number SR–CBOE–2008–113 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–CBOE–2008–113. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

[3] *See* Exchange Act Release No. 58799 (October 16, 2008), 73 FR 63534 (October 24, 2008) (SR–NYSEArca-2008–108) (''Arca Notice'').

[4] *See* Rule 5.3(q) which states that the underlying securities shall be registered and be an ''NMS'' stock as defined in Rule 600 of Regulation NMS under the Act.

[5] *See* Rule 5.3.01 which sets forth minimum requirements for the underlying security which include, but are not limited to, 7,000,000 underlying shares, 2,000 shareholders, and trading volume of 2,400,000 shares over the preceding twelve months.

[6] *See* Interpretation and Policy .07 to Rule 4.11, *Position Limits,* and Interpretation and Policy .02 to Rule 4.12, *Exercise Limits.*

[7] *See* Rule 12.3, Margin Requirements.

[8] *See* Interpretation and Policy .06 to Rule 5.3, which is the Exchange's rule governing the applicable CSSA requirements for options on exchange-traded funds. We note that any non-U.S. component securities (including fixed-income) in an index or portfolio of securities on which the Fund Shares are based that are not subject to comprehensive surveillance agreements may in the aggregate represent an amount equal to 50% of the weight of the index or portfolio.

[9] A complete list of the current members of the ISG, is available at *http://www.isgportal.org.*

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–113 and should be submitted on or before December 22, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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 [12] and, in particular, the requirements of Section 6 of the Act.[13] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the rules of a national securities exchange be designed 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.

Listing and Trading of Options on Managed Fund Shares

As set out above, CBOE's proposed rules include requirements regarding initial and continued listing standards, the creation/redemption process for Managed Fund Shares, and trading halts. Managed Fund Shares must be traded through a national securities exchange or through the facilities of a national securities association, and must be ''NMS stock'' as defined under Rule 600 of Regulation NMS.[15]

The Commission notes that, pursuant to Interpretation and Policy .06(E) to CBOE Rules 5.3 and Interpretation and Policy .08 to CBOE Rule 5.4, Managed Fund Shares will be subject to the initial and continuing eligibility standards for underlying securities provided in CBOE Rules 5.3 and 5.4, as applicable. In particular, to be options eligible, a Managed Fund Share must either meet the criteria and guidelines for underlying securities set forth in CBOE Rule 5.3 and Interpretation and Policy .01 thereunder, or alternately, the Managed Fund Share must be available for creation or redemption each business day in cash or in kind from or through the issuing trust, investment company, commodity pool or other issuer at a price related to the net asset value. In addition, the issuing trust, investment company, commodity pools or other issuer is obligated to issue Managed Fund Shares in a specified aggregate number even if some or all of the investment assets and/or cash required to be deposited have not been received by the issuing trust, investment company, commodity pools or other issuer, subject to the condition that the person obligated to deposit the investment assets has undertaken to deliver the investment assets and/or cash as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer of the Managed Fund Shares which underlie the option as described in the prospectus of the Managed Fund Share.

To continue to be eligible to underlie options, the Managed Fund Share must remain an NMS stock listed on a national securities exchange. The Exchange will also consider the suspension of opening transactions in any series of options of the class covering Managed Fund Shares where the Managed Fund Share does not satisfy the requirements set out in Interpretation and Policy .08 to CBOE Rule 5.4. These include: (1) Continued compliance with paragraphs (a) through (d) of Interpretation and Policy .01 to CBOE Rule 5.4 in the case of options on Managed Fund Shares approved pursuant to clause (E)(x) under Interpretation and Policy .06 of CBOE Rule 5.3; (2) in the case of options on Managed Fund Shares approved pursuant to clause (E)(y) under Interpretation and Policy .06 of CBOE Rule 5.3, following the initial twelve-month period, beginning upon the commencement of trading of the Managed Fund Shares on a national securities exchange and being defined as an ''NMS stock'', there are fewer than 50 record and/or beneficial holders of such Managed Fund Shares for 30 or more consecutive trading days; (3) the value of the index or portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts, options on physical commodities and/or Financial Instruments and Money Market Instruments on which the Managed Fund Shares are based is no longer calculated or available. In addition, the Exchange retains discretion to suspend opening transactions in options on Managed Fund Shares where conditions make further dealings in such options inadvisable.

Furthermore, the Exchange represented that options on Managed Fund Shares will be subject to all Exchange rules governing the trading of equity options and that the rules pertaining to position and exercise limits [16] or margin [17] shall apply as well.

Surveillance

The Commission notes that the Exchange has represented that it will utilize its existing surveillance procedures applicable to options on exchange traded funds, which would include Managed Fund Shares, to monitor trading. In addition, the Exchange would implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Managed Fund Shares, including adequate comprehensive surveillance sharing agreements (''CSSA'') with markets trading in non-U.S. components,[18] as applicable. Also, the Exchange may obtain trading information via the Intermarket Surveillance Group (''ISG'') [19] from other exchanges who are members or affiliates of the ISG. The Exchange represented that it believes that these procedures will be adequate to properly monitor Exchange trading of options on these the securities and to

[12] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(5).

[15] 17 CFR 242.600(b)(47).

[16] *See* Interpretation and Policy .07 to Rule 4.11, *Position Limits*, and Interpretation and Policy .02 to Rule 4.12, *Exercise Limits*.

[17] *See* Rule 12.3, Margin Requirements.

[18] *See* Interpretation and Policy .06 to CBOE Rule 5.3, *supra*, note 8.

[19] A complete list of the current members of the ISG, is available at *http://www.isgportal.org*.

deter and detect violations of Exchange rules. This order is based on these representations.

Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[20] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission notes this proposed rule change is substantively identical to that of NYSE Arca, Inc. being concurrently approved today, which was published for a 21-day comment period and generated no comments.[21] The Commission does not believe that this proposal raises any new regulatory issues. Therefore, the Commission believes that accelerating approval of this proposal should benefit investors by permitting, without undue delay, options on Managed Fund Shares to trade on CBOE.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–CBOE–2008–113) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28424 Filed 11–28–08; 8:45 am]

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[20] 15 U.S.C. 78s(b)(2).

[21] *See* Arca Notice, *supra* note 3.

[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59008; File No. SR–CBOE–2008–114]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Web CRD Fingerprinting Fees

November 24, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 20, 2008, Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. 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

CBOE proposes to amend its Fees Schedule relating to Web Central Registration Depository (''Web CRD'') fingerprint processing fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

(a) Purpose

The Exchange has established an arrangement with the Financial Industry Regulatory Authority, Inc. (''FINRA'') to allow Exchange members that are not FINRA members to register associated persons electronically with the Exchange through the Web CRD system. Section 12 of the Exchange's Fees Schedule includes fees that are imposed upon non-FINRA Exchange members and member organizations, which fees members pay directly to FINRA through the Web CRD system at the time the Exchange member or member organization effects a registration transaction through Web CRD. These fees include fees assessed by FINRA for its work in processing fingerprints.

FINRA has amended its fingerprinting processing fees so that the charge for the first and third submission of a fingerprint card is $30.25 and the charge for the second submission of a fingerprint card is $13.00.[1] The fee for processing fingerprint cards where the member had fingerprints processed through a self-regulatory organization other than FINRA is unchanged at $13.00. Accordingly, the Exchange proposes to amend its Fees Schedule to reflect the updated Web CRD fingerprinting fees charged by FINRA.

The Exchange also proposes to update its Fees Schedule to replace references to the NASD with references to FINRA.[2]

(b) Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act'')[3], in general, and furthers the objectives of Section 6(b)(4)[4] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members. The Exchange believes the proposed fees are reasonable in that they are identical to those charged by other exchanges that use FINRA's Web CRD.[5]

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and subparagraph (f)(2) of Rule 19b–4[7] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission

[1] CBOE's Fees Schedule includes a fee for the second submission of a fingerprint card with the initial fingerprint card attached and a separate fee for the second submission of a fingerprint card without the initial fingerprint card attached. CBOE proposes to eliminate this distinction and charge a single fee for the second submission of a fingerprint card because FINRA no longer distinguishes its fee in this manner.

[2] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56146 (July 26, 2007).

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] *See, e.g.*, Boston Options Exchange Fee Schedule, Section 6(b), Chicago Stock Exchange Fee Schedule Section J, and Philadelphia Stock Exchange Fee Schedule, Appendix A.

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2008–114 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–CBOE–2008–114. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–114 and should be submitted on or before December 22, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28426 Filed 11–28–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58997; File No. SR–ISE–2008–88]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List Options on the Mini-Nasdaq-100 Index at $1 Strike Price Intervals

November 21, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 18, 2008, the International Securities Exchange, LLC (''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend certain of its rules to allow the Exchange to list options on the Mini-Nasdaq-100 Index (''MNX''), which is based on 1/10th the value of the Nasdaq-100 Index, at $1 strike price intervals. The text of the proposed rule change is as follows, with additions italicized:

Rule 504. Series of Options Contracts Open for Trading

(a)—(g) no change.

Supplementary Material To Rule 504

.01—.03 no change.

.04 Notwithstanding Supplementary Material .01 above, the intervals between strike prices for Mini-Nasdaq-100 Index (''MNX'' or ''Mini-NDX'') options series shall be determined in accordance with Rule 2009(c)(5).

* * * * *

Rule 2009. Terms of Index Options Contracts

(a)—(b) no change.

(c) *Procedures for Adding and Deleting Strike Prices.* The procedures for adding and deleting strike prices for index options are provided in Rule 504, as amended by the following:

(1)—(4) no change.

(5) Notwithstanding Rule 2009(c)(1), the interval between strike prices of series of Mini-Nasdaq-100 Index (''MNX'' or ''Mini-NDX'') options will be $1 or greater, subject to following conditions:

(i) Initial Series. The Exchange may list series at $1 or greater strike price intervals for Mini-NDX options, and will list at least two strike prices above and two strike prices below the current value of MNX at about the time a series is opened for trading on the Exchange. The Exchange shall list strike prices for Mini-NDX options that are within 5 points from the closing value of MNX on the preceding day.

(ii) Additional Series. Additional series of the same class of Mini-NDX options may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the underlying MNX moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices shall be within thirty percent (30%) above or below the closing value of MNX. The Exchange may also open additional strike prices that are more than 30% above or below the current MNX value provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market-Makers trading for their own account shall not be considered when determining customer interest under this provision. In addition to the initial listed series, the Exchange may list up to sixty (60) additional series per expiration month for each series in Mini-NDX options.

(iii) The Exchange shall not list LEAPS on Mini-NDX options at intervals less than $5.

(iv)(A) Delisting Policy. With respect to Mini-NDX options added pursuant to the above paragraphs, the Exchange will, on a monthly basis, review series that are outside a range of five (5) strikes above and five (5) strikes below the current value of MNX, and delist series with no open interest in both the

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[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

put and the call series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month.

(B) Notwithstanding the above referenced delisting policy, Customer requests to add strikes and/or maintain strikes in Mini-NDX option series eligible for delisting shall be granted.

(C) In connection with the above referenced delisting policy, if the Exchange identifies series for delisting, the Exchange shall notify other options exchanges with similar delisting policies regarding eligible series for delisting, and shall work with such other exchanges to develop a uniform list of series to be delisted, so as to ensure uniform series delisting of multiply listed Mini-NDX options.

(d)—(e) no change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend ISE Rule 2009, Terms of Index Option Contracts, to allow the Exchange to list options on the Mini-Nasdaq-100 Index (''MNX'' or ''Mini-NDX''), which is based on 1/10th the value of the Nasdaq-100 Index, at $1 or greater strike price intervals.[3] Specifically, the Exchange proposes that the minimum strike price interval Mini-NDX options will be 0.01 point ($1.00). The Exchange believes that $1 strike price intervals in Mini-NDX option series will provide investors with greater flexibility by allowing them to establish positions that are better tailored to meet their investment objectives.

For initial series, the Exchange would list at least two strike prices above and two strike prices below the current value of MNX at or about the time a series is opened for trading on the Exchange. As part of this initial listing, the Exchange would list strike prices that are within 5 points from the closing value of MNX on the preceding day. As for additional series, the Exchange would be permitted to add additional series when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the underlying MNX moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices shall be within thirty percent (30%) above or below the closing value of MNX. The Exchange would also be permitted to open additional strike prices that are more than 30% above or below the current MNX value provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market-Makers trading for their own account would not be considered when determining customer interest. In addition to the initial listed series, the Exchange may list up to sixty (60) additional series per expiration month for each series in Mini-NDX options. In addition, the Exchange proposes that it shall not list LEAPS on Mini-NDX options at intervals less than $5.

The Exchange is also proposing to set forth a delisting policy with respect to Mini-NDX options. Specifically, the Exchange would, on a monthly basis, review series that are outside a range of five (5) strikes above and five (5) strikes below the current value of the MNX and delist series with no open interest in both the put and the call series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month.

Notwithstanding the proposed delisting policy, customer requests to add strikes and/or maintain strikes in Mini-NDX options in series eligible for delisting shall be granted.

Further, in connection with the proposed delisting policy, if the Exchange identifies series for delisting, the Exchange shall notify other options exchanges with similar delisting policies regarding eligible series for listing, and shall work with such other exchanges to develop a uniform list of series to be delisted, so as to ensure uniform series delisting of multiply listed Mini-NDX options.

It is expected that the proposed delisting policy for Mini-NDX options will be adopted by other options exchanges that list and trade Mini-NDX options.

The Exchange also proposes to add new Supplementary Material .04 to Rule 504, Series of Option Contracts Open for Trading, which would be an internal cross reference stating that the intervals between strike prices for Mini-NDX option series would be determined in accordance with proposed new paragraph (5) to Rule 2009(c).

ISE has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of $1 strikes or greater for Mini-NDX options.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(5) of the Exchange Act[4] that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and in general, to protect investors and the public interest. In particular, the proposed rule change will allow the Exchange to list options on MNX options at $1 strike intervals for the benefit of investors and as a competitive response to the listing of MNX options at $1 strike price intervals by other exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

[3] Currently, under ISE Rule 2009(c)(1)(vii), the Exchange has authority to list Mini-NDX options at $2.50 strike price intervals.

[4] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (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 [5] and Rule 19b–4(f)(6) thereunder.[6]

The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest because such waiver will permit the Exchange to respond promptly to demand by market participants to list options on MNX at $1 strike price intervals, and compete with other exchanges listing options on MNX at $1 strike price intervals.[7] Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–ISE–2008–88 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–ISE–2008–88. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–ISE–2008–88 and should be submitted on or before December 22, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Acting Secretary.

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[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission deems this requirement to be met.

[7] 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).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58995; File No. SR–Phlx–2008–74]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ OMX PHLX, Inc., Relating to Automated Openings in Index Options

November 21, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on November 20, 2008, the NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to amend Exchange Rules 1017, 1047A, and Options Floor Procedure Advice (''OFPA'') G–2, to: (i) Provide that index options will open automatically following the receipt by the Exchange's system of the opening price in the underlying index, and (ii) modify the circumstances authorizing the Exchange to halt trading in index options and to re-open trading of index options following a trading halt.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.phlx.com/regulatory/reg_rulefilings.aspx.*

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to eliminate the requirement that a specified minimum percentage of the underlying value of an index be open for trading in order for index options overlying such index to open for trading, and re-open following trading halts, in the Exchange's automated opening system [5] on its electronic trading platform for options, Phlx XL.[6] A further purpose of the proposed rule change is to amend Rule 1047A and OFPA G–2 to provide that it will no longer require a minimum percentage of the underlying value of an index to be halted in order for the Exchange to halt trading in options overlying the index, and that trading in a halted index option may be resumed upon a determination by an Options Exchange Official that the conditions which led to the halt are no longer present.

Background

Rule 1017 and the relevant sections of OFPA G–2 were initially adopted when the Exchange listed options overlying proprietary indices only. At the time, the Exchange's rules envisioned systemic calculations of the open for trading percentage of the underlying value of a particular proprietary index in order to determine whether options overlying such an index could open automatically under Exchange rules, and whether the specialist in such index options could elect to engage the system.

Values of non-proprietary indices underlying many of the options traded on the Exchange, such as options based on the KBW Bank Index, are currently calculated outside the NASDAQ OMX Group,[7] and the Exchange receives electronic price feeds from outside market data vendors (''vendors''). For such indices, the percentage of the underlying value that is open is generally not disseminated by the outside vendors. Moreover, while the information respecting index values and percentage of underlying value of proprietary indices may be accessible to Phlx XL participants,[8] it is not easily accessible to the general public.

The proposed elimination of the ''percentage open'' calculation from the Exchange's rules is intended to make rules governing the opening of index options on the Exchange consistent and transparent across both proprietary and non-proprietary indices. Specifically, the rules would provide that options overlying both types of indices would open automatically upon receipt of the opening price in the underlying index, regardless of what percentage of the index value is open for trading.

Pre-Opening Orders and Quotes

Exchange Rule 1017(a) currently states that, respecting index options, the Exchange will accept orders and quotes for a period of time before the scheduled opening in the underlying securities constituting 100% of the index value. The proposed rule change would amend Rule 1017(a) to eliminate the 100% benchmark, and instead state that in the case of index options, before the Exchange receives the opening price in the underlying index (and not less than one hour as determined by the Options Committee with notice to the membership via Exchange circular), Phlx XL will accept orders and quotes in index options during the ''Pre-Opening Phase.''

Current Rule 1017(b) requires the specialist assigned in the particular option to enter opening quotes not later than one minute following the dissemination of a quote or trade by the market for the underlying security or, in the case of index options, following the dissemination of a quote or trade by the markets for underlying securities constituting 100% of the index value. The proposed rule change would provide that the specialist must enter such opening quotes following the receipt of the opening price of the underlying index.

Once the specialist submits such opening quotes, respecting index options the Phlx XL system will calculate an Anticipated Opening Price (''AOP'') and an Anticipated Opening Size (''AOS''), provided, under current rules, that (i) the Exchange has received market orders, or the book is crossed (highest bid is higher than the lowest offer) or locked (highest bid equals the lowest offer); and (ii) either (A) the specialist's quote has been submitted; (B) the quotes of at least two Phlx XL participants have been submitted within two minutes opening trades or quotes on the markets for underlying securities constituting 100% of the index value, or (C) if neither the specialist's quote nor the quotes of two Phlx XL participants have been submitted within two minutes of the opening trades or quotes on the markets for underlying securities constituting 100% of the index value, one Phlx XL participant has submitted their quote.

The proposed rule change would amend all of the above parameters in the rules for the calculation of an AOP and AOS respecting index options to base the time period on the receipt of the opening price in the underlying index (or such shorter time as determined by the Options Committee and disseminated to membership via Exchange Circular).

Opening

Current Exchange Rule 1017(b)(iii) provides that, respecting index options, when the conditions described are satisfied, the system will open the series for trading within a time period not to exceed 5 seconds (as determined by the Exchange and disseminated to membership via Exchange circular) following the dissemination of a quote or trade by the markets for underlying securities constituting 100% of the index value. The Exchange proposes to amend the rule to remove the ''percentage open'' calculation requirement and provide that the overlying index option would open when the Exchange has received the opening price in the underlying index.

Under the proposal, if there is an imbalance on the opening for an index option, the Phlx XL system will send an Imbalance Notice to Phlx XL participants provided that the Exchange has received the opening price in the underlying index.

Current Rule 1017(g) states that the specialist may engage the automated opening system to open index options when underlying securities representing 50% of the current index value of all the securities underlying the index have opened for trading on the markets and that the system will automatically open such options when underlying securities representing 100% of all the securities underlying the index have opened for trading on the markets. The proposal would amend the rule to provide that index options will open

[5] For a complete description of the Exchange's automated opening system, *see* Exchange Rule 1017. *See also,* Securities Exchange Act Release No. 52667 (October 25, 2005), 70 FR 65953 (November 1, 2005) (SR–Phlx–2005–25).

[6] *See* Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 44612 (August 3, 2004) (SR–Phlx–2003–59).

[7] The NASDAQ OMX Group has integrated internally the calculations of the legacy proprietary NASDAQ and legacy proprietary Phlx indices. All NASDAQ OMX Group indices are calculated using the same index ''engine''.

[8] The term ''Phlx XL participant'' means SQTs, RSQTs, non-SQT ROTS, specialists and non-Phlx market makers on another exchange; non-broker-dealer customers and non-market-maker off-floor broker-dealers; and Floor Brokers using the Options Floor Broker Management System. *See* Securities Exchange Act Release No. 58361 (August 14, 2008), 73 FR 49529 (August 21, 2008) (SR–Phlx–2008–50).

automatically when the Exchange's system has received the opening price of the underlying index. The specialist would thus have no need to determine the percentage of underlying value that is open, since the index option would open automatically upon receipt by the system of the opening price in the underlying index.

The corresponding sections of Exchange Rule 1047A, and OFPA G–2 concerning the opening of index options will include the same language reflecting the manner in which index options would open under the proposal as stated above.[9]

Trading Halts and Re-Openings Following a Trading Halt

The Exchange is proposing additional amendments to Rule 1047A and OFPA G–2 to reflect the conditions under which the Exchange would halt trading in index options, and re-opening trading in index options following a trading halt. The purpose of this proposal is to reflect the deletion from the rule of the calculation of the percentage of an underlying index as discussed above, because current rules concerning trading halts in index options include a ''percentage halted'' requirement. In the same way that the rules concerning automated openings in index options system would no longer include the ''percentage open'' calculation requirement, Rule 1047A and OFPA G–2 would not include a ''percentage halted'' calculation requirement.

Specifically, Rule 1047A(c) and OFPA G–2(c) each state that whenever trading on the market in underlying securities representing more than 10% of the current index value is halted or suspended on the primary market, trading on the Exchange in any option may be halted with the approval of an Options Exchange Official. For consistency, and because the proposal would eliminate the calculation of ''percentage open'' from the rules, the proposed rule change would eliminate the current ''10% halted'' requirement from Rule 1047A and OFPA G–2, and provide that trading on the Exchange in any index option may be halted with the approval of an Options Exchange Official, whenever trading on the primary market in any underlying security is halted or suspended.[10]

Additionally, Rule 1047A(c)(iv) and OFPA G–2(c)(iv) currently state that in the event that trading is halted on the primary market in underlying securities representing more than 10% of the current index value, the specialist may halt trading in the option overlying such index, subject to the approval of an Options Exchange Official within five minutes of the halt in trading in the option. The proposed rule change would account for the deletion of such a calculation requirement from the rule and provide that the specialist may take such action whenever trading on the primary market in any underlying security is halted.

Finally, respecting re-openings following a trading halt, Rule 1047A(d) and OFPA G–2(d) state that trading in any class or series of stock index options that has been the subject of a halt by the Exchange may be resumed upon a determination by an Options Exchange Official that the conditions which led to the halt are no longer present, or that underlying securities representing 50% or more of the current index value are not subject to halt or suspension in the market for the trading of such underlying securities. The proposed rule change would delete the ''50%'' provision because of the proposed elimination of all such calculations from the Exchange's rules. Under the proposal, such trading would resume upon a determination by an Options Exchange Official that the conditions which led to the halt are no longer present.

The Exchange believes that the proposed rule change is necessary to promote consistency and transparency concerning the automated opening of proprietary and non-proprietary index options on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act[11] in general, and furthers the objectives of section 6(b)(5) of the Act[12] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act title matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange further believes that the proposed rule change should promote consistency and transparency respecting the opening of trading in all index options traded on the Exchange, and also respecting trading halts and re-openings following trading halts, which would benefit customers and Phlx XL participants trading index options on the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (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[13] and Rule 19b–4(f)(6) thereunder.[14]

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public

[9] The Exchange notes that Rule 1047A and OFPA G–2 refer to ''Industry Index'' and ''Market Index'' options. The Exchange represents that, respecting opening and reopening of Industry and Market Index options, the Phlx XL system does not make a distinction between the two in terms of the current percentages of index value necessary for automatic openings. Therefore, such openings would take place on the Exchange uniformly among all index options traded on the Exchange.

[10] The Exchange notes that it has deleted references to ''primary market'' regarding openings in options in a separate filing. *See* SR–Phlx–2008–75. Then Exchange does not intend to delete such references from its rules governing trading halts.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has met this requirement.

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–Phlx–2008–74 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–Phlx–2008–74. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2008–74 and should be submitted on or before December 22, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

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BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58994; File No. SR–NYSEArca–2008–125]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Listing of Units of the United States Short Oil Fund

November 21, 2008.

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 November 18, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NYSE Arca. 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

NYSE Arca, through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), proposes to list and trade pursuant to NYSE Arca Equities Rule 8.300 units (''Units'') of the United States Short Oil Fund, LP (''USSO'' or ''Partnership''). The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Under NYSE Arca Equities Rule 8.300, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges (''UTP'') Partnership Units.[3] The Exchange proposes to list and trade the Units pursuant to NYSE Arca Equities Rule 8.300.[4] The Commission has previously approved listing of similar limited partnerships on the American Stock Exchange LLC (''Amex'') (now known as NYSE Alternext US LLC)[5] and trading on the Exchange pursuant to UTP.[6] In addition, the Commission has approved for listing on the Exchange and, previously, on the Amex fourteen funds of the ProShares Trust II based on underlying commodity or currency benchmarks that seek daily investment results, before fees and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On May 25, 2006, the Commission approved NYSE Arca Equities Rule 8.300, which sets forth the rules related to listing and trading criteria for Partnership Units. *See* Securities Exchange Act Release No. 53875 (May 25, 2006), 71 FR 32164 (June 2, 2006) (SR–NYSEArca–2006–11) (approving trading pursuant to UTP of Partnership Units of the United States Oil Fund, LP). On July 11, 2007, the Commission approved the Exchange's proposal to trade pursuant to UTP Partnership Units of the United States Natural Gas Fund, LP. *See* Securities Exchange Act Release No. 56042 (July 11, 2007), 72 FR 39118 (July 17, 2007) (SR–NYSEArca–2007–45).

[4] USSO has filed with the Commission Amendment No. 1 to Form S–1, dated September 29, 2008 (File No. 333–152386) (the ''Registration Statement''). Unless otherwise noted, descriptions herein relating to USSO are based on the Registration Statement.

[5] *See* Securities Exchange Act Release Nos. 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR–Amex–2005–127) (order approving Amex listing of United States Oil Fund, LP); 56831 (November 21, 2007), 72 FR 67612 (November 29, 2007) (SR–Amex–2007–98) (order approving Amex listing of United States 12 Month Oil Fund, LP and United States 12 Month Natural Gas Fund, LP); 55632 (April 13, 2007), 72 FR 19987 (April 20, 2007) (SR–Amex–2006–112) (order approving Amex listing of United States Natural Gas Fund, LP); 57188 (January 23, 2008), 73 FR 5607 (January 30, 2008) (SR–Amex–2007–70) (order approving Amex listing of United States Heating Oil Fund, LP and United States Gasoline Fund, LP) (collectively, the ''Amex Filings'').

[6] *See* Securities Exchange Act Release No. 56832 (November 21, 2007), 72 FR 67328 (November 28, 2007) (SR–NYSEArca–2007–102) (order approving UTP trading of United States 12 Month Oil Fund, LP and United States 12 Month Natural Gas Fund, LP); Securities Exchange Act Release No. 56042 (July 11, 2007), 72 FR 39118 (July 17, 2007) (SR–NYSEArca–2007–45) (order approving UTP trading of United States Natural Gas Fund, LP); Securities Exchange Act Release No. 57294 (February 8, 2008), 73 FR 8917 (February 15, 2008) (SR–NYSEArca–2007–78) (order approving UTP trading of United States Heating Oil Fund, LP and United States Gasoline Fund, LP) (collectively, with the orders cited in note 3, *supra*, the ''UTP Filings'').

expenses, that correspond to twice (200%) the daily performance of the underlying benchmark or twice the inverse (−200%) of the daily performance of the underlying benchmark.[7]

The net assets of USSO will consist primarily of short positions in futures contracts for crude oil, heating oil, gasoline, natural gas and other petroleum-based fuels that are traded on the New York Mercantile Exchange (''NYMEX''), ICE Futures or other U.S. and foreign exchanges (collectively, ''Futures Contracts''). USSO may also take short positions in other crude oil-related investments such as cash-settled options on Futures Contracts, forward contracts for crude oil, and over-the-counter transactions that are based on the price of crude oil and other petroleum-based fuels, Futures Contracts and indices based on the foregoing (''Other Crude Oil-Related Investments''). A short position is one in which USSO will have sold the Futures Contract or Other Crude-Oil Related Investment (together with futures contracts, ''Crude Oil Interests'') and must buy it back or otherwise close out the position in the future.[8] As a result, a drop in the market value of the investment would lead to a potential gain for USSO, while an increase in the market value of the investment would lead to a potential loss for USSO.

USSO will take short positions in Crude Oil Interests to the fullest extent possible without being leveraged or unable to satisfy its current or potential margin or collateral obligations with respect to its short positions in Futures Contracts and Other Crude Oil-Related Investments. In pursuing this objective, the primary focus of United States Commodity Funds LLC (the ''General Partner'') will be taking short positions in Futures Contracts and the management of investments in short-term obligations of the United States of two years or less (''Treasuries''), cash and/or cash equivalents for margining purposes and as collateral.

USSO will comply with the requirements of Rule 10A–3[9] under the Securities Exchange Act of 1934 (''Act'')[10] as it applies to limited partnerships.

USSO Investment Objective and Policies

The investment objective of USSO is to have the changes in percentage terms of the Units' net asset value (''NAV'') inversely reflect the changes in percentage terms of the spot price of light, sweet crude oil delivered to Cushing, Oklahoma, as measured by the changes in the price of the futures contract on light, sweet crude oil as traded on the NYMEX. The futures contract employed is the near month expiration contract, except when the near month contract is within two weeks of expiration, in which case the futures contract will be the next month contract to expire (the ''Benchmark Futures Contract''), less USSO's expenses.[11]

As a specific benchmark, the General Partner will endeavor to place USSO's trades in Futures Contracts and Other Crude Oil-Related Investments and otherwise manage USSO's investments so that ''A'' will be within plus/minus 10 percent of ''B'', where:

- A is the average daily change in USSO's NAV for any period of 30 successive valuation days, *i.e.*, any day as of which USSO calculates its NAV, and
- B is the inverse of the average daily change in the price of the Benchmark Futures contract over the same period.

According to the Registration Statement, an investment in the Units is intended to allow both retail and institutional investors to easily gain inverse or negative exposure to the crude oil market in a cost-effective manner. The Units are also expected to provide additional means for diversifying an investor's investments or hedging exposure to changes in crude oil prices.

According to the Registration Statement, the General Partner believes that market arbitrage opportunities will cause changes in USSO's Unit price on the NYSE Arca to closely track changes in USSO's NAV.[12] The General Partner believes that changes in USSO's NAV in percentage terms will closely track the changes in percentage terms in the Benchmark Futures Contract. It is not the intent of USSO to be operated in a fashion such that its NAV will equal, in dollar terms, the dollar price of spot crude oil or any particular futures contract based on crude oil.

A description of the petroleum-based fuels market for light, sweet crude oil, heating oil, natural gas and gasoline is contained in the Registration Statement.

Structure and Regulation of USSO

USSO is a Delaware limited partnership formed on June 30, 2008. It is managed and controlled by the General Partner, a single member limited liability company formed in Delaware on May 10, 2005, registered as a commodity pool operator (''CPO'') with the Commodity Futures Trading Commission (''CFTC'') and a member of the National Futures Association (''NFA''). Prior to June 13, 2008, the General Partner's name was Victoria Bay Asset Management, LLC. The General Partner is not affiliated with a broker-dealer.

Clearing Broker. UBS Securities, LLC, a CFTC registered futures commission merchant, will act as clearing broker for USSO. The clearing arrangements between the clearing broker and USSO generally are terminable by the clearing broker once it has given USSO notice. Upon termination, the General Partner may be required to renegotiate or make other arrangements for obtaining similar services if USSO intends to continue trading in Futures Contracts or Other Crude Oil-Related Investments at its present level of capacity.

Administrator and Custodian. Brown Brothers Harriman & Co. is anticipated to be the registrar and transfer agent for the Units. It is also anticipated to be the Custodian for USSO. In this capacity, Brown Brothers Harriman & Co. will hold USSO's Treasuries, cash and cash equivalents pursuant to a custodial agreement. In addition, Brown Brothers Harriman & Co. will perform certain administrative and accounting services for USSO and will prepare certain SEC and CFTC reports on behalf of USSO.

Marketing Agent. USSO plans to employ ALPS Distributors, Inc. as its marketing agent. USSO, through its marketing agent, will continuously offer Creation Baskets to and redeem Redemption Baskets from Authorized Purchasers and will receive and process creation and redemption orders from Authorized Purchasers.

Investment Strategy of USSO

To achieve its investment objective, USSO intends to maintain ''short'' positions in Futures Contracts and Other Crude Oil-Related Investments in

[7] *See* Securities Exchange Act Release No. 58161 (July 15, 2008), 73 FR 42380 (July 21, 2008) (SR–Amex–2008–39) (approving listing of (1) ProShares Ultra DJ–AIG Commodity, (2) ProShares UltraShort DJ–AIG Commodity, (3) ProShares Ultra DJ–AIG Agriculture, (4) ProShares UltraShort DJ–AIG Agriculture, (5) ProShares Ultra DJ–AIG Crude Oil, (6) ProShares UltraShort DJ–AIG Crude Oil, (7) ProShares Ultra Gold, (8) ProShares UltraShort Gold, (9) ProShares Ultra Silver, (10) ProShares UltraShort Silver, (11) ProShares Ultra Euro, (12) ProShares UltraShort Euro, (13) ProShares Ultra Yen, and (14) ProShares UltraShort Yen (''Funds'')); Securities Exchange Act Release No. 58457 (September 3, 2008), 73 FR 52711 (September 10, 2008) (SR–NYSEArca–2008–91) (approving listing of the Funds on the Exchange).

[8] Terms relating to USSO referred to, but not defined, herein are defined in the Registration Statement.

[9] 17 CFR 240.10A–3.

[10] 15 U.S.C. 78a.

[11] The Benchmark Futures Contract will be changed or ''rolled'' from the near month contract to expire to the next month contract to expire during one day.

[12] *See* section entitled ''Arbitrage,'' *infra.*

which it invests. USSO seeks to have the percent changes in its Units' NAV inversely track percentage changes in the price of light, sweet crude oil. For that reason, the net assets of USSO will consist primarily of short positions in futures contracts for crude oil, heating oil, gasoline, natural gas and other petroleum-based fuels that are traded on the NYMEX, ICE Futures or other U.S. or foreign exchanges. USSO may also take short positions in other crude oil-related investments such as cash-settled options on Futures Contracts and forward contracts for crude oil, and over-the-counter transactions that are based on the price of crude oil and other petroleum-based fuels, Futures Contracts and indices based on the foregoing.

In addition to the Futures Contracts and options on the Futures Contracts, there also exists an active non-exchange-traded market in derivatives tied to crude oil. These derivatives transactions (also known as over-the-counter contracts) are usually entered into between two parties. Unlike most of the exchange-traded Futures Contracts or exchange-traded options on the Futures Contracts, each party to such contract bears the credit risk that the other party may not be able to perform its obligations under its contract.

Some crude oil-based derivatives transactions contain fairly generic terms and conditions and are available from a wide range of participants. Other crude oil-based derivatives have highly customized terms and conditions and are not as widely available. Many of these over-the-counter contracts are cash-settled forwards for the future delivery of crude oil- or petroleum-based fuels that have terms similar to the Futures Contracts. Others take the form of ''swaps'' in which the two parties exchange cash flows based on pre-determined formulas tied to the crude oil spot price, forward crude oil price, the Benchmark Futures Contract price, or other crude oil futures contract price. USSO anticipates that the use of Other Crude Oil-Related Investments together with its investments in Futures Contracts will produce price and total return results that closely track the investment goals of USSO.

Impact of Accountability Levels and Position Limits

According to the Registration Statement, U.S. designated contract markets such as NYMEX have established accountability levels and position limits on the maximum net long or net short futures contracts in commodity interests that any person or group of persons under common trading control (other than as a hedge, which an investment in USSO is not) may hold, own or control. The current accountability level for investments in Futures Contracts is not a fixed ceiling, but rather a threshold above which NYMEX may exercise greater scrutiny and control over an investor.

In addition to accountability levels and position limits, NYMEX also sets daily price fluctuation limits on Futures Contracts. The daily price fluctuation limit establishes the maximum amount that the price of futures contracts may vary either up or down from the previous day's settlement price. Once the daily price fluctuation limit has been reached in a particular Futures Contract, no trades may be made at a price beyond that limit.

These limits may potentially cause a tracking error between the price of the Units and the price of the Benchmark Futures Contract. This may in turn prevent an investor from being able to effectively use USSO as a way to hedge against crude oil-related losses or as a way to indirectly take short positions in crude oil.

Investment Procedures

According to the Registration Statement, USSO anticipates that the use of Futures Contracts, together with Other Crude Oil-Related Investments, as necessary, will produce price and total return results that closely track the investment goals of USSO.

Counterparty Procedures. To protect itself from the credit risk that arises in connection with taking short positions in Other Crude Oil-Related Investments, USSO will enter into agreements with each counterparty that provide for the netting of its overall exposure to its counterparty. The General Partner will assess or review, as appropriate, the creditworthiness of each potential or existing counterparty to an over-the-counter contract pursuant to guidelines approved by the General Partner's Board of Directors. Furthermore, the General Partner on behalf of USSO will only enter into over-the-counter contracts with (a) members of the Federal Reserve System or foreign banks with branches regulated by the Federal Reserve Board; (b) primary dealers in U.S. government securities; (c) broker-dealers; (d) commodities futures merchants; or (e) affiliates of the foregoing. Existing counterparties will also be reviewed periodically by the General Partner.

Cash, Cash Equivalents, and Treasuries. USSO will also invest in cash, cash equivalents, and Treasuries with a remaining maturity of two years or less. The cash, cash equivalents, and Treasuries are to be used to meet USSO's current or potential margin or collateral requirements with respect to its short positions in Futures Contracts and Other Crude Oil-Related Investments. USSO plans to reinvest the earned interest income, hold it in cash, or use it to pay its expenses. If USSO reinvests the earned interest income, it will make investments that are consistent with its investment objectives.

Creation and Redemption of Units

USSO will continuously offer Creation Baskets consisting of 100,000 Units to Authorized Purchasers through the marketing agent. USSO will create and redeem Units only in one or more Creation Baskets or Redemption Baskets. Only Authorized Purchasers may purchase or redeem Creation Baskets or Redemption Baskets. The creation and redemption of baskets will only be made in exchange for delivery to USSO or the distribution by USSO of the amount of Treasuries and any cash represented by the baskets being created or redeemed. The amount will be based on the combined NAV of the number of Units included in the baskets being created or redeemed determined as of 4:00 p.m. Eastern Time (''E.T.'') on the day the order to create or redeem baskets is properly received.

Calculation of Partnership NAV. The Administrator will calculate NAV by taking the current market value of USSO's total assets and subtracting any liabilities. The Administrator will calculate NAV once each trading day and the NAV for a particular trading day will be released after 4 p.m. E.T. The Administrator will calculate NAV as of the earlier of the close of the New York Stock Exchange or 4 p.m. E.T. USSO will use the NYMEX closing price (determined at the earlier of the close of that Exchange or 2:30 p.m. E.T.) for the contracts held on NYMEX, but will calculate or determine the value of all other USSO investments as of the earlier of the close of the NYSE Arca Core Trading Session or 4 p.m. E.T.

Calculation of Basket Amount. USSO will create and redeem Units only in blocks of 100,000 Units called Creation Baskets and Redemption Baskets, respectively. The price of each Unit offered in Creation Baskets on any day will be the total NAV of USSO calculated as of the close of the New York Stock Exchange on that day divided by the number of issued and outstanding Units.

The creation and redemption of baskets will only be made in exchange for delivery to USSO or the distribution by USSO of the amount of Treasuries and any cash represented by the baskets

being created or redeemed, the amount of which will be based on the combined NAV of the number of Units included in the baskets being created or redeemed as of 4:00 p.m. E.T. on the day the order to create or redeem baskets is properly received. Additional procedures relating to the creation and redemption of Units are described in the Registration Statement.

Arbitrage

According to the Registration Statement, investors and market professionals will be able, through out the trading day, to compare the market price of USSO and the Indicative Partnership Value (''IPV''), as discussed below. If the market price of USSO Units diverges significantly from the IPV, market professionals will have an incentive to execute arbitrage trades. Such arbitrage trades can tighten the tracking between the market price of USSO and the IPV and thus can be beneficial to all market participants. In addition, quotation and last-sale information regarding the Units will be disseminated through the facilities of the Consolidated Tape Association.

Dissemination and Availability of Information

Underlying Spot Price and Price of Futures Contracts. The spot price of light, sweet crude oil delivered to Cushing, Oklahoma, and the applicable Futures Contracts are the underlying benchmark investment, commodity or asset, as applicable, for purposes of NYSE Arca Equities Rule 8.300(d)(2)(ii).[13]

The NYMEX disseminates price information on the Futures Contracts traded on the NYMEX on a real-time basis during normal trading hours on the NYMEX from 10 a.m. E.T. to 2:30 p.m. E.T.

Portfolio Disclosure. USSO's total portfolio composition will be disclosed each business day that the NYSE Arca is open for trading on USSO's Web site at *http://www.unitedstatesshortoil fund.com.* The Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name and value of each Crude Oil Interest, the specific types of Other Crude Oil-Related Investments and characteristics of such Other Crude Oil-Related Investments, Treasuries, and the amount of cash and cash equivalents held in USSO's portfolio. USSO's Web site is publicly accessible at no charge.

Indicative Partnership Value. In order to provide updated information relating to USSO for use by investors and market professionals, NYSE Arca will calculate and disseminate during the trading day an updated IPV, as described below. The IPV will be calculated by using the prior day's closing NAV per Unit of USSO as a base and updating that value throughout the trading day to reflect changes in the most recently reported trade price for the active Futures Contract on NYMEX. The prices reported for the active Futures Contract month will be adjusted based on the prior day's spread differential between settlement values for that contract and the spot month contract. In the event that the spot month contract is also the active contract, the last sale price for the active contract will not be adjusted. The IPV disseminated during the NYSE Arca Core Trading Session should not be viewed as an actual real time update of the NAV, because NAV is calculated only once at the end of each trading day.

The IPV will be disseminated on a per Unit basis every 15 seconds during the Core Trading Session of NYSE Arca from 9:30 a.m. E.T. to 4 p.m. E.T. The normal trading hours of NYMEX are 10 a.m. E.T. to 2:30 p.m. E.T. This means that there will be a gap in time at the beginning and the end of each day during which USSO Units will be traded on the NYSE Arca, but real-time NYMEX trading prices for futures contracts traded on the NYMEX will not be available. As a result, during those gaps there will be no update to the IPV. The IPV will not be updated during the Exchange's Opening Trading Session from 4 a.m. to 9:30 a.m., during that part of the Exchange's Core Trading Session when NYMEX is not normally open for trading (specifically, 9:30 a.m. to 10 a.m. E.T. and 2:30 p.m. to 4 p.m. E.T.), and during the Late Trading Session from 4 p.m. to 8 p.m. E.T.

The NYSE Arca will disseminate the IPV through the facilities of CTA/CQ High Speed Lines. In addition, the IPV will be published on the NYSE Arca's Web site and will be available through on-line information services such as Bloomberg and Reuters. Dissemination of the IPV provides additional information that is not otherwise available to the public and is useful to investors and market professionals in connection with the trading of the Units on the NYSE Arca.

Trading Rules

The Exchange deems the Units to be equity securities, thus rendering trading in the Units subject to the Exchange's existing rules governing the trading of equity securities. The Units will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. The Exchange has appropriate rules to facilitate transactions in the Units during all trading sessions. The minimum trading increment for the Units on the Exchange will be $0.01.

NYSE Arca Equities Rule 8.300(e) sets forth certain restrictions on ETP Holders acting as registered Market Makers in Partnership Units to facilitate surveillance. NYSE Arca Equities Rule 8.300(e)(2)–(3) requires that the ETP Holder acting as a registered Market Maker in Partnership Units provide the Exchange with necessary information relating to its trading in the underlying asset or commodity, related futures or options on futures, or any other related derivatives. NYSE Arca Equities Rule 8.300(e)(4) prohibits the ETP Holder acting as a registered Market Maker in Partnership Units from using any material nonpublic information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the underlying asset or commodity, related futures or options on futures or any other related derivative (including the Partnership Units). In addition, NYSE Arca Equities Rule 8.300(e)(1) prohibits the ETP Holder acting as a registered Market Maker in Partnership Units from being affiliated with a market maker in the underlying asset or commodity, related futures or options on futures or any other related derivative unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Units. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Units inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying Futures Contracts, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the Units could be halted pursuant to the Exchange's ''circuit breaker'' rule.[14] If the value of the underlying benchmark investment, commodity or asset or IPV applicable to the Units is not being disseminated as required, the Exchange may halt trading in the Units during the day on which

[13] NYSE Arca Equities Rule 8.300(d)(2)(ii) provides that NYSE Arca Equities will consider removing from listing Partnership Units if the value of the underlying benchmark investment, commodity or asset is no longer calculated or available on at a least a 15-second delayed basis or NYSE Arca Equities stops providing a hyperlink on its Web site to any such investment, commodity or asset value.

[14] *See* NYSE Arca Equities Rule 7.12.

the interruption first occurs. If such interruption persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[15] Under Rule 7.34(a)(5), if the Exchange becomes aware that the NAV for the Units is not being disseminated to all market participants at the same time, it will halt trading in the Units on the Exchange until such time as the NAV is available to all market participants. In addition, if the portfolio composition applicable to the Units, as disseminated on the Web site for the Units, is not disseminated to all market participants at the same time, the Exchange will halt trading in the affected Units.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, including Partnership Units, to monitor trading in the Units. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Units in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillances focus on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange is able to obtain information regarding trading in the Units, the applicable physical commodities included in, or options, futures or options on futures on, or any other derivatives based on such commodities, through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect on any relevant market. With regard to the Futures Contracts, the Exchange can obtain market surveillance information, including customer identity information, with respect to transactions occurring on NYMEX and ICE Futures pursuant to its comprehensive information sharing agreements with each of those exchanges. All of the other trading venues on which current Futures Contracts are traded are members of the Intermarket Surveillance Group (''ISG'') and the Exchange therefore has access to all relevant trading information with respect to those contracts without any further action being required on the part of the Exchange. A list of ISG members is available at *http://www.isgportal.org.*

In addition, to the extent that the Partnership invests in Futures Contracts traded on other exchanges, not more than 10% of the weight of the Partnership assets in the aggregate shall consist of Crude Oil Interests whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Units. Specifically, the Bulletin will discuss the following: (1) The risks involved in trading the Units during the Opening and Late Trading Sessions when an updated IPV will not be calculated or publicly disseminated; (2) the risks involved in trading the Units during the part of the Core Trading Session when an updated IPV will not be available;[16] (3) the procedures for purchases and redemptions of Units (and that Units are not individually redeemable); (4) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Units; (5) how information regarding the IPV is disseminated; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Units prior to or concurrently with the confirmation of a transaction; and (7) trading information.

In addition, the Bulletin will reference that each Partnership is subject to various fees and expenses described in the relevant Registration Statement.

The Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical commodities, that the Commission has no jurisdiction over the trading of crude oil, heating oil, gasoline, natural gas or other petroleum-based fuels, and that the CFTC has regulatory jurisdiction over the trading of futures contracts traded on U.S. exchanges and related options.

The Bulletin will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

The Bulletin will also disclose that the NAV for the Units will be calculated after 4:00 p.m. E.T. each trading day.

2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act,[17] in general, and furthers the objectives of section 6(b)(5),[18] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change will allow the listing of the Units on the Exchange, which the Exchange believes will benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in Rule 8.300 are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change; or

[15] E-mail from Michael Cavalier, Chief Counsel, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated November 20, 2008.

[16] As noted above, the IPV will not be updated during that part of the Exchange's Core Trading Session when NYMEX is not normally open for trading (specifically, 9:30 a.m. to 10 a.m. E.T. and 2:30 p.m. to 4 p.m. E.T.).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice thereof in the **Federal Register**. The Commission has determined that a 15-day comment period is appropriate in this case.

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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–125 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-NYSEArca-2008–125. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–125 and should be submitted on or before December 16, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28419 Filed 11–28–08; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11543 and #11544]

North Carolina Disaster #NC–00018

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of North Carolina dated 11/21/2008.

Incident: Severe Storms and Tornadoes.

Incident Period: 11/14/2008 through 11/15/2008.

Effective Date: 11/21/2008.

Physical Loan Application Deadline Date: 01/21/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 08/21/2009.

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 Administrator's disaster declaration, applications for disaster loans may be filed 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: Johnston.

Contiguous Counties:

North Carolina: Franklin, Harnett, Nash, Sampson, Wake, Wayne, Wilson.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere:	5.375
Homeowners Without Credit Available Elsewhere:	2.687
Businesses With Credit Available Elsewhere:	7.750
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere:	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere:	4.500
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11543 C and for economic injury is 11544 0.

The State which received an EIDL Declaration # is North Carolina.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: November 21, 2008.

Sandy K. Baruah,

Acting Administrator.

[FR Doc. E8–28430 Filed 11–28–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 6435]

U.S. Department of State Advisory Committee on Private International Law: Working Group on Conflicts of Law

A Working Group on Conflicts of Law has been established under the Department of State Advisory Committee on Private International Law to consider issues relating to choice of law, applicable law and dispute resolution. This is not a meeting of the full Advisory Committee.

In the context of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP–VII), the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States (OAS) is carrying out work on consumer rights as part of its program on private law. Three proposals have been put forward: a Brazilian draft convention on applicable law, a Canadian draft model law on jurisdiction and applicable law, and a United States proposal in the form of legislative guidelines and model laws/rules to promote consumer redress mechanisms such as small claims tribunals, collective procedures, on-line dispute resolution, and government actions.

The United States is also considering whether to pursue ratification of the Inter-American Convention on the Law Applicable to International Contracts

(known as the Mexico City Convention), which was adopted at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP–V), and whether a possible protocol to that Convention on choice of law concerning consumer protection would be desirable. Other developments which may be relevant to work at the OAS include proposals at UNCITRAL for future work on on-line dispute resolution, proposals at the Hague Conference on Private International Law for work on a non-binding instrument on choice of law in business to business transactions, and the recently concluded Hague Convention on Choice of Court Agreements.

Accordingly, the Advisory Committee's Working Group on Conflicts of Law will hold a public meeting to obtain views on the three consumer protection proposals identified above and the Mexico City Convention.

Time and Place: The public meeting of the working group will take place at the Federal Trade Commission, 600 Pennsylvania Ave., NW., Room H–294, Washington, DC on December 10, 2008, from 10 a.m. EST to 4 p.m. EST. This date is necessary due to travel arrangements of the participants. If you are unable to attend the public meeting and would like to participate from a remote location, teleconferencing will be available.

Public Participation: Advisory Committee Working Group meetings are open to the public. Persons wishing to attend must contact Trisha Smeltzer at *smeltzertk@state.gov* or 202–776–8423 and provide their name, e-mail address, and affiliation(s). Please contact Ms. Smeltzer for additional meeting information, any of the documents referenced above, or dial-in information on the conference call. Persons who cannot attend or participate by conference call but who wish to comment on any of the topics referred to above are welcome to do so by e-mail to Michael Dennis at *DennisMJ@state.gov.*

Dated: November 24, 2008.

Keith Loken,

Assistant Legal Adviser, Office of Private International Law, Office of the Legal Adviser, Department of State.

[FR Doc. E8–28472 Filed 11–28–08; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Seeking OMB Approval

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA invites public comments about our intention to request the Office of Management and Budget's (OMB) revision of a current information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 19, 2008, vol. 73, no. 119, pages 34975–34976. The rule requires passengers who intend to use an approved POC to present a physician statement before boarding.

DATES: Please submit comments by December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Carla Mauney at *Carla.Mauney@faa.gov.*

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Use of Certain Personal Oxygen Concentrator (POC) Devices on Board Aircraft.

Type of Request: Extension without change of a currently approved collection.

OMB Control Number: 2120–0702.

Form(s): There are no FAA forms associated with this collection.

Affected Public: An estimated 1,735,000 Respondents.

Frequency: This information is collected on occasion.

Estimated Average Burden per Response: Approximately 6 minutes per response.

Estimated Annual Burden Hours: An estimated 172,694 hours annually.

Abstract: The rule requires passengers who intend to use an approved POC to present a physician statement before boarding. The flight crew must then inform the pilot-in-command that a POC is on board.

ADDRESSES: Interested persons are invited to 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 attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop,gov*, or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 19, 2008.

Carla Mauney,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. E8–28028 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Change the Use of Airport Property at the Cincinnati/Northern Kentucky International Airport, Covington, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comment.

SUMMARY: The Federal Aviation Administration is requesting public comment on the change of use of land at the Cincinnati/Northern Kentucky International Airport in the city of Covington, KY. This property, approximately .538 acres, will change to a non-aeronautical use. This action is taken under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before December 31, 2008.

ADDRESSES: Documents are available for review at the Cincinnati/Northern Kentucky International Airport, 2939 Terminal Drive, Second Floor Administration, Hebron, KY 41048 and the FAA Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118. Written comments on the Sponsor's request must be delivered or mailed to: Mr. Phillip J. Braden, Manager, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118 or Barbara Schempf, Cincinnati/Northern Kentucky International

Airport, 2939 Terminal Drive, Second Floor Administration, Hebron, KY 41048.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Thompson, Program Manager, Federal Aviation Administration, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118. The application may be reviewed in person at this same location, by appointment.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the request to change the use of property at the Cincinnati/Northern Kentucky International Airport, Covington, KY, under the provisions of AIR 21 (49 U.S.C. 47107(h)(2)).

On November 4, 2008, the FAA determined that the change of use of property at Cincinnati/Northern Kentucky International Airport, submitted by the airport sponsor, meets the procedural requirements of the Federal Aviation Administration. The FAA may approve the request, in whole or in part, no later than December 31, 2008.

The following is a brief overview of the request:

The County of Kenton, Kentucky and The Kenton County Airport Board, owners of the Cincinnati/Northern Kentucky International Airport, are proposing a permanent slope easement, changing the use of approximately .583 acres of airport property from aeronautical use to non-aeronautical use so the property can be used to accommodate a maintainable slope for an adjoining residential development.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon appointment and request, inspect the request, notice and other documents germane to the request in person at the Cincinnati/Northern Kentucky International Airport.

Issued in Memphis, TN on November 4, 2008.

Phillip J. Braden,

Manager, Memphis Airports District Office, Southern Region.

[FR Doc. E8–28029 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice; Receipt of Noise Compatibility Program and Request for Review; Waterbury-Oxford Airport, Oxford, CT

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure map for Waterbury-Oxford Airport, as submitted by the Connecticut Department of Transportation under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR Part 150, is in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program that was submitted for Waterbury-Oxford Airport under Part 150 in conjunction with the noise exposure map, and that this program will be approved or disapproved on or before May 5, 2009.

DATES: *Effective Date:* The effective date of the FAA's determination on the noise exposure map and of the start of its review of the associated noise compatibility program is November 6, 2008. The public comment period ends on January 5, 2009.

FOR FURTHER INFORMATION CONTACT: John C. Silva, Federal Aviation Administration, New England Region, Airports Division, ANE–600, 12 New England Executive Park, Burlington, Massachusetts 01803.

Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure map submitted for Waterbury-Oxford Airport is in compliance with applicable requirements of Part 150, effective November 6, 2008. Further, FAA is reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before May 5, 2009. This notice also announces the availability of this program for public review and comment.

Under Section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as ''the Act''), an airport operator may submit to the FAA a noise exposure map which meets applicable regulations and which depicts non-compatible land uses as of the date of submission of such map, a description of projected aircraft operations, and the ways in which such operations will affect such map. The Act requires such map to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport. An airport operator who has submitted a noise exposure map that is found by FAA to be in compliance with the requirements of Federal Aviation Regulation (FAR) Part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken, or proposes, for the introduction of additional non-compatible uses.

The Connecticut Department of Transportation submitted to the FAA, on October 9, 2008, a noise exposure map, descriptions, and other documentation that were produced during the Airport Noise Compatibility Planning (Part 150) study at Bradley International Airport from September 2004 to October 2008. It was requested that the FAA review this material as the noise exposure map, as described in Section 103(a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under Section 104(b) of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by Connecticut Department of Transportation. The specific maps under consideration were Figures 5–7, (2007 Baseline Noise Contours), 5–8 (2012 Baseline Noise Contours) and 5–9 (2012 NCP Noise Contours), along with the supporting documentation in *Noise Exposure Map and Noise Compatibility Program: Volume 1.* The FAA has determined that the maps for Bradley International Airport are in compliance with applicable requirements. This determination is effective on November 6, 2008.

FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program. If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under Section 103 of the Act, it should be noted that the FAA is not involved in

any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure map to resolve questions concerning, for example, which properties should be covered by the provisions of Section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of a noise exposure map. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator that submitted the map, or with those public agencies and planning agencies with which consultation is required under Section 103 of the Act. The FAA has relied on the certification by the airport operator, under Section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Bradley International Airport, also effective on November 6, 2008. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before May 5, 2009. The FAA's detailed evaluation will be conducted under the provisions of 14 CFR Part 150, Section 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure map, the FAA's evaluation of the map, and the proposed noise compatibility program are available for examination at the following locations:

Waterbury-Oxford Airport, 300 Christian Street, Oxford, Connecticut 06483.

Federal Aviation Administration, New England Region, Airports Division, ANE–600, 16 New England Executive Park, Burlington, Massachusetts 01803.

Questions may be directed to the individual named above under the heading: **FOR FURTHER INFORMATION CONTACT**.

Issued in Burlington, Massachusetts, on November 6, 2008.

LaVerne F. Reid,

Manager, Airports Division.

[FR Doc. E8–28030 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In September 2008, there were 10 applications approved. This notice also includes information on two applications, approved in August 2008, inadvertently left off the August 2008 notice. Additionally, nine approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Erie Regional Airport Authority, Erie, Pennsylvania.

Application Number: 08–07–U–00–ERI.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue Approved for Use in This Decision: $10,219,437.

Charge Effective Date: May 1, 2006.

Estimated Charge Expiration Date: May 1, 2024.

Class of Air Carriers not Required to Collect PFC's: No change from previous decision.

Brief Description of Project Approved for use: Runway 6/24 extension and runway safety area.

Decision Date: August 29, 2008.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Erie Regional Airport Authority, Erie, Pennsylvania.

Application Number: 08–08–C–00–ERI.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $589,960.

Earliest Charge Effective Date: May 1, 2024.

Estimated Charge Expiration Date: February 1, 2025.

Classes of Air Carriers not Required to Collect PFC's: Non-scheduled on-demand air carriers.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Erie International Airport.

Brief Description of Projects Approved for Collection and Use: Terminal expansion and runway environmental assessment.

Runway environmental assessment, benefit cost analysis, apron design and runway safety area.

Additional environmental assessment, wetlands mitigation, and project formulation.

Quality control.

Flight information display system.

Obstruction removal.

Obstruction removal phase II.

Install emergency communication system.

Crack sealing and airside marking.

Upgrade security systems.

Acquire safety equipment.

Server/installation.

Water service upgrade.

Airport signage.

Boarding area renovations.

Security renovations.

Terminal plan.

Miscellaneous terminal improvements.

Benches and receptacles.

Security evaluation.

Emergency generator, phase II.

Emergency generator, phase III.

Air conditioning unit—main lobby.

PFC application preparation.

Brief Description of Disapproved Project: Energy management system.

Determination: The FAA determined that the project did not meet eligibility requirements.

Decision Date: August 29, 2008.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: City of Monroe, Louisiana.

Application Number: 08–03–C–00–MLU.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $16,400,000.

Earliest Charge Effective Date: November 1, 2008.

Estimated Charge Expiration Date: June 1, 2036.

Class of Air Carriers not Required to Collect PFC's: Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Monroe Regional Airport.

Brief Description of Projects Approved for Collection and Use: Passenger terminal building.

Professional fees associated with PFC program administration.

Decision Date: September 8, 2008.

FOR FURTHER INFORMATION CONTACT: Patrick Vaught, Louisiana! New Mexico Airports Development Office, (817) 222–5638.

Public Agency: City of Atlanta, Georgia.

Application Number: 08–10–C–00–ATL.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $25,166,712.

Earliest Charge Effective Date: April 1, 2020.

Estimated Charge Expiration Date: June 1, 2020.

Class of Air Carriers not Required to Collect PFCs: All air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Hartsfield-Jackson Atlanta International Airport.

Brief Description of Projects Approved for Collection and Use: Security fencing.

South airfield lighting vault generator.

Terminal security screening checkpoint expansions.

Decision Date: September 16, 2008.

FOR FURTHER INFORMATION CONTACT: Anna Guss, Atlanta Airports District Office (404) 305–7146.

Public Agency: Williams Gateway Airport Authority, Mesa, Arizona.

Application Number: 08–01–C–00–IWA.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $3,585,510.

Earliest Charge Effective Date: November 1, 2008.

Estimated Charge Expiration Date: February 1, 2013.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use:

Runway 12L/30R rehabilitation.

Modify existing terminal building.

Acquire aircraft rescue and firefighting vehicles.

Rehabilitate taxiway A and construct taxiway B.

Cargo apron construction.

Taxiway F construction.

Taxiway A/P fillet construction.

Rehabilitate runway 12C/30C and 12R/30L.

Part 150—noise compatibility study.

Decision Date: September 25, 2008.

FOR FURTHER INFORMATION CONTACT: Darlene Williams, Los Angeles Airports District Office, (310) 725–3625.

Public Agency: City of Billings Aviation and Transit Department, Billings, Montana.

Application Number: 08–05–C–00–BIL.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $2,000,000.

Earliest Charge Effective Date: November 1, 2008.

Estimated Charge Expiration Date: August 1, 2011.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use:

Acquire high speed runway sweeper.

Acquire sweeper! vacuum truck.

Acquire truck chassis for aircraft rescue and firefighting vehicle water tender.

Install terminal building emergency generator.

Decision Date: September 25, 2008.

FOR FURTHER INFORMATION CONTACT: Dave Stelling, Helena Airports District Office, (406) 449–5257.

Public Agency: Metropolitan Airport Authority of Peoria, Peoria, Illinois.

Application Number: 08–05–C–00–PIA.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $7,550,000.

Earliest Charge Effective Date: November 1, 2008.

Estimated Charge Expiration Date: February 1, 2015.

Class of Air Carriers not Required to Collect PFC's: Nonscheduled/on demand operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Greater Peoria Regional Airport.

Brief Description of Projects Approved for Collection and Use:

Passenger terminal construction.

Snow removal support facility.

Land acquisition.

Taxiways A and D relocation.

Americans with Disabilities Act lift.

Perimeter road and perimeter fence.

Master plan.

Snow removal equipment.

Operations/security driver training system.

Decision Date: September 26, 2008.

FOR FURTHER INFORMATION CONTACT: Richard Pur, Chicago Airports District Office, (847) 294–7527.

Public Agency: State of Hawaii, Honolulu, Hawaii.

Application Number: 08–03–C–00–HNL.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $55,344,953.

Earliest Charge Effective Date: February 1, 2007.

Estimated Charge Expiration Date: January 1, 2010.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Project Approved for Collection at Honolulu International Airport (HNL) and Use at HNL at a $4.50 PFC Level: Taxiways G and L widening.

Brief Description of Projects Approved for Collection at HNL and Use at HNL at a $3.00 PFC Level:

Aircraft rescue and firefighting facilities improvements.

Escalator improvements.

Loading bridge replacement.

Air conditioning system improvements, phase II.

PFC administrative costs.

Brief Description of Withdrawn Project: New Diamond Head concourse, phase I.

Date of withdrawal: August 4, 2008.

Decision Date: September 29, 2008.

FOR FURTHER INFORMATION CONTACT: Steve Wong, Honolulu Airports District Office, (808) 541–1225.

Public Agency: State of Hawaii, Honolulu, Hawaii.

Application Number: 08–03–C–00–OGG.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $13,034,882.

Earliest Charge Effective Date: February 1, 2007.

Estimated Charge Expiration Date: January 1, 2010.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Project Approved for Collection at Kahului Airport (OGG) and Use at HNL at a $4.50 PFC Level: Taxiways G and L widening.

Brief Description of Projects Approved for Collection at OGG and Use at HNL at a $3.00 PFC Level:

Aircraft rescue and firefighting facilities improvements.

Escalator improvements.

Loading bridge replacement.

Air conditioning system improvements, phase II.

PFC administrative costs.

Brief Description of Withdrawn Project: New Diamond Head concourse, phase I.

Date of withdrawal: August 4, 2008.

Decision Date: September 29, 2008.

FOR FURTHER INFORMATION CONTACT: Steve Wong, Honolulu Airports District Office, (808) 541–1225.

Public Agency: State of Hawaii, Honolulu, Hawaii.

Application Number: 08–03–C–00–KOA.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $4,712,963.

Earliest Charge Effective Date: February 1, 2007.

Estimated Charge Expiration Date: January 1, 2010.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Project Approved for Collection at Kona International Airport at Keahole (KOA) and Use at HNL at a $4.50 PFC Level: Taxiways G and L widening.

Brief Description of Projects Approved for Collection at KOA and Use at HNL at a $3.00 PFC Level:

Aircraft rescue and firefighting facilities improvements.

Escalator improvements.

Loading bridge replacement.

Air conditioning system improvements, phase II.

PFC administrative costs.

Brief Description of Withdrawn Project: New Diamond Head concourse, phase I.

Date of withdrawal: August 4, 2008.

Decision Date: September 29, 2008.

FOR FURTHER INFORMATION CONTACT: Steve Wong, Honolulu Airports District Office, (808) 541–1225.

Public Agency: State of Hawaii, Honolulu, Hawaii.

Application Number: 08–03–C–00–LIH.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $2,497,337.

Earliest Charge Effective Date: February 1, 2007.

Estimated Charge Expiration Date: January 1, 2010.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Project Approved for Collection at LihueAirport (LIH) and Use at HNL at a $4.50 PFC Level: Taxiways G and L widening.

Brief Description of Projects Approved for Collection at LIH and Use at HNL at a $3.00 PFC Level:

Aircraft rescue and firefighting facilities improvements.

Escalator improvements.

Loading bridge replacement.

Air conditioning system improvements, phase II.

PFC administrative costs.

Brief Description of Withdrawn Project: New Diamond Head concourse, phase I.

Date of withdrawal: August 4, 2008.

Decision Date: September 29, 2008.

FOR FURTHER INFORMATION CONTACT: Steve Wong, Honolulu Airports District Office, (808) 541–1225.

Public Agency: State of Hawaii, Honolulu, Hawaii.

Application Number: 08–02–C–00–ITO.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $548,196.

Earliest Charge Effective Date: February 1, 2007.

Estimated Charge Expiration Date: January 1, 2010.

Class of Air Carriers not Required to Collect PFC's: None.

Brief Description of Project approved for Collection at HILO International Airport (ITO) and Use at HNL at a $4.50 PFC Level: Taxiways G and L widening.

Brief Description of Projects Approved for Collection at ITO and Use at a HNL at $3.00 PFC Level:

Aircraft rescue and firefighting facilities improvements.

Escalator improvements.

Loading bridge replacement.

Air conditioning system improvements, phase II.

PFC administrative costs.

Brief Description of Withdrawn Project: New Diamond Head concourse, phase I.

Date of withdrawal: August 4, 2008.

Decision Date: September 29, 2008.

AMENDMENTS TO PFC APPROVALS

Amendment No., city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
93–01–C–05–CRW, Charleston, WV	07/17/08	$2,504,316	$2,304,154	12/01/97	12/01/97
98–04–C–03–CRW, Charleston, WV	07/21/08	700,795	698,992	05/01/00	05/01/00
06–06–C–01–ERI, Erie, PA	08/29/08	3,140,337	10,582,878	06/01/12	05/01/24
06–02–C–02–HNL, Honolulu, HI	09/04/08	46,699,392	37,026,705	11/01/09	11/01/09
06–02–C–02–OGG, Kahului, HI	09/04/08	9,573,226	7,587,537	11/01/09	11/01/09
06–02–C–02–KOA, Kona, HI	09/04/08	3,758,088	2,977,261	11/01/09	11/01/09
06–02–C–02–LIH, Lihue, HI	09/04/08	2,002,001	1,586,826	11/01/09	11/01/09
06–01–C–02–ITO, Hilo, HI	09/04/08	467,293	381,671	11/01/09	11/01/09
98–02–C–04–SAN, San Diego, CA	09/09/08	38,273,650	33,797,475	08/01/03	08/01/03

Issued in Washington, DC. on November 19, 2008.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. E8–28032 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals.

In October 2008, there were nine applications approved. This notice also includes information on two applications, one approved in June 2008 and the other approved in September 2008, inadvertently left off the June 2008 and September 2008 notices, respectively. Additionally, 22 approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Blair County Airport Authority, Martinsburg, Pennsylvania.

Application Number: 08–06–C–00–AOO.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $139,918.

Earliest Charge Effective Date: December 1, 2011.

Estimated Charge Expiration Date: December 1, 2014.

Class of Air Carriers not Required to Collect PFCs: Unscheduled Part 121 and Part 135 charter operators for hire to the general public.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Altoona-Blair County Airport.

Brief Description of Projects Approved for Collection and Use:

Improve runway 3/21 and 30 safety areas.

Expand south hangar apron (construction), phase II.

Acquire land/easements for runway 3/21, phase II.

Acquire snow removal equipment (snow blower).

Construct T-Hangar taxilanes (design), phase I.

Acquire aircraft rescue and firefighting vehicle, class 1 (per Part 139 safety inspectors).

Rehabilitate airport beacon (replacement).

Construct hangar taxilanes (construction), phase II.

Update airport master plan study.

Acquire land/easement runway 3/21 primary surface, 1 acre, phase II, purchase.

Decision Date: June 6, 2008.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (707) 730–2835.

Public Agency: Lawton Metropolitan Airport Authority, Lawton, Oklahoma.

Application Number: 08–06–C–00–LAW.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $917,000.

Earliest Charge Effective Date: April 1, 2009.

Estimated Charge Expiration Date: November 1, 2013.

Class of Air Carriers not Required to Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Emergency generator.

Terminal building renovations.

Security enhancements.

PFC administration fees.

Decision Date: September 30, 2008.

FOR FURTHER INFORMATION CONTACT: Bill Bell, Arkansas/Oklahoma Airports Development Office, (817) 222–5664.

Public Agency: Metropolitan Nashville Airport Authority, Nashville, Tennessee.

Application Number: 08–14–C–00–BNA.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $55,362,918.

Earliest Charge Effective Date: November 1, 2011.

Estimated Charge Expiration Date: June 1, 2016.

Class of Air Carriers not Required to Collect PFCs:

Unscheduled air carriers with enplaned passengers using air taxis that enplane fewer than 25,000 passengers per year.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Nashville International Airport.

Brief Description of Projects Approved for Collection and Use:

In-line explosive detection system.

Reconstruct taxiway Alpha south (construction).

Terminal renovation and concession upgrade, phase II.

West side spill gates.

Terminal access road improvements phase I—road and bridge work.

Terminal apron repair.

Rehabilitate Federal Inspection Services facility.

Brief Description of Project Paritally Approved for Collection and Use:

Reconstruct taxiway Bravo south (construction).

Determination: This project was for the local matching share of an Airport Improvement Program grant. The grant amount was less than had been anticipated resulting in a smaller local matching share. Therefore, the PFC approved amount was reduced from that requested.

Decision Date: October 2, 2008.

FOR FURTHER INFORMATION CONTACT: Tommy DuPree, Memphis Airports District Office, (901) 322–8182.

Public Agency: Texas A&M University, College Station, Texas.

Application Number: 08–06–C–00–CLL.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $1,385,581.

Earliest Charge Effective Date: April 1, 2009.

Estimated Charge Expiration Date: January 1, 2013.

Class of Air Carriers not Required to Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Taxiway E rehabilitation.

Westside apron (with taxiway H–1 fillet).

Airfield drainage improvements.

Perimeter fencing upgrades.

Airfield regulators.

Runway 16/34 rehabilitation.

Wind cones.

Taxiway H construction.

Terminal apron expansion.

Terminal building rehabilitation.

Security system upgrades—closed circuit television system.

PFC application and administration.

Decision Date: October 15, 2008.

FOR FURTHER INFORMATION CONTACT: Steven Cooks, Texas Airports Development Office, (817) 222–5608.

Public Agency: Tulsa Airports Improvement Trust, Tulsa, Oklahoma.

Application Number: 08–06–C–00–TUL.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $65,043,406.

Charge Effective Date: April 1, 2010.

Estimated Charge Expiration Date: September 1, 2026.

Class of Air Carriers not Required to Collect PFCs: Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Tulsa International Airport.

Brief Description of Projects Approved for Collection and Use:

Terminal building rehabilitation and improvement.

Terminal access roadway rehabilitation.

Medium intensity approach lighting system with runway end identifier lights installation, runway 26.

Runway 26 repair and rehabilitation.

Taxiway C and taxiway L repair and rehabilitation.

Runway 18L/36R rehabilitation.

Taxiway J design and rehabilitation.

Decision Date: October 16, 2008.

FOR FURTHER INFORMATION CONTACT: Lana Logan, Arkansas/Oklahoma Airports Development Office, (817) 222–5636.

Public Agency: Luzerne and Lackawanna Counties, Avoca, Pennsylvania.

Application Number: 08–05–C–00–AVP.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $6,888,604.

Earliest Charge Effective Date: April 1, 2011.

Estimated Charge Expiration Date: August 1, 2017.

Class of Air Carriers not Required to Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Runway 4/22 overlay.

Runway 4/22 emergency repairs.

Runway sensor system computers.

Security vehicles including airfield radios and aircraft rescue and firefighting pagers.

Replace 22-foot runway flared end snow plow.

Continuous runway friction measuring equipment.

Seal coat aircraft ramp and rejuvenate taxiways to runway 10/28.

Expand concrete area of airline ramp.

Four wheel drive loader.

Brief Description of Projects Approved for Collection:

Rehabilitate general aviation and old terminal apron.

Quick response aircraft rescue and firefighting vehicle.

Construct taxiway B extension to runway 22 end (environmental assessment and design).

Rehabilitate landside roadway.

Construct shoulders along taxiway D.

Brief Description of Disapproved Project:

Construct covered walkway to employee parking.

Determination: This project is not Airport Improvement Program eligible, and therefore, is not PFC eligible.

Decision Date: October 17, 2008.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Clark County Department of Aviation, Las Vegas, Nevada.

Application Number: 08–07–U–00–LAS.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue Approved for Use in this Decision: $379,859,124.

Charge Effective Date: April 1, 2014.

Estimated Charge Expiration Date: July 1, 2022.

Class of Air Carriers not Required to Collect PFC's: No change from previous decision.

Brief Description of Projects Approved for Use at a $4.50 PFC Level:

Design of terminal 3.

Russell Road relocation.

Brief Description of Project Approved for Use at a $3.00 PFC Level: Russell Road park.

Decision Date: October 23, 2008.

FOR FURTHER INFORMATION CONTACT: Ron Biaoco, San Francisco Airports District Office, (650) 876–2778, extension 626.

Public Agency: City of Amarillo, Texas.

Application Number: 08–01–C–00–AMA.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $19,200,000.

Earliest Charge Effective Date: December 1, 2008.

Estimated Charge Expiration Date: July 1, 2018.

Class of Air Carriers not Required to Collect PFC's:

Nonscheduled/on-demand Part 135 air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Rick Husband Amarillo International Airport.

Brief Description of Project Approved for Collection and Use: Construction of the terminal building addition and update of systems in the main terminal.

Decision Date: October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Glenn Boles, Texas Airports Development Office, (817) 222–5661.

Public Agency: City of Houston, Texas.

Application Number: 08–01–C–00–IAH.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in this Decision: $1,372,445,143.

Earliest Charge Effective Date: December 1, 2008.

Estimated Charge Expiration Date: November 1, 2027.

Class of Air Carriers not Required to Collect PFCs:

Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at George Bush Intercontinental Airport.

Brief Description of Projects Approved for Collection and Use:

Automated people mover system.

Terminal B expansion program and related improvements.

Central Federal Inspection Services facility.

New north parallel runway.

PFC program administrative costs.

Central plant heating, ventilation, and air conditioning upgrades.

Terminal A/B south taxiways.

Decision Date: October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Ben Guttery, Texas Airports Development Office, (817) 222–5614.

Public Agency: Evansville-Vanderburgh Airport Authority, Evansville, Indiana.

Application Number: 08–02–C–00–EVV.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $3,983,706.

Earliest Charge Effective Date: December 1, 2008.

Estimated Charge Expiration Date: March 1, 2013.

Class of Air Carriers not Required to Collect PFC's:

Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Evansville Regional Airport.

Brief Description of Projects Approved for Collection and Use:

Install perimeter road, fence, and drainage basin.

PFC administrative costs.

Decision Date: October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Gary Wilson, Chicago Airports District Office, (847) 294–7631.

Public Agency: Duluth Airport Authority, Duluth, Minnesota.

Application Number: 08–08–C–00–DLH.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $422,485.

Earliest Charge Effective Date: May 1,2010.

Estimated Charge Expiration Date: April 1, 2011.

Class of Air Carriers not Required to Collect PFC's: Air taxi/ commercial operators.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Duluth International Airport.

Brief Description of Projects Approved for Collection and Use:

Preparation of PFC letter of intent.

Conduct wildlife assessment.

Design terminal building modifications.

Planning for replacement terminal building and apron.

Rehabilitate and expand cargo apron.

Rehabilitate runway 3/21.

Remove and replace boiler in terminal building.

Conduct pavement condition index inventory study.

Prepare spill prevention control and countermeasures plan.

Expand terminal building for baggage and ticketing.

Prepare plans and specifications for passenger boarding bridge.

Rehabilitate and expand general aviation aircraft parking area.

Construct taxiway to new general aviation apron.

Construct general aviation apron.

Construct taxiway to future hangar area.

Construct taxilane within future hangar area.

Relocate and construct general aviation area access road.

Replace airport beacon.

Purchase Minnesota Power hangar.

Purchase Monaco T-Hangar.

Decision Date: October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Nancy Nistler, Minneapolis Airports District Office, (612) 713–4353.

AMENDMENTS TO PFC APPROVALS

Amendment No., City, State	Amendment Approved Date	Original Approved Net PFC Revenue	Amended Approved Net PFC Revenue	Original Estimated Charge Exp. Date	Amended Estimated Charge Exp. Date
*03–05–C–01–AOO Altoona, PA	06/08/08	$232,460	$208,710	11/01/13	12/01/11
92–01–C–11–SJC San Jose, CA	09/26/08	$64,570,368	$65,220,180	07/01/96	07/01/96
99–07–C–03–SJC San Jose, CA	09/26/08	$12,628,000	$12,778,609	07/01/02	07/01/02
01–11–C–03–SJC San Jose, CA	09/26/08	$131,055,103	$131,401,412	01/01/07	02/01/08
94–01–C–05–ISP Islip, NY	09/29/08	$21,974,503	$21,865,831	07/01/04	07/01/04
92–01–C–01–ACV Arcata, CA	09/30/08	$188,500	$169,564	03/01/94	03/01/94
04–04–0–01–LAW Lawton, OK	09/30/08	$253,021	$249,492	10/01/05	10/01/05
97–01–C–02–MFE McAllen, TX	09/30/08	$3,114,426	$3,304,011	01/01/02	01/01/02
03–03–C–01–HLN Helena, MT	10/07/08	$2,336,432	$2,938,178	06/01/10	10/01/12
94–01–C–10–10–CVG Covington, KY	10/08/08	$35,797,000	$27,431,000	04/01/96	04/01/96
95–02–C–07–CVG Covington, KY	10/08/08	$76,920,000	$73,633,000	12/01/98	12/01/98
01–06–C–04–CVG Covington, KY	10/08/08	$19,580,000	$16,313,000	11/01/02	11/01/02
01–07–C–06–CVG Covington, KY	10/08/08	$39,590,000	$39,596,000	02/01/04	02/01/04
02–08–C–04–CVG Covington, KY	10/08/08	$268,108,000	$213,098,000	11/01/11	05/01/09
07–11–C–01–CVG Covington, KY	10/08/08	$6,478,000	$3,590,000	11/01/15	09/01/12
08–08–C–01–JNU Juneau, AK	10/09/08	$8,142,712	$9,905,870	08/01/16	11/01/17
06–07–C–01–BUR Burbank, CA	10/09/08	$19,543,195	$26,793,195	09/01/12	09/01/12
96–03–0–02–LAX Los Angeles, CA	10/10/08	$52,027,000	$54,716,297	01/01/96	01/01/96
01–04–C–02–MAF Midland, TX	10/14/08	$1,622,298	$1,395,921	11/01/14	11/01/14
07–05–C–01–MAF Midland, TX	10/14/08	$1,553,549	$1,544,032	08/01/15	08/01/15
01–04–C–01–CLL College Station, TX	10/16/08	$1,174,445	$1,306,529	01/01/07	01/01/07
04–08–C–03–RNO Reno, NV	10/23/08	$26,712,865	$49,500,000	08/01/07	07/01/07

NOTES: The amendment denoted by an asterisk (*) includes a change to the PFC level charged from $3.00 per enplaned passenger to $4.50 per enplaned passenger. For Altoona, PA this change is effective on December 1, 2008.

Issued in Washington, DC on November 20, 2008.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. E8–28227 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Draft Environmental Impact Statement/ Environmental Impact Report; Mid-County Parkway, Riverside County, CA

ACTION: Notice of extension of comment period.

SUMMARY: The Federal Highway Administration is extending the review and comment period for the Mid-County Parkway (MCP) Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for an additional 30 days. Comments on the Draft EIR/EIS may now be submitted until January 8, 2009. The MCP is a proposed 32-mile roadway on new and existing alignment between State Route 79 and Interstate 15 in western Riverside County. A Notice of Availability was previously published in the **Federal Register** Volume 73, No. 199 on Tuesday, October 14, 2008 (FR Doc. ES–23805 Filed 10–10–08; 8:45 a.m.). The Notice of Availability includes supplemental information describing the project and the alternatives.

DATES: Comments will now be accepted until January 8, 2009.

ADDRESSES: Comments on the MCP Draft EIR/EIS can be mailed to the following addresses: Ms. Cathy Bechtel at Riverside County Transportation Commission, 4080 Lemon Street, 3rd Floor, Riverside, CA 92502 and/or Mr. Tay Dam, Federal Highway Administration, 650 Capitol Mall, Suite 4–100, Sacramento, CA 95814, or via e-mail at: *http://midcountyparkway.org.*

The Draft EIR/EIS and technical studies are available for viewing at the following locations during regular business hours: (1) RCTC, 4080 Lemon Street—3rd Floor, Riverside, CA 92502; (2) FHWA, 650 Capitol Mall, Suite 4–100, Sacramento, CA 95814; (3) Caltrans District 8 Office—6th Floor, 464 W. 4th St., San Bernardino, CA 92401; (4) City of Corona—Public Works Department, 400 South Vicentia Avenue, 2nd Floor—Suite 210, Corona, CA 92882; (5) Corona Public Library, 650 S. Main St., Corona, CA 92882; (6) Perris Public Library, 163 E. San Jacinto Ave., Perris, CA 92507; (7) San Jacinto Public Library, 500 Idyllwild Dr., San Jacinto, CA 92583; (8) Woodcrest Library, 16625 Krameria, Riverside, CA 92504; (9) Hemet Library, 300 E. Latham Avenue, Hemet, CA 92543; and (10) Moreno Valley Public Library, 25480 Alessandro Blvd., Moreno Valley, CA 92553. You may also view and comment on the Draft EIR/EIS at *http://www.midcountyparkway.org.*

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

FOR FURTHER INFORMATION CONTACT: Ms. Cathy Bechtel at RCTC: (951) 787–7141, or Mr. Tay Dam at FHWA: (213) 605–2013.

Dated: November 21, 2008.

Cindy Vigue,

Director of State Programs, Major Projects Program Manager, Federal Highway Administration, 650 Capitol Mall, Suite 4–100, Sacramento, CA 95814.

[FR Doc. E8–28429 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2000–7257; Notice No. 50]

Railroad Safety Advisory Committee (RSAC); Working Group Activity Update

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Announcement of Railroad Safety Advisory Committee (RSAC) Working Group activities.

SUMMARY: FRA is updating its announcement of RSAC's Working Group activities to reflect its current status.

FOR FURTHER INFORMATION CONTACT: Larry Woolverton, RSAC Coordinator, FRA, 1200 New Jersey Avenue, SE., Mailstop 25, Washington, DC 20590, (202) 493–6212; or Grady Cothen, Deputy Associate Administrator for Safety, FRA, 1200 New Jersey Avenue, SE., Mailstop 25, Washington, DC 20590, (202) 493–6302.

SUPPLEMENTARY INFORMATION: This notice serves to update FRA's last announcement of working group activities and status reports of August 29, 2008 (73 FR 51041). The 36th full RSAC Committee meeting was held September 10, 2008, and the 37th meeting is scheduled for December 10, 2008, at the Marriott Metro Center Hotel Ballroom in Washington, DC.

Since its first meeting in April of 1996, the RSAC has accepted 26 tasks. Status for each of the open tasks (neither completed nor terminated) is provided below:

Open Tasks

Task 96–4—Tourist and Historic Railroads. This Task includes reviewing the appropriateness of the agency's current policy regarding the applicability of existing and proposed regulations to tourist, excursion, scenic, and historic railroads. This Task was accepted on April 2, 1996, and a Working Group was established. The Working Group monitored the steam locomotive regulation task. Planned future activities involve the review of other regulations for possible adaptation to the safety needs of tourist and historic railroads. Contact: Grady Cothen, (202) 493–6302.

Task 03–01—Passenger Safety. This Task includes updating and enhancing the regulations pertaining to passenger safety, based on research and experience. This Task was accepted on May 20, 2003, and a Working Group was established. Prior to embarking on substantive discussions of a specific task, the Working Group set forth in writing a specific description of the task. The Working Group reports planned activity to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. At the first meeting, held September 9–10, 2003, a consolidated list of issues was completed. At the second meeting, held November 6–7, 2003, four task groups were established: Emergency Preparedness, Mechanical, Crashworthiness, and Track/Vehicle Interaction. The task forces met and reported on activities for Working Group consideration at the third meeting, held May 11–12, 2004, and a fourth meeting was held October 26–27, 2004. The Working Group met on March 21–22, 2006, and again on September 12–13, 2006, at which time the group agreed to establish a task force on General Passenger Safety. The full Passenger Safety Working Group met on April 17–18, 2007; December 11–12, 2007; and June 18, 2008. The next meeting is scheduled for November 13, 2008. Contact: Charles Bielitz, (202) 493–6314.

(Emergency Preparedness Task Force) At the Working Group meeting of March 9–10, 2005, the Working Group received and approved the consensus report of the Emergency Preparedness Task Force related to emergency communication, emergency egress, and rescue access. These recommendations were presented

to and approved by the full RSAC Committee on May 18, 2005. The Working Group met on September 7–8, 2005, and additional, supplementary recommendations were presented to and accepted by the full RSAC on October 11, 2005. The Notice of Proposed Rulemaking (NPRM) was published on August 24, 2006 (71 FR 50275), and was open for comment until October 23, 2006. The Working Group agreed upon recommendations for the final rule, including resolution of final comments received, during the April 17–18, 2007, meeting. The recommendations were presented to and approved by the full RSAC on June 26, 2007. The Passenger Train Emergency Systems Final Rule, focusing on emergency communication, emergency egress, and rescue access, was published on February 1, 2008 (73 FR 6370). The Task Force met on October 17–18, 2007, and reached consensus on draft rule text for a followup NPRM on Passenger Train Emergency Systems, focusing on low-location emergency exit path marking, emergency lighting, and emergence signage. The Task Force presented the draft rule text to the Passenger Safety Working Group on December 11–12, 2007, and the consensus draft rule text was presented to and approved by full RSAC vote during the February 20, 2008, meeting. At its most recent meeting, held May 13–14, 2008, the Task Force recommended clarifying the applicability of backup emergency communication system requirements in the February 1, 2008, final rule, and FRA announced its intention to exercise limited enforcement discretion for a new provision amending instruction requirements for emergency window exit removal. The Working Group ratified these recommendations on June 19, 2008. No additional Task Force meetings are currently scheduled. Contact: Brenda Moscoso, (202) 493–6282.

(Mechanical Task Force) (COMPLETED) Initial recommendations on mechanical issues (revisions to Title 49 Code of Federal Regulations (CFR) Part 238) were approved by the full Committee on January 26, 2005. At the Working Group meeting of September 7–8, 2005, the Task Force presented additional perfecting amendments and the full RSAC approved them on October 11, 2005. An NPRM was published in the **Federal Register** on December 8, 2005 (70 FR 73070). Public comments were due by February 17, 2006. The final rule was published in the **Federal Register** on October 19, 2006 (71 FR 61835), effective December 18, 2006.

(Crashworthiness Task Force) Among its efforts, the Crashworthiness Task Force provided consensus recommendations on static-end strength that were adopted by the Working Group on September 7–8, 2005. The full Committee accepted the recommendations on October 11, 2005. The Front-End Strength of Cab Cars and Multiple-Unit Locomotives NPRM was published in the **Federal Register** on August 1, 2007 (72 FR 42016), with comments due by October 1, 2007. A number of comments were entered into the docket, and a Crashworthiness Task Force meeting was held September 9, 2008, to resolve comments on the NPRM. Based on the consensus language agreed to at the meeting, FRA has prepared the text of the final rule, incorporating the resolutions made at the Task Force meeting, and the final rule language was adopted at the Passenger Safety Working Group meeting held on November 13, 2008. The language will be presented for vote at the December 10, 2008, full RSAC meeting for approval. If approved by the RSAC, the rule will go forward with a target publication date of April 2009. Contact: Gary Fairbanks, (202) 493–6322.

(Vehicle/Track Interaction Task Force) This Task Force is developing proposed revisions to 49 CFR Parts 213 and 238, principally regarding high-speed passenger service. The Task Force met on October 9–11 and again on November 19–20, 2007, in Washington, DC, and presented the final Task Force Report and final recommendations and proposed rule text for approval by the Passenger Safety Working Group at the December 11–12, 2007, meeting. The final report and the proposed rule text were approved by the Working Group and were presented to and approved by full RSAC vote during the February 20, 2008, meeting. The group last met on February 27–28, 2008, and FRA is currently drafting an NPRM with a target publication date of April 2009. No additional Task Force meetings are currently scheduled. Contact: John Mardente, (202) 493–1335.

(General Passenger Safety Task Force) At the Working Group meeting on April 17–18, 2007, the Task Force presented a progress report to the Working Group. The Task Force met on July 18–19, 2007, and afterwards it reported proposed reporting cause codes for injuries involving the platform gap, which were approved by the Working Group by mail ballot in September 2007. The full RSAC approved the recommendations for changes to 49 CFR Section 225 accident/incident cause codes on October 25, 2007. The Task Force continues work on passenger train door securement, ''second train in station,'' trespasser incidents, and System Safety-based solutions by developing a regulatory approach to System Safety. The General Passenger Safety Task Force presented draft guidance material for management of the gap that was considered and approved by the Working Group during the December 11–12, 2007, meeting and that was presented and approved by full RSAC vote during the February 20, 2008, meeting. The group met April 23–24, 2008, and the next meeting is currently scheduled for December 3–4, 2008. Contact: Dan Knote, (631) 567–1596.

Task 05–01—Review of Roadway Worker Protection Issues. This Task was accepted on January 26, 2005, to review 49 CFR Part 214, Subpart C, Roadway Worker Protection (RWP), and related sections of Subpart A and to recommend consideration of specific actions to advance the on-track safety of railroad employees and contractors engaged in maintenance-of-way activities throughout the general system of railroad transportation, including clarification of existing requirements. A Working Group was established and reported to the RSAC any specific actions identified as appropriate. The first meeting of the Working Group was held on April 12–14, 2005. The group drafted and accepted regulatory language for various revisions, clarifications, and additions to 32 separate items in 19 sections of the rule. However, two parties raised technical concerns regarding the draft language concerning electronic display of track authorities. The Working Group reported recommendations to the full Committee at the June 26, 2007, meeting. FRA, through the NPRM process, is to address this issue along with eight additional items on which the Working Group was unable to reach a consensus. Comments were received and were considered during the drafting of the NPRM. In early 2008, the external Working Group members were solicited to review the consensus text for errata. In order to address the heightened concerns raised with the current regulations for adjacent-track on-track safety, an NPRM was published on July 17, 2008, that focused on this element of the RWP rule alone. As this was an NPRM, FRA sought comment on the entire proposal, including those portions that FRA sought to clarify. However, on August 13, 2008, the NPRM was withdrawn to permit further consideration of the RSAC-reported consensus language. FRA will address

discrepancies between the consensus language and the proposed rule, clarify the essential issues, and publish a proposed rule on adjacent track protection as soon as possible. A separate NPRM on other roadway worker safety issues will follow in 2009. Contact: Christopher Schulte, (610) 521–8201.

Task 05–02—Reduce Human Factor-Caused Train Accident/Incidents. This Task was accepted on May 18, 2005, to reduce the number of human factor-caused train accidents/incidents and related employee injuries. The Railroad Operating Rules Working Group was formed, and the Group extensively reviewed the issues presented. The final Working Group meeting devoted to developing a proposed rule was held February 8–9, 2006. The Working Group was not able to deliver a consensus regulatory proposal, but did recommend that it be used to review comments on FRA's NPRM, which was published in the **Federal Register** on October 12, 2006 (FR 71 60372), with public comments due by December 11, 2006. Two reviews were held, one on February 8–9 and the other on April 4–5, 2007. Consensus was reached on four items and those items were presented and accepted by the full RSAC Committee at the June 26, 2007, meeting. A Final Rule was published in the **Federal Register** on February 13, 2008 (73 FR 8442), with an effective date of April 14, 2008. FRA received four petitions for reconsideration of that final rule. The final rule that responded to the petitions for consideration was published in the **Federal Register** on June 16, 2008, and concluded the rulemaking. Working Group meetings were held September 27–28, 2007; January 17–18, 2008; May 21–22, 2008; and September 25–26, 2008. The Working Group has considered issues related to issuance of Emergency Order No. 26 (prohibition on use of certain electronic devices while on duty) and ''after arrival mandatory directives,'' among other issues. At the September meeting, the Working Group approved the creation of a Highway Grade Crossings and Warning System Task Force. Contact: Douglas Taylor, (202) 493–6255.

Task 06–01—Locomotive Safety Standards. This Task was accepted on February 22, 2006, to review 49 CFR Part 229, Railroad Locomotive Safety Standards, and revise as appropriate. A Working Group was established with the mandate to report any planned activity to the full Committee at each scheduled full RSAC meeting, to include milestones for completion of projects and progress toward completion. The first Working Group meeting was held May 8–10, 2006. Working Group meetings were held on August 8–9, 2006; September 25–26, 2006; October 30–31, 2006; and the Working Group presented recommendations regarding revisions to requirements for locomotive sanders to the full RSAC on September 21, 2006. The NPRM regarding sanders was published in the **Federal Register** on March 6, 2007 (72 FR 9904). Comments received were discussed by the Working Group for clarification, and FRA published a final rule on October 19, 2007 (72 FR 59216). The Working Group is continuing the review of Part 229 with work in the areas of locomotive cab temperature standards, alerters, remote control locomotives, and critical locomotive electronics with a view to proposing further revisions to update the Standards. The Working Group met on January 9–10, 2007; November 27–28, 2007; February 5–6, 2008; May 20–21, 2008; August 5–6, 2008; and October 22–23, 2008. The next meeting is scheduled for January 6–7, 2009. Contact: George Scerbo, (202) 493–6249.

Task 06–02—Track Safety Standards and Continuous Welded Rail. Section 9005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. No. 109–59, ''SAFETEA-LU''), the 2005 surface transportation authorization act, requires FRA to issue requirements for inspection of joint bars in continuous welded rail (CWR) in order to detect cracks that could affect the integrity of the track structure. See Title 49 U.S.C. 20142(e). FRA published an Interim Final Rule (IFR) establishing new requirements for inspections on November 2, 2005 (70 FR 66288). On October 11, 2005, FRA offered the RSAC a task to review comments on this IFR, but the conditions could not be established under which the Committee could have undertaken this with a view toward consensus. Comments on the IFR were received through December 19, 2005; FRA reviewed the comments. On February 22, 2006, the RSAC accepted this task to review and revise the CWR related to provisions of the Track Safety Standards, with particular emphasis on reduction of derailments and consequent injuries and damage caused by defective conditions, including joint failures, in track using CWR. A Working Group was established. The first Working Group meeting was held April 3–4, 2006, at which time the Working Group reviewed comments on the IFR. The second Working Group meeting was held April 26–28, 2006. The Working Group also met on May 24–25, 2006, and July 19–20, 2006. The Working Group reported consensus recommendations for the final rule that were accepted by the full RSAC Committee by mail ballot on August 11, 2006. The final rule was published in the **Federal Register** on October 11, 2006 (71 FR 59677). The Working Group continued review of 49 CFR Section 213.119, with a view to proposing further revisions to update the standards. The Working Group met on January 30–31, 2007; April 10–11, 2007; June 27–28, 2007; August 15–16, 2007; October 23–24, 2007; and January 8–9, 2008. The Working Group reported consensus recommendations for revisions to Section 213.119 regulations to the full RSAC Committee on February 20, 2008, and the recommendations were accepted. FRA is preparing an NPRM with a target publication date of December 2008. See Tasks 07–01 and 08–03 below. Contact: Ken Rusk, (202) 493–6236.

Task 06–03—Medical Standards for Safety-Critical Personnel. This Task was accepted on September 21, 2006, to enhance the safety of persons in the railroad operating environment and the public by establishing standards and procedures for determining the medical fitness for duty of personnel engaged in safety-critical functions. A Working Group has been established and will report any planned activity to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. The first Working Group meeting was held December 12–13, 2006. The Working Group has held followup meetings on the following dates: February 20–21, 2007; July 24–25, 2007; August 29–30, 2007; October 31–November 1, 2007; December 4–5, 2007; February 13–14, 2008; March 26–27, 2008; and April 22–23, 2008. At the latter meeting, FRA announced that the agency would prepare an NPRM draft based on the discussions to date and schedule a further meeting for review of the document. The draft NPRM is currently in FRA coordination and the language is being revised based on comments. The draft NPRM will be presented to the RSAC Medical Standards Working Group when completed. A Doctors Task Force, established by the Working Group in May 2007, is proceeding to develop accompanying medical guidelines that will be used to provide consistent criteria for determining the medical fitness for duty of the safety-critical positions. These guidelines will be presented for Working Group consideration when complete. When

accepted by the Medical Standards Working Group, the two parts of the rulemaking will be presented to the full RSAC for approval. The target date for publishing the NPRM is May 2009. The Doctors Task Force has had meetings or conference calls on July 24, 2007; August 20, 2007; October 15, 2007; October 31, 2007; June 23–24, 2008; September 8–10, 2008; October 8, 2008; and November 12–13, 2008. The next meeting of the Task Force is tentatively scheduled for January 27–28, 2009. Contact: Alan Misiaszek, (202) 493–6002.

Task 07–01—Track Safety Standards. This Task was accepted on February 22, 2007, to consider specific improvements to the Track Safety Standards or other responsive actions supplementing work already underway on CWR, specifically to: review controls applied to reuse of rail in CWR ''plug rail,'' review the issue of cracks emanating from bond wire attachments, consider improvements in the Track Safety Standards related to fastening of rail to concrete ties, and to ensure a common understanding within the regulated community concerning requirements for internal rail flaw inspections. The tasks were assigned to the Track Safety Standards Working Group. The Working Group will report any planned activity to the full Committee at each scheduled full RSAC meeting, including milestones for completion of projects and progress toward completion. The first Working Group meeting was held on June 27–28, 2007, and the group met again on August 15–16, 2007, and October 23–24, 2007. Two Task Forces were created under the Working Group: Concrete Ties and Rail Integrity. The Concrete Ties Task Force met on November 26–27, 2007; February 13–14, 2008; April 16–17, 2008; July 9–10, 2008; and September 17–18, 2008. The Concrete Ties Task Force finalized consensus language regarding concrete crossties (49 CFR Part 213) and presented a recommendation to the Track Safety Standards Working Group at the November 20, 2008, Working Group meeting. The language may be presented for vote at the December 10, 2008, RSAC meeting for approval. If approved by the RSAC, the rule will go forward with a target publication date of April 2009. Contact: Ken Rusk, (202) 493–6236.

Task 08–01—Report on the Nation's Railroad Bridges. This Task was accepted on February 20, 2008, to report to the Federal Railroad Administrator on the current state of railroad bridge safety management, update the findings and conclusions of the 1993 Summary Report of the FRA Railroad Bridge Safety Survey, and to include recommendations for further action, with a target date of November 3, 2008. The Working Group first met on April 24–25, 2008, with followup meetings held on June 12–13, 2008, and August 7–8, 2008. The Working Group presented and received approval on findings and a final report to the RSAC during the September 10, 2008, full Committee meeting, completing this task. Contact: Gordon Davids, (202) 230–9568.

Task 08–03—Track Safety Standards Rail Integrity. This Task was accepted on September 10, 2008, to consider specific improvements to the Track Safety Standards or other responsive actions designed to enhance rail integrity. The Rail Integrity Task Force was created in October 2007 under Task 07–01 and first met on November 28–29, 2007. The Task Force met on February 12–13, 2008; April 15–16, 2008; and July 8–9, 2008; and September 16–17, 2008. Consensus has been achieved on bond wires and a common understanding on internal rail flaw inspections has been reached; however, more work remains before a recommendation for possible regulatory action is made. The next Rail Integrity Task Force meeting is scheduled for February 3–4, 2009. Contact: Ken Rusk, (202) 493–6236.

Completed Tasks

Task 96–1—(Completed) Revising the Freight Power Brake Regulations.

Task 96–2—(Completed) Reviewing and recommending revisions to the Track Safety Standards (49 CFR Part 213).

Task 96–3—(Completed) Reviewing and recommending revisions to the Radio Standards and Procedures (49 CFR Part 220).

Task 96–5—(Completed) Reviewing and recommending revisions to Steam Locomotive Inspection and Maintenance Standards (49 CFR Part 230).

Task 96–6—(Completed) Reviewing and recommending revisions to miscellaneous aspects of the regulations addressing Qualification and Certification of Locomotive Engineers (49 CFR Part 240).

Task 96–7—(Completed) Developing Roadway Maintenance Machines (On-Track Equipment) Safety Standards.

Task 96–8—(Completed) This Planning Task evaluated the need for action responsive to recommendations contained in a report to Congress titled, *Locomotive Crashworthiness & Working Conditions.*

Task 97–1—(Completed) Developing crashworthiness specifications (49 CFR Part 229) to promote the integrity of the locomotive cab in accidents resulting from collisions.

Task 97–2—(Completed) Evaluating the extent to which environmental, sanitary, and other working conditions in locomotive cabs affect the crew's health and the safe operation of locomotives, proposing standards where appropriate.

Task 97–3—(Completed) Developing event recorder data survivability standards.

Task 97–4 and *Task 97–5*—(Completed) Defining Positive Train Control functionalities, describing available technologies, evaluating costs and benefits of potential systems, and considering implementation opportunities and challenges, including demonstration and deployment.

Task 97–6—(Completed) Revising various regulations to address the safety implications of processor-based signal and train control technologies, including communications-based operating systems.

Task 97–7—(Completed) Determining damages qualifying an event as a reportable train accident.

Task 00–1—(Completed—task withdrawn) Determining the need to amend regulations protecting persons who work on, under, or between rolling equipment and persons applying, removing, or inspecting rear end marking devices (Blue Signal Protection).

Task 01–1—(Completed) Developing conformity of FRA's regulations for accident/incident reporting (49 CFR Part 225) to revised regulations of the Occupational Safety and Health Administration, U.S. Department of Labor, and to make appropriate revisions to the *FRA Guide for Preparing Accident/Incident Reports* (Reporting Guide).

Task 08–01—(Completed) Reporting on the Nation's Railroad Bridges.

Please refer to the notice published in the **Federal Register** on March 11, 1996 (61 FR 9740), for more information about the RSAC.

Issued in Washington, DC, on November 24, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–28448 Filed 11–28–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35200]

Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company

Pursuant to a written trackage rights agreement, BNSF Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP) over BNSF's lines of railroad between Basta, CA (milepost 163.15), and Fullerton, CA (milepost 165.23), a distance of approximately 2 miles.

The transaction is scheduled to be consummated on December 17, 2008, and the temporary trackage rights will expire on or about January 26, 2009.[1] The purpose of the temporary trackage rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employees affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law No. 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay must be filed by December 10, 2008 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35200, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Gabriel S. Meyer, Assistant General Attorney, 1400 Douglas Street, STOP 1580, Omaha, NE 68179.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 21, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeff Herzig,

Clearance Clerk.

[FR Doc. E8–28256 Filed 11–28–08; 8:45 am]

BILLING CODE 4915–01–P

[1] UP states that, under section 2 of the trackage rights agreement, BNSF may consider extending the time frame if conditions allow.

DEPARTMENT OF VETERANS AFFAIRS

Clinical Science Research and Development Service; Cooperative Studies Scientific Evaluation Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Clinical Science Research and Development Service Cooperative Studies Scientific Evaluation Committee will be held on January 7, 2009, at the St. Gregory Hotel, 2033 M Street, NW., Washington, DC. The session is scheduled to begin at 8 a.m. and end at 4 p.m.

The Committee advises the Chief Research and Development Officer through the Director of the Clinical Science Research and Development Service on the relevance and feasibility of proposed projects and the scientific validity and propriety of technical details, including protection of human subjects.

The session will be open to the public for approximately 30 minutes at the start of the meeting for the discussion of administrative matters and the general status of the program. The remaining portion of the session will be closed to the public for the Committee's review, discussion and evaluation of research and development applications.

During the closed portion of the meeting, discussions and recommendations will deal with qualifications of personnel conducting the studies, staff and consultant critiques of research proposals and similar documents and the medical records of patients who are study subjects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. As provided by section 10(d) of Public Law 92–463, as amended, closing portions of this meeting is in accordance with 5 U.S.C. 552b(c)(6) and (c)(9)(B).

Those who plan to attend should contact Dr. Grant Huang, Deputy Director, Cooperative Studies Program (125), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, at (202) 461–1700.

Dated: November 24, 2008.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–28436 Filed 11–28–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Monday,
December 1, 2008

Part II

Environmental Protection Agency

40 CFR Parts 261 and 262

Standards Applicable to Generators of Hazardous Waste; Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material at Laboratories Owned by Colleges and Universities and Other Eligible Academic Entities Formally Affiliated With Colleges and Universities; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261 and 262

[EPA–HQ–RCRA–2003–0012; FRL–8743–9]

RIN 2050–AG18

Standards Applicable to Generators of Hazardous Waste; Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material at Laboratories Owned by Colleges and Universities and Other Eligible Academic Entities Formally Affiliated With Colleges and Universities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is finalizing an alternative set of generator requirements applicable to laboratories owned by eligible academic entities, as defined in this final rule. The rule provides a flexible and protective set of regulations that address the specific nature of hazardous waste generation and accumulation in laboratories at colleges and universities, as well as other eligible academic entities formally affiliated with colleges and universities. This final rule is optional and colleges and universities and other eligible academic entities formally affiliated with a college or university have the choice of managing their hazardous wastes in accordance with the new alternative regulations as set forth in this final regulation or remaining subject to the existing generator regulations.

DATES: This final rule is effective December 31, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. RCRA–2003–0012. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA RCRA 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 RCRA Docket is (202) 566–0270.

FOR FURTHER INFORMATION CONTACT: For further information regarding specific aspects of this notice, contact Kristin Fitzgerald, Office of Solid Waste, (703) 308–8286, *Fitzgerald.Kristin@epa.gov;* Patricia Mercer, Office of Solid Waste, (703) 308–8408, *Mercer.Patricia@epa.gov;* or Jessica Biegelson, Office of Solid Waste, (703) 308–0026, *Biegelson.Jessica@epa.gov.* Mail inquiries may be directed to the Office of Solid Waste, (5304P), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Entities Potentially Affected by This Rule

The rule establishes a new Subpart K within 40 CFR part 262. Entities potentially affected by this final action are colleges and universities; non-profit research institutes that are either owned by or have a formal written affiliation agreement with a college or university; and teaching hospitals that are either owned by or have a formal written affiliation agreement with a college or university, that generate hazardous waste in laboratories. Today's final rule refers to these collectively as ''eligible academic entities.'' This final action is optional for eligible academic entities. That is, eligible academic entities that are large quantity generators (LQGs), small quantity generators (SQGs), or conditionally exempt small quantity generators (CESQGs) may choose to have their laboratories be subject to 40 CFR part 262, Subpart K in lieu of the existing generator regulations. In States authorized to implement the RCRA program, Subpart K would only be available as an option once it has been adopted by the State in which the eligible academic entity is located.

Only eligible academic entities can participate under Subpart K for the laboratories they own. The following are examples of entities that are not eligible because they do not satisfy the definition of ''eligible academic entity:'' government facilities; commercial research and development (R&D) facilities; non-profit research institutes that are not owned by nor have a formal written affiliation agreement with a college or university; non-teaching hospitals; and teaching hospitals that are not owned by nor have a formal written affiliation agreement with a college or university. To determine whether the laboratories owned by an eligible academic entity are covered by this action, interested parties should examine 40 CFR part 262, Subpart K carefully. If there are questions regarding the applicability of the rule to a particular entity, consult your State, EPA Regional office, or the person(s) listed in the section of this preamble entitled, **FOR FURTHER INFORMATION CONTACT.**

NAICS CODES OF ENTITIES POTENTIALLY AFFECTED BY THIS FINAL RULE

NAICS codes	Description of NAICS code
Colleges & Universities	
6112, 61121, 611210	Junior Colleges.
6113, 61131, 611310	Colleges, Universities, and Professional Schools.
6115, 61151	Technical and Trade Schools.
611519	Other Technical and Trade Schools.
61161, 611610	Fine Arts Schools.
Teaching Hospitals	
54194, 541940	Veterinary Services (Animal Hospitals).
622	Hospitals.
6221, 62211, 622110	General Medical and Surgical Hospitals.
6222, 62221, 622210	Psychiatric and Substance Abuse Hospitals.
6223, 62231, 622310	Specialty (except Psychiatric and Substance Abuse) Hospitals.

NAICS CODES OF ENTITIES POTENTIALLY AFFECTED BY THIS FINAL RULE—Continued

NAICS codes	Description of NAICS code
Non-profit Research Institutes	
5417, 54171, 541710	Research and Development in the Physical, Engineering, and Life Sciences.
54172, 541720	Research and Development in the Social Sciences and Humanities.

LIST OF ACRONYMS

APA	Administrative Procedures Act.
ACE	American Council on Education.
AAMC	Association of American Medical Colleges.
AIRI	Association of Independent Research Institutes.
BR	Biennial Report.
BMPs	Best Management Practices.
CAA	Central Accumulation Area.
CAS	Chemical Abstract Service.
CESQG	Conditionally Exempt Small Quantity Generator.
CFR	Code of Federal Regulations.
C2E2	Campus Consortium for Environmental Excellence.
CSHEMA	Campus Safety Health and Environmental Management Association.
EH&S	Environmental Health and Safety.
HHMI	Howard Hughes Medical Institute.
HSWA	Hazardous and Solid Waste Amendments of 1984.
ICR	Information Collection Request.
LDR	Land Disposal Restrictions.
LMP	Laboratory Management Plan.
LQG	Large Quantity Generator.
NACUBO	National Association of College and University Business Officers.
NTTAA	National Technology Transfer Advancement Act.
OMB	Office of Management and Budget.
OSHA	Occupational Safety and Health Administration.
PRA	Paperwork Reduction Act.
Project XL	eXcellence and Leadership.
R&D	Research and Development.
RCRA	Resource Conservation and Recovery Act.
RFA	Regulatory Flexibility Act.
SAA	Satellite Accumulation Area.
SQG	Small Quantity Generator.
SWDA	Solid Waste Disposal Act.
TSDF	Treatment, Storage or Disposal Facility.
UMRA	Unfunded Mandates Reform Act.

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I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. Statutory Authority

These regulations are promulgated under the authority of §§ 2002, 3001, 3002, and 3004 of the Solid Waste Disposal Act (SWDA) of 1970, as amended by the Resource Conservation and Recovery Act (RCRA) of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6921, 6922, 6923, and 6924.

II. Background

A. History and Summary of the Proposed Rule

This rulemaking is a culmination of many years of investigation and participation by EPA in efforts designed to better understand the challenges that the academic community faces when managing hazardous wastes generated in laboratories under the hazardous waste regulations. As discussed at length in the preamble to the proposed rule (see 71 FR 29715), these efforts include two Reports to Congress; a project under EPA's eXcellence and Leadership program (Project XL) with three colleges and universities in New England; a pilot project led by the Howard Hughes Medical Institute (HHMI) to develop and implement a performance-based approach to the management of laboratory waste at ten colleges and universities; and a public meeting on June 18, 2003, sponsored by EPA to discuss the management of hazardous waste in research and/or academic laboratories. (See the announcement of the public meeting at 68 FR 33121, June 3, 2003. The comments submitted to EPA in response to the public meeting are included in the docket for today's rulemaking.)

As a result of these and other efforts, on May 23, 2006, EPA proposed alternative generator requirements applicable to college and university laboratories that generate hazardous waste (71 FR 29712 [1]). This preamble will refer to the alternative generator requirements as ''Subpart K,'' because it establishes a new Subpart K of 40 CFR part 262. The proposed rule provided a flexible and protective set of regulations that addressed the specific nature of hazardous waste generation and accumulation in college and university laboratories. The proposed rule was optional and colleges and universities had the choice of managing their hazardous wastes in accordance with the proposed alternative Subpart K requirements or remaining subject to the existing generator regulations. Although the applicability of the proposed rule was limited to colleges and universities, the Agency requested comment on whether it would be appropriate to expand the applicability of the final rule to other organizations that also have research or teaching laboratories. In addition, since the Agency assumed that CESQGs would not want to be subject to the increased burden of Subpart K, the proposed rule was limited to colleges and universities that are SQGs and LQGs. However, we solicited comments on whether CESQGs should be allowed to be subject to Subpart K.

Throughout the years of working with academic institutions, EPA has heard consistently that the greatest challenge that academic institutions face in managing their laboratory hazardous wastes under the existing generator regulations is making the RCRA hazardous waste determination at the point of generation pursuant to 40 CFR 262.11 (i.e., determining whether their solid waste is hazardous waste and assigning the proper hazardous waste code(s) in the laboratory at the time the hazardous waste is generated). This is largely because the individuals in the laboratory generating the hazardous waste and other materials are students, who are often not trained to make a hazardous waste determination. We, therefore, proposed to remove the responsibility for the hazardous waste determination from the students in the laboratory and place it in the hands of trained environmental health and safety (EH&S) professionals. While the hazardous waste remains in the laboratory, we proposed that it would be referred to as ''unwanted material,'' since the hazardous waste determination had not yet been made and some portion of the unwanted materials may be unused and therefore still usable, or may not be hazardous waste when discarded. We proposed that while in the laboratory, the P-listed commercial chemical products that were listed for reactivity would be referred to as ''reactive acutely hazardous unwanted materials.'' In lieu of making the hazardous waste determination at the point of generation, the Agency proposed that the hazardous waste determination must be made prior to removing the unwanted materials from the laboratory (but not at the time the unwanted materials are first generated), or within four calendar days of arriving at an on-site central accumulation area (CAA) or on-site interim status or permitted treatment, storage, or disposal facility (TSDF).

The Agency also proposed that the unwanted materials would be regulated in the laboratory by performance-based container labeling and container management standards. These performance-based standards for the management of unwanted materials in the laboratory were coupled with a requirement for a Laboratory Management Plan (LMP). This combination provided flexibility by allowing the college or university to specify in its LMP how it would comply with the performance-based standards. The Agency co-proposed two options regarding the enforceability of the contents of the individual LMPs that colleges and universities developed. One option was that the contents of the LMP would be enforceable; the second option was that the contents of the LMP would not be enforceable.

Additionally, we proposed that all containers of unwanted materials would have to be removed from the laboratory on a regular basis, not to exceed six months. However, if a laboratory accumulated more than 55 gallons of unwanted material before the regularly scheduled removal, then all containers of unwanted material would have to be removed from the laboratory within ten calendar days. Likewise, if a laboratory accumulated more than 1 quart of reactive acutely hazardous unwanted material prior to the regularly scheduled removal, then the reactive acutely hazardous unwanted materials would have to be removed from the laboratory within ten calendar days.

Finally, to address the problem of laboratories keeping old, unneeded, or expired chemicals (i.e., ''legacy chemicals''), the Agency proposed regulatory provisions that would give colleges and universities incentives for conducting laboratory clean-outs: a

[1] Please see page 29716 of the preamble to the proposed rule for information on other EPA efforts to improve hazardous waste management at colleges and universities through compliance assistance centers and more.

laboratory clean-out could occur over a 30 day period, even if the 55-gallon limit of unwanted material was exceeded; and the hazardous waste generated during a laboratory clean-out would not have to be counted toward the college or university's generator status. However, we proposed that colleges and universities could only utilize the clean-out incentives once per 12 months per laboratory.

The comment period for the proposed rule was originally due to close on August 21, 2006. However, EPA received a request from the National Association of College and University Business Officers (NACUBO), on behalf of the American Council on Education (ACE), the Campus Safety Health and Environmental Management Association (CSHEMA), and the Campus Consortium for Environmental Excellence (C2E2) to extend the comment period for 45 days. On August 21, 2006, EPA extended the public comment period by 30 days (see 71 FR 48500). The comment period for the proposed rule closed on September 20, 2006.

The Agency received 111 comments on the proposed rule. Approximately two-thirds of the comments were from colleges and universities, or trade groups that represent colleges and universities. In general, colleges and universities were very supportive of the Agency's effort to address the challenges they face in complying with the RCRA hazardous waste regulations in their laboratories. However, many of these commenters also suggested specific changes to the rule. Thirteen States also submitted comments. Some States expressed support for the rule, while others were very skeptical of the need for the rule. Most of the rest of the comments were from organizations that were not eligible to participate in Subpart K, as proposed. These commenters, which included non-profit research organizations, commercial companies that conduct research and manufacture pharmaceuticals and other products, as well as several Federal governmental agencies, requested that the Agency expand the scope of the final rule to allow them to be subject to Subpart K. The more significant comments on the proposal are addressed later in this preamble, in section III, but all are addressed in the Response to Comments Document for today's final rule found in the docket at *http://www.regulations.gov* (EPA–HQ–RCRA–2003–0012).

B. Rationale of the Final Rule

In the proposal, the Agency discussed how the hazardous waste generation and management practices at college and university laboratories differ from both industrial production and industrial laboratory operations in several meaningful ways (see 71 FR 29714). These differences, which were confirmed by many of the commenters, provide the rationale for today's final rule.

Specifically, the Agency identified four primary differences between laboratory operations at colleges and universities and typical industrial production facilities. First, laboratories at colleges and universities have a large number of points of generation (i.e., points where waste is originally generated), such as multiple laboratory benchtops within a single laboratory and laboratories located at several areas on a single campus. Second, these laboratories tend to generate relatively small volumes of each hazardous waste at each of these points of generation. Third, the hazardous wastes generated in these laboratories tend to vary over time, as areas of research change. In contrast, industrial generators tend to have a different hazardous waste generation pattern; they tend to generate a smaller number of predictable wastestreams in large quantities at relatively few generation points. Fourth, and of particular note, is that most individuals involved in hazardous waste generation activities at college and university laboratories are students. Students are inherently transient, which makes it more difficult to train them. This fourth difference sets college and university laboratories apart not only from typical industrial production facilities, but also from non-academic, government and commercial R&D laboratories. At both industrial production facilities and non-college or university, commercial laboratories, employees who generate hazardous waste are professionally trained in managing hazardous wastes and are held accountable due to their employee status.

The proposal addressed challenges faced by colleges and universities that result from these differences, and proposed to establish a new, optional Subpart K under 40 CFR part 262 for making the hazardous waste determination, and accumulating and removing unwanted materials from laboratories at colleges and universities. Comments from colleges and universities and their trade associations confirm EPA's conclusion that differences in hazardous waste generation and management activities at laboratories at academic institutions warrant this alternative set of requirements. Because of these differences, the alternative generator requirements found in Subpart K are directed at the management of unwanted materials in the laboratory and not in other areas on the same site where hazardous waste may be generated or managed.

Therefore, today EPA is finalizing an alternative set of generator regulations for the management of hazardous waste generated in laboratories at specific types of academic facilities (i.e., eligible academic entities). Based on comments received on the proposed rule, as well as additional analysis, the Agency is finalizing the rule with some changes from the proposal. The Agency believes that today's final rule is better suited to the circumstances specific to these laboratories, and that it promotes environmental protection and public health through safer management of laboratory hazardous wastes.

C. Summary of the Final Rule

This section provides a brief overview of today's final rule and describes the major ways in which today's rule differs from the proposal. For a detailed description and justification of the changes in today's final rule, see Section III of today's preamble.

The final rule establishes a set of alternative generator regulations for laboratories owned by eligible academic entities under a new Subpart K in 40 CFR part 262. Eligible academic entities may choose to be subject to Subpart K in lieu of the existing generator requirements for the management of the hazardous waste generated in the laboratories that they own. Laboratories operating under Subpart K must comply with the performance-based standards, while the unwanted materials remain in the laboratory. The eligible academic entity also must develop an LMP that reasonably addresses the nine elements that are required to be part of the LMP and that describes how the eligible academic entity will comply with the performance-based standards. The final rule also provides incentives for eligible academic entities to conduct laboratory clean-outs of old, unneeded chemicals.

One of the major changes from the proposed rule found in today's final action is the Agency's decision to expand the applicability of the rule. Specifically, the scope of the final rule includes colleges and universities, non-profit research institutes that are owned by or have a formal written affiliation agreement with a college or university, and teaching hospitals that are owned by or have a formal written affiliation agreement with a college or university.

In addition, although the proposed rule specifically precluded laboratories

at colleges or universities that are CESQGs from choosing to be subject to Subpart K, the final rule allows laboratories that are owned by eligible academic entities that are CESQGs, SQGs or LQGs to operate under Subpart K. We also have modified the definition of laboratory, so that additional areas within an eligible academic entity, such as photo laboratories, field laboratories, and art studios are considered laboratories. In addition, chemical stockrooms and preparatory laboratories and other areas that provide a support function to research and teaching laboratories, are allowed to operate under Subpart K.

EPA recognizes that the details of hazardous waste management operations vary widely among campuses and some eligible academic entities have developed programs consistent with the existing generator regulations that have proven to be successful. Thus, these institutions may be reluctant to change from the generator regulations under which they are currently operating. Therefore, today's final rule, like the proposal, remains an optional, alternative set of requirements to the existing generator regulations and eligible academic entities may continue to manage their laboratory hazardous wastes under the current hazardous waste generator regulations. Eligible academic entities that would like the additional flexibility of today's rule may choose to manage their laboratory hazardous wastes according to the set of generator regulations we are finalizing today.

Public comments received on the proposed rule confirmed that the primary difficulty with managing laboratory hazardous wastes under current regulations is making the hazardous waste determination at the point of generation. As with the proposal, the final rule addresses this challenge by providing flexibility with regard to where and when the hazardous waste determination can be made (i.e., in the laboratory before it is removed from the laboratory, or within four calendar days of arriving at an on-site CAA, or on-site TSDF), provided all unwanted materials (as defined by the rule) that are generated in the laboratory are managed according to the requirements promulgated in today's rule.

EPA continues to stress that today's final rule does not alter or move the point of generation of any hazardous waste, but merely allows the hazardous waste determination to be made at an on-site CAA or on-site TSDF; or in the laboratory, but at a point in time after the initial generation of the waste. The point of generation of the hazardous waste continues to be the location and time at which the hazardous waste is first generated. Therefore, the applicability of the land disposal restrictions (LDRs) to hazardous wastes generated in the laboratory are not affected by today's rule and continue to ''attach'' at the point of generation of the hazardous waste. In addition, RCRA's statutory inspection and enforcement authorities continue to apply in the laboratory, even though under Subpart K the hazardous wastes are referred to as ''unwanted materials,'' while they remain in the laboratory.

Today's final rule maintains the proposed requirement that unwanted materials must be removed from the laboratory primarily on a time basis, and secondarily on a volume basis. That is, we are requiring that eligible academic entities conduct removals of unwanted materials from the laboratory on a regular basis, not to exceed six months, although we have included some additional flexibility. If a laboratory accumulates more than 55 gallons of unwanted material (including reactive acutely hazardous unwanted material) before the regularly scheduled removal, then all unwanted materials (including reactive acutely hazardous unwanted material) must be removed within ten calendar days. And if a laboratory accumulates more than 1 quart of reactive acutely hazardous unwanted material before the regularly scheduled removal, then the reactive acutely hazardous unwanted material must be removed from the laboratory within ten calendar days.

Another key issue identified by the academic community that we addressed in the proposal focused on incentives for discarding unneeded or expired chemicals that can accumulate in college and university laboratories and chemical store rooms. The academic community contends that the existing generator regulations result in discouraging laboratory clean-outs (because the increased quantities of hazardous waste generated can change the eligible academic entity's generator status) and therefore, laboratories often hold on to expired chemicals, some of which become dangerous over time. EPA believes that revising the regulations to encourage laboratories to remove legacy chemicals will result in greater protection of human health and the environment, as well as increased environmental compliance. Thus, an important part of this final rule is the laboratory clean-out provisions: once per 12 months per laboratory, a laboratory will have 30 days to conduct a clean-out and will not have to count the hazardous waste that consists of unused commercial chemical products (either listed or characteristic) generated during those 30 days towards the eligible academic entity's generator status.

As in the proposed rule, today's final rule pairs a performance-based approach for management of unwanted materials in the laboratory with a requirement for the eligible academic entity to develop and implement an LMP. We believe that a performance-based approach will allow eligible academic entities greater flexibility by allowing them to tailor their laboratory waste management program with respect to container labeling, container management, and training, while ensuring better environmental results. Like the proposal, under today's final rule, the LMP must describe how an eligible academic entity will meet the required provisions (i.e., the performance-based standards) by reasonably addressing all the required elements. However, unlike the proposal, the LMP under today's final rule must include two distinct parts (Parts I and II). The eligible academic entity must comply with the specific contents it includes in Part I of its LMP, while Part II will comprise the institution's best management practices (BMPs). Thus, EPA and authorized States may take enforcement action against an institution if it fails to meet the specifics of Part I of its LMP. However, EPA and authorized States may not take enforcement action if an institution's actions vary from the specific procedures contained in Part II of its LMP, but may take enforcement action if the institution fails to reasonably address all the required elements in Part II of its LMP.

In summary, the Agency believes that today's rule will lead to the safe management of unwanted materials and greater environmental protection by requiring that the RCRA hazardous waste determination be performed by trained personnel, rather than by untrained students. We also believe that today's final rule will promote the protection of human health and the environment by ensuring that all unwanted materials which may, in whole or in part, be RCRA hazardous wastes, are safely managed while in the laboratory prior to the time that the hazardous waste determination is made. In addition, EPA believes that the requirement to develop and implement an LMP will improve the coordination and integration of hazardous waste management procedures and enhance environmental awareness among researchers and students at eligible

academic entities, leading to a transfer of good environmental management practices to the larger community.

D. Effective Date of the Final Rule

This final rule is effective on December 31, 2008 section 3010(b) of RCRA allows EPA to promulgate a rule with an effective date shorter than six months where the Administrator finds that the regulated community does not need additional time to come into compliance with the rule. This rule is optional for those eligible academic entities that choose to follow it. For those entities, this rule provides an alternative set of requirements that are intended to provide them flexibility from current applicable regulations. Therefore, the Agency finds that the regulatory community does not need six months to come into compliance.

III. Detailed Discussion of the Final Rule

Today, EPA is publishing a final rule establishing alternative regulations (40 CFR part 262, Subpart K) for the management of unwanted materials generated in laboratories in eligible academic entities. This section discusses in detail the major features of the final rule and the rationale for the changes made from the proposal to today's final rule.

In today's final rule and preamble, we introduce and use several new terms. We are including here a brief description of how we will use the terminology in today's preamble. First, we will use the terms ''choose to become subject to,'' ''participate under,'' ''operate under'' and ''opt in'' to Subpart K interchangeably. Second, the regulations require that in order to be eligible to opt into Subpart K, a non-profit research institute must be owned by or have a formal written affiliation agreement with a college or university, and a teaching hospital must be owned by or have a formal written affiliation agreement with a college and university. In the preamble, we will generally refer to eligible academic entities other than colleges and universities as non-profit research institutes and teaching hospitals that are owned by or formally affiliated with a college or university.

Third, many eligible academic entities have multiple EPA Identification Numbers for different sections of the same ''campus,'' typically because the sections of the eligible academic entity are separated by public roads. When referring to the individual sections of an eligible academic entity, we will use the term ''site'' or ''EPA Identification Number.'' When referring collectively to all the sections of the eligible academic entity, we will use the term, ''campus,'' or ''eligible academic entity,'' or ''institution.'' As an example, when an eligible academic entity opts into Subpart K for its laboratories, it must notify the Agency for each EPA Identification Number on a campus that is opting in.

A. Scope of Eligible Academic Entities Covered Under the Final Rule

EPA proposed that this alternative set of generator regulations would apply only to laboratories at colleges and universities. As discussed in section II.A of today's preamble, EPA has had a long history of interaction with colleges and universities. From these interactions, the Agency has learned about the unique hazardous waste generation pattern in teaching and research laboratories at colleges and universities. However, EPA recognized that there may be additional types of facilities with laboratories that may fit the rationale for Subpart K. Thus, while the proposal was limited to colleges and universities, EPA solicited comment on whether to expand the scope of the final rule to other institutions that fit the rationale of Subpart K.

Public comments from trade groups, such as the Association of American Medical Colleges (AAMC), the Association of Independent Research Institutes (AIRI), the Campus Safety Health and Environmental Management Association (CSHEMA), and individual comments submitted by non-profit research institutes, teaching hospitals, private research and development companies, governmental research laboratories, and colleges and universities with teaching hospitals and/or non-profit research institutes all asserted that their research laboratories fit the hazardous waste generation pattern rationale of today's rule. That is, these commenters assert that given the nature of research, research laboratories share the same hazardous waste generation patterns, regardless of what type of institution they are found in. In addition, EPA has conducted site visits in various research laboratories at teaching hospitals and private R&D companies, among others, and has seen similar hazardous waste generation patterns and activities of these laboratories.

Based on the comments EPA received and additional research by EPA regarding the presence of students in laboratories at institutions other than colleges and universities, we have expanded the scope of the final rule to include specific additional entities that fit all aspects of the rationale for this rule. This rationale includes not only a hazardous waste generation pattern that is similar to that found at college and university laboratories, but also a significant student population. EPA did not expand the scope of the final rule to include certain entities because they did not fit all aspects of the rationale for this rule. Therefore, today's final rule allows colleges and universities, teaching hospitals that are owned by or have a formal written affiliation agreement with a college or university, and non-profit research institutes that are owned by or have a formal written affiliation agreement with a college or university, to opt into Subpart K. This expansion includes laboratories at facilities that we and many commenters believe are closely integrated with laboratories at colleges and universities. Collectively, we are calling the entities that are eligible to opt into today's final rule, ''eligible academic entities.'' Details on these entities are contained in the following sections. (For information regarding changes to the definition of laboratory, see section III.B.2 and § 262.200.)

1. Hazardous Waste Generation Data

In the preamble to the proposed rule, we stated that 9% of the hazardous waste generated at college and university LQGs was from laboratories. We received several comments from colleges and universities asserting that we erred in our estimates and that at their campuses, laboratory hazardous waste constituted a much higher percentage of their total hazardous waste. The Agency sent follow-up letters to several commenters requesting additional information in support of their comments. In response to our inquiries, many of the commenters supplied detailed information about their hazardous waste generation and one commenter provided a detailed analysis of our methodology for determining the percentage of laboratory hazardous waste, including specific suggestions on how to improve the methodology for the final rule. The follow-up letters and the responses are all included in the docket for today's rule.

As a result of these comments, EPA has significantly revised the methodology used in the proposal to determine the total quantity of hazardous waste and laboratory hazardous waste. Specifically, in the proposal, we used key-word searches of the description field on Biennial Report (BR) forms to identify laboratory hazardous waste as a percent of the total hazardous waste generated. Our revised methodology uses three source codes

from the BR to identify which hazardous wastes are from laboratories:

(1) G11—Discarding off-specification or out-of-date chemicals or products (unused chemicals or products—corresponds to P and U hazardous waste codes);

(2) G22—Laboratory analytical wastes (used chemicals from laboratory operations), and

(3) G09—Other production or service-related processes from which the waste is a direct outflow or result. (Because hazardous waste from the source code G09 could also be generated in non-laboratory operations, these wastes were only considered laboratory wastes if the waste form codes indicated it was shipped in a lab pack (i.e., waste form codes W001 or W004)).

Additional laboratory wastes were identified using key-word searches of the description field. This revised method resulted in a much higher estimate for laboratory hazardous waste as a percent of total hazardous waste at colleges and universities—73% under the revised methodology, compared to 9% under the original methodology used in the proposed rule. This revised methodology was used to calculate the amount of laboratory hazardous waste generated as a percent of the total hazardous waste generated for colleges and universities, as well as for other types of facilities with laboratories that we considered including in today's final rule: teaching hospitals, non-profit research institutes, governmental research laboratories, and commercial R&D laboratories. For a full explanation of the methodology used to determine the amounts of total hazardous waste and laboratory hazardous waste generated at colleges and universities, teaching hospitals, and non-profit research institutes, see the memo entitled, Lab Rule Data Analyses, from ICF International to Patricia Mercer, May 1, 2008; and for hazardous waste information for LQG government research laboratories and LQG commercial R&D laboratories see the memo entitled, Final Analyses of College and University Laboratory Hazardous Waste, from ICF International to Patricia Mercer, August 17, 2007. Copies of both memos are in today's docket.

Below is a table of the hazardous waste data for eligible academic entities (i.e., those entities eligible to opt into Subpart K) that are LQGs. Using the revised methodology, we now estimate that for college and university LQGs, 73% of their total hazardous waste is from laboratories. The percent of hazardous waste coming from laboratories at teaching hospitals and non-profit research institutes is even higher—81% and 92%, respectively. Further, with all three types of eligible academic entities, nearly all LQGs generate laboratory hazardous waste.

	Colleges and universities	Teaching hospitals [1]	Non-profit research institutes [2]
# LQGs generating laboratory hazardous waste	286	104	8
# LQGs generating hazardous waste	293	109	8
% that generate laboratory hazardous waste	98	95	100
Tons of laboratory hazardous waste	6,530	1,712	119
Tons of all hazardous waste [3]	8,951	2,119	130
% of hazardous waste that is laboratory hazardous waste	73	81	92

[1] To be eligible to opt into Subpart K, a teaching hospital must be owned by or have a formal written affiliation agreement with a college or university

[2] To be eligible to opt into Subpart K, a non-profit research institute must be owned by or have a formal written affiliation agreement with a college or university

[3] Excludes remediation wastes because remediation wastes are not regularly generated hazardous wastes, but rather are hazardous wastes generated only when a clean-up or remediation project takes place.

As discussed above, based on EPA's observations, as well as comments that we have received and given the nature of teaching and research, activities conducted at teaching and research laboratories in colleges, universities, teaching hospitals, and non-profit research institutes are comparable and therefore share similar hazardous waste generation patterns. EPA identified challenges associated with the specific hazardous waste generation patterns, such as difficulty making hazardous waste determinations with a large variety of wastestreams. These difficulties, along with the difficulties associated with the presence of a significant student population, form the basis of this rule. Even at proposal, when we estimated that 9% of a college or university's hazardous waste was generated in the laboratory, we believed that these challenges were sufficient to warrant the development of Subpart K. With the revised estimates indicating that the percentage of hazardous waste generated in laboratories by eligible academic entities being much higher, these specific challenges are shown to be even more pervasive and support the need for the flexibility offered by Subpart K for these particular entities.

Given that these types of organizations with research and teaching laboratories share similar hazardous waste generation patterns, we focused on the extent to which these entities had a significant student presence, which is a very important basis of today's rule. Because students are inherently transient, and generally have less accountability than professionals employed in laboratories, it is unlikely that they will make a proper hazardous waste determination which requires detailed knowledge of RCRA. The following discussion of which entities are and are not eligible to opt into today's rule focuses on whether there is a significant student presence. However, there are limited data readily available about the number of students in laboratories even at colleges and universities much less for entities, such as teaching hospitals and non-profit research institutes. Thus, we used certain factors as indications that the organization did indeed have students in the laboratories. Examples of factors indicating student presence include programs for high school, undergraduate, or graduate students to conduct laboratory research, presence of medical residents/interns, co-sponsored degree programs with colleges or universities, or classes offered independent of the college or university.

2. Laboratories Owned by Teaching Hospitals

In the proposal, EPA specifically requested comment on whether laboratories in hospitals affiliated with colleges or universities should be included in the final rule. Previously, information about hospital laboratories led EPA to believe that their wastestreams are fairly routine and they

did not have the same challenges faced by college or university laboratories in training their workers. Through comments, EPA learned that many teaching hospitals owned by or formally affiliated with a college or university have research and teaching laboratories in addition to diagnostic laboratories dedicated to patient care. As stated earlier, research laboratories at teaching hospitals have similar hazardous waste generation patterns as research laboratories on a college or university campus. In addition, such teaching hospitals have students working in the laboratories to learn how to run various tests, how to operate equipment, or to conduct research with professors.

In fact, one commenter asserted that, ''these types of laboratories [laboratories at college or university affiliated hospitals and other similar locations such as dental colleges, clinics and associated laboratories] are very similar to instructional and research laboratories. They are used by a large number of students; they are used for instructional and research purposes; while some processes are static and predictable, others are not; large numbers of different wastestreams are produced, but in relatively small quantities.'' Another commenter wrote, ''Research labs in a hospital are essentially the same as a research lab in a college or university and have similar waste generation patterns.''

Based on these comments, EPA conducted additional research into the types of laboratories that are present at teaching hospitals that are owned by or formally affiliated with a college or university. In particular, EPA identified three types of laboratories: (1) Clinical diagnostic laboratories that conduct typical laboratory tests related to patient care, (2) applied research laboratories that conduct clinical trials and (3) research laboratories that conduct basic medical research. While strictly speaking, clinical diagnostic laboratories may not exhibit the hazardous waste generation pattern identified in the rationale for this rule, we found that the setup in teaching hospitals makes it difficult to draw hard distinctions between the various types of laboratories. That is, each teaching hospital divides its laboratory space differently and oftentimes a single laboratory serves multiple functions, such as both diagnostic testing and research. Furthermore, in some cases, laboratory personnel perform multiple functions within a laboratory and are involved with both diagnostic and research activities. Thus, EPA has determined that it would be extremely difficult to implement a rule that made a distinction between the various types of laboratories at such teaching hospitals.

The Agency also analyzed data from the BR which are sent to the Agency every other year by LQGs and housed in EPA's RCRAInfo database, to find out more about the universe of non-teaching and teaching hospitals owned by or formally affiliated with a college or university and their hazardous waste generation patterns. Notably, one of the main differences between the hazardous waste generation patterns at LQG teaching hospitals owned by or formally affiliated with a college or university and non-teaching hospitals is in the amount of laboratory hazardous waste as a percentage of the total amount of hazardous waste generated. Specifically, teaching hospitals showed approximately 80% of the total quantity of hazardous waste generated coming from laboratories, while non-teaching hospitals only had 13% of the total quantity of hazardous waste generated coming from laboratories. EPA attributes this disparity to be the result of the greater amount of research generally occurring in teaching hospitals owned by or formally affiliated with a college or university.

In terms of the transient students, EPA has learned from its research that teaching hospitals instruct a variety of students—interns, residents, nursing students, laboratory technicians, and more, in the hospital. Instruction of these students includes work in the laboratories to learn about the processes and tests conducted there, introducing similar difficulties as those encountered at colleges and universities in teaching and training transient students and making the hazardous waste determination. In fact, one commenter asserted that, ''the amount of time a student spends at a teaching hospital is comparable to that of a graduate student in another laboratory discipline.'' Also, medical research at a college and university oftentimes is shared between the college and university laboratories and teaching hospital laboratories. One commenter pointed out that professors, graduate students, and undergraduate students often go back and forth between laboratories at colleges and universities, and at teaching hospitals, to conduct research.

EPA recognizes that a teaching hospital that is owned by a college or university will instruct students from its medical school. However, due to the complex healthcare system, many times medical students or residents from a medical school will train in a teaching hospital that is affiliated with a college or university, but not owned by the college or university. We do not want to preclude these teaching hospitals that are training students and have a significant transient student population from participating in Subpart K. Therefore, EPA looked for a way to define the concept of ''affiliated teaching hospital.'' We discovered that the Accreditation Council for Graduate Medical Education (ACGME) defines two types of agreements between a medical school and a teaching hospital: A master affiliation agreement and a program letter of agreement.[2] EPA has determined that the presence of both these agreements indicates that a teaching hospital is formally affiliated with a college or university.

Based on the evidence provided by commenters and additional EPA research, we have concluded that teaching hospitals owned by or formally affiliated with a college or university fit within all aspects of the rationale of today's final rule: many hazardous wastes that vary over time are generated in small quantities at many points of generation, and there is a significant and transient student population that is not familiar with the RCRA hazardous waste requirements. Therefore, EPA is allowing teaching hospitals, as defined in this final rule that are either owned by or have a formal written affiliation agreement with a college or university, to opt into Subpart K for their laboratories. (See section III.B.3 for a discussion of the definition of teaching hospital and formal written affiliation agreement or § 262.200.)

3. Laboratories Owned by Non-profit Research Institutes

EPA received many comments from representatives of non-profit research institutes, colleges and universities, and trade groups stressing the similarities between college and university laboratories and the laboratories at non-profit research institutes in terms of the hazardous waste generation pattern rationale identified in the rule and the student presence in the laboratories. As indicated above, a research laboratory at a non-profit research institute that is owned by or has a formal written affiliation agreement with a college or university shares the same hazardous waste generation pattern.

[2] The ACGME defines these terms in the ''Glossary of Terms'' that appears on its Web site at *http://acgme.org/acWebsite/about/ab_ACGMEglossary.pdf.* The ACGME also describes these documents in more detail in a document called Frequently Asked Questions Related to Master Affiliation Agreements and Program Letters of Agreement that appears on its Web site at *http://acgme.org/acWebsite/about/ab_FAQAgreement.pdf.*

In terms of the presence of a significant transient student population, one commenter explained that as a non-profit research institute, it has close ties with the local university; they collaborate with the university on projects and faculty hold joint appointments. The commenter added that students and researchers often travel between the non-profit's laboratories and the local university's laboratories and that because the hazardous waste management requirements at both institutions are the same under the existing generator regulations, currently there are minimal differences in hazardous waste management for the students and researchers to learn when working at both institutions. Thus, the commenter requested that EPA add non-profit research institutes to the final rule in order to minimize confusion and training challenges under Subpart K.

In response to these comments, EPA conducted additional research and identified from the BR information housed in the RCRAInfo database, nine non-profit research institutes that are LQGs (see section III.A.1 for information on their hazardous waste generation). For all nine LGG non-profit research institutes, we were able to obtain readily available information on student populations and programs, as well as substantial evidence that non-profit research institutes are similar to colleges and universities in that they sometimes grant degrees of their own, co-sponsor degrees with colleges and universities, teach classes, and share faculty, funding sources, and laboratory space with colleges and universities. We determined that the information obtained is generally representative of the universe of laboratories at non-profit research institutes, because among the non-profits we researched, we found that their hazardous waste generation patterns and student programs were remarkably homogenous.

One commenter wrote, ''* * * the distinction between a research laboratory in a college and university and a research laboratory in an institution that is not a college and university has blurred considerably over the last decade.'' As EPA conducted additional study into non-profit research institutes, it was difficult for the Agency to draw a hard line between college and universities and non-profit research institutes. For example, Memorial Sloan-Kettering Cancer Center (MSKCC) is a non-profit cancer research institute, a teaching hospital, a graduate school in biomedical sciences, and is in partnership with the Weill Cornell Graduate School of Medical Sciences and Cornell University to train students in research and patient care. MSKCC also partners with New York-Presbyterian Hospital, the Hospital for Special Surgery, and the Rockefeller University. Via these partnerships, the majority of the faculty of the Weill Cornell Medical Graduate School of Medical Sciences has their research laboratories and other facilities located within the Weill Cornell Medical College-New York-Presbyterian Hospital Complex and the MSKCC's research laboratory buildings. Another outgrowth of this partnership is that MSKCC jointly administers a Ph.D. program with Cornell and Weill Medical College in computational biology and medicine. Finally, besides its own graduate school of biomedical sciences, MSKCC offers two certificate programs for students to learn cytotechnology and radiation therapy.

As shown in the example above, a non-profit research institute owned or formally affiliated with a college or university may be so closely associated with the college and university that excluding them will prevent colleges and universities from establishing one laboratory waste management system, introducing confusion among researchers working in laboratories at both institutions. In this situation, such non-profit research institutes are virtually identical to a college and university and their hazardous waste generation patterns and student presence fit within the rationale of this rule. This information made it clear to us that non-profit research institutes often are ''academic'' and should be eligible to opt into today's final rule, when they are owned by or formally affiliated with a college or university.

One commenter recommended that EPA expand the scope of the rule to any institution that has a formal affiliation with a college or university. While the Agency does not believe it should expand the scope of the rule to all institutions that have any kind of an affiliation with a college or university, we do believe it is appropriate to allow those non-profit research institutes that have a formal written affiliation agreement with a college or university to opt into Subpart K. In order to ensure that the formal written affiliation agreement between the two entities represents an affiliation that is longstanding, we believe that the affiliation must be at the institutional level, as opposed to an agreement between staff or professors at the two eligible academic entities. Of the nine non-profit research institutes that are identified as LQGs in the BR, we determined that eight had formal affiliations with colleges and universities on an institutional level. For example, the Burnham Institute not only administers its own graduate program, it also has an institutional affiliation with the University of California at San Diego by participating in a joint graduate training program in molecular pathology (where approximately 30 graduate students a year obtain their primary scientific training at the Institute).

The reason we are requiring a formal written affiliation agreement at the institutional level is because having a formal affiliation at the institutional level with a college or university seemed to increase the likelihood that the non-profit research institutes would have students in their laboratories. The presence of a significant transient student presence is an important rationale of today's rule. Typically, a formal affiliation at the institutional level allows students at a college or university to conduct thesis research at the non-profit research institute, use non-profit researchers as mentors, and at times, take some of their degree classes at the non-profit research institute. Further, requiring a formal written affiliation agreement between the non-profit research institute and a college or university will assist the implementing agency verify that an affiliation at the institutional level exists. Thus, for these reasons, we decided to limit today's rule to those non-profit research institutes that have a formal written affiliation at the institutional level with a college or university. For a discussion of the definition of ''formal written affiliation agreement,'' see section III.B.3 of this preamble or § 262.200.

4. Laboratories Owned by Eligible Academic Entities That Are Conditionally Exempt Small Quantity Generators (CESQGs)

EPA recognizes that laboratories at eligible academic entities that are CESQGs share the same hazardous waste generation patterns as laboratories at larger generators, except the eligible academic entities that are CESQGs generate smaller quantities of hazardous waste. However, while laboratories at CESQGs fit within the rationale used to define the scope of this rule, the proposal did not allow them to opt in. At the time of the proposal, we had thought CESQGs would not want to opt into Subpart K since they currently are not subject to the controls that apply to satellite accumulation areas (SAAs) and do not have to comply with most of the other requirements that apply to LQGs and SQGs. In fact, many of the

provisions in today's final rule would be more stringent than those to which they are currently subject under § 261.5. At proposal, we solicited comment on whether the final rule should include laboratories at CESQGs.

Numerous commenters indicated that we should provide CESQGs with the same opportunity as SQGs and LQGs to assess which set of generator regulations is most appropriate for their laboratories and that we should not prohibit them from opting into Subpart K. Additionally, many comments from colleges and universities indicated that laboratory management would improve if their CESQG sites with laboratories could operate under this rule and follow the required LMP. Further, commenters explained that since colleges and universities often have CESQG sites, as part of a larger campus, a college or university may want to be able to manage all of its laboratories under one management system and that EPA should allow CESQGs to participate in Subpart K. This issue is particularly pertinent for urban college and university campuses that are divided by public roads. One campus can potentially include many separate generator sites, some LQGs, some SQGs, and some CESQGs. In light of the comments received, EPA agrees that it makes sense that at least some CESQGs would want to opt into Subpart K. Thus, EPA is allowing eligible academic entities to opt into Subpart K for their CESQG sites and is allowing stand-alone CESQGs to opt into Subpart K, as well. CESQG sites at an eligible academic entity may include field laboratories and small laboratories separated from the main campus by public roadways. In addition, we expect that some eligible academic entities that are themselves CESQGs (i.e., stand-alone CESQGs), such as small non-profit research institutes, may choose to opt into the rule to take advantage of the clean-out provisions.

Other commenters argued that the rule would encourage better environmental performance by extending the laboratory clean-out provisions to eligible academic entities that are themselves CESQGs or have CESQG sites without requiring them to comply with the rest of the Subpart K requirements. EPA agrees that stand-alone CESQGs and CESQG sites that are part of a larger eligible academic entity will benefit by removing legacy chemicals from the laboratory by taking advantage of the clean-out incentives of today's rule. However, EPA is not allowing a stand-alone eligible academic entity or a CESQG site that is part of a larger eligible academic entity to partake only in the laboratory clean-out provisions and not the other Subpart K requirements because this would prevent CESQGs from taking advantage of the two main benefits of today's final rule. That is, if a CESQG site only participated in the laboratory clean-out provisions, it would not be able to take advantage of the flexibility in where and when to make the hazardous waste determination. Second, if a CESQG site that is part of a larger eligible academic entity only participated in the laboratory clean-out provisions, it would be unable to establish one hazardous waste management system in all the laboratories at the eligible academic entity. The ability to establish a unified hazardous waste management system for all laboratories is one of the priorities cited by academic commenters. Therefore, in order for a CESQG site at an eligible academic entity or an eligible academic entity that is itself a CESQG to take part in the laboratory clean-out incentives, the eligible academic entity must opt into Subpart K in its entirety and follow the management standards for unwanted materials in the laboratories.

5. Facilities With Laboratories Not Eligible To Participate in Subpart K

As explained above, EPA solicited comment on whether to expand the scope of the rule beyond laboratories at colleges and universities to laboratories at other types of facilities. Many commenters supported expansion of the scope of the rule. We received comments from both government research laboratories and commercial R&D laboratories requesting to be included in this rulemaking. Overall, from the information available at this time, it appears that laboratories at both of these types of facilities have hazardous waste generation patterns similar to laboratories at colleges and universities—generating small quantities of many types of waste that vary over time at many points of generation—since they are research laboratories. However, information about the other key aspect of the rationale for today's rule, that is, significant student presence, has led EPA to determine that, at this time, laboratories at government research and commercial R&D facilities are not eligible to participate in Subpart K.

(a) Government Research Laboratories: We received comments from a number of governmental organizations that have research laboratories requesting that they be allowed to participate in (or opt into) Subpart K. These commenters, all from the Federal government, asserted that they fit the hazardous waste generation pattern explained by EPA as part of the rationale for Subpart K. In addition to the public comments, EPA collected readily available information on hazardous waste generation patterns and student presence in government research laboratories. From EPA's BR on hazardous waste generated by LQGs, we identified 39 LQG government research laboratories. In addition, in its comments on the proposal, one Federal agency provided student numbers for ten of its laboratories, three of which we have identified as LQGs. We also acquired aggregated student numbers or estimates for three other Federal agencies. We were unable to obtain student population data at laboratories at the remaining government research laboratories, including State and local governmental laboratories. Based on this lack of available information, EPA has decided to defer our decision on government research laboratories and therefore, government research laboratories are not included in this final rulemaking. Rather, in 2009, EPA expects to prepare a **Federal Register** Notice soliciting additional information about government research laboratories, particularly the presence of students at such research laboratories in order to make a more informed decision regarding whether or not to allow them to opt into Subpart K in the future.

(b) Commercial R&D Laboratories: EPA requested comment on whether private laboratories fit within the rationale of Subpart K and received comments from pharmaceutical companies, engineering companies, and a utility solid waste activity group, all requesting to be included in Subpart K because their laboratories fit within the rationale of the hazardous waste generation pattern. Based on these comments and responses to follow-up letters to commercial research and development laboratories (copies of which are in today's docket), it appears that there is a similar hazardous waste generation pattern (*i.e.*, small amounts of many different types of waste generated at multiple points of generation) as at laboratories at colleges and universities. However, there is little evidence of student presence in these laboratories as indicated in the follow-up responses from commenters and EPA's own research. Without the presence of students, commercial R&D laboratories do not have the same challenges in making hazardous waste determinations for their laboratory hazardous wastes and in training their laboratory personnel. Having similar hazardous waste generation patterns is

only one element in determining which entities should be eligible to opt into Subpart K. EPA believes that having a significant student presence in the laboratories (which increases the difficulty in training and in making hazardous waste determinations) is extremely important. Therefore, without meeting the rationale that a significant number of students must be present, EPA has decided not to allow commercial R&D laboratories to opt into Subpart K.

6. Non-Laboratory Facilities at Eligible Academic Entities

The Agency received many comments requesting that the rule address all types of facilities at a college or university where hazardous waste is generated, rather than limiting the rule to teaching and research laboratories. Commenters requested that non-laboratory areas, such as vehicle maintenance shops, machine shops, maintenance shops, fabrication units, athletic departments, power plants/energy generation units, print shops, and facilities operations be included in the scope of the final rule. Some commenters suggested that we include these areas by modifying the definition of laboratory to include them. Other commenters stated that creating a dual regulatory system for hazardous waste management on college or university campuses would hinder their participation in Subpart K and ultimately be confusing.

While the Agency understands the concerns raised by the commenters, we also believe that the Subpart K requirements were developed to address specific concerns raised by the academic community as they relate to hazardous wastes generated in their laboratories—that is, the situations and challenges that exist in teaching and research laboratories are unique (e.g., having to identify which of the potentially hundreds of different wastestreams meet the definition of hazardous waste). The academic community has not raised such concerns about the hazardous wastes generated outside of the laboratories. For this reason, we believe it is inappropriate to expand the scope of the rule beyond laboratories at eligible academic entities.

B. Discussion of Definitions

All of the definitions that appear in today's final rule are only for the purposes of 40 CFR part 262, Subpart K. Therefore, the definitions are relevant only to the eligible academic entities that have laboratories and choose to be subject to the provisions of today's final rule. This section discusses: (1) Those definitions that were proposed and have not changed since the proposal; (2) those definitions that were proposed, but have been modified based on comments received on the proposal; and (3) any new definitions that are being added, based on modifications to the final rule or comments on the proposed rule.

1. Definitions That Have Not Changed From the Proposed Rule

The following definitions have not been changed from the proposal. In general, we received few comments on these definitions and the comments we received on these definitions were supportive. Refer to the preamble from the proposed rule for a detailed discussion of these definitions (71 FR 29722).

College/University means a private or public, post-secondary, degree—granting, academic institution, that is accredited by an accrediting agency listed annually by the U.S. Department of Education.

Laboratory clean-out means an evaluation of the inventory of chemicals and other materials in a laboratory that are no longer needed or that have expired and the subsequent removal of those chemicals or other unwanted materials from the laboratory. A clean-out may occur for several reasons. It may be on a routine basis (e.g., at the end of a semester or academic year) or as a result of a renovation, relocation, or change in laboratory supervisor/occupant. A regularly scheduled removal of unwanted material as required by § 262.208 does not qualify as a laboratory clean-out.

Laboratory worker means a person who handles chemicals and/or unwanted material in a laboratory and may include, but is not limited to, faculty, staff, post-doctoral fellows, interns, researchers, technicians, supervisors/managers, and principal investigators. A person does not need to be paid or otherwise compensated for his/her work in the laboratory to be considered a laboratory worker. Undergraduate and graduate students in a supervised classroom setting are not laboratory workers.

Commenters pointed out that the definition of ''laboratory worker'' in the preamble to the proposed rule differed slightly from the definition in the proposed regulatory text. In the definition included the regulatory text, the last sentence of the definition included the words ''Undergraduate and graduate'' when referring to students. However, the definition included in the preamble discussion omitted the words ''Undergraduate and graduate.'' Today, we are finalizing the definition, as it was proposed, so that the final sentence reads, ''Undergraduate and graduate students in a supervised classroom setting are not laboratory workers.''

It is worth noting that EPA would consider undergraduate or graduate students in an unsupervised research setting to be laboratory workers. Additionally, any student performing duties of a trained professional, such as transferring unwanted materials and hazardous wastes outside of a laboratory, would be considered a trained professional, rather than a student.

2. Definitions That Have Changed From the Proposed Rule

This section discusses comments on the definitions that were included in the proposed rule, as well as the changes that have been made to these definitions in today's final rule.

Central accumulation area—The Agency proposed to define ''central accumulation area'' as: an on-site hazardous waste accumulation area subject to either § 262.34(a) of this Part (large quantity generators) or § 262.34(d) of this Part (small quantity generators). A central accumulation area at a college or university that chooses to be subject to this subpart must also comply with § 262.211 when accumulating unwanted material.

The Agency has made three minor changes to the proposed definition of central accumulation area (CAA). First, we added a reference to the hazardous waste accumulation area regulations that are applicable to Performance Track members. There are currently three Performance Track members that would likely qualify as eligible academic entities (the MD Anderson Cancer Center, the University of Texas Medical Branch, and Washington State University), and we did not intend to imply that these eligible academic entities could not opt into Subpart K when we omitted a reference to the hazardous waste accumulation area regulations of § 262.34 that pertain to them.

The second change is to make more complete the reference to the hazardous waste accumulation area regulations for SQGs. The proposed definition referred only to § 262.34(d), which among other things, allows 180 days or less for the on-site accumulation of hazardous waste. However, SQGs also have the option of complying with § 262.34(e), which allows them to accumulate hazardous waste on-site for 270 days or less, if they must send their hazardous waste more than 200 miles for treatment, storage or disposal. In

addition, SQGs are subject to § 262.34(f), which states that if more than a total of 6000 kg of hazardous waste is accumulated on-site, the generator is a storage facility that is subject to the requirements for TSDFs. The third change was made to reflect the expansion of the applicability of the final rule beyond colleges and universities to eligible academic entities.

The definition of ''central accumulation area'' in the final rule is:

> an on-site hazardous waste accumulation area subject to either § 262.34(a) (or 262.34(j) and (k) for Performance Track members) of this part (large quantity generators); or § 262.34(d)–(f) of this part (small quantity generators). A central accumulation area at an eligible academic entity that chooses to be subject to this subpart must also comply with § 262.211 when accumulating unwanted material and/or hazardous waste.

Laboratory—The Agency proposed to define ''laboratory'' as:

> an area within a college or university where relatively small quantities of chemicals and other substances are used on a non-production basis for teaching or research purposes and are stored and used in containers that are easily manipulated by one person. An area where the same hazardous wastes are routinely generated, such as photo processing, is not a laboratory.

In response to comments and as a result of the expansion of scope of the final rule, the Agency has made several changes to the definition of laboratory. Specifically, the Agency has made two changes to reflect the expansion of scope, as discussed in section III.A of today's preamble. The first is to change the phrase ''colleges and universities'' to the phrase ''eligible academic entities.'' The second change is to indicate that clinical diagnostic laboratories at teaching hospitals are included within the scope of the final rule, as well as teaching and research laboratories at all eligible academic entities. This change is being made due to the expansion of the scope to include teaching hospitals.

As discussed in section III.A.2 of today's preamble, the Agency believes, and commenters have supported the conclusion, that it is the research laboratories at a teaching hospital that are most similar to laboratories at colleges and universities in their hazardous waste generation patterns. However, we realize that it would be confusing and difficult for institutions to implement today's rule if the research laboratories at a teaching hospital were allowed to operate under Subpart K, but diagnostic laboratories at the same teaching hospital were not allowed to operate under Subpart K. In fact, some commenters have indicated that in many cases at teaching hospitals, it is not possible to distinguish a research laboratory from a clinical laboratory because they share physical space and staff. Therefore, the Agency has amended the definition of laboratory to include clinical diagnostic laboratories at teaching hospitals so that unwanted materials from all of the laboratories at a teaching hospital can be managed under the same management standards.

In addition, in response to numerous comments, the Agency has deleted the last sentence from the proposed definition of laboratory: ''An area where the same hazardous wastes are routinely generated, such as photo processing, is not a laboratory.'' The reason the Agency originally included this statement in the proposed definition is that part of our basis for proposing this rule is that laboratories at colleges and universities, unlike other types of hazardous waste generators, generate many different types of wastes that vary over time. However, based on the comments received, we believe it is no longer appropriate to include this sentence for the following reasons. First, comments indicated that some photo laboratories do, in fact, generate many wastestreams that vary over time—this is especially true when the photo laboratories are art studios where students may be experimenting with different photographic techniques, such as daguerreotype and calotype finishing.

Second, commenters pointed out that it is not unusual for an individual research laboratory to generate the same hazardous waste routinely for lengthy periods of time, as it focuses on a single area of research. Additionally, commenters pointed out that teaching laboratories can have an experiment that is part of the ongoing curriculum and that generates the same hazardous wastes each semester. We did not intend to create a system whereby some laboratories at the eligible academic entity would be eligible and some would not, based on the hazardous waste generation pattern of each individual laboratory. To the contrary, for ease of implementation and enforcement, if the eligible academic entity chooses to be subject to Subpart K, the Agency is requiring that all laboratories covered under an individual EPA Identification Number must operate under those provisions. Therefore, we believe that it is sufficient that an eligible academic entity's laboratories, as a category, rather than each laboratory, generate many different wastes every day.

Third, based on comments and follow-up discussion, we now understand that in many cases photo processing takes place alongside teaching and research and that it would be difficult to regulate differently the various laboratory operations, as the same students and laboratory workers operate in both areas. Therefore, we have revised the definition of laboratory to include photo laboratories.

The Agency also received many comments suggesting that the definition of laboratory should include chemical stockrooms, preparatory laboratories and other areas ancillary to the laboratory. EPA agrees with these commenters that the definition of laboratory should include chemical stockrooms and preparatory laboratories and other areas that provide a support function to teaching or research laboratories (or diagnostic laboratories at teaching hospitals). The reason for this change is that the operation of these areas is well integrated with the operation of the laboratories; that is, they are often in close proximity to the laboratories, and share laboratory personnel, and thus should properly be viewed as part of the laboratory. Chemical stockrooms that are not associated with laboratory operations would not, however, be eligible to operate under Subpart K. For example, a chemical stockroom that stores cleaning chemicals or pesticides for maintenance at the facility would not be providing a support function to a laboratory and would not be considered a laboratory that is allowed to operate under Subpart K.

The Agency also agrees with commenters that field laboratories should be considered laboratories because we agree that field laboratories, like other laboratories under this rule, exhibit similar hazardous waste generation patterns. By considering field laboratories as laboratories, laboratory workers would thus only need to operate under one set of hazardous waste regulations. However, if the field laboratory is off-site and/or has a separate EPA Identification Number from the rest of the campus, the eligible academic entity must notify separately that the field laboratory will be subject to Subpart K. In the proposal, we stated that we expected many field laboratories to be CESQGs, which under the proposal were not eligible to opt into Subpart K. Commenters confirmed that many field laboratories are, indeed, CESQGs. Therefore, with the modifications that the Agency is making in today's rule regarding the eligibility of CESQGs and the definition of ''laboratory,'' field laboratories, whether they are located on-site or off-site from the rest of the eligible academic entity, would be allowed to operate under the

Subpart K requirements. See Section III.C.9 regarding the implementation of Subpart K at CESQG sites.

Furthermore, a number of commenters agreed with the Agency's position that art studios at eligible academic entities should be considered laboratories, despite the fact that they are rarely referred to as laboratories. These commenters confirmed that art studios have similar hazardous waste generation patterns as scientific laboratories, and, like other classroom settings, have students generating much of the hazardous waste. Therefore, the definition has been changed to clarify that the Agency considers art studios to be laboratories for the purposes of Subpart K.

Finally, we proposed that a ''laboratory'' is ''an area within a college or university * * *'' We received comments suggesting that we modify the definition of laboratory to be ''an area under the administrative or managerial control of a college or university * * *'' However, this terminology is not currently used or defined under RCRA. The Agency agrees that the definition should be more specific and we have incorporated into today's definition of ''laboratory'' a similar concept as suggested by the commenters. However, we have relied on terminology that is already used and defined in RCRA. Specifically, under today's final rule, a laboratory is ''an area that is owned by an eligible academic entity * * *'' Therefore, in today's preamble and final rule, when we use the term laboratory, we are referring to laboratories that are owned by an eligible academic entity.

To be eligible to opt into today's final rule, an institution first must meet the definition of ''eligible academic entity.'' That is, it must be a college or university, or a non-profit research institute or teaching hospital that is owned by or has a formal written affiliation agreement with a college or university, as these terms are defined in today's rule. Second, an eligible academic entity may opt into Subpart K for the laboratories that it owns. Therefore, government facilities with laboratories that are operated by colleges and universities (such as many of the Department of Energy's laboratories) would not be eligible to opt into Subpart K, because the government facility is not an eligible academic entity and the laboratories are not owned by an eligible academic entity.

For the reasons discussed above, today's final rule defines ''laboratory'' as follows:

> an area owned by an eligible academic entity where relatively small quantities of chemicals and other substances are used on a non-production basis for teaching or research (or diagnostic purposes at a teaching hospital) and are stored and used in containers that are easily manipulated by one person. Photo laboratories, art studios, and field laboratories are considered laboratories. Areas such as chemical stockrooms and preparatory laboratories that provide a support function to teaching or research laboratories (or diagnostic laboratories at teaching hospitals) are also considered laboratories.

Reactive acutely hazardous unwanted material—The Agency proposed to define ''reactive acutely hazardous unwanted material'' as:

> an unwanted material that is one of the acutely hazardous commercial chemical products listed in § 261.33(e) for reactivity and toxicity.

At proposal, the Agency intended to maintain more stringent regulations in the laboratory for the ''P-listed'' commercial chemical products that are listed for reactivity because of their high potential for causing immediate harm. In the preamble to the proposed rule, we provided a list of seven commercial chemical products that we believed met this definition:

(1) P006 (CAS Number: 20859–73–8) Aluminum phosphide;

(2) P009 (CAS Number: 131–74–8) Ammonium picrate; Pheno, 2,4,6-trinitro-, ammonium salt;

(3) P042 (CAS Number: 51–43–4) 1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl];

(4) P065 (CAS Number: 628–86–4) Fulminic Acid, mercury(2+) salt; Mercury fulminate;

(5) P081 (CAS Number: 55–63–0) Nitroglycerine; 1,2,3-Propanetriol, trinitrate;

(6) P112 (CAS Number: 509–14–8) Methane, tetranitro-; Tetranitromethane; and

(7) P122 (CAS Number: 1314–84–7) Zinc phosphide Zn_3P_2 when present at concentrations greater than 10%.

Many commenters correctly pointed out that P042 (CAS Number 51–43–4) 1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-, which is actually Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-, (R)-, (and is also known as epinephrine) is not listed on the ''P-list'' because of reactivity. They pointed out that the (R)- following the listing for P042 refers to the R enantiomer of the chemical and does not refer to the reactivity characteristic. The Agency acknowledges that the commenters are, indeed, correct, and if epinephrine were an unwanted material in a laboratory, it would not meet the definition of reactive acutely hazardous unwanted material. EPA's acknowledgment is simply a matter of clarification and does not affect the definition as proposed.[3]

Many commenters also correctly pointed out that three of the chemicals on the list above are listed only for reactivity (P009, P081, P112), and not for toxicity and, therefore, do not meet the definition of reactive acutely hazardous unwanted material, as proposed. While the commenters are correct that P009, P081, and P112 are listed only for reactivity, we believe that the proposal was clear as to the Agency's intent—that a ''reactive acutely hazardous unwanted material'' includes those chemicals included on the P-list for reactivity, and that *some* of those chemicals were listed for toxicity, as well. The wording of the proposed definition, however, did not convey that clearly. Therefore, we are revising the definition of ''reactive acutely hazardous unwanted material'' to be consistent with the intent discussed in the preamble, by omitting the reference to toxicity, as follows:

> an unwanted material that is one of the acutely hazardous commercial chemical products listed in § 261.33(e) for reactivity.

Trained professional—The Agency proposed to define a ''RCRA-trained individual'' as:

> a person who has completed the applicable RCRA training requirements of § 265.16 for large quantity generators, or § 262.34(d)(5)(iii) for small quantity generators. A RCRA-trained individual may be an employee of the college/university or may be a contractor or vendor.

The Agency is replacing the term ''RCRA-trained individual'' with ''trained professional.'' This does not affect the substance of the definition, but is merely a change in terminology since Subpart K is part of the RCRA hazardous waste regulations and including ''RCRA'' as part of the term is unnecessary and may, in fact, imply that anyone who is trained under Subpart K is not ''RCRA'' trained.

In addition, because the final rule has been expanded to include eligible academic entities that include CESQG sites or that are themselves CESQGs, we have added to the definition of ''trained professional'' a requirement that a trained professional at an eligible academic entity that is a CESQG must be trained in accordance with the SQG training requirements of

[3] The Agency has recently issued a memo clarifying that the scope of the P042 listing does not include epinephrine salts (see memo from Hale to EPA Regions, October 15, 2007, RCRA Online # 14778).

§ 262.34(d)(5)(iii). As discussed in more detail in Section III.C.4 of today's preamble, the hazardous waste determination and on-site transfers of unwanted materials outside the laboratory must be performed by trained professionals (also see § 262.207). The proposed definition of ''RCRA-trained individual'' (which is re-named ''trained professional'' in today's final rule) relied on references to the existing generator training requirements, which vary based on generator status. The existing CESQG regulations, however, do not include training requirements. It would be counter to the intent of today's rule to allow CESQGs opting into Subpart K to have untrained personnel making the hazardous waste determination and transferring unwanted materials outside the laboratory. Therefore, today's final rule requires that trained professionals at eligible academic entities that are CESQGs must be trained in accordance with the SQG training requirements.

Finally, because the applicability of the final rule has been broadened beyond colleges and universities, the Agency has modified the definition of ''trained professional'' accordingly, as follows:

> a person who has completed the applicable RCRA training requirements of § 265.16 for large quantity generators, or is knowledgeable about normal operations and emergencies in accordance with § 262.34(d)(5)(iii) for small quantity generators and conditionally exempt small quantity generators. A trained professional may be an employee of the eligible academic entity or may be a contractor or vendor who meets the requisite training requirements.

Unwanted material—The Agency proposed to define ''unwanted material'' as:

> means any chemical, mixtures of chemicals, products of experiments or other material from a laboratory that are no longer needed, wanted or usable in the laboratory and that are destined for hazardous waste determination by a RCRA-trained individual. Unwanted material includes reactive acutely hazardous unwanted materials. Unwanted material includes material that may eventually be determined not to be solid waste pursuant to § 261.2 or a hazardous waste, pursuant to § 261.3.

The Agency has made two changes to the definition of unwanted material. The first is to reflect the change from the term ''RCRA-trained individual'' to ''trained professional.'' The second change is to reflect the additional flexibility that we have added to the final rule that allows an eligible academic entity the option of using another ''equally effective term'' in lieu of the term ''unwanted material.'' In the preamble and the regulations, the Agency continues to use the term, ''unwanted material,'' but an eligible academic entity that opts into Subpart K may use another term if it chooses, provided the term is used consistently and is identified in its LMP. Regardless of the term that is used, however, it will have the same meaning as found in the definition for unwanted material, and it will be subject to the same requirements under Subpart K. This additional flexibility allowed for using another term in lieu of ''unwanted material'' is discussed in more detail in preamble section III.C.2 (also see § 262.206).

For the reasons discussed above, today's final rule defines ''unwanted material'' as:

> any chemical, mixtures of chemicals, products of experiments or other material from a laboratory that is no longer needed, wanted or usable in the laboratory and that is destined for hazardous waste determination by a trained professional. Unwanted materials include reactive acutely hazardous unwanted materials and materials that may eventually be determined not to be solid waste pursuant to § 261.2, or a hazardous waste pursuant to § 261.3. If an eligible academic entity elects to use another equally effective term in lieu of ''unwanted material,'' as allowed by § 262.206(a)(1)(i), the equally effective term has the same meaning and is subject to the same requirements as ''unwanted material'' under this subpart.

3. Definitions That Are New

The definitions discussed in this section of today's preamble are those definitions that have been developed and added since the proposal. All new definitions, except one, pertain to the expansion of the scope to other eligible academic entities.

Eligible academic entity—Today's final rule defines ''eligible academic entity'' as:

> a college or university, or a non-profit research institute that is owned by or has a formal written affiliation agreement with a college or university, or a teaching hospital that is owned by or has a formal written affiliation agreement with a college or university.

Since we have expanded the scope of the final rule to allow non-profit research institutes and teaching hospitals that are either owned by or have a formal written affiliation agreement with a college or university to opt into Subpart K, we believe it is appropriate to add a new term to refer to these types of institutions collectively.

Incorporated in the definition above is the concept that teaching hospitals and non-profit research institutes must be either owned by or have a formal written affiliation agreement with a college or university. As explained in section III.A. of today's preamble, we are requiring a formal written affiliation agreement with a college or university because the affiliation indicates that an entity is integrated with the college or university and that the entity has a significant transient student presence. Our research also demonstrated that in some instances, a teaching hospital or non-profit research institute is owned by a college or university. We assume that if a non-profit research institute is owned by a college or university it would not have a formal written affiliation agreement. Similarly for teaching hospitals, we assume that a formal written affiliation agreement, defined below for teaching hospitals as a master affiliation agreement and program letter of agreement, would not exist when the teaching hospital is owned by the college or university. Thus, this definition allows teaching hospitals and non-profit research institutes that are located on-campus or off-campus to opt into this rule, provided they are owned by or have a formal written affiliation agreement with a college or university.

Formal written affiliation agreement—Today's final rule defines ''formal written affiliation agreement'' as:

> for a non-profit research institute means a written document that establishes a relationship between institutions for the purposes of research and/or education and is signed by authorized representatives, as defined by § 260.10, from each institution. A relationship on a project-by-project or grant-by-grant basis is not considered a formal written affiliation agreement. A formal written affiliation agreement for a teaching hospital means a master affiliation agreement and program letter of agreement, as defined by the Accreditation Council for Graduate Medical Education, with an accredited medical program or medical school.

For non-profit research institutes, ''formal written affiliation agreement'' is defined in a manner to reflect the importance of having an official legal written agreement documenting the affiliation, partnership, collaboration, or association between the non-profit research institute and a college or university. In order for a non-profit research institute to be eligible to opt into Subpart K, it must have this documentation.

The Agency is requiring that this agreement be signed by authorized representatives with the authority to obligate the institution as a whole. The term ''authorized representative'' is already defined in 40 CFR 260.10 as ''the person responsible for the overall

operation of a facility or an operational unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.'' The Director or Chief Executive Officer (CEO) of a non-profit research institute and the President or Dean of a college or university, among others, would be considered authorized representatives.

The Agency also stresses that the formal written affiliation agreement must be between the institutions: The non-profit research institute and the college or university. This agreement is intended to represent a long-standing collaboration between the two institutions rather than simply a relationship between two principal investigators or researchers, working jointly for the duration of a particular project or grant. An example of what we would consider to be an affiliation at the institutional level includes being a member of a research consortium with colleges and universities. For instance, the Southwest Research Institute is a member of the Southwest Research Consortium which combines the research capabilities of nine research and educational organizations, including the University of Texas at San Antonio, Trinity University, and St. Mary's University. Another example of what we would consider an institutional-level affiliation agreement is when there are joint faculty appointments on a departmental or other large-scale basis. For instance, Seattle Biomedical Research and the University of Washington have a formal affiliation where all researchers at Seattle Biomedical Research are also faculty members at the University of Washington. A third example of what we would consider an institutional-level affiliation agreement is when a non-profit co-sponsors degrees with a college or university. For instance, Fred Hutchinson Cancer Research Center and the University of Washington jointly administer or co-sponsor a Ph.D. program in Molecular and Cellular Biology. Thus, EPA developed this definition to be broad to encompass the various working situations that we understand to be currently in existence.

For the definition of formal written affiliation agreement for teaching hospitals, EPA researched definitions and terms to describe the concept of ''affiliated teaching hospitals,'' such as ''academic health centers,'' ''major teaching hospital,'' and ''university teaching hospital.'' We quickly discovered that an industry-wide standard term for referring to teaching hospitals affiliated with colleges and universities does not exist. Without a standard definition, we looked into how college or university medical schools are linked with hospitals. We learned that the ACGME has established a mechanism for medical schools to send residents to hospitals that are not part of the medical school. In such cases, ACGME requires a master affiliation agreement and a program letter of agreement between the medical school and the teaching hospital. Since the ACGME defines these two types of agreements and requires them in certain arrangements between teaching hospitals and colleges and universities, and since the industry already follows and understands these agreements, we have decided to refer to these agreements in the definition of ''formal written affiliation agreement'' for teaching hospitals in this rule.

Non-profit research institute—Today's final rule defines ''non-profit research institute'' as:

> an organization that conducts research as its primary function and files as a non-profit organization under the tax code of 26 U.S.C. 501(c)(3).

EPA's definition, which refers to a well-known, existing definition under the tax code of 26 U.S.C. 501(c)(3), is intended to make the definition as clear as possible, as well as easy for implementers and inspectors to verify. We are emphasizing through this definition that not every non-profit organization is eligible to opt into the Subpart K requirements. Rather, the non-profit must conduct research as its primary function. We require this because, as explained in sections II.B and III.A of this preamble, research laboratories, as a category of laboratories, have a hazardous waste generation pattern that fits within the rationale of today's final rule. Further, as discussed above, the non-profit research institute must either be owned by a college or university or have a formal written affiliation agreement with a college or university in order to be eligible to opt into this rule.

Teaching hospital—Today's final rule defines ''teaching hospital'' as:

> a hospital that trains students to become physicians, nurses or other health or laboratory personnel.

EPA believes it is important to capture the basic purpose of a teaching hospital in this definition: training students in medicine. A teaching hospital will train nursing students, medical residents, technicians, and others in the laboratories at the hospital's facilities ensuring that teaching hospitals fit within a key aspect of the rationale of today's rule: a significant transient student presence in the laboratories. In addition, the teaching hospital must either be owned by a college or university or have a formal written affiliation agreement with a college or university in order to be eligible to opt into this rule.

Working container—The Agency did not include a definition of ''working container'' in the proposed rule. In the preamble to the proposed rule, however, we did discuss a possible definition for working container and solicited comment on whether the final rule should include such a provision. The definition of ''working container'' in the preamble to the proposed rule was:

> A small container (of one gallon or less), managed under the control of a laboratory worker and used at a bench or work station, whose contents are emptied into a container of unwanted material at the end of the procedure.

There generally was broad support among commenters for including a definition of working container in the final rule. A number of commenters suggested, however, that the Agency increase the maximum size limit of a working container to five gallons. Since one gallon is equal to 3.78 liters, the one-gallon limit discussed in the preamble to the proposed rule would have precluded the use of four-liter solvent bottles as working containers. The Agency believes that a 5-gallon limit for working container is too large to be appropriate despite suggestions from commenters. Given that water weighs 8.34 pounds per gallon, a full 5-gallon container would weigh in excess of 40 pounds, which may be pushing the limits of what can be easily manipulated by one person (without the aid of equipment or other devices). This is especially true considering that the contents of many working containers will be transferred to other containers for disposal.

Nevertheless, the Agency does agree that since 4-liter solvent bottles are commonly used as collection containers in laboratories and are easily manipulated by one person, even if full, the Agency believes a two-gallon limit for working containers is more appropriate. Furthermore, two gallons is consistent with an interpretive letter signed by both Region I and the State of Massachusetts (September 2004; a copy of which is in today's docket), that originally introduced the concept of a working container under RCRA. Therefore, in response to these comments, the Agency has increased the maximum size of a working container to two gallons. The Agency is not limiting the type of containers that can be used as working containers. Thus, the types of containers that we would expect to be

used as working containers are beakers, flasks, bottles, and other types of containers typically used in a teaching or research laboratory.

The Agency also has deleted from the definition of working container that appeared in the preamble to the proposed rule the requirement for the contents of a working container to be emptied into a container of unwanted material at the end of a procedure. We believe it is more appropriate to include any management standards for working containers in § 262.206(b), which addresses the management standards for all containers.

Finally, the Agency has added to the definition that working containers are those that are used to collect ''unwanted material.'' The Agency believes that this modification is necessary in order to distinguish ''working containers'' from other containers used during an experiment or procedure that may contain product and are not subject to the RCRA Subtitle C regulations. See section III.C.3 of today's preamble for a detailed discussion of the container management standards that apply to working containers (also see § 262.206).

The definition of ''working container'' in today's final rule is:

a small container (i.e., two gallons or less) that is in use at a laboratory bench, hood, or other work station, to collect unwanted material from a laboratory experiment or procedure.

C. Specific Requirements of the Alternative Regulations

Today's final Subpart K regulations will allow laboratories at eligible academic entities to send unwanted materials that are generated in the laboratory to an on-site CAA or an on-site TSDF before making the hazardous waste determination for the unwanted materials, or to make the hazardous waste determination in the laboratory prior to its removal. However, the eligible academic entity must meet certain requirements such as notifying, complying with performance-based standards in the laboratory, and developing and implementing an LMP with nine required elements as described in the sections below.

1. Notification

Because today's final rule provides eligible academic entities the option to manage their hazardous wastes from laboratories under the existing generator regulations or their laboratories' unwanted materials under today's provisions, it is important that EPA, or the authorized State, know to which set of regulations an eligible academic entity's laboratories are subject. Therefore, this rule requires that an eligible academic entity choosing to manage its unwanted materials in compliance with the alternative set of generator requirements being promulgated today submit a one-time notification to the appropriate EPA Regional Administrator or, when appropriate, State Director in authorized States that have adopted the final rule. Should an eligible academic entity decide not to opt into Subpart K, it will continue to operate under the existing generator regulations and there is no need to notify.

EPA proposed that the notification be provided by letter, but requested comment on whether the RCRA Subtitle C Site Identification Form (EPA Form 8700–12; or Site Identification Form) should be used to provide this notice, and whether the form should be modified to include a checkbox to indicate that a college or university is choosing to be subject to Subpart K. One commenter pointed out the advantage to using a letter would be to allow a college or university to submit one notice for several sites with different EPA Identification Numbers. However, most commenters supported the option of using the Site Identification Form to notify EPA (or the authorized State) regarding their decision to manage laboratory hazardous waste under the Subpart K requirements. The commenters noted that the regulated community is already familiar with this form and the form requires much of the necessary information required by the notification requirement that was proposed under Subpart K, such as name of the facility, address, and EPA Identification Number. Further, most commenters agreed that by using the Site Identification Form, there would be increased consistency in reporting. When eligible academic entities notify by Site Identification Form, the information is included in the RCRAInfo database, which provides an additional benefit of being able to monitor the extent to which eligible academic entities are taking advantage of this new Subpart.

Based on these comments, EPA is requiring the use of the Site Identification Form for notification of opting into, as well as withdrawing from Subpart K. In order to use this form for this purpose, we will be modifying the Site Identification Form to include a checkbox for an eligible academic entity to indicate what type of entity it is (i.e., a college or university, or a teaching hospital or a non-profit research institute that is either owned by or has a formal written affiliation agreement with a college or university) and that it is choosing to be subject to the 40 CFR part 262, Subpart K requirements.[4] There is also a checkbox for an eligible academic entity to indicate that it is withdrawing from the Subpart K requirements, if after having decided to be subject to Subpart K, it determines it would prefer to be regulated under the existing hazardous waste generator standards.

Since we are requiring the use of the Site Identification Form, an eligible academic entity will have to submit one Site Identification form for each EPA Identification Number, or site as defined by RCRA.[5] Thus, if the eligible academic entity is composed of multiple sites (i.e., it has multiple EPA Identification Numbers) and all its sites will operate under Subpart K, separate Site Identification Forms must be submitted for each site. For example, if an urban college or university composed of multiple sites divided by public roads wants all of its laboratories to operate under Subpart K, the college or university must notify the appropriate authority that each of its sites is going to be subject to 40 CFR part 262, Subpart K by submitting a Site Identification Form for each distinct site (i.e., EPA Identification Number) opting into today's rule.

As indicated in the example above, an eligible academic entity can be composed of multiple sites because of the way RCRA defines ''on-site.'' We believe that where this is the case, the eligible academic entity will choose to have all its sites at a single campus opt into Subpart K. This would allow eligible academic entities to have a unified institution-wide hazardous waste management system for all its laboratories on campus, which is one of the highest priorities for Subpart K cited by the academic community in their public comments. However, since a campus or institution opts in for each individual site, via EPA Identification Number, there is nothing in today's rule

[4] If an eligible academic entity chooses to opt into Subpart K prior to the completion of the revisions to the Site Identification Form (8700–12), it should indicate in the comment field of the form what type of eligible academic entity it is and that it is opting into Part 262 Subpart K.

[5] RCRA 40 CFR part 260.10 defines, ''on-site'' to mean the same or geographically contiguous property which may be divided by public or private right-of-way provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right-of-way. Non-contiguous properties owned by the same person, but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property. For further interpretations, see Memo, Shapiro to Wojdyla; May 1, 1996, (RCRA Online #14031), a copy of which is in today's docket.

that requires an eligible academic entity to have all of its separate sites opt into the Subpart K requirements. Thus, by not requiring that all the sites with different EPA Identification Numbers at an eligible academic entity opt into this rule together, we are providing additional flexibility for the eligible academic entity to determine the best hazardous waste management practices for its facility.

Teaching hospitals and non-profit research institutes, as defined in this rule, may be located on a college or university campus or located nearby. In rare instances, they may even be located in a separate State from the college or university with which they are affiliated. Since eligible academic entities opt in by filling out the Site Identification Form, a teaching hospital or non-profit research institute that has a separate EPA Identification Number from a college or university must decide independently whether it wants to opt into today's final rule. When a teaching hospital or non-profit research institute is owned by or formally affiliated with a college or university and located on campus, it does not have to opt in when the college or university opts in, if it is a separate site or has a separate EPA Identification Number, although, as noted above, we believe that teaching hospitals and non-profit research institutes will likely opt into Subpart K, if the colleges or universities with which they are affiliated opt in, to create a more integrated laboratory waste management system on campus.

As explained above, while not all the sites of an eligible academic entity must choose to be subject to today's rule, we continue to stress that all laboratories owned by the eligible academic entity within one EPA Identification Number must comply with the same set of regulations. In other words, the alternative approach cannot be applied to only one or a few laboratories within that EPA Identification Number, but rather must apply to all laboratories or no laboratories. The reason for this is that EPA believes it would be difficult for an eligible academic entity to keep track of which set of generator regulations apply to which laboratory or group of laboratories. Moreover, it would be extremely difficult, if not impossible, for the States or Regions to keep track of the applicable set of regulations if, within a single EPA Identification Number, different laboratories were choosing to be regulated under different requirements. No mechanism currently exists at EPA or the States to track such distinctions.

The required notice must be submitted to the appropriate EPA Regional Administrator (or State Director in authorized States that adopt the final rule). At all times, an eligible academic entity's laboratories must comply with either the existing hazardous waste generator regulations or the Subpart K regulations. Once an eligible academic entity notifies by Site Identification Form that it is opting into Subpart K, EPA expects that the site will be in compliance with the Subpart K requirements. Therefore, we strongly suggest that an eligible academic entity prepare its LMP and ready its facilities for the Subpart K laboratory hazardous waste management system before it submits a Site Identification Form to the EPA Regional Authority (or State Director in authorized States). Further, an eligible academic entity may, for example, want to train its employees in the Subpart K labeling requirements and container management standards before notifying. In addition, an eligible academic entity may want to contact its hazardous waste vendors to prepare the vendor for the eligible academic entity's switch to Subpart K.

It is also possible that after an eligible academic entity has chosen to manage its unwanted materials under the Subpart K regulations and has gained some experience with the program, it may decide that this approach is not meeting its needs, and that it would prefer to return to regulation under the now existing applicable generator regulations, 40 CFR part 262 (or 40 CFR 261.5 for CESQGs). Under this final rule, an eligible academic entity that chooses to end its participation in the Subpart K program would be required to submit another Site Identification Form to the EPA Regional Administrator (or State Director in authorized States) checking the box for withdrawing from 40 CFR part 262, Subpart K. Then, the eligible academic entity's laboratories would no longer be subject to Subpart K and would be subject to the existing applicable generator regulations. Once the Agency receives the Site Identification Form from the eligible academic entity indicating that it is withdrawing from the Subpart K program, the Agency expects that the eligible academic entity will be in compliance with the 40 CFR part 262 applicable generator requirements (or 40 CFR 261.5 for CESQGs).

Finally, EPA sought comment on whether the Regional Administrator (or State Director in authorized States) should provide the eligible academic entity with a written receipt of the one-time notice before it could manage its unwanted materials in accordance with the Subpart K requirements. Most commenters did not want to wait for EPA or the State to provide a written receipt of the one-time notice before managing their unwanted materials under these alternative generator requirements; they argued that it would cause delay and confusion. Other commenters pointed out that many States already respond in writing when the Site Identification Form is received. Therefore, we are not requiring that the Regional Administrator (or State Director in authorized States) provide a written receipt of the one-time notice before the eligible academic entity can manage its unwanted materials under the Subpart K requirements. (For more information on how CESQGs notify, see section III.C.9 and § 262.203.)

2. Labeling Standards

Because today's rule provides laboratories owned by eligible academic entities with flexibility in where and when to make the hazardous waste determination, labeling requirements for unwanted materials in the laboratory are needed. For example, labeling is critical to ensure that non-laboratory personnel, such as firefighters can quickly ascertain the hazardous materials that are in the laboratory in case of an emergency. In order to provide the necessary information to laboratory personnel, EH&S staff, inspectors, emergency responders, and others, today's rule includes performance-based labeling requirements that are informative, yet flexible to fit the varying situations at eligible academic entities.

The labeling requirements in the proposed rule consisted of two sets of performance-based labels. First, the proposal required that a label be affixed to or physically accompany the container of unwanted material. This label was intended to convey the most essential information that one needs to know about the contents of the container in an emergency situation. It also was intended to convey the notion that ''unwanted material'' was no longer wanted in the laboratory. Thus, the proposal required that this label include the words ''unwanted material,'' as well as sufficient information to alert emergency response personnel to the container's hazards or contents.

The second part of the proposed labeling requirements provided flexibility by allowing information to be ''associated with the container.'' We proposed that this label contain sufficient information for the RCRA-trained professional (which has been changed to trained professional in today's final rule) to make the hazardous waste determination. At a minimum, the information ''associated'' with containers of unwanted materials

was intended to ensure that a hazardous waste determination of the contents can be made by a trained professional. Additionally, the proposal required that the date when the unwanted materials first began accumulating in the container be associated with the container, so that EH&S staff or other trained professionals would know when to remove the containers of unwanted materials from the laboratory. The preamble to the proposed rule indicated that the accumulation start date and information sufficient to make a hazardous waste determination could be on the label that is affixed to or physically accompanies the container, but must, at a minimum, be associated with the container.

In the preamble to the proposed rule, we discussed examples of how the required information might be ''associated'' with a container. One example is that laboratory personnel could number containers of unwanted material and create an accompanying spreadsheet containing sufficient information to identify the material for each numbered container of unwanted material that would be given to the trained professional to make the hazardous waste determination. Another example is that laboratories could affix a bar code to each container of unwanted material that when scanned would provide the necessary information to make the hazardous waste determination of the unwanted material. Alternatively, laboratory personnel might choose to include a printed inventory of the unwanted materials and the associated information for each container that would provide the necessary information for a trained professional to make the hazardous waste determination.

The Agency received a large number of comments from academia in support of the performance-based labeling requirements in lieu of prescriptive requirements. In keeping with the original intent of the rulemaking, today's final rule maintains the performance-based two-tiered labeling structure; however, we have revised the labeling requirements to take into account public comments received on the proposal.

Specifically, we have revised the proposed labeling requirements in today's final rule to clarify that the first part of the labeling requirement requires the label to be ''affixed or attached to'' the container of unwanted material rather than be ''affixed to or physically accompany'' the container. We believe this modified language provides clarity and ensures that, during the accumulation period in the laboratory or during on-site transfer, the identifying information will not be inadvertently separated from a container of unwanted material and thus the contents of any container can be quickly identified in an emergency situation. Examples of labels that are ''affixed or attached to'' containers of unwanted materials are stickers that have been affixed on the container by adhesive, or labels that are attached to a small container of unwanted material (i.e., too small for an adhesive label) by wire or a piece of tape.

Many commenters expressed concern about the proposed requirement to label containers with the words ''unwanted material,'' preferring a more flexible labeling requirement. As one commenter stated, ''The purpose of adding an additional label [unwanted material] to a reagent chemical container, for instance, is to differentiate it from others that a lab still wants or needs in their work so that the pickup crew or contractor knows which containers to take. The exact terminology is not important to meeting this goal.'' In response to this and other similar comments, in the final rule, we are requiring that containers be labeled with the words ''unwanted material'' or another ''equally effective term'' that is used consistently by the eligible academic entity and is identified in Part I of the eligible academic entity's LMP. Examples of an ''equally effective term'' include, but are not limited to, ''laboratory waste'' or ''chemical lab waste.'' We believe this approach is responsive to the comments in that it provides each eligible academic entity with flexibility, yet conveys the basic information that the material is no longer needed or wanted in the laboratory. To this end, if an eligible academic entity elects to use another equally effective term in lieu of ''unwanted materials,'' that term must address and have the same meaning as ''unwanted material,'' and is subject to the same requirements in Subpart K for ''unwanted material.'' Additionally, if an eligible academic entity chooses to use an equally effective term instead of ''unwanted materials,'' the eligible academic entity must use the term consistently in all its laboratories that are covered by its LMP. It would not be acceptable for each laboratory at an eligible academic entity to be free to use its own term of choice because the use of different terms at the same eligible academic entity would cause confusion for implementers and enforcers.

A number of commenters opposed the proposed requirement that the label that is ''affixed to or physically accompany'' the container provide sufficient information to alert emergency responders to the contents or the hazards of the container, arguing that the requirement is unnecessary and burdensome.[6] EPA disagrees with these comments and believes that maintaining this information is necessary to protect the safety of workers, students, emergency responders, and others that may come into contact with containers of unwanted materials. For safety purposes, emergency responders need to have a quick way to assess the contents of a container. However, we understand that at least part of the concern was the use of the term ''hazards,'' in that it caused some confusion among commenters, many of whom thought that the Agency was proposing to require Department of Transportation (DOT) hazard classes or National Fire Protection Agency (NFPA) chemical hazard labels to be on the label that must be ''affixed to or attached to'' the container. This was not the Agency's intent. To address this misunderstanding in today's final rule, we have clarified the requirement that the label contain sufficient information to alert emergency responders to the contents of the container. This performance-based standard could be met by including information, such as the name of the chemical(s) in the container or, alternatively, a descriptive phrase, such as ''inorganic solvents,'' ''halogenated organic solvents,'' or ''water reactive chemicals.'' This requirement is flexible, yet provides sufficient information to emergency responders in an easily understandable manner that would allow them to ascertain the potential dangers associated with the contents of containers in the laboratory, while being protective of health and safety.

As proposed, today's final rule requires that each container of unwanted material must have associated with the container the date that the unwanted material begins accumulating and information sufficient to make a hazardous waste determination. We are allowing this information to be ''associated with'' the container, as opposed to requiring that it be ''affixed or attached to'' the container, in order to facilitate the use of technology in conveying this information. This could be done using an electronic spreadsheet, a bar code, or some other printed inventory of containers (see previous examples of ''affixed or attached to'' or

[6] As discussed previously, the requirement that the label be ''affixed to or physically accompany'' the container has been changed in the final rule to that the label must be ''affixed or attached to'' the container.

''associated'' labels). We also point out that this labeling requirement maintains the flexibility of the proposed rule, such that an eligible academic entity can use the container labeling approach that works best for the institution. That is, while it is acceptable to have the accumulation start date and information sufficient to make a hazardous waste determination ''associated with'' the container, some eligible academic entities may prefer to have all required container labeling information in a single place. Therefore, it is also acceptable to place the accumulation start date and the information sufficient to make a hazardous waste determination on the label that is ''affixed or attached to'' the container. We have reworded the container labeling regulations accordingly to reflect the intended flexibility and to indicate that, at a minimum, the accumulation start date and information sufficient to make a hazardous waste determination must be ''associated with'' the container, but that it can be on the label that is ''affixed or attached'' to the container, if that is preferred.

Many commenters had concerns about the burden imposed by the requirement to associate the accumulation start date with containers of unwanted material because it is not required in the current satellite accumulation area regulations. We maintain that this requirement is necessary to ensure that accumulation time limits in the laboratory are complied with for containers of unwanted material. Some commenters argued that alternatively, EPA should add a requirement to log regular removals from each laboratory in lieu of the container ''dating'' requirement. We disagree with this comment because we believe that the suggested method would not provide the information necessary to verify that a particular container had not been accumulating unwanted material for more than six months in the laboratory and, therefore, would not allow EPA or an authorized State to determine whether the laboratory was in compliance with Subpart K. Therefore, the dating requirement for each container of unwanted material has been retained in today's final rule.

Finally, we have retained the requirement from the proposal that the label associated with the container must contain information sufficient to make a hazardous waste determination. As discussed above, this requirement provides flexibility to eligible academic entities in that this information can be on the label that is ''affixed or attached to'' the container, but it must at least be on the label that is ''associated with'' the container. However, we stress that ''information sufficient'' to make a hazardous waste determination, whether that information is ''associated with'' or ''affixed or attached to'' containers of unwanted materials, must ensure that a hazardous waste determination of the contents can be made. Examples of information sufficient to make a hazardous waste determination include, but are not limited to: the name and/or description of the chemical contents or composition of the unwanted material, or, if known, the product of the chemical reaction, whether the unwanted material has been used or is unused, and a description of the manner in which the chemical was processed, if applicable.

In summary, today's rule finalizes the proposed performance-based two-tiered labeling structure, but has modified it to address a number of comments received on the proposal. The first part of the final labeling requirement consists of information that must be ''affixed or attached to'' the container. The information must consist of the words ''unwanted material'' or another equally effective term that is used consistently by the eligible academic entity and is identified in Part I of the eligible academic entity's LMP. Additionally, the label must contain sufficient information to alert emergency responders to the contents of the container. The second part of the final labeling requirement consists of information that must be ''associated with'' the container in some manner, which could include affixing or attaching it to the container. The information required includes the date that unwanted material first begins accumulating in the container, and information sufficient to allow trained professionals to determine whether the unwanted material is a solid and hazardous waste, as well as assign the proper hazardous waste code(s), pursuant to § 262.11. For more detail on specific labeling requirements for when volume limits are exceeded in the laboratory and after hazardous waste determinations are made, see section III.C.5, Removal Frequency of Unwanted Materials and Section III.C.6, Making the Hazardous Waste Determination, respectively.

3. Container Standards

When accumulating unwanted materials in the laboratory, proper container management is essential to protect human health and the environment. We proposed performance-based container management standards, requiring that the containers be stored to prevent leaks, spills, emissions to the air, adverse chemical reactions, and to avoid dangerous situations that may result in harm to human health and the environment. The proposed container management standards also included two specific standards as a means to achieve these goals: (1) Containers must be kept in good condition and damaged containers must be replaced; and (2) containers must be compatible with their contents.

In the preamble to the proposed rule, we solicited comment on two alternative approaches for container management. First, we requested comment as to whether the rule should include more specific container management requirements in the regulations, potentially going beyond what was proposed. In the preamble, we included some examples of specific requirements we were considering, such as secondary containment and imposing a minimum safe distance for the storage of incompatibles. Another example that was discussed in the preamble was requiring that containers of unwanted material always be closed during storage, except for cases of in-line collection. An in-line collection system is a piece of laboratory equipment, such as a high performance liquid chromatograph (HPLC) that is directly connected to a container that collects unwanted material, including hazardous waste, typically by tubing. The tube carries the waste from the equipment directly into the container.

The second alternative approach for container management that we requested comment on was the concept of a ''working container.'' In the preamble to the proposal, a working container was defined as a small container (one gallon or less), managed under the control of a laboratory worker and used at a bench or work station, whose contents are emptied into a container of unwanted material at the end of the procedure. Similar to the previous alternative, we indicated that if we added ''working container'' to the final rule, we would also add a more specific requirement that any container of unwanted material that does not fit the definition of working container, be closed at all times, except when necessary to add or remove unwanted materials.

We received many comments on the proposed container management standards. Most commenters were supportive of the performance-based container management standards in lieu of the more prescriptive standards. Commenters argued that performance-based container management standards

would allow them the flexibility to tailor the standards to laboratory-specific operations. On the other hand, a few State commenters preferred more prescriptive container management standards as they found them easier to enforce than performance-based standards. However, we decided to maintain the performance-based container standards because we believe they are protective of human health and the environment, while providing flexibility to eligible academic entities.

Today's rule finalizes the proposed container management standards with one minor change and adds a new requirement. The requirement that eligible academic entities must properly manage containers of unwanted material to assure safe storage of the unwanted materials, to prevent leaks, spills, emissions to the air, adverse chemical reactions, and dangerous situations that may result in harm to human health or the environment has remained the same from proposal. Similarly, containers must be compatible with their contents. A minor clarification was added to the requirement that damaged containers be replaced. Several commenters requested that the Agency add language clarifying that replacing damaged or degraded containers is not the only method of reducing their threat. We agree and have added the requirement in the final rule that damaged or degraded containers be replaced, overpacked, or repaired, in order to prevent releases of the container's contents into the environment. An example of overpacking a container is taking a damaged container of unwanted materials and placing it into a second container in good condition and then packing the second container with absorbent filler similar to the practice of lab-packing. An example of repairing a damaged container would be if a small leak appears in the cap of a container of unwanted material, and a laboratory worker covered the broken cap with a polymer film.

Many commenters also provided comments in support of the concept of a ''working container,'' although a few commenters were opposed to allowing a ''working container'' in the final rule. Opponents believed that the approach is not protective of the environment, while supporters felt that the prescriptive requirement that containers be kept closed, except when adding or removing waste, which we said would be added if a working container provision were added to the final rule, is easier to enforce. In addition, commenters in support of adding a working container wrote that this concept ''recognizes the fact that many unwanted laboratory materials are actively accumulated in small containers at a bench, work station, or fume hood.'' Academic and State commenters supported the inclusion of a working container provision because it allows containers that are in use for collecting unwanted materials to be open while the experiment is running, while at the same time it provides protection by requiring that non-working containers be closed at all times, except when adding, removing, or consolidating unwanted materials.

After evaluating all of the comments, we have decided to include a provision in the final rule allowing laboratories to use ''working containers.'' As discussed in the definition section above (section III.B.3), a working container is defined in the final rule as a small container (i.e., two gallons or less) that is used at a laboratory bench, hood, or other work station in order to collect unwanted material from a laboratory experiment or procedure. We have added to the container management standards a requirement that a working container may be open until the end of the procedure or work shift, or until it is full, whichever comes first, at which time it must either be closed or the contents must be emptied into a container that is closed after the contents of the working container are added.

In reference to the other containers of unwanted materials in the laboratory (i.e., non-working containers), several commenters opposed the requirement that these non-working containers remain closed, except to add or remove unwanted material. We disagree with these commenters. We believe that the requirement that containers remain closed, except when adding, removing, or consolidating unwanted material is straightforward and is protective of human health and the environment. Requiring that containers remain closed, except in certain instances, will prevent or mitigate accidents in the laboratory that could otherwise lead to spills or releases.

Commenters identified two additional situations (besides working containers) where they believed a requirement to keep containers closed is problematic. One commenter stated, ''* * * tightly capping containers after addition of waste is sometimes impractical and dangerous. Capping systems should be allowed which preclude excessive evaporation while providing for displacement of air while filling from in-line systems such as an HPLC or allow pressure relief from wastes which have not fully reacted.'' The comment about ''in-line'' collection of unwanted materials is consistent with what the Agency has heard over the years through our Project XL with the three New England colleges and universities, as well as through public meetings. In many cases, automated laboratory equipment will shut down if air is not able to escape from an in-line collection system because of a build-up of pressure. Another commenter stated, ''* * * that the closed container rule may also have a negative effect by creating a compromised container in certain situations. Chemical reaction residues may react slowly over several days, thus building up pressure in a container. The semiconductor etching solution known as ''piranha solution'' is one example. Proper management of these solutions requires that the container be able to safely vent the excess pressure.''

In response to the two public comments above, we have modified the container management regulations to add these two additional situations (besides working containers) in which containers are not required to be completely closed, because in these two situations keeping a container of unwanted materials closed may be problematic. Specifically, the final rule allows containers to be vented when it is necessary (1) for the operation of laboratory equipment, such as in-line collection, and (2) to avoid dangerous situations, such as the build-up of extreme pressure. Thus, as we have explained, we have determined that a combination of both performance-based and prescriptive approaches (as it relates to whether containers must be kept closed) is more protective of human health and the environment than performance-based requirements alone. The Agency believes it is preferable to maintain the requirement that containers remain closed, except when adding, removing or consolidating unwanted material in most instances, while allowing for a few specific instances in which it is not appropriate, rather than to eliminate the requirement for closed containers altogether. This is because such an approach provides the flexibility in specific situations where commenters have shown that requiring closed containers is inappropriate and does not compromise protection for all the other containers of unwanted materials that have no cause to be open. Furthermore, this approach is simpler for an eligible academic entity to implement and is more easily enforceable.

In summary, today's final rule contains container management standards that require that containers be managed to assure the safe storage of the

unwanted material to prevent leaks, spills, emissions to the air, adverse chemical reactions, and dangerous situations that may result in harm to human health or the environment. Specifically, today's final rule requires that containers be maintained and kept in good condition and that damaged containers be replaced, overpacked, or repaired. Additionally, containers must be compatible with their contents to avoid reactions between the contents and the container and must be made of, or lined with, material that is compatible with the unwanted material so that the container's integrity is not impaired. Finally, containers of unwanted material must be kept closed at all times, with three exceptions: (1) When adding, removing or consolidating unwanted material, (2) when using working containers, which may be open until the end of the procedure or work shift, or until they are full, whichever comes first, and (3) allowing containers to be vented if necessary for the proper operation of laboratory equipment, such as with in-line collection, or to prevent dangerous situations, such as build-up of extreme pressure.

4. Training Requirements

The Agency intends to provide flexibility in the content and method of training for laboratory workers and students, while ensuring that unwanted materials are properly managed and that an eligible academic entity is in full compliance with the Subpart K requirements. Thus, EPA has included performance-based standards in today's final rule for training of laboratory workers and students.

EPA proposed that under Subpart K a college or university be required to provide training or instruction to all individuals working in the laboratory. Specifically, the proposal required that laboratory workers be trained commensurate with their duties so they understand the requirements of Subpart K and can implement them to ensure the laboratories' compliance with the requirements of the rule. In addition, we proposed that students in a laboratory where unwanted material is generated must receive instruction relevant to their activities in the laboratory. We proposed that instruction may include proper container labeling, collection procedures for unwanted material, and emergency response procedures. Further, the proposal required that on-site transfers of unwanted materials (which ultimately may prove to be hazardous wastes) and the hazardous waste determination could only be conducted by RCRA-trained individuals (called ''trained professionals'' in the final rule). The proposal indicated that a college or university could provide training and instruction for laboratory workers and students in a variety of ways, including, but not limited to, instruction by the professor or laboratory manager before or during an experiment, formal classroom training, electronic or written training, on-the-job training, or written or oral exams. Finally, the proposal required that a college or university that is an LQG must maintain training records for the laboratory workers that are sufficient to determine whether such workers have been trained.

Many commenters expressed general or partial support for the proposed performance-based training and instruction requirements, in lieu of prescriptive training requirements. However, many commenters requested that the training requirements be made more performance-based and include greater flexibility in training approaches (e.g., use of postings and signs). In contrast, a few commenters expressed support for a more prescriptive approach to training and instruction, including a clear and concise required curriculum for RCRA training in order to make the Subpart K requirements more meaningful.

We maintain that performance-based training requirements are appropriate for laboratory workers and students. Eligible academic entities should have the flexibility to offer training to laboratory workers and students through their choice of an effective method, provided the information is sufficient and thorough enough to ensure proper management of the unwanted materials by laboratory personnel in order to avoid dangerous situations. However, EPA disagrees that merely posting a sign would adequately instruct laboratory workers and students on the proper and safe management of unwanted materials, believing that some active training is necessary to ensure that all laboratory personnel fully comprehend their duties and assignments with respect to unwanted materials management. As stipulated in the proposal and supported by comments, today's final rule maintains that training methods may consist of a variety of approaches, including formal classroom or electronic on-line training, on-the-job training, or instruction by a professor or manager. Use of postings or signs may supplement and serve as a reminder of the more formal training, but does not itself constitute ''training'' for the purposes of today's final rule. While we do not believe the use of postings or signs alone constitute ''training,'' EPA believes that the use of signs and postings to supplement and reinforce the knowledge gained from the required training program would be beneficial. Training must be sufficient to enable individual laboratory workers and students in the laboratory to conduct their duties in an environmentally safe manner and in accordance with all applicable regulations.

Many commenters stated that all training and instruction should be commensurate with the duties and activities of the personnel, irrespective of their status as students or laboratory workers. We concur with these commenters and thus the final rule has been modified to reflect that principle. Therefore, as opposed to the proposed rule, which distinguished between training for laboratory workers and instruction for students, today's final rule requires that both laboratory workers and students be trained commensurate with their duties. Therefore, commensurate training constitutes training aligned with an individual's assigned duties and the degree of involvement with the management of the unwanted materials. EPA believes that training commensurate with ones duties should correspond with the level of knowledge or practical application needed by individuals to perform their assigned functions or fulfill their job or enrollment classification (i.e., professor, researcher, graduate student, undergraduate student) within an eligible academic entity.

We believe that training commensurate with the duties for students constitutes familiarization or transference of knowledge to perform tasks and assignments in the laboratory in a safe and environmentally sound manner for unwanted materials handling, in accordance with the Subpart K requirements. Specifically, students conducting experiments will come in contact with and use a variety of chemicals which may potentially become hazardous waste following experimentation or may react adversely if incorrectly stored or managed. Students in a supervised classroom setting generally would require less training than students in a research setting. In a teaching laboratory, containers for the unwanted materials that are generated during an experiment are typically pre-labeled by the laboratory instructor. Therefore, students in a supervised classroom setting should be trained to place the products of experiments in the appropriate containers of unwanted materials. On the other hand, students conducting research where such

containers are not provided should be trained to store unwanted materials in containers to minimize risk and label containers with the words ''unwanted materials,'' or another equally effective term, so that EH&S staff know that the containers are not longer wanted, as well as the contents of the container and the accumulation start date. There is also the potential for dangerous or hazardous situations, such as explosions, fires, spills, or other hazards from mishandling chemicals of unwanted materials which would require emergency response actions by qualified personnel. It is not necessary that students have the capability of an emergency response coordinator or other qualified individual to respond and perform emergency procedures and other remedial actions. Rather, it is sufficient for students to know how to correctly handle and manage unwanted materials to avoid dangerous or hazardous situations and in case of an emergency, know the correct information or procedures to follow, such as how to contact emergency responders and when to evacuate the laboratory.

Training commensurate with the duties for laboratory workers and graduate students working as laboratory workers may be more formalized or technical instruction whereby upon completion of training, personnel are qualified to perform the functions of their job descriptions or assigned duties. For the purpose of Subpart K, laboratory workers must receive training or technical instruction in direct correlation to their individual job description or assignments. Under Subpart K, the definition of ''laboratory worker'' includes a broad array of job classifications with different duties, such as supervisor or manager of a laboratory, faculty, staff, researcher, post-doctoral fellows, interns, technicians and principal investigators. Examples of training for laboratory workers commensurate with ones duties include, but are not limited to, training to perform their duties to comply with the Subpart K labeling and container management standards, supervising students in the laboratory, preparing containers for transport, emergency response duties, and/or other duties, as appropriate.

Several commenters expressed concern about the requirement that personnel conducting on-site transfers of unwanted materials be RCRA-trained. The commenters stated that this requirement is unnecessary and does not recognize that these entities have been safely transferring hazardous waste on-site for years and that a person can safely transfer unwanted materials with appropriate safety training. In contrast, the Agency heard from one commenter stating that students and non-RCRA trained staff should not transfer hazardous wastes outside of the laboratory. We believe that the person transferring unwanted materials on-site must be a ''trained professional'' according to the definition in § 262.200, which requires that the individual complete the applicable RCRA training requirements of § 265.16 for LQGs, or § 262.34(d)(5)(iii) for SQGs and CESQGs. Despite the fact that commenters stated otherwise, this requirement is consistent with the Agency's existing interpretation for on-site transfers of hazardous waste (see memo March 17, 2004, Springer to Regions, RCRA Online #14703). Furthermore, we believe that this level of training is ''commensurate'' with the duties of the individual transferring the unwanted materials on-site, which are to transfer the materials safely, to avoid spills or releases, and to respond properly to any releases, among other things. Specifically, we believe that the on-site transfer of unwanted materials outside of the laboratory should be conducted by an individual who has received the full complement of RCRA training in accordance with the eligible academic entity's generator status, to ensure that that individual is knowledgeable about the RCRA requirements, especially with regard to the compatibility of chemicals, spill prevention, and emergency response. This is especially important considering that the unwanted materials from many individual laboratories will often be collected together during the on-site collection and transfer of those materials.

We also heard from two commenters who emphasized the importance of training for personnel who make the hazardous waste determination at an eligible academic entity. We agree with the commenters, and, as proposed, require in today's final rule that the individual making the hazardous waste determination, whether it is in the laboratory, at the on-site CAA or on-site TSDF, be a trained professional who has the full complement of RCRA training in accordance with the eligible academic entity's generator status (SQG status for CESQGs). Individuals making the hazardous waste determination must be aware of all applicable RCRA requirements in order to complete their duties, which are to classify the unwanted materials properly as solid and/or hazardous wastes and to apply the correct hazardous waste code(s). Thus, we are continuing to require that the person making the hazardous waste determination be a ''trained professional'' according to the definition set out in § 262.200.

Therefore, today's final rule maintains the requirement that trained professionals make the hazardous waste determination and transfer unwanted materials (or hazardous wastes, if the hazardous waste determination is made in the laboratory) outside the laboratory and that the trained professionals must meet the existing RCRA generator training requirements applicable to the eligible academic entity's generator status. In addition, today's final rule has added the requirement that trained professionals at CESQGs must receive RCRA training in accordance with the training requirements for SQGs, at a minimum (see definition of ''trained professional'' in Section III.B.2 of today's preamble, as well as § 262.200).

Several commenters described other regulatory bodies (e.g., DOT; U.S. Nuclear Regulatory Commission (NRC); Occupational Safety and Health Administration (OSHA)) that require training on hazardous chemicals, emphasizing that Subpart K's training requirements should avoid redundancy with other required training. Some of these commenters stated that they would use OSHA training to satisfy the proposed Subpart K training requirements. In contrast, we heard from one commenter expressing concern that there are no other appropriate regulatory requirements for training specific enough to be appropriate for RCRA because they do not effectively cover the RCRA hazardous waste determination. The Agency believes that neither the ''traditional'' RCRA generator regulations nor Subpart K prohibits the use of other training programs to satisfy the training requirements of Subpart K, provided the other training program(s) address the relevant RCRA requirements for trained professionals, and the relevant Subpart K requirements to train laboratory workers and students commensurate with their duties.

Several commenters argued that eligible academic entities should be able to provide evidence of training, in lieu of training records, which they believe are too burdensome to keep. Furthermore, a few commenters advocated eliminating the proposed recordkeeping requirements for LQGs, arguing that such requirements would be more burdensome than the existing requirements for satellite accumulation areas, which do not require documented training for personnel. The Agency recognizes that the satellite

accumulation area regulations do not require documented training for personnel and is not requiring that records be retained for training of students in the laboratory. However, we believe it is appropriate that eligible academic entities that are LQGs retain the records for training of laboratory workers in order to demonstrate that the laboratory worker received the necessary training. The records that are required for laboratory workers at LQGs are the same that are required for trained professionals at eligible academic entities that are LQGs (and which they are subject to today), both of which reference the current LQG training regulations in § 265.16.

Finally, we heard from a few commenters who stated that the maintenance of training records for trained professionals or laboratory workers at SQGs is unnecessary. We did not propose to require such recordkeeping for training of laboratory workers or trained professionals at SQGs, nor has the Agency included such a requirement in today's final rulemaking.

In summary, under today's final rule, eligible academic entities managing their laboratory hazardous wastes under Subpart K must provide training for laboratory workers and students, and the training must provide sufficient information so that laboratory workers and students can understand and implement the requirements of Subpart K, commensurate with their duties. An eligible academic entity can provide training and instruction for laboratory workers and students in a variety of ways, including, but not limited to, instruction by the professor/manager before or during an experiment, formal classroom training, electronic/written training, on-the-job training, or written or oral exams. LQGs managing their laboratory waste under Subpart K must maintain documentation demonstrating that the training has been provided to laboratory workers and trained professionals. Documentation demonstrating training can include, but is not limited to, sign-in or attendance sheet(s) for training session(s), syllabi for training session(s), certificate(s) of completion, or test results. Finally, the training requirements in today's final rule restrict who may conduct certain activities under Subpart K. Specifically, only ''trained professionals,'' as defined in § 262.200, may transfer unwanted materials on-site and make the hazardous waste determination, pursuant to § 262.11, for unwanted material.

5. Removal Frequency of Unwanted Materials

Currently, most laboratories operate under what is commonly referred to as the satellite accumulation area (SAA) regulations (see 40 CFR 262.34(c)). At SAAs, removal of hazardous waste is dependent on the volume of hazardous waste that is accumulated in each SAA. That is, once more than 55 gallons of hazardous waste (or more than 1 quart of acutely hazardous waste) is accumulated in an SAA, a generator has three days to remove the excess of 55 gallons (or excess of 1 quart of acutely hazardous waste) from the SAA and transfer it to an on-site CAA or TSDF, or transport it off-site.

In large part because colleges and universities explained to us that they rarely accumulate 55 gallons of hazardous waste in a laboratory, except during a laboratory clean-out, in Subpart K we proposed to require the removal of unwanted materials from laboratories based primarily on time, and secondarily by the volume of unwanted materials. Specifically, we proposed that all unwanted materials, including reactive acutely hazardous unwanted materials (as defined in the proposal), generated in laboratories must be removed from the laboratory at a regular interval that is specified in the entity's LMP, and that such interval for routine removals must not exceed six months. College and university representatives had told EPA that tying the removal of laboratory wastes with the academic calendar would facilitate removal of laboratory wastes that accumulate during the course of the semester with a minimum of disruption. Therefore, the Agency believed that six months was an appropriate length of time to allow colleges and universities to schedule routine removals of unwanted materials at the end of each semester.

We also proposed that if a laboratory accumulates more than 55 gallons of unwanted materials (including reactive acutely hazardous unwanted materials) prior to the regularly scheduled removal specified in the entity's LMP, then all of the unwanted materials, including the reactive acutely hazardous unwanted materials, must be removed from the laboratory within ten calendar days of exceeding 55 gallons, or at the next regularly scheduled removal, whichever occurs first. For reactive acutely hazardous unwanted materials, we proposed that if a laboratory accumulates more than 1 quart prior to the regularly scheduled removal, then the reactive acutely hazardous unwanted materials would have to be removed from the laboratory within ten calendar days of exceeding 1 quart, or at the next regularly scheduled removal, whichever occurs first. The Agency proposed that the reactive acutely hazardous unwanted materials be subject to the 1-quart volume limit for accumulation in the laboratory, instead of the 55-gallon limit, because when these reactive chemicals are stored for long periods, they can become unstable, posing an extreme danger because these reactive chemicals have the potential to cause significant harm to laboratory personnel and property.

Many commenters generally supported the shift to the time-driven removal of unwanted materials from laboratories. However, they also requested that the maximum time between regularly scheduled removals be lengthened from six months to a year, or an ''academic year,'' which commenters defined as ''the 11–13 month period that corresponds to a college or university's annual teaching and research activities.'' Some commenters argued that six months was too frequent because some laboratories generate very small quantities of unwanted material in that time period. While some laboratories may generate small quantities of unwanted material, we have determined, based on all the available information, to keep six months as the maximum time between regularly scheduled removals.

We have retained six months as the maximum time between regularly scheduled removals of unwanted materials from the laboratory for several reasons. First, we believe that implementing regular removals on the basis of an ''academic year'' could be confusing. Second, as we indicated in the preamble to the proposed rule, our goal is to have unwanted materials removed from laboratories at least once each semester. One commenter indicated that a schedule that allows removals on a semester basis is preferred by stating, ''colleges and universities generally use the semester's end to encourage laboratory workers and students to have unwanted materials removed from their laboratories before leaving campus. This practice reduces the risk that unknown materials will be left behind by a student or laboratory worker who does not return the following semester. Also it limits the amount of waste material stored in laboratories during the break, when fewer people are around to monitor or be aware of the conditions in the laboratory.'' Finally, as discussed in the proposal, we do not believe that allowing unwanted materials to accumulate for longer than six months

would reduce risk to laboratory personnel and provide the benefits to human health and the environment to the same extent and therefore the anticipated benefits from moving to a time-driven rather than a volume-driven approach would be diminished.

We realize that some laboratories will not generate any unwanted materials during a six month period and we do not intend for EH&S personnel or other staff or contractors to make a trip to the laboratory if they know that the laboratory does not have any unwanted materials. The eligible academic entity must describe in Part II of its LMP how it will determine whether a removal of unwanted material is necessary at each individual laboratory. For example, a form or an e-mail could be sent to each laboratory asking whether the laboratory has any unwanted material accumulating and the EH&S could respond accordingly. Eligible academic entities have flexibility with respect to how they intend to comply with the requirements for regular removals of unwanted materials. However, each eligible academic entity is responsible for ensuring that it meets the time-driven requirement (i.e., every six months) for the method it has selected for removing unwanted materials from the laboratory. The accumulation start date associated with each container (or affixed or attached to each container, if that is preferred) of unwanted material is intended to be used as the mechanism for determining compliance with regularly scheduled removals. Of course, unwanted materials may always be picked up with greater frequency than specified in either the regulations or the eligible academic entity's LMP.

A number of commenters expressed concern over the requirement to remove ''all'' containers of unwanted materials from the laboratory either during a regularly scheduled removal or when the volumes have been exceeded, because this would require partially-filled containers to be removed from the laboratory, which could require the use of more containers. Many of these commenters requested that EPA modify the requirement to remove ''all'' unwanted material from the laboratory to require that only full containers of unwanted material have to be removed from the laboratory.

We recognize the commenters' concerns regarding the requirement to remove ''all'' unwanted materials from the laboratory during regularly scheduled removals or when volumes have been exceeded. However, we do not consider the alternative suggested by commenters—to require that only full containers of unwanted material have to be removed from the laboratory—to be practical. It would be easy to circumvent the intent of the regulations for regular systematic removals of unwanted materials from the laboratory by simply not completely filling containers of unwanted materials. In this scenario, the removal of unwanted materials from the laboratory would be based primarily on volume, rather than based on EPA's preferred approach of time. We prefer the time-driven approach, with the maximum volumes as a backup because, for most laboratories, it is rare to accumulate 55 gallons of unwanted material. Without a time limit, unwanted materials could remain in the laboratory for extended periods of time. As for the concern about using too many containers, consolidation of compatible materials is allowed within in a laboratory, as well as at an on-site CAA or on-site TSDF, which could then return some or most of the reusable containers for use in collecting unwanted material.

One commenter suggested adopting a system that mirrors the Universal Waste system for tracking the amount of time that unwanted materials remain in the laboratory. This commenter suggested that a laboratory should be allowed to demonstrate the length of time that each container has been accumulating unwanted material and that EPA should base the removal on how long each container is in the laboratory. We also heard from many commenters that we should be more flexible in the removal provisions.

In response to these comments, there are now two alternative approaches allowed for regular removals of unwanted materials. The first approach is the one that was proposed. That is, all containers of unwanted material must be removed from the laboratory on a regular basis, not to exceed six months. Under this approach, however, it is possible that a container that began accumulating unwanted materials the day before the regularly scheduled removal would be required to be removed. This approach is easy to implement, as all containers of unwanted material would be removed from the laboratory, regardless of when they began accumulating unwanted materials.

The second alternative being added today allows the removal of containers of unwanted material using a ''rolling'' six months approach. That is, no individual container of unwanted material could remain in the laboratory for more than six months. We believe this alternative approach provides additional flexibility that many commenters sought by adding a choice of implementation methods for the removal of unwanted materials, while maintaining the intent of the regulations by requiring regular, systematic, time-driven removals of unwanted materials. Since there is already a requirement that all containers have an accumulation start date associated with them, this approach would rely on checking the dates associated with each container in order to determine which containers would have to be removed from the laboratory. Individual containers could potentially remain in the laboratory longer than under the other alternative approach and therefore, would be more likely to be full or nearly full. On the other hand, this approach would likely require more frequent removals from the laboratory to ensure that no container accumulating unwanted materials remains in the laboratory longer than six months.

Each eligible academic entity choosing to be subject to Subpart K must select and identify in Part I of its LMP, the approach it chooses for complying with regular removals of unwanted materials from the laboratory. In Part II of its LMP, the eligible academic entity must describe how it plans to comply with the approach it has chosen for regular removal of unwanted materials from the laboratory.

Under the SAA regulations of § 262.34(c), if the maximum volumes are exceeded, the excess of 55 gallons of hazardous waste (or 1 quart of acutely hazardous waste) must be removed from the area within three days. We have frequently heard that the three-day time limit was problematic, especially during long weekends and holidays. Under Subpart K, we proposed to extend from three days to ten calendar days the removal of unwanted materials from the laboratory when the maximum volumes are exceeded. Many commenters supported this change, although a few commenters believed that three days was sufficient. One State commenter suggested that laboratories should remove their unwanted materials before the maximum volumes are reached, which would remove the need for providing additional time for the removal of unwanted materials from the laboratory. We have decided to retain ten calendar days for removing unwanted materials from the laboratory when the maximum volumes are exceeded. We believe that ten calendar days will provide sufficient flexibility to respond to the occasions when 55 gallons of unwanted material (or 1 quart of reactive acutely hazardous unwanted material) is exceeded, while maintaining protection to human health and the environment.

With regard to which unwanted materials must be removed from the laboratory when maximum volumes are exceeded, we proposed that when a laboratory exceeds 55 gallons of unwanted material, it must remove all unwanted materials—including the reactive acutely hazardous materials. This is because all reactive acutely hazardous materials are unwanted materials and should be considered in calculating whether the 55 gallons has been exceeded. On the other hand, we proposed that when a laboratory exceeds 1 quart of acutely reactive unwanted material, it must remove only the reactive acutely hazardous unwanted material, not all containers of unwanted material, because not all unwanted materials are reactive acutely hazardous unwanted materials, and therefore should not be subject to the lower accumulation limits in the laboratory. We have retained these requirements in today's final rule, with some minor rewording to clarify our intent. Of course, in the case where a laboratory exceeds 1 quart of reactive acutely hazardous unwanted material, an eligible academic entity may choose to remove all unwanted materials from the laboratory. If a trained professional has to make a trip to the laboratory to remove reactive acutely hazardous unwanted materials in excess of 1 quart, it may be more efficient to remove all unwanted materials at the same time, even if they are not required to be removed at that time.

We proposed that if a laboratory accumulates more than 55 gallons of unwanted material, then all containers of unwanted materials (including reactive acutely hazardous unwanted materials) must be dated with the date the 55 gallons is exceeded. We also proposed that if a laboratory accumulates more than 1 quart of reactive acutely hazardous unwanted material, then all containers of reactive acutely hazardous unwanted materials must be dated with the date the 1 quart is exceeded. This date is necessary to determine whether the ten calendar days had elapsed and, therefore, when the containers must be removed from the laboratory. In the proposed regulations, we did not specify which label this date must go on—the label that is ''affixed to or physically accompanies'' (which has been changed to ''affixed or attached to'' in the final rule) the container, or the label that is ''associated with'' the container. However, in the preamble to the proposed rule, we did indicate that, as with the requirement to date containers with their accumulation start date, this date may be included on either label—the label that is ''affixed or physically accompanies'' the container, or the label that is ''associated with'' the container (see 71 FR 29730). In today's final rule, we have revised the regulatory text to be consistent with the preamble discussion from the proposed rule. Therefore, when 55 gallons of unwanted material (or 1 quart of reactive acutely hazardous unwanted material) is exceeded in a laboratory, the date that the maximum volume is exceeded may be added to either type of label. That is, it may be added to the label that is ''affixed or attached to'' the container, but at a minimum it must be added to the label that is ''associated with'' the container.

One commenter pointed out that if an eligible academic entity does not have an on-site CAA and one of its laboratories exceeds the specified volume limits, the generator must be prepared to have a vendor ship the unwanted materials from the laboratory to an off-site TSDF within 10 calendar days. We agree with the commenter's assessment and point out that this is an increase in the time allowed under the current SAA regulations, under which the same generator would have only three days in which to ship the hazardous waste off-site (or come into compliance with the requirements for 90/180/270-day generator accumulation areas).

One commenter suggested that in order to be consistent with the SAA regulations, the 55-gallon limit should be on a ''per wastestream'' basis, rather than a ''total volume'' basis. We disagree with the commenter and find the commenter's interpretation of the SAA regulations to be incorrect. To the contrary, EPA has consistently interpreted the SAA regulations such that 55 gallons is based on a total volume of all wastestreams combined (see memo from Robert Springer, Director, OSW to EPA Regional Directors, March 17, 2004, RCRA Online #14703). Thus, Subpart K is consistent with the SAA regulations with respect to this provision.

a. Reactive Acutely Hazardous Unwanted Materials

Under the SAA regulations of § 262.34(c), if more than 1 quart of an acutely hazardous waste listed in § 261.33(e) is accumulated, the excess of 1 quart must be removed from the SAA within three days and taken either to an on-site CAA or TSDF, or transported off-site. Section 261.33(e), which is commonly referred to as the ''P list'' of hazardous wastes, currently comprises 124 chemicals. The P-list is a list of commercial chemical products that are considered acutely hazardous waste when discarded because they are considered hazardous even when managed in small quantities. Under Subpart K, the Agency is reducing the number of chemicals that are subject to removal from the laboratory at the 1-quart threshold from all 124 chemicals on the P-list to the six chemicals that are on the P-list because they are reactive. We focused on the reactive chemicals on the P-list because, as reactive chemicals, they have the potential to cause significant and immediate harm to individuals and property. We are finalizing this provision as proposed, along with the change to the definition of reactive acutely hazardous unwanted material that was previously discussed in section III.B.2 of today's preamble (also see § 262.200).

We also would like to clarify that this regulatory revision—that is, the number of P-listed chemicals that are subject to removal from the laboratory if they exceed the 1-quart threshold—does not impact other aspects of the hazardous waste regulations. That is, we have not changed the regulations with respect to which chemicals are identified as acutely hazardous wastes or the 1 kg/month threshold for becoming an LQG. Therefore, the entire P-list must be considered when a trained professional makes the hazardous waste determination for unwanted materials. If an eligible academic entity generates more than 1 kg/month of acutely hazardous waste, it is an LQG for that calendar month, except if the acutely hazardous waste is from a laboratory clean-out conducted in accordance with § 262.213 of today's rule, in which case it need not be counted toward the eligible academic entity's generator status. See section III.C.7 of today's preamble for a discussion of the laboratory clean-out provisions, as well as § 262.213.

b. Transferring Unwanted Materials or Hazardous Wastes From the Laboratory to an On-site CAA or On-site TSDF

To ensure that unwanted materials removed from the laboratory are brought promptly to their next destination, such as an on-site CAA or TSDF, the Agency proposed to require that when unwanted materials (or hazardous wastes, if the hazardous waste determination was made in the laboratory) are removed from a laboratory, they must be brought ''directly'' from the laboratory(ies) to an on-site CAA or TSDF. We sought comment on whether it was necessary to define ''directly'' or to replace it with a more specific time-frame, such as a same day requirement.

We received several comments in support of defining the term ''directly.'' Other commenters, however, stated that it was not necessary to define the term, especially given our preamble discussion in the proposed rule. In reviewing the comments, we have decided not to add a regulatory definition of ''directly'' and will simply reiterate and expand upon the preamble discussion from the proposed rule.

In general, if the unwanted material is sent from the laboratory or laboratories to the on-site CAA or TSDF within the same work day, this would meet the intent of the regulation. We realize that many eligible academic entities will collect unwanted materials from many laboratories at a time, in series, and will deliver all the unwanted materials to an on-site CAA or TSDF at the end of the collection process. This would be an acceptable practice under today's regulations, provided the unwanted materials are in continuous custody of the trained professional that is collecting and transferring the unwanted materials and they are delivered to the on-site CAA or TSDF at the end of the work shift. It is not necessary to bring the unwanted material from each individual laboratory directly to the on-site CAA or TSDF and then in a separate trip bring the unwanted materials from the next laboratory. Such an arrangement would only increase the amount of time that trained professionals would spend in removing unwanted materials from laboratories and that unwanted materials would spend in transport, with no benefit. On the other hand, if unwanted materials were left on a cart in the hallway overnight, this would not be an acceptable practice and would not meet the intent of the regulation.

c. On-site Consolidation Areas

Under the existing regulations, generators may accumulate hazardous waste in two types of areas without having a permit or interim status: (1) An SAA or (2) an on-site generator accumulation area (≤90, ≤180 or ≤270 day areas).[7] Under Subpart K, eligible academic entities also may accumulate unwanted materials and hazardous wastes in two types of areas without having a permit or interim status: (1) Laboratories (in lieu of SAAs) and (2) an on-site CAA (''CAA'' is a term that has been defined under Subpart K, but is the same as what has sometimes been called ''generator accumulation areas'' or ''90/180/270-day areas'').

At proposal, we solicited comment on whether an additional accumulation area beyond what is already allowed in the rules should be created to allow for the consolidation of unwanted materials after they have been removed from the laboratory. We received many comments in favor of establishing a consolidation area as a new type of area for the accumulation of unwanted materials after such material has been removed from the laboratory. Some commenters even included suggested regulatory text for how these new consolidation areas would be regulated, including specific requirements for labeling/dating, container management, training, removal frequency, hazardous waste determinations, inspections, spill response, signage, and documentation in the LMP. A few commenters, however, opposed the creation of another type of accumulation area, primarily because they were concerned that the addition of another accumulation area would cause confusion.

After analyzing the comments and considering the flexibility that is already provided in the regulations, we have decided not to establish a ''consolidation area'' as another type of accumulation area for unwanted materials. We agree with the commenters that argued that adding another type of accumulation area with another set of standards would be confusing for implementers and enforcers with little, if any, benefit. We believe that the flexibility that is already in Subpart K can provide the benefits of a consolidation area, without establishing a new regulatory category for them.

It has been EPA's regulatory interpretation that hazardous wastes can not be moved from one SAA to another (see memo from Robert Springer, Director, OSW, to EPA Regional Directors; March 17, 2004, RCRA Online #14703). One reason for this prohibition is that it would be easy to circumvent the 55-gallon limit in an SAA by moving hazardous wastes from one SAA to another SAA and thus remain below the volume limits, allowing hazardous wastes to remain in the SAA indefinitely.

In today's rule, however, the removal of unwanted materials is based on time primarily, and volume secondarily. Containers must be marked with the date that unwanted materials first begin to accumulate. This requirement is necessary in order to verify that unwanted materials are being removed from the laboratory on a regular basis. The requirement for a date to be associated with each container provides laboratories with additional flexibility that does not exist in SAAs. That is, under Subpart K, unwanted materials can be safely consolidated within an on-site laboratory, such as in a chemical stockroom. As with all on-site transfers of unwanted material outside of a laboratory, the transfer of unwanted materials between laboratories must be accompanied by a trained professional. Further, any laboratory in which unwanted materials are consolidated from other laboratories is subject to the time and volume limits for all laboratories that are subject to Subpart K (i.e., if the laboratory accumulates more than 55 gallons of unwanted material (or 1 quart of reactive acutely hazardous unwanted material), the unwanted material must be removed from the laboratory within 10 calendar days). In addition, the date that an unwanted material first begins to accumulate in a container would remain the same, regardless of where the container is moved. In other words, no re-dating of a container would be permitted if it were moved to another laboratory or chemical stockroom. If the contents of two or more containers with compatible materials are combined into one container; however, the earliest date associated with the original containers must be used. The date that is associated with each container will allow inspectors to verify that containers are being removed from the laboratory on a routine basis not to exceed six months, as required. The 55-gallon volume limit will ensure that large quantities of unwanted materials are not consolidated without the additional protections required at CAAs.

We envision this flexibility to be particularly useful for eligible academic entities that do not have on-site CAAs. Commenters have indicated that by consolidating their unwanted materials in a laboratory or chemical stockroom themselves prior to a vendor's arrival, they can save money because the vendor will be able to collect unwanted materials from fewer laboratories, thus spending less time on-site. In such a situation, if an eligible academic entity (or the vendor) makes the hazardous waste determination in the laboratory, the eligible academic entity does not have to make the hazardous waste

[7] LQGs may accumulate hazardous waste for 90 days or less on-site without a permit or interim status, provided the provisions of § 262.34(a) (or § 262.34(g)–(i) for F006 recyclers; or § 262.34(j)–(k) for Performance Track members) are met. SQGs may accumulate hazardous waste for 180 days or less on-site without a permit or interim status, provided the provisions of § 262.34(d) and (f) are met. SQGs that must send their hazardous waste more than 200 miles for off-site treatment, storage, or disposal are allowed to accumulate hazardous waste for 270 days or less on-site without a permit or interim status, provided the provisions of § 262.34(d) and (f) are met (see § 262.34(e)).

determination when the unwanted material is removed from the first laboratory. Rather, the hazardous waste determination may be made when the unwanted material is removed from the final laboratory where the unwanted materials are consolidated, before it is sent off-site. Consolidating unwanted materials from multiple laboratories will provide another opportunity to consolidate unwanted materials that are compatible with one another, thereby allowing containers to be reused. We emphasize that trained professionals must transfer unwanted materials between laboratories and that any laboratory where unwanted materials are consolidated also is subject to the Subpart K requirements, including the time and volume limits.

6. Making the Hazardous Waste Determination

One of the primary benefits that Subpart K provides over the existing generator regulations is flexibility in where and when to make the hazardous waste determination. The Agency has consistently interpreted the existing generator regulations to require that the hazardous waste determination be made at the point of generation. We now recognize that making the hazardous waste determination at the point of generation is difficult and impractical in teaching and research laboratories, because of the high number of individual wastes, the variability in such wastes, and the transient nature of those generating many of the wastes, namely students. Therefore, in Subpart K, we proposed to allow the hazardous waste determination to be made in the laboratory before the unwanted materials are removed from the laboratory, or within four calendar days of arriving at an on-site CAA or interim status or permitted TSDF. We proposed that when the hazardous waste determination is made in the laboratory, it does not have to be made at the initial time that the hazardous waste is generated, as is required under the existing generator regulations, only that it must be made before the unwanted materials are removed from the laboratory. This alternative approach ensures that the hazardous waste determination is made by a trained professional, rather than by students, who would likely lack the necessary training, and allows much greater flexibility in where and when to make the hazardous waste determination.

In general, we received favorable comments about the flexibility provided by Subpart K with regard to making the hazardous waste determination. Today, we are finalizing the regulations pertaining to where and when the hazardous waste determination must be made with some minor changes to address the expansion of the applicability of the final rule to include eligible academic entities that are CESQGs. Eligible academic entities that are LQGs or SQGs will continue to have the choice of making the hazardous waste determination in the laboratory before the unwanted material is removed from the laboratory, or within four calendar days of arriving at an on-site CAA or interim status or permitted TSDF. Because CESQGs would not have an on-site CAA or TSDF, CESQGs are required to make the hazardous waste determination in the laboratory before the unwanted material is removed from the laboratory. See section III.C.9 of today's preamble for further discussion of how Subpart K is implemented at CESQGs.

At the time of the proposal, the Agency was aware that many smaller eligible academic entities contract with outside vendors to make the hazardous waste determination on their behalf. We expected that the smaller eligible academic entities, which do not have on-site CAAs or on-site TSDFs, would be relying on vendors to make the hazardous waste determination in the laboratory(ies) prior to the hazardous waste being brought off-site. As proposed, the regulations of Subpart K, specifically § 262.210, allowed for this scenario.

From comments, we learned that even eligible academic entities with on-site CAAs contract with vendors to make and/or confirm their hazardous waste determinations. Thus, we received many comments arguing against the requirement that the hazardous waste code(s) be placed on the container within four days of arriving at the on-site CAA because this essentially would preclude these entities from using vendors to make the hazardous waste determinations for them. These commenters believe that placing the words ''hazardous waste'' on the container is sufficient to indicate that a hazardous waste determination has been made and that they should be allowed to delay putting the hazardous waste code(s) on the container until the vendor comes to ship the hazardous wastes off-site.

We agree with these commenters that the practice of using vendors to make the hazardous waste determination should not be limited to those eligible academic entities that make the hazardous waste determination in the laboratory. Eligible academic entities that make the hazardous waste determination in an on-site CAA or interim status or permitted TSDF also should be able to use vendors to assist them with their hazardous waste determination. In today's final rule, therefore, the hazardous waste determination must still be made within four calendar days of arriving at an on-site CAA or TSDF, and for those unwanted materials that are hazardous waste, the words ''hazardous waste'' still must be added to the label that is affixed or attached to the container within those four calendar days. However, the Agency is amending the final rule so that eligible academic entities may delay assigning the hazardous waste code(s) until immediately prior to shipping the hazardous waste(s) off-site. When containers of unwanted materials arrive at an on-site CAA, they are subject to the CAA regulations appropriate to the site's generator status, including dating of the containers to calculate the 90/180/270 days that the containers may be accumulated on-site, and the container management standards. Likewise, when containers of unwanted materials arrive at an on-site TSDF, the unwanted material becomes subject to the terms of the facility's hazardous waste permit or interim status, as soon as it arrives. Therefore, since the containers must be managed as hazardous waste upon arriving at an on-site CAA or TSDF, we believe there is no decrease in protection of human health and the environment by delaying the addition of the hazardous waste code(s). The hazardous waste code(s) are necessary for determining the LDR regulations that apply to the hazardous wastes, but do not provide additional protection while the hazardous wastes are being accumulated on-site. We emphasize that, in all cases, regardless of generator status, or where the eligible academic entity chooses to make the hazardous waste determination, the hazardous waste determination must be made on-site before the unwanted material can be treated at an on-site CAA, or treated or disposed at an on-site TSDF, or sent off-site.

Many commenters stated that four calendar days was not sufficient to make the hazardous waste determination in an on-site CAA or TSDF. However, given that (1) the hazardous waste determination is usually required to be made at the point of generation and that the Agency is providing considerable flexibility in Subpart K for where and when to make the hazardous waste determination and (2) the initial hazardous waste determination should be more straightforward without the addition of the hazardous waste code(s),

we are not providing additional time. Thus, under today's final rule, the hazardous waste determination must be made within four calendar days of arriving at an on-site CAA or TSDF. Commenters also gave various suggestions for changing ''calendar'' days to ''working'' or ''business'' days. We believe that this would be confusing because not everyone shares the same ''working'' or ''business'' days. By relying on ''calendar'' days, we are providing consistency and clarity in calculating the timeframes within the rule.

The Agency solicited comment on whether the four calendar days should be included within the 90/180/270 day timeframe allowed for accumulation in an on-site CAA or whether it should be separate from these timeframes. Most commenters preferred the proposed option of including the four calendar days for making the hazardous waste determination as part of the 90/180/270 days allowed for the on-site accumulation of hazardous wastes. They expressed this preference, in large part, to avoid additional dating of containers that would be necessary if the four days were separate from, and additional to, the 90/180/270 days of accumulation time. Therefore, under today's final rule, a container's date of arrival at an on-site CAA will be used for two purposes: (1) Calculating the four calendar days allotted for making the hazardous waste determination and (2) calculating the maximum accumulation time in the CAA.

Many commenters objected to the proposed requirement that the hazardous waste code(s) be placed on the label that is affixed to or physically accompanies the container (as previously discussed, today's final rule changes this requirement so that the label must be ''affixed or attached'' to the container). They pointed out that the majority of hazardous wastes generated in a laboratory are lab-packed when they are transported off-site and that putting the hazardous waste code(s) on the label that is affixed to the container, then placing the container inside of a lab pack is of no value because the hazardous waste code(s) would not be able to be seen. The commenters suggested allowing the hazardous waste code(s) to be placed on the label that is ''associated with the container'' rather than the label that is ''affixed or physically accompanies the container.'' We had proposed that, as part of the hazardous waste determination, the hazardous waste code(s) must be placed on the containers within four days of arriving at an on-site CAA or interim status or permitted TSDF. In this instance, the hazardous waste code(s) on the container label would have been visible during accumulation in an on-site CAA or storage in an on-site TSDF. However, since the final regulations have been revised so that the hazardous waste code(s) do not need to be added until just before the hazardous waste is transported off-site and since most containers will be lab-packed, we agree that placing the hazardous waste code(s) on the container label that is affixed or attached to the container provides no value. Therefore, we have revised the regulatory language in §§ 262.210(b)(2), 262.211(e)(2), and 262.212(e)(2) to allow the appropriate hazardous waste code(s) to be placed on the container label that is associated with the container. This will allow the practice of putting hazardous waste code(s) on a packing slip or inventory list for a lab pack to continue.

One commenter expressed concern about the statement in the preamble to the proposed rule (see 71 FR 29735) that, ''* * * regardless of whether an employee or non-employee makes the hazardous waste determination, the college or university could (emphasis added) still be responsible if the hazardous waste determination is not made correctly and for any mismanagement of hazardous waste.'' The commenter was concerned ''that such wording could be used to contradict current RCRA requirements that the generator is always responsible for the proper waste determination regardless of who does the actual designation.'' We did not intend this language to suggest the potential interpretation for which the commenter expressed concern. Indeed, we agree with the commenter that making the proper hazardous waste determination is, and always has been, the responsibility of the generator (as described in 40 CFR 262.11), which in this case, would be the eligible academic entity, and did not intend to suggest otherwise.

Another commenter requested that the Agency clarify that the hazardous waste determination can be made in ''any'' of the three areas, rather than in ''one'' of the three areas identified in § 262.209(a). We agree with the commenter and have changed the regulatory language to reflect the comment. For LQGs and SQGs, it is not necessary for the eligible academic entity to limit itself to making the hazardous waste determination in the same place all the time. We realize that this could change depending upon circumstances. For instance, during typical operations, an eligible academic entity may choose to make the hazardous waste determination in its on-site CAA. However, during a laboratory clean-out, the hazardous waste determination might be made in the laboratory. Eligible academic entities that are CESQGs, however, are limited by regulation to making the hazardous waste determination in the laboratory before the unwanted materials are removed from the laboratory and sent off-site.

Several commenters requested that the Agency clarify the status of chemicals or unwanted materials that can be redistributed to other laboratories. It has always been the case under existing RCRA regulations, and continues to be the case under Subpart K, that chemicals that are fit for continued use are not solid or hazardous wastes (see § 261.2(e)(1)) and can be transferred between SAAs, laboratories, and chemical stockrooms. Under Subpart K, we realize that some chemicals that are initially identified as unwanted materials will turn out not to be solid or hazardous wastes. If, for example, an unwanted material is brought to an on-site CAA or TSDF for a hazardous waste determination, and it is determined that such unwanted material can be reused, then it is not a solid or hazardous waste and is not subject to Subpart K or the Subtitle C hazardous waste regulations, once the determination is made. That is, if a chemical is initially labeled as an unwanted material and then it is subsequently discovered that it can continue to be used, the chemical can be returned to a laboratory or chemical stockroom for redistribution. EPA selected the term ''unwanted material'' over ''laboratory waste,'' in part to indicate that the material may still be useable.

Sometimes laboratories end up discarding chemicals for which little or no identifying information is available. We recognize that, in some cases, chemicals will be managed in the laboratory and that when those chemicals are eventually disposed, it may not be possible to identify the chemicals. This sometimes happens when a researcher retires and leaves unlabeled chemicals behind. In addition, some laboratories synthesize new compounds as part of their research. When these ''unknowns'' are disposed of, it may not be possible to make a hazardous waste determination without analysis. A few commenters requested that the Agency address more specifically how to handle the hazardous waste determination for such unknown chemicals. As a result, we have added a requirement that an eligible academic entity must develop,

in Part II of its LMP, procedures for the timely and reliable characterization of unknown chemicals. See section III.C.8, of today's preamble for more detail, as well as § 262.214.

7. Laboratory Clean-outs

a. Summary of the Proposed Laboratory Clean-out Provisions

EPA inspections and enforcement cases have revealed that used and unused chemicals that are clearly no longer useable, have in some cases remained in laboratories at academic institutions for years and even decades. Sometimes these chemicals have not been discarded because the eligible academic entity did not want to change its RCRA generator status. In fact, one of EPA's goals in promulgating Subpart K has been to provide incentives for eligible academic entities to remove such ''legacy'' chemicals from their laboratories. We proposed to provide two incentives for conducting voluntary laboratory clean-outs. First, we proposed that a college or university would have 30 days to conduct a laboratory clean-out. It is during a laboratory clean-out that a laboratory is most likely to accumulate more than 55 gallons of unwanted material (or 1 quart of reactive acutely hazardous unwanted material). If a laboratory accumulates more than 55 gallons, the current SAA regulations require that the excess of 55 gallons of hazardous waste (or 1 quart of acutely hazardous waste) be removed within three days. Under Subpart K, we proposed that if a laboratory accumulates more than 55 gallons of unwanted material, all unwanted material, including reactive acutely hazardous unwanted material, must be removed within ten calendar days, and if a laboratory accumulates more than 1 quart of reactive acutely hazardous unwanted material then all reactive acutely hazardous unwanted material must be removed from the laboratory within ten calendar days. In a laboratory clean-out conducted under Subpart K, however, a laboratory has 30 days from the starting date of the laboratory clean-out to complete the laboratory clean-out without being required to remove the assembled unwanted materials from the laboratory, even if the laboratory exceeds 55 gallons of unwanted material (or 1 quart of reactive acutely hazardous unwanted material). This incentive provides flexibility by giving an extension in the time allowed for removal of the unwanted material over the three days allowed in the satellite accumulation area regulations, as well as the ten days allowed in Subpart K for unwanted materials that are routinely generated.

Second, we proposed that unwanted materials that are generated during the 30 days of a laboratory clean-out and that are hazardous wastes do not need to be counted toward the facility's generator status. However, with this ''no counting'' incentive, we were and remain concerned about inadvertently encouraging eligible academic entities to retain unwanted materials that are generated in the laboratory on a routine basis and to remove them only during a laboratory clean-out, thereby improperly manipulating their generator status. Two provisions in the proposal were intended to safeguard against this. First was the proposed requirement for the college or university to identify the start date of the laboratory clean-out in its records. This, in combination with the proposed labeling requirement for each container to have an accumulation start date associated with it, provides a method of verification to ensure that any container of unwanted material that has a date that pre-dates the onset of the laboratory clean-out would not be considered to be from the laboratory clean-out and the unwanted material would have to be counted toward calculating the facility's generator status, assuming it is determined to be hazardous waste. The second safeguard that was proposed was that each laboratory at an eligible academic entity could take advantage of the laboratory clean-out incentives only once per 12 month period. Given that each laboratory is required to have a regularly scheduled removal of unwanted material at least every six months, this was intended to ensure that each laboratory would have at least one regularly scheduled removal during a calendar year between laboratory clean-outs.

We received a large number of comments, covering all aspects of the laboratory clean-out provisions. In general, there was overwhelming support for the concept of the laboratory clean-out incentives, although there was opposition expressed by some commenters, as well. Based on these comments, in today's final rule, we have made some revisions to the proposed laboratory clean-out provisions. Below, we discuss the revisions to the proposed laboratory clean-out provisions, as well as the aspects of the laboratory clean-out provisions that are being finalized as proposed, and we provide clarifications regarding the laboratory clean-out provisions.

b. Changes Made to the Laboratory Clean-Out Provisions

Many commenters expressed support for the laboratory clean-out incentive that allowed them not to count their laboratory clean-out hazardous wastes toward their generator status. On the other hand, several commenters expressed concern that the Agency was creating a system that would encourage laboratories to hold onto their routinely generated unwanted materials until a laboratory clean-out, in order to manipulate their generator status. We share the commenters' concerns and have changed the provision of the laboratory clean-out incentive so that only laboratory clean-out hazardous wastes that are unused commercial chemical products are not counted toward the eligible academic entity's generator status. Unused commercial chemical products include chemicals that are discarded P- or U-listed commercial chemical products, and unused discarded chemicals that are hazardous waste because they exhibit one or more characteristics. Any unwanted material that has been used and is a hazardous waste must be counted toward the eligible academic entities generator status, even if it is removed during the 30-day period of a laboratory clean-out. We intend for routinely generated unwanted materials to be removed from the laboratory during regularly scheduled removals, and we expect that the bulk of these routinely generated unwanted materials will be used chemicals. We do not consider these used, routinely generated unwanted materials to be laboratory clean-out wastes and thus, they must be counted toward the eligible academic entity's generator status. Therefore, we have revised the regulatory language to be consistent with our intent and to safeguard against the potential for abuse of the laboratory clean-out incentive. This change will also emphasize that the purpose of the laboratory clean-out is to remove unneeded or unusable chemicals from the laboratory's inventory in order to increase safety within the laboratory.

We will rely on existing regulations and guidance for defining what is considered a used or unused commercial chemical product. For example, the P- or U-listings of § 261.33(e) and (f) apply only to unused commercial chemical products. Therefore, a P- or U-listed hazardous waste generated during a laboratory clean-out would not have to be counted toward the eligible academic entity's generator status, because, by definition, it would be unused. An unused

chemical that is a hazardous waste because it exhibits one or more characteristics also would not have to be counted toward the eligible academic entity's generator status if it were generated during a laboratory clean-out. In a memo dated June 14, 1990, (Bussard to Wilson, RCRA Online #11523), the Agency answered a series of specific questions relating to the definition of ''used.'' In summary, the memo states that dissolving or diluting P- or U-listed chemicals in water, acids, bases, preservatives, or solvents to make laboratory standards (in lieu of buying such solutions) does not constitute use of these chemicals. In addition, any unused, leftover chemical (either P- or U-listed, or characteristic) in an original container, either unopened or opened, or that has been transferred to another container, such as a squirt bottle, for use would also be considered unused.

Some commenters were concerned about the possibility that as a result of the laboratory clean-out provision that allows some hazardous waste not to count toward the eligible academic entity's generator status, some eligible academic entities that are typically CESQGs but would become either SQGs or LQGs as a result of a laboratory clean-out (absent Subpart K), would be able to maintain their CESQG status. If this were the case, the commenter was concerned that hazardous wastes that should normally be managed as hazardous waste would be eligible to be disposed of in a municipal solid waste landfill, which is allowed under the CESQG regulations of § 261.5. The Agency shares the commenter's concern. In fact, in the preamble to the proposed rule we stated, ''any hazardous waste that is not counted toward generator status during a laboratory clean-out is still a hazardous waste and is subject to all applicable regulations, including the land disposal regulations, and the regulations for on-site and off-site management, transportation, and treatment and disposal of hazardous waste. The incentive that the Agency is proposing to provide for hazardous wastes generated during a laboratory clean-out affects only the length of time that hazardous wastes are stored on-site and other associated regulations of 40 CFR 262.34 pertaining to generator status, such as biennial reporting and contingency plans'' (see 71 FR 29739).

Nevertheless, we believe that for clarity it is appropriate to revise the regulatory language of § 262.213 to reflect the intent of the rule as stated in the preamble to the proposed rule. This is made all the more necessary by the expansion of the final rule to include eligible academic entities that are CESQGs. If an SQG avoided LQG status as the result of a laboratory clean-out incentive, the hazardous waste would still be regulated as hazardous waste once it is taken off-site, since both SQGs and LQGs must comply with the same transportation and disposal regulations. With the inclusion of CESQGs into the final rule, however, if a CESQG avoided becoming an SQG or LQG as the result of a laboratory clean-out incentive, then potentially regulated hazardous waste would be allowed to be disposed of at a municipal solid waste landfill. Therefore, we are modifying the language of § 262.213(a)(2) to indicate that the effect of not counting hazardous wastes that are unused commercial chemical products toward the eligible academic entity's generator status is limited to the *on-site accumulation* of the hazardous waste. In tandem, we also are including a new paragraph, § 262.213(a)(3), to indicate that for the purposes of *off-site management,* if an eligible academic entity generates more than the monthly CESQG limits (i.e., >1 kg of acutely hazardous waste, or >100 kg of hazardous waste), then the eligible academic entity must manage its hazardous waste according to all applicable hazardous waste regulations for SQGs and LQGs. When determining whether these monthly limits have been exceeded, the eligible academic entity must count all of its hazardous wastes, including those generated during laboratory clean-outs. In other words, even when hazardous wastes are not counted toward the site's generator status, if they are generated in excess of the CESQG monthly limits, they are regulated as hazardous waste when they are transported, treated, stored or disposed of off-site. EPA intended to create an incentive to conduct laboratory clean-outs by relieving the generator of some of the additional burden that would be incurred by changing generator status. However, we did not intend to allow regulated hazardous waste in excess of the CESQG monthly limits to be disposed of in municipal solid waste landfills.

We illustrate how this would work by providing an example of a likely scenario. An eligible academic entity that is normally a CESQG conducts a laboratory clean-out. As a result of the laboratory clean-out, the eligible academic entity generates 5 kg of P-listed hazardous waste. Because P-listed hazardous wastes are all acute hazardous wastes, the eligible academic entity generates more than 1 kg of acute hazardous waste that month. Normally, this would mean that the eligible academic entity would become subject to the LQG regulations for that month. However, because the laboratory clean-out provisions allow the eligible academic entity not to count the 5-kg of P-listed hazardous waste from the laboratory clean-out toward its generator status, the eligible academic entity will remain a CESQG under § 261.5 for the purposes of on-site accumulation of its hazardous waste, including the acute hazardous waste. However, once the hazardous waste is sent off-site, the eligible academic entity would not be allowed to send its hazardous waste to a non-hazardous waste facility, such as a municipal solid waste landfill, as allowed by the CESQG regulations of § 261.5. Instead, because the eligible academic entity generated acute hazardous waste in excess of the CESQG monthly limits (i.e., >1 kg acute hazardous waste), the hazardous waste would have to be managed as hazardous wastes when sent off-site. This means, for example, that the hazardous waste would have to be manifested, comply with the LDRs, and be either recyled or treated and disposed of at a hazardous waste TSDF.

A number of commenters expressed support for extending the laboratory clean-out incentives to ancillary spaces, such as stockrooms and laboratory preparatory rooms. As discussed in the preceding section on the definition of laboratory (see Section III.B.2 and § 262.200), these ancillary spaces would be considered laboratories, whether they support individual laboratories or the laboratories of a department, and thus would be eligible to take advantage of the laboratory clean-out provisions. In fact, since these ancillary areas typically store chemicals for use by nearby or surrounding laboratories, we believe the clean-out provisions are especially important for these ancillary areas.

Two commenters pointed out an inconsistency between the preamble and the regulatory text with respect to how long records of laboratory clean-outs must be kept. The preamble to the proposed rule stated that records must be kept ''for as long as the college or university operates under this new subpart'' (see 71 FR 29739), while the proposed regulatory text stated that records pertaining to laboratory clean-outs must be kept ''for a period of three years from the date the clean-out ends.'' The proposed regulatory text reflects what we intended for record retention pertaining to laboratory clean-outs. Thus, the final rule makes clear that records for laboratory clean-outs must be kept for three years from the date the clean-out ends.

c. Changes Not Made to the Laboratory Clean-Out Provisions

Many commenters expressed support for the 30-day timeframe for conducting laboratory clean-outs, believing that 30 days is sufficient time to conduct a laboratory clean-out. About the same number of commenters, however, requested a longer timeframe for conducting laboratory clean-outs. Suggestions ranged from 60 days to 180 days. One commenter indicated that ''60 days is a more reasonable length of time to arrange for and mobilize a hazardous waste contractor for on-site lab-packing services, especially if the clean-out was unexpected or the institution is in a remote location.'' We anticipate that in most instances, laboratory clean-outs will be planned events. Therefore, we continue to believe that 30 days is sufficient time to conduct a thorough laboratory clean-out and we are finalizing the time limit for laboratory clean-outs, as proposed.

Commenters asked the Agency when the 30 days of a laboratory clean-out would begin—while the inventory of laboratory chemicals is being sorted or when they are discarded? The definition of ''laboratory clean-out'' in today's final rule is:

> an evaluation of the inventory of chemicals and other materials in a laboratory that are no longer needed or that have expired and the subsequent removal of those chemicals or other unwanted materials from the laboratory. A clean-out may occur for several reasons. It may be on a routine basis (e.g., at the end of a semester or academic year) or as a result of a renovation, relocation, or change in laboratory supervisor/occupant. A regularly scheduled removal of unwanted material as required by § 262.208 does not qualify as a laboratory clean-out.

Therefore, the 30 days of a laboratory clean-out starts when a trained professional or laboratory personnel begins sorting through and evaluating the inventory of laboratory chemicals, making decisions about whether they are unwanted materials or not. Once it has been determined that a chemical is, indeed, an unwanted material, as opposed to a chemical or other material that can be kept in the laboratory for further use, then the unwanted material becomes subject to the requirements of Subpart K. We realize that a laboratory clean-out can involve considerable planning before the laboratory clean-out begins. Advanced planning for a laboratory clean-out prior to sorting and evaluating a laboratory's chemical inventory is not considered the start of the 30 days allowed for a laboratory clean-out.

At the conclusion of the laboratory clean-out, all unwanted materials (or hazardous waste, if the hazardous waste determination is made in the laboratory) must be removed from the laboratory. Note that, as with routinely generated unwanted materials, unwanted materials from a laboratory clean-out can be taken to an on-site CAA or TSDF to make the hazardous waste determination. Eligible academic entities without an on-site CAA, or on-site interim status or permitted TSDF will have to make the hazardous waste determination for unwanted materials generated during a laboratory clean-out in the laboratory before they are removed from the laboratory and will have to be prepared to send the hazardous wastes off-site at the conclusion of the 30-day clean-out.

Finally, although a few commenters suggested that the Agency require that eligible academic entities conduct laboratory clean-outs, the Agency has decided not to do so. Rather, we believe that the laboratory clean-out provisions are attractive enough to eligible academic entities such that they will avail themselves of the clean-out provisions without EPA forcing them to do so through a mandate.

d. Clarifications About the Laboratory Clean-Out Provisions

The Agency wants to reiterate the point that we view laboratory clean-outs to be distinct from routine, regularly scheduled removals of unwanted materials. In the course of normal laboratory operations, many chemicals are used and will become unwanted materials and ultimately may be determined to be hazardous wastes. This can occur as a result of teaching or research activities or, in the case of teaching hospitals, as a result of clinical or diagnostic activities. We expect that these routinely generated wastestreams will comprise the bulk of the unwanted materials that are removed from the laboratory during regularly scheduled removals. On the other hand, a laboratory often can accrue a large number of unused chemicals in its inventory, some of which can become dangerous over time, developing the potential to cause significant harm. It has been our observation that it is unusual for laboratories to remove unused chemicals from their inventories on any regular basis. We have developed the laboratory clean-out provisions to provide incentives for laboratories to assess their inventory and remove chemicals from the laboratory that are either dangerous or have the potential to become dangerous, or are unlikely to be used in the future, regardless of the reason. We anticipate that many eligible academic entities will take advantage of the laboratory clean-out provisions when a researcher or faculty member retires or moves, or when a building is renovated. However, we are not limiting the use of the laboratory clean-out provisions to these events because we would like to encourage laboratories to develop the practice of more frequent reviews and removals of their unneeded or unusable chemicals. However, the laboratory clean-out incentives (i.e., having 30 days to conduct a laboratory clean-out and not counting toward the eligible academic entity's generator status the hazardous waste that consists of unused commercial chemical products) is still limited to once per laboratory per 12 month period.

Two commenters asked for clarification about the labeling and container management standards that apply to laboratory clean-out wastes. During the course of a laboratory clean-out, some chemicals will be considered unwanted materials and ultimately hazardous wastes, while others will not. Those laboratory clean-out chemicals that become unwanted materials are subject to all the same labeling and container management standards—as well as all other applicable requirements of Subpart K—as any other unwanted material in the laboratory, with the exceptions noted in § 262.213(a)(1)–(4). On the other hand, those chemicals that can continue to be used in the same laboratory would be considered products, not unwanted materials, and would not be subject to the labeling and container management standards of Subpart K. If a clean-out chemical from one laboratory can be used in a different laboratory, we can envision two probable scenarios. If the determination is made in the laboratory that a chemical can be used in another laboratory, it would not be considered an unwanted material; rather, it would be considered a product and thus not regulated under RCRA. If, on the other hand, the determination that the chemical can be used in another laboratory is made after it is removed from the laboratory, in an on-site CAA or TSDF, the clean-out chemical would be regulated as an unwanted material until it is redistributed from the CAA to another laboratory for further use.

Several commenters were concerned that if hazardous wastes generated as a result of a laboratory clean-out do not have to be counted toward the eligible academic entity's generator status, fewer generators will have to submit a BR and the result would be under-reporting of hazardous wastes from those eligible academic entities that choose to be subject to the Subpart K requirements.

We acknowledge that there may be fewer generators reporting hazardous waste generation as a result of the laboratory clean-out provisions not to count hazardous waste that consists of unused commercial chemical products toward the eligible academic entity's generator status because under the Federal regulations, only LQGs have to submit the BR. Nevertheless, we anticipate that even after subtracting laboratory clean-out wastes when calculating their generator status, many eligible academic entities will still generate enough hazardous waste to be LQGs, based on their routinely generated laboratory waste, as well as their non-laboratory hazardous wastes, in which case they will still be required to submit the BR. Moreover, some States require SQGs to submit a BR. For information on how to submit the BR with respect to hazardous wastes generated during laboratory clean-outs, see Section III.D.1.

8. Laboratory Management Plan

Today's final rule requires that eligible academic entities choosing to be subject to the Subpart K requirements must develop an LMP. As EPA explained in the preamble to the proposed rule, the goal of the LMP is for a college or university to plan carefully how it is going to implement Subpart K's performance-based requirements for safely managing the unwanted materials generated in laboratories. We believe that the LMP provides a necessary supplement to the flexibility provided in this rule and will ultimately work to increase environmental performance and protection. EPA received positive feedback from commenters about requiring the LMP. Many commenters explained that requiring an LMP along with a performance-based approach will help make it possible for eligible academic entities to achieve their environmental goals, such as regulatory compliance, pollution prevention and laboratory safety.

Some commenters misinterpreted EPA's intent for the LMP. One commenter believed that each laboratory within a college or university had to develop an LMP. That is not the case at all. Rather, EPA intended that the eligible academic entity—a college or university, or non-profit research institute or teaching hospital that is owned by or has a formal written affiliation agreement with a college or university—would create one LMP for all its laboratories that are operating under Subpart K. In addition, if an eligible academic entity has multiple EPA Identification Numbers or sites, then it can develop one LMP to cover operations for all laboratories at all sites operating under the Subpart K requirements. Also, a number of commenters suggested that an eligible academic entity should list in its LMP which laboratories would be covered under Subpart K and its LMP. The commenters go on to state that each eligible academic entity should be allowed to determine which of its laboratories will operate under Subpart K and document this in its LMP. In response, and as described earlier in the preamble, if multiple sites with separate EPA Identification Numbers operate under one LMP, the LMP must identify which sites are covered by the LMP. However, there is no requirement to identify each laboratory within each site, as all laboratories at a participating eligible academic entity within that site or covered by an EPA Identification Number must operate under Subpart K (see section III.C.1, Notification and § 262.203). Nevertheless, should an eligible academic entity choose to list all its laboratories that are participating in Subpart K, it could be a valuable tool to manage removals of unwanted material, as well as assist EPA and State inspectors in determining compliance with the Subpart K requirements.

Another commenter argued that requiring an LMP would be redundant documentation since laboratories are required to have a Chemical Hygiene Plan under OSHA's Laboratory Standard. We disagree. As the proposal clearly explained, a college or university (and now eligible academic entities) can take an existing plan, such as the Chemical Hygiene Plan and revise it to include the additional necessary information or procedures required by today's rule.

Two requirements for the LMP are remaining the same in today's final rule. First, an eligible academic entity must make its LMP ''available'' to laboratory workers, students, and anyone requesting the LMP at the eligible academic entity. Examples may include, but are not limited to, posting the LMP on the Web site of the participating eligible academic entity or keeping a copy of the LMP at each individual site of the eligible academic entity that is participating in Subpart K. Second, since the LMP is a document to plan how an eligible academic entity will meet the performance-based standards of Subpart K, EPA requires the LMP to be reviewed and updated, as needed, so that it is current with the waste management practices at the eligible academic entity's laboratories.

Most of the comments received about the LMP centered on the two options EPA co-proposed regarding the enforceability of the contents of the LMP. Both proposed options required development of an LMP that addressed how the college or university would achieve the performance-based standards of the rule. The difference between the two options was in the enforceability of the contents of the LMP. Under one proposed option, compliance with the performance-based regulations was enforceable, but the contents of the LMP were not enforceable. In the other proposed option, the contents of the LMP were enforceable, as well as compliance with the performance-based regulations.

EPA received comments supporting both options. There was a strong belief from some commenters that if the EPA did not make the LMP's contents enforceable, then the LMP would not be a meaningful document and would not be followed. On the other side, commenters argued that the LMP should not be enforceable; these commenters believed that an enforceable LMP would compel colleges or universities to develop vague, minimum procedures and that an enforceable LMP would be contrary to the goals of a performance-based regulation.

Reviewing the Agency's reasons for proposing the requirement for an LMP, EPA wanted colleges and universities to give careful thought regarding the management of unwanted materials and hazardous waste generated in their laboratories. Moreover, we wanted to encourage colleges or universities to go above and beyond the regulations and to think holistically about waste management on campus by planning and developing best management practices (BMPs) in the LMP. We continue to believe strongly that the LMP is necessary in order to provide the planning component for implementing the provisions of this rule. Based on our views regarding the purpose of the LMP and the comments we received, we have decided to split the LMP into two parts—with the contents of one part enforceable and the contents of the other part not enforceable, although in order to be in compliance with Subpart K, an eligible academic entity must address all nine elements in its LMP.

Thus, under the final rule, the LMP must be comprised of two parts with a total of nine elements as specified in 40 CFR 262.214. The specific contents in Part I of the LMP are enforceable, while the specific contents in Part II of the LMP are not enforceable. Below is a discussion of the required elements in the two Parts of the LMP. If an element has remained the same as proposed, it is simply enumerated without discussion.

a. Part I of the LMP

As a way to incorporate more flexibility into the regulations, while maintaining the accountability in this Subpart, the contents of Part I of the LMP are enforceable. This part of the LMP contains necessary information for inspectors and other officials about what options within Subpart K the eligible academic entity is exercising. The two elements of Part I of the LMP are explained here:

1. Describe procedures for container labeling in accordance with § 262.206(a), including

i. Identifying whether the eligible academic entity will use the term ''unwanted material'' on the containers in the laboratory. If not, identify the equally effective term that will be used in lieu of ''unwanted material'' and consistently by the eligible academic entity. The equally effective term, if used, has the same meaning and is subject to the same requirements as ''unwanted material.''

ii. Identifying the manner in which information that is ''associated with the container'' will be imparted.

The first sub-element allows flexibility in using different terminology other than ''unwanted materials.'' Many commenters wrote that they disliked the term ''unwanted materials'' because it was overbroad and would cause confusion. While we do not necessarily agree with these commenters, EPA does not object to including additional flexibility concerning the terminology that can be used in the laboratory instead of ''unwanted materials.'' [8] However, in order for an eligible academic entity to take advantage of this option, it must identify another equally effective term (e.g., laboratory waste) in the first element of Part I of its LMP. This equally effective term must be used consistently in all of its laboratories operating under Subpart K (see Section III.C.2 and § 262.206(a)(1)(i)).

The second sub-element of the first element of Part I of the LMP in today's final rule requires eligible academic entities to describe the manner in which information associated with the container will be provided. For example, if an eligible academic entity chooses to use barcodes and a computer tracking system to meet the requirement to have information associated with a container, it must describe this in the enforceable Part I of the LMP, so that inspectors know where the associated container information resides.

2. Identify whether the eligible academic entity will comply with § 262.208(a)(1) or § 262.208(a)(2) for regularly scheduled removals of unwanted material from the laboratory.

In the second element of Part I of the LMP, an eligible academic entity must describe which method it will exercise for the removal of unwanted materials. Today's final rule adds another option for the removal of unwanted materials, as described in Section III.C.5 of today's preamble, in order to increase the flexibility for eligible academic entities. However, with the added flexibility, we require that the eligible academic entity documents which removal method it chooses to use. For example, if an eligible academic entity elects to comply with 40 CFR 262.208(a)(2), where it must remove containers of unwanted material from each laboratory within six months of each container's accumulation start date, then the eligible academic entity must record this choice in Part I of the LMP. If the eligible academic entity elects to comply with the other approach, that must be documented in Part I of the LMP.

b. Part II of the LMP

As with Part I of the LMP, Part II of the LMP is required and must reasonably address the seven required elements. EPA envisions that eligible academic entities will use this section to capture BMPs for holistic waste management within laboratories. In order to encourage the development of BMPs, the specific contents of Part II of the LMP are not enforceable. For example, should an eligible academic entity explain that it will train students commensurate with their duties by showing a video, but instead provides classroom instruction because the video is broken, then the eligible academic entity is not in violation of its LMP. The following are the seven elements that an eligible academic entity must address in Part II of its LMP; discussed in the order in which they appear in the regulations.

• The first three elements of Part II of the LMP are essentially the same as proposed.

The second element includes a minor change that was necessary because of the change in the training and instruction requirements for laboratory workers and students. Under the proposed rule, training was required for laboratory workers, while instruction was required for students. Today's final rule requires that for both laboratory workers and students, training be commensurate with their duties. Elements one, two, and three of Part II of the LMP are below:

1. Describe its intended best practices for container labeling and management standards, including how the eligible academic entity will manage containers used for in-line collection of unwanted materials, such as with high performance liquid chromatographs and other laboratory equipment (see the required standards at § 262.206).

2. Describe its intended best practices for providing training for laboratory workers and students commensurate with their duties (see the required standard at § 262.207(a)).

3. Describe its intended best practices for providing training to ensure safe on-site transfers of unwanted material by trained professionals (see the required standard at § 262.207(d)(1)).

• The fourth element of Part II of the LMP has changed since proposal.

The fourth element of Part II of the LMP concerns the procedures of regularly removing unwanted materials from the laboratory. While EPA is not adding anything to this element, the regulatory language has been modified to clarify what the Agency intends as part of this element. That is, we have included two different types of removals of unwanted materials from laboratories—regularly scheduled removals, and removals when maximum volumes are exceeded—because they require different procedures. This clarification will ensure that an eligible academic entity develops a method to communicate with EH&S personnel or vendors when laboratories exceed the maximum volume and a pickup of the unwanted materials is needed. See the fourth element below:

4. Describe its intended best practices for removing unwanted material from the laboratory, including:

a. For regularly scheduled removals—Develop a regular schedule for identifying and removing unwanted materials from its laboratories (see the required standards at § 262.208(a)(1) and § 262.208(a)(2)).

b. For removals when maximum volumes are exceeded

A. Describe its intended best practices for removing unwanted materials from the laboratory within 10 calendar days when unwanted materials have exceeded their maximum volumes (see the required standards at § 262.208(d)).

B. Describe its intended best practices for communicating that unwanted materials have exceeded their maximum volumes.

• The fifth and sixth elements of Part II of the LMP have remained essentially the same as proposed. The second part of element six reflects one minor change. In the preamble to the proposed rule and as finalized today, one of the requirements for a laboratory clean-out is that an eligible academic entity must document its clean-out activities (see section III.D.2 or § 261.213(a)(4)). Because we are not mandating that an

[8] If an eligible academic entity elects to use another equally effective term in lieu of ''unwanted material,'' in compliance with § 262.206(a)(1)(i), the equally effective term will have the same meaning as ''unwanted material.'' In addition, the equally effective term shall be subject to all of the same requirements in this rule that apply to unwanted materials.

eligible academic entity document its laboratory clean-out in a particular format or media, we are requiring that an eligible academic entity develop procedures for documenting it as part of element six of Part II of the LMP. See elements five and six below:

5. Describe its intended best practices for making hazardous waste determinations, including specifying the duties of the individuals involved in the process (see the required standards at § 262.11 and §§ 262.209–262.212).

6. Describe its intended best practices for laboratory clean-outs if the eligible academic entity plans to use the incentives for laboratory clean-outs provided in § 262.213, including:

a. Procedures for conducting laboratory clean-outs (see the required standards at § 262.213(a)(1)–(3)) and

b. Procedures for documenting laboratory clean-outs (see the required standards at § 262.213(a)(4)).

• The seventh element of Part II of the LMP has changed since proposal.

The seventh element has been expanded in the final rule based on several comments about the characterization of unknown chemicals and chemicals that degrade over time. The proposed rule required colleges and universities to develop emergency prevention, notification, and response procedures appropriate to the hazards in the laboratory, and the final rule keeps this requirement as the first sub-element of element seven. In comments, however, we were informed that laboratories face issues with chemicals that expire and/or become dangerous as they degrade. A good example of this is picric acid, which becomes explosive if it becomes dehydrated/crystallized. Because of the threat some chemicals may pose, the final rule requires that the seventh element of Part II of the LMP includes a list of chemicals that the eligible academic entity has or is likely to have that can degrade over time and become more dangerous with age; the list of chemicals is intended to facilitate the removal of these chemicals before a problem develops. The third sub-element requires eligible academic entities to develop procedures to dispose of these chemicals safely.

Finally, a number of commenters suggested that eligible academic entities should develop procedures in their LMPs for identifying and characterizing unknown chemicals in a timely manner. Since transporters and TSDFs often will not accept unknown chemicals, the unknown chemicals tend to remain on-site for extended periods. We agree with the commenters and believe this requirement will assist in the timely removal of these unknown chemicals and in emergency prevention for laboratories. Thus, we have added it as the fourth sub-element of the seventh element of Part II of the LMP. See the seventh element below:

7. Describe its intended best practices for emergency prevention, including:

a. Procedures for emergency prevention, notification, and response, appropriate to the hazards in the laboratory, and

b. A list of chemicals that the eligible academic entity has, or is likely to have, that become more dangerous when they exceed their expiration date and/or as they degrade, and

c. Procedures to safely dispose of chemicals that become more dangerous when they exceed their expiration date and/or as they degrade, and

d. Procedures for the timely characterization of unknown chemicals.

In summary, an eligible academic entity must develop an LMP with two parts covering a total of nine elements. The contents of the two elements in Part I of the LMP are enforceable. Part II of the LMP is intended to encourage eligible academic entities to develop BMPs for their laboratories. While the contents of Part II of the LMP are not enforceable, eligible academic entities must reasonably address the seven required elements.

9. How CESQGs Comply With Subpart K and How They Differ From LQGs and SQGs

In most respects, an eligible academic entity that opts into Subpart K is regulated the same, regardless of whether the eligible academic entity is a CESQG, SQG, or LQG. However, because CESQGs are regulated differently than SQGs and LQGs under the existing generator regulations, we have had to tailor some sections of the Subpart K requirements to reflect their inclusion. This section discusses how the Subpart K requirements will be implemented for CESQGs.

Specifically, Subpart K provides an alternative set of requirements for generators of laboratory hazardous waste. For SQGs and LQGs, Subpart K provides an alternative to §§ 262.11 and 262.34(c) (the SAA regulations). For CESQGs, however, the Subpart K requirements provide an alternative to the conditional exemption in § 261.5(b), which exempts hazardous waste from regulation under 40 CFR Parts 124, 262–266, 268, 270, and the notification requirements of RCRA section 3010, provided the CESQG complies with the conditions of the exemption. Thus, by choosing to become subject to Subpart K, an eligible academic entity relinquishes its conditionally exempt status and becomes subject to the requirements of 40 CFR part 262, Subpart K, while managing its unwanted materials and hazardous wastes in its laboratories. However, a CESQG also will be able to take advantage of the two main benefits of the alternative standards: Making the hazardous waste determination before the unwanted materials are removed from the laboratory (but at a time after the initial generation) and the laboratory clean-out provisions.

As with other eligible academic entities, an eligible academic entity that is a CESQG and that opts into Subpart K must notify EPA of its intended participation using the Site Identification Form (EPA Form 8700–12). One of the fields on the Site Identification Form asks for the site's EPA Identification Number. We realize that most CESQGs will not have EPA Identification Numbers when they submit their notifications for Subpart K and they are not required to apply for one, although some States may choose to assign an Identification Number once a Site Identification Form is submitted. If an eligible academic entity that opts into Subpart K is a CESQG and does not have an EPA Identification Number, all of the laboratories owned by the eligible academic entity and that are on-site (as opposed to under the same EPA Identification Number) will be subject to Subpart K.

Many college and university commenters informed the Agency that they have multiple EPA Identification Numbers (or sites) within a single campus. When a campus is divided into numerous sites, each site has its own generator status, based on its monthly generation of hazardous waste. Therefore, a single campus may be comprised of sites that are CESQGs, SQGs, and LQGs. Some other commenters also indicated that they have field laboratories, which may not be on campus, that are typically CESQGs, and which may not be on campus, but that laboratory personnel often work in both the campus laboratories and the field laboratories. Commenters requesting that CESQGs be allowed to be subject to Subpart K argued that it would be to their benefit to have the same management standards for the hazardous wastes generated in all of their laboratories. The Agency agrees and is clarifying that when eligible academic entities that are CESQGs choose to be subject to the Subpart K requirements, their laboratories must follow the same container labeling, container management, training requirements and all other management standards for the management of their unwanted materials in the laboratory as other generators operating under Subpart K.

Since CESQGs will not have an on-site CAA or TSDF, CESQGs must make the hazardous waste determination in the laboratory before the unwanted materials may be removed from the laboratory (but at a time after the initial generation of the unwanted materials). We realize that a CESQG may be part of a larger ''main'' campus that has a CAA and that the eligible academic entity may want to bring the unwanted materials from the CESQG site to the main campus's CAA to make the hazardous waste determination. However, today's rule does not allow for this and all hazardous waste determinations must be made on-site before the unwanted material may be treated or disposed of on-site or transported off-site. Today's rule does not allow for off-site consolidation of unwanted materials or hazardous wastes, with two exceptions that are discussed in section III.C.10 of today's preamble. As discussed previously, eligible academic entities, including CESQGs, may consolidate unwanted materials on-site in another laboratory (see section III.C.5.c of today's preamble for more detail).

Once the hazardous waste determination is made in accordance with § 262.11, the eligible academic entity must count the unwanted materials that are hazardous wastes toward calculating its monthly generator status and it must remove the hazardous waste from the laboratory directly. If the total quantity of hazardous waste for the month for the site is below the CESQG limits (i.e., <1 kg of acutely hazardous waste and <100 kg of hazardous waste), the hazardous waste may be managed as CESQG hazardous waste when removed from the laboratory. That is, the hazardous waste may be managed at any of the types of facilities listed in § 261.5(f)(3) for acute hazardous waste, or § 261.5(g)(3) for hazardous waste:

(i) Permitted under 40 CFR part 270.

(ii) In interim status under 40 CFR parts 265 and 270.

(iii) Authorized to manage hazardous waste by a State with a hazardous waste management program approved under 40 CFR part 271.

(iv) Licensed, registered or permitted by the State to manage municipal solid waste, and if managed in a solid waste landfill is subject to 40 CFR part 258.

(v) Licensed, registered or permitted by the State to manage non-municipal non-hazardous waste, and if managed in a non-municipal non-hazardous waste disposal unit is subject to 40 CFR 257.5–257.30.

(vi) Beneficially uses, reuses, legitimately recycles or reclaims its waste; or treats its waste prior to beneficial use, reuse, legitimate recycling or reclamation, or

(vii) For universal waste, a universal waste handler or destination facility subject to the requirements of 40 CFR part 273.

Eligible academic entities that are CESQGs or have CESQG sites also will be able to take advantage of the laboratory clean-out provisions in the final rule. That is, CESQGs can have up to 30 days to conduct a laboratory clean-out and not be required to count hazardous wastes that are unused commercial chemical products and that are generated during a laboratory clean-out toward calculating their generator status. Thus, we believe that the laboratory clean-out incentives will now provide a considerable benefit to generators that are typically CESQGs, but become LQGs on an episodic or periodic basis when they discard unused commercial chemical products (either listed or characteristic) from their laboratories. As discussed in section III.B.7 of today's preamble, even if the laboratory clean-out incentives allow an eligible academic entity to maintain its conditionally exempt status, if the eligible academic entity generates hazardous waste in quantities in excess of the CESQG monthly limits, the hazardous waste is fully regulated as hazardous waste when it is transported, treated, stored or disposed of off-site (also see § 262.213).

10. Off-site Consolidation

a. Off-site Consolidation by CESQGs

Several commenters suggested that the Agency allow the off-site consolidation of unwanted materials at a centralized, off-site location. These commenters generally suggested this as part of their request to expand the applicability of the final rule to include CESQGs. The current generator regulations, for any generator status, provide limited opportunities for a generator to accept off-site shipments of another generator's hazardous waste. Under both the existing generator regulations, as well as under today's final rule, there are two situations that allow for a generator to receive hazardous waste from another, off-site generator.

The first situation applies to the off-site consolidation of hazardous waste generated only by CESQGs. Under § 261.5, in order to qualify as a CESQG, a CESQG must ensure delivery of its acute hazardous waste and hazardous waste to one of the seven types of facilities listed in § 261.5(f)(3) and 261.5(g)(3):

(i) Permitted under 40 CFR part 270.

(ii) In interim status under 40 CFR Parts 265 and 270.

(iii) Authorized to manage hazardous waste by a State with a hazardous waste management program approved under 40 CFR part 271.

(iv) Licensed, registered or permitted by the State to manage municipal solid waste, and if managed in a solid waste landfill is subject to 40 CFR part 258.

(v) Licensed, registered or permitted by the State to manage non-municipal non-hazardous waste, and if managed in a non-municipal non-hazardous waste disposal unit is subject to 40 CFR 257.5 through 257.30.

(vi) Beneficially uses, reuses, legitimately recycles or reclaims its waste; or treats its waste prior to beneficial use, reuse, legitimate recycling or reclamation, or

(vii) For universal waste, a universal waste handler or destination facility subject to the requirements of 40 CFR part 273.

If a CESQG that generates hazardous waste wants to send its hazardous waste to an off-site consolidation area for centralized collection, it must send its hazardous waste to a collection site that would qualify as one of the above mentioned facilities in order to still qualify as a CESQG. Thus, a receiving generator could be an acceptable collection site if it qualified as one of the seven categories of facilities above. For example, a CESQG could send its hazardous waste to an eligible academic entity if such receiving entity was an interim status or permitted TSDF or was authorized by the State to manage hazardous waste under the State approved program. If the CESQG that generates hazardous waste sends it to another generator that does not qualify as one of the facilities specified above, the generating CESQG would not meet the conditions of the CESQG exemption and would be subject to the applicable generator regulations of 40 CFR part 262 (see Q&A dated April 4, 1987; RCRA Online #12894).

b. Off-site Consolidation by CESQGs, SQGs, and LQGs

The second situation applies to all generator categories. A generator can send its hazardous waste to another generator's site if the receiving site qualifies as a transfer facility (see Q&A dated April 4, 1987; RCRA Online #12894). Under § 263.12, hazardous waste may be stored in containers at a transfer facility for ten days or less without requiring interim status or a permit. A transfer facility is defined in 40 CFR 260.10 as '' * * * any transportation related facility including loading docks, parking areas, storage

areas, and other similar areas where shipments of hazardous waste are held during the normal course of transportation.'' It is possible that a generator may qualify as a transfer facility, as long as the hazardous waste it receives is not stored on-site for more than ten days. As stated previously, the hazardous waste determination must be made for all unwanted materials prior to transporting them off-site, regardless of whether the off-site transportation includes a stop at a transfer facility.

11. Topics That Are Outside the Purview of This Rulemaking

EPA has consistently interpreted our existing hazardous waste regulations to allow generators to non-thermally treat the hazardous waste they generate on-site in their accumulation tanks and containers, without needing to obtain a RCRA permit or having interim status (51 FR 10168, March 24, 1986). Examples of treatment that may be conducted in accumulation tanks and containers without a permit or interim status include precipitating heavy metals from solutions and oxidation/reduction reactions. A permit or interim status would be required to store and/or treat hazardous waste that is consolidated from off-site locations or if the treatment was thermal treatment.

Many commenters suggested that the Subpart K requirements should specifically address treatment of hazardous waste by generators in laboratories. In the proposal to Subpart K, the Agency did not specifically identify a regulatory approach for the treatment of hazardous waste by generators in laboratories. Therefore, because the Agency did not provide notice and an opportunity for public comment on this subject, it is outside the scope of this rulemaking and EPA does not intend to add any such provisions to the final rule. While today's final rule does not specifically address the treatment of hazardous waste in laboratories, it also does not change EPA's interpretation of its existing regulations.

We have also often been informed, and commenters confirmed, that it is not uncommon for an eligible academic entity to have numerous EPA Identification Numbers per ''campus.'' Typically, this is because the campus is intersected by public roads so that not all areas of the campus are considered ''on-site,'' as defined by RCRA. We received several comments encouraging EPA to allow a single EPA Identification Number per campus. We did not specifically identify in the proposal to Subpart K a regulatory approach for allowing one EPA Identification Number per campus. Therefore, because the Agency did not provide notice and an opportunity for public comment on this subject, it is outside the scope of this rulemaking and EPA does not intend to add any such provisions to the final rule.

D. Reporting and Recordkeeping

1. Reporting to the Biennial Report for Eligible Academic Entities That Are LQGs

Under the existing generator regulations, LQGs are required to submit information about their hazardous waste generation and management activities in the BR. The data are prepared and submitted to the EPA Regions (or authorized States) in even-numbered years (e.g., 2006) and must include waste information from the previous, odd-numbered year (e.g., 2005). The data submitted for the BR is retained in the RCRAInfo System. When developing rulemakings, the Agency often relies on data submitted for the BR to inform us about various aspects of the hazardous waste activities, such as identifying generators of hazardous wastes and waste generation and management activities (i.e., number of hazardous waste generators and volume of hazardous waste being generated and managed). When analyzing data in the RCRAInfo System to support the development of this rulemaking, it became clear to the Agency that there are a variety of ways in which similar entities with similar hazardous waste generation patterns report data for the BR. The Agency recognizes the differences in reporting may be situational; however, we offer suggestions here for reporting future laboratory hazardous waste activities to the BR that will assist the Agency in analyzing data in a more consistent and accurate manner.

On the Generation and Management (GM) form of the BR, we suggest the use of the Source Code G22 (Laboratory analytical wastes (used chemicals from laboratory operations)) would be appropriate in most cases for hazardous wastes that are generated in the laboratory and that are not from a laboratory clean-out. When G22 is not applicable, but the hazardous wastes are generated in a laboratory, the generator should indicate in the comment field (when provided by the State) that the hazardous waste originated in a laboratory. In addition, the Form Codes W001 (Lab packs from any source not containing acute hazardous waste) and W004 (Lab packs from any source containing acute hazardous waste) should be used when applicable.

If an eligible academic entity submits a BR that includes hazardous waste from laboratory clean-outs, the Agency's guidance on preparing the GM Form of the BR is to use the Source Code G11, for the discarding of off-specification or out-of-date chemicals or products. If the State's version of the GM form provides a comment section, we suggest the eligible academic entity indicate that the hazardous waste is from a Subpart K laboratory clean-out.

2. Recordkeeping

Today's final rule requires that eligible academic entities choosing to comply with the Subpart K requirements maintain certain records. Specifically, eligible academic entities must maintain the following records: (1) Notification(s) to the appropriate EPA Regional Administrator (or State Director, in authorized States) of its participation in or subsequent withdrawal from Subpart K (using the EPA Site Identification Form (EPA Form 8700–12)); (2) non-profit research institutes and teaching hospitals that are not owned by a college or university must keep the formal written affiliation agreement on file; (3) training records for laboratory workers defined in 40 CFR 262.200 of this Subpart at participating LQG eligible academic entities; (4) documentation of laboratory clean-out activities identifying the laboratory being cleaned out, the date the clean-out begins and is completed, and the volume of hazardous waste generated during the clean-out that is conducted in accordance with § 262.213; and (5) an LMP (an existing plan may be modified to address the specific requirements of this alternative regulation).

EPA is not requiring that a participating eligible academic entity keep all required records, such as notifications, training records, formal written affiliation agreements and the LMP together. However, EPA believes filing all required records together, if practicable, may enhance the ease of accessibility by those individuals needing access to the records at any given time. Additionally, having the records located in one central location may help increase efficiency of inspections by reducing the amount of time expended to locate records that may be kept in several different locations at a participating institution (e.g., training records might normally be filed with personnel files and the LMP might normally be kept at the EH&S department).

EPA is requiring that an eligible academic entity maintain a copy of its notification to participate in this

Subpart on file in-house (i.e., at the participating eligible academic entity) for the duration that the institution remains subject to the Subpart K requirements. Additionally, an eligible academic entity must maintain a copy of its notification to withdraw from Subpart K on file for three years from the date of the notification of withdrawal from the Subpart K requirements.

Because of the expansion in scope of today's final rule, the Agency has added recordkeeping for teaching hospitals and non-profit research institutes, as defined in the final rule. In order to document that a non-profit research institute or a teaching hospital is eligible to opt into Subpart K, the non-profit research institute or teaching hospital must keep on file for the duration that the institution remains subject to the Subpart K requirements a copy of the formal written affiliation agreement that it has with the college or university. For a teaching hospital, the formal written affiliation agreement must consist of a master affiliation agreement and program letter of agreement with the medical college or school with which it is affiliated.

We reiterate that today's final rule does not change the existing recordkeeping requirements for documenting training of trained professionals at LQGs. Under the existing hazardous waste generator regulations, LQGs must comply with the recordkeeping requirements found at 40 CFR 265.16(e). Since this rule simply refers to the existing applicable training requirements pertaining to an eligible academic entity's generator status, training records for trained professionals (i.e., individuals conducting the hazardous waste determination or transferring unwanted materials on-site) must be maintained at LQGs. SQG training requirements at 40 CFR 262.34(d)(5)(iii) do not require retention of training records; therefore, Subpart K does not require training records to be kept for trained professionals at SQGs. Likewise, training records are not required for trained professionals at CESQGs. Furthermore, training records for students are not required for LQGs, SQGs or CESQGs.

In addition, as proposed, today's final rule requires that LQG eligible academic entities maintain documentation that demonstrates that laboratory workers have been trained commensurate with their duties. As with trained professionals, these records must be kept for the duration specified in § 265.16(e). Thus, these training records must be kept until the institution closes or for three years after the departure of a trained professional or laboratory worker.

Additionally, as proposed, today's final rule includes a recordkeeping provision for laboratory clean-out events at participating eligible academic entities. Section 262.213(a)(4) of today's rule requires eligible academic entities to document their clean-out activities. EPA is not mandating a particular record format or media. Instead, participating institutions may determine the most appropriate type of record that best suits their individual capabilities and recordkeeping systems (e.g., filed hard copy, electronic copy). However, the documentation must contain certain information and be retained at the eligible academic entity for three years from the date the laboratory clean-out ends. Specifically, this documentation must identify the particular laboratory that is being cleaned out, the date the clean-out began and ended, and the volume of hazardous waste generated during the clean-out. This documentation is particularly relevant since a laboratory may only utilize the laboratory clean-out provision incentives (i.e., not counting hazardous wastes that are unused commercial chemical products toward its generator status and the 30-day allowance for removal) once per 12-month period per laboratory.

Also, EPA is requiring that a copy of a participating eligible academic entity's LMP be retained on file at the participating institution for the duration that it is regulated under 40 CFR part 262, Subpart K. Furthermore, we recommend that the LMP be dated. While EPA is not requiring that a copy of the LMP at a participating eligible academic entity be kept at each individual site with a unique EPA Identification Number that has opted in, we do require that the LMP is ''available'' by anyone involved in the management of unwanted materials (e.g., students in the laboratory, faculty, inspectors and other relevant regulatory authorities). The participating eligible academic entity will determine how best to meet the requirements of making the LMP available since EPA envisions that an LMP will be revised periodically. Examples of ''available'' may include, but are not limited to, posting the LMP on the participating eligible academic entities Web site or other universally accessible electronic system, or keeping a copy of the LMP at each individual site that has opted in.

Today's rule strives to reduce or minimize additional recordkeeping requirements on eligible academic entities participating in Subpart K. As an example, we believe some participating eligible academic entities will revise their current required planning documents, such as the Chemical Hygiene Plan (CHP), which is required by OSHA's Laboratory Standard regulations at 29 CFR 1910.1450. In such cases, there would be minimal additional recordkeeping associated with an LMP. However, we also understand that this may not be true in all cases. When planning documents don't already exist, an additional recordkeeping requirement would be associated with maintaining an LMP since eligible academic entities will need to develop this document to comply with this Subpart.

We solicited comment on whether there should be a requirement to retain records of the labels associated with containers. The information on the label associated with containers, such as the accumulation start date and information sufficient to make a hazardous waste determination, was assumed to be either electronic, via spreadsheets and bar codes, or written logs and in the proposed rule EPA considered requiring that this information be retained on file as a record. However, commenters noted that records of container labels should not be retained because it would be too burdensome and unnecessary. We agree with the commenters and believe that other recordkeeping requirements sufficiently document the information necessary for inspections of laboratories at eligible academic entities. Therefore, the final rule does not require that records be kept for labeling information associated with containers, beyond the time that a hazardous waste determination is made for the contents.

EPA also solicited comment in the proposal on whether maintenance of any other records or reporting requirements should be required under today's Subpart K regulations for purposes of improving implementation, compliance monitoring and assistance by the relevant regulatory authority or for program implementation. Comments submitted by the academic community stated, ''do not add recordkeeping.'' These comments noted that the proposed recordkeeping or documentation requirements for notification, labeling, laboratory clean-outs and the LMP are sufficient to ensure compliance and measure success. We agree with these commenters that additional recordkeeping or reporting requirements beyond what was included in the proposal are unnecessary to ensure compliance with today's rule. Therefore, in today's final rule, we are not including any new or additional

recordkeeping or reporting requirements to the final rule.

E. Implementation and Enforcement

Subpart K blends traditional regulatory requirements with performance-based standards to maximize flexibility and enable better environmental compliance at eligible academic entities. Subpart K also offers greater flexibility in implementation than the existing generator requirements. As such, we are highlighting some points on compliance for a few of the more flexible requirements of Subpart K.

First, only eligible academic entities, as defined in this final rule, may participate in Subpart K. As this rule is optional, eligible academic entities must at all times comply with either the existing generator regulations or with today's Subpart K requirements. Specifically, under today's final rule, an eligible academic entity must decide under which set of standards (existing generator standards or Subpart K) it will operate all of its laboratories that are covered by the same EPA Identification Number (or that are on-site) and notify EPA if it chooses to opt into Subpart K. Eligible academic entities may have several sites with unique EPA Identification Numbers, and each site may have laboratories. It is important to note that eligible academic entities operating laboratories with different EPA Identification Numbers may elect which laboratories will opt into or withdraw from Subpart K on a site-by-site basis.

Second, since this rule is for laboratories only, it is likely that participating eligible academic entities will be subject to two different sets of requirements for hazardous waste management: 40 CFR part 262, Subpart K for unwanted materials generated in its laboratories, and existing generator requirements for all other hazardous wastes generated at these institutions. As a result, implementers (eligible academic entities and compliance and enforcement individuals) will need to determine whether the laboratories at an eligible academic entity are operating under Subpart K (i.e., under different generator regulations) from the remainder of the site for compliance monitoring and assistance.

Third, because the enforcement of the contents of the LMP differs for Part I and Part II, and participating entities may modify an existing plan to meet the LMP requirements, we reiterate the requirements relating to the different parts below (see preamble section III.C.8 or § 262.214 of today's final rule for all requirements related to the LMP). We also remind eligible academic entities that if they choose to modify an existing plan in order to meet the LMP requirements under Subpart K, today's rule does not supersede or otherwise affect the requirements related to that existing plan.

For Part I of the LMP, the eligible academic entity must implement and comply with the specific contents for all the elements they develop for Part I. For example, if an eligible academic entity chooses to use another ''equally effective term'' for ''unwanted material,'' then it must identify the term in Part I of its LMP and must use this equally effective term consistently. In addition, the equally effective term is subject to all requirements of this rule that apply to unwanted materials. If the eligible academic entity uses another term, but fails to identify the equally effective term in Part I of its LMP, or uses a different term not identified in Part I of its LMP, then the eligible academic entity would be considered in violation of Subpart K.

While an eligible academic entity's LMP must include, and reasonably address, the required elements in Part II of its LMP, if the eligible academic entity does not meet or implement the specific contents of the elements in Part II of its LMP, an enforcement action would not be brought against it for such deviations. For example, an eligible academic entity must describe in Part II of its LMP how it will provide training for laboratory workers and students commensurate with their duties. If the institution describes a training program that specifies the number of hours of classroom training for laboratory workers or students in its LMP, but they receive either a different number of hours, or a different type of training, such as video instruction, the participating institution would not be in violation of Subpart K, provided the laboratory workers and students are trained commensurate with their duties.

Finally, today's rule would not affect a participating eligible academic entity's obligation to respond promptly to any releases of hazardous wastes that may occur, including releases of unwanted materials in the laboratory. Any management of released unwanted material not in compliance with applicable Federal and State hazardous waste requirements could result in an enforcement action. For example, if a spill or release of hazardous waste occurred and was not immediately cleaned up, the participating eligible academic entity could potentially be subject to enforcement for illegal disposal of the hazardous waste. In addition, solid and hazardous waste releases could potentially be addressed through enforcement orders, such as orders under RCRA sections 3013 and 7003.

IV. State Authorization

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize a qualified State to administer its own hazardous waste programs within the State in lieu of the Federal program. Following authorization, EPA retains enforcement authority under Sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for State authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in that State, since only the State was authorized to issue RCRA permits. When new, more stringent Federal requirements were promulgated, the State was obligated to enact equivalent authorities within specified time frames. However, the new Federal requirements did not take effect in an authorized State until the State adopted the Federal requirements as State law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized States at the same time that they take effect in unauthorized States. EPA is directed by the statute to implement these requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA related provisions as State law to retain final authorization, EPA implements the HSWA provisions in authorized States until the States do so.

Authorized States are required to modify their programs only when EPA enacts Federal requirements that are more stringent or broader in scope than the existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program (see also 40 CFR 271.1). Therefore, authorized States may, but are not required to, adopt Federal regulations, both HSWA

and non-HSWA, that are considered less stringent than previous Federal regulations.

B. Effect on State Authorization

Today's rule finalizes regulations that are not being promulgated under the authority of HSWA. Thus, the standards finalized today would be applicable on the effective date only in those States that do not have final authorization of their base RCRA programs. Moreover, authorized States are required to modify their programs only when EPA promulgates Federal regulations that are more stringent or broader in scope than the authorized State regulations. For those changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their program. This is a result of section 3009 of RCRA, which allows States to impose more stringent regulations than the Federal program. However, today's final rule is considered to be neither more nor less stringent than the current standards. Therefore, authorized States would not be required to modify their programs to adopt regulations consistent with and equivalent to today's standards. Nevertheless, because EPA believes that today's rule will increase the ability of eligible academic entities to comply with the RCRA hazardous waste generator regulations which would likely lead to greater environmental protection, EPA strongly encourages States to adopt today's rule. Eligible academic entities located in authorized States wishing to be subject to Subpart K do not have this option until their State has adopted the final rule.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' since this action may raise novel legal or policy issues [3(f)(4)]. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866. Any changes made in response to OMB recommendations have been documented in the docket for this action.

This rule is projected to result in benefits to society in the form of cost savings. The aggregate cost savings for all eligible academic entities that are projected to take advantage of the final rule is estimated to be $396,000 per year. This figure is significantly below the $100 million threshold [9] established under part 3(f)(1) of the Order. Thus, this rule is not considered to be an ''economically significant action.'' However, in an effort to comply with the spirit of the Executive Order, we have prepared an economic assessment in support of today's action. This document is entitled: *Assessment of Potential Costs, Benefits and Other Impacts for the Revised Standards Applicable to Generators of Hazardous Waste; Subpart K—Laboratories Owned by Eligible Academic Entities*. This document is otherwise referred to as the ''*Economic Assessment*.'' The docket established for today's rulemaking maintains a copy of this *Economic Assessment* for public review. For a more detailed discussion regarding the comments received on the economic assessment for the proposed rule, refer to the Response to Comments Document which can be found in the docket for today's final rule.

1. Introduction to the Economic Assessment for the Final Rule

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The Agency's economic assessment conducted as part of EPA's obligations under Executive Order 12866 evaluates costs, cost savings (benefits), waste quantities affected, and other impacts, such as environmental justice, children's health, unfunded mandates, regulatory takings, and small entity impacts. To conduct this analysis, we prepared a baseline characterization, developed and implemented a methodology for examining impacts, and followed appropriate guidelines and procedures for examining equity considerations, children's health, and other impacts.

2. Baseline Specification

Proper baseline specification is vital to the accurate assessment of incremental costs, benefits, and other economic impacts associated with any rulemaking. The baseline essentially describes the world absent today's final rulemaking. The incremental impacts of today's final rule are evaluated by assessing anticipated post-rule responses with respect to baseline conditions and actions. The baseline, as applied in this analysis, reflects the practices and requirements of eligible academic entities under the existing hazardous waste generator regulations. A full discussion of the baseline specification is presented in the *Economic Assessment.*

3. Analytical Methodology, Primary Data Sources, and Key Assumptions

The first step in the methodology for the economic assessment of today's final rule was to use data from EPA's *2005 National Biennial Report* database and other sources to estimate the number of eligible academic entities that generate laboratory hazardous wastes and may be affected by the final rule. Several of the comments submitted to EPA expressed concern that in the proposed rule, EPA underestimated the fraction of hazardous waste generated in teaching and research laboratories at colleges and universities compared to total hazardous waste generated at colleges and universities. In contrast to the 9 percent estimate used by EPA for its economic analysis for the proposed rule, these commenters stated that in their experience, laboratory hazardous waste represents a much larger portion (60 to 95 percent) of a college or university's total hazardous waste stream. Several commenters provided detailed data on their hazardous waste generation especially laboratory hazardous waste. To address this concern, a more refined methodology for estimating the quantity of hazardous waste generated by laboratories at eligible academic entities was developed. For more details about the methodology changes, see section III.A.1 of today's preamble or the economic assessment for today's final rule.

Since today's final rule is equally as stringent as the existing Federal hazardous waste regulations, authorized States are not required to adopt Subpart K. Thus, once the number of eligible academic entities was determined, for purposes of the rule's *Economic Assessment,* EPA estimated how many States would adopt Subpart K. EPA assumed that States which have historically adopted at least 85 percent of RCRA's rule changes over a five-year period will adopt Subpart K. Thus, 29 States and Puerto Rico are projected to adopt today's final rule, while 21 States are assumed to not adopt today's rule.

In order to model the various scenarios at eligible academic entities, we employed four factors to categorize eligible academic entities: institution type, laboratory system size, hazardous waste generator status, and whether an eligible academic entity operates a CAA. Using these categorizations, the *Economic Assessment* examines the costs and savings of this rule's new requirements, such as recordkeeping, reporting, training, laboratory clean-outs, etc., compared to the existing

[9] The $100 million threshold applies to both costs, and cost savings.

hazardous waste generator requirements, to determine the net overall cost or cost savings of Subpart K which includes all of these factors.

Finally, a specific annualized before-tax cost analysis was conducted for each affected entity. Before-tax incremental compliance costs were used because they represent a resource or social cost of the rulemaking. A discount rate (real rate of return) of 7 percent was used covering the estimated period of service or life of the product. All costs are adjusted to year 2008 dollars using the Implicit Price Deflator for Gross Domestic Product.

4. Key Analytical Limitations

The Agency was not able to complete a formal RCRA Section 3007 survey of laboratories at colleges and universities, and non-profit research institutes and teaching hospitals that are either owned by or have a formal written affiliation agreement with a college or university. Consequently, for this assessment, it was necessary to rely on publicly available data. The key analytical limitations associated with these data are briefly summarized in the bullets below. Additional limitations and assumptions related to the economic analysis are discussed in more detail in the *Economic Assessment*.

- The analysis relies heavily on information generated in 2005 through a survey by NACUBO and, while this survey represents the best available source of data, the facilities captured by the survey may not be representative of the colleges and universities impacted by the rule.
- This analysis relies on BR data which includes hazardous waste quantity data for a limited number of SQGs and CESQGs. Thus, the number of entities within the universe of potentially eligible academic entities is uncertain.
- Data were not available to estimate the number of laboratories at non-profit research institutes and teaching hospitals. College and university data and Web-based internet information were used to estimate the number of laboratories at these sites.
- The cost impact analysis is very sensitive to the number and size of containers requiring labeling in the laboratory. The analysis assumes that one-third of the containers are pint-size, one-third are quart-size and one-third are gallon-size.
- An eligible academic entity can develop a single LMP that can cover all its laboratories regardless of whether they are located in sites with separate EPA Identification Numbers. Data limitations prevented us from determining which sites generating laboratory hazardous waste may choose to operate under the same LMP.

5. Findings

The findings presented here reflect a number of analytical assumptions and limitations, as touched on above, and as described in more detail in the *Economic Assessment*. Furthermore, we have analyzed additional scenarios and conducted sensitivity analyses that are not presented in today's preamble. Readers wanting to gain a full understanding of our analytical methodology, data, findings, assumptions, and limitations are encouraged to read the *Economic Assessment* document prepared in support of this final rule.

In summary, we have identified a total of 1,580 facilities in operation in the U.S., which generate laboratory hazardous wastes and are eligible academic entities as defined under today's rulemaking. Of this total, 397 are LQGs, 759 are SQGs, and the remaining 424 are CESQGs. However as stated above, we assume the States which have historically adopted at least 85 percent of RCRA's rule changes over a five-year period will adopt Subpart K; thus the universe of eligible academic entities located in these States is 169 LQGs, 323 SQGs and 181 CESQGs (673 facilities in total). Out of this number of eligible academic entities located in the States that adopt Subpart K, we assumed for this analysis that eligible academic entities that experience cost savings by opting into Subpart K will be the only eligible academic entities that participate in the final rule. Thus, the final rule would provide annual aggregate net cost savings of approximately $396,000. These savings would be realized by the estimated 112 eligible academic entities that we project would choose to operate under Subpart K. The greatest savings would accrue to the 25 LQGs projected to elect to be regulated under Subpart K; the analysis estimates average annual cost savings of approximately $12,200 per LQG opting into the rule. Lesser savings would be realized by the 87 SQGs that are projected to elect to be regulated under Subpart K; for each SQG opting into Subpart K, we estimate average annual cost savings of approximately $1,000. Under this *Economic Assessment,* all CESQG eligible academic entities demonstrated cost increases by operating under Subpart K, so we assumed that CESQGs would not opt into the final rule. Overall, average annual savings for eligible academic entities operating under Subpart K are estimated at approximately $3,500 per entity.

An important benefit of Subpart K for some eligible academic entities will be the opportunity to maintain their typical RCRA generator status because of today's rule's laboratory clean-out provisions (see § 262.213). Eligible academic entities that are able to maintain their normal generator status rather than episodically increasing their generator status by generating laboratory clean-out waste can realize savings in reporting, planning, and overall administrative costs when operating under Subpart K. Another significant portion of the cost savings achieved reflects a reduction in the number of off-site hazardous waste shipments, thereby reducing shipment costs, particularly among colleges, universities, and research institutes that are able to maintain their typical generator status from LQG to SQG as a result of the laboratory clean-out provisions. Such a change allows for longer accumulation times and increased efficiencies in the number of laboratories visited per day for entities without CAAs, in order to remove unwanted materials. In addition to reduced shipments, much of the benefits of the rule include reduced costs for on-site travel. This largely reflects the stipulation that a hazardous waste determination for unwanted material in the laboratory may occur at any time before it is removed from the laboratory or within four days of arrival at an on-site CAA or TSDF, unlike the existing generator regulations that stipulate that the hazardous waste determination must be made at the point of generation.

The overall goal of today's action is to promote environmental protection and public health through safer management of laboratory hazardous waste at eligible academic entities. The Agency has not monetized or quantitatively estimated the human health or environmental benefits. However, this rule is expected to result in numerous environmental benefits. The structured nature of the LMP is expected to result in safer laboratory practices and increased awareness of hazardous waste management. This will minimize exposure of humans and the environment to hazardous wastes. Ultimately, LMPs are expected to improve the way eligible academic entities coordinate and integrate their hazardous waste management activities and enhance awareness about proper laboratory waste handling techniques. In addition to the LMP, the rule specifies streamlined, yet cost-neutral training requirements that are expected to increase awareness of waste hazards

and so reduce the potential for mismanagement of the hazardous waste generated in laboratories. Also, the Agency included incentives in today's final rule to encourage more frequent laboratory clean-outs of unwanted and unused reagents, thus reducing the potential for accidental releases of these chemicals into the environment. Further, EPA expects to see a benefit from allowing CESQGs to opt into the rule, because those hazardous wastes generated above CESQGs' monthly volume limits during a laboratory clean-out will be managed within the Subtitle C system, as opposed to being managed as a non-hazardous waste. Finally, we anticipate additional non-quantified economic gains through improved hazardous waste management practices, waste minimization, and waste coordination activities.

B. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR Number 2317.01.

The Paperwork Reduction Act requires that EPA estimate the burden (time, effort, financial resources) on respondents to comply with all actions that involve the collection of information, such as recordkeeping, reporting, or disclosure requirements or other information collection activities required by this rulemaking. Below is a description of the information collection activities required by today's rulemaking.

Since this rule establishes an alternative set of hazardous waste generator requirements for eligible academic entities' laboratories, it is important that EPA or the authorized States know to which set of regulations an eligible academic entity is subject. Therefore, EPA has determined at 40 CFR 262.203 and 262.204 that it is necessary to require an eligible academic entity to submit a notification to the EPA Regional Administrator (or State Director in authorized States) indicating that it is electing to be subject to or withdrawing from Subpart K for all laboratories under the same EPA Identification Number (or on the same site, in the absence of an EPA Identification Number). The Site Identification Form must be used by eligible academic entities to notify the appropriate authority of its participation in or withdrawal from Subpart K. Under 40 CFR 262.206, 262.208, 262.10, 262.11, and 262.12 of Subpart K, an eligible academic entity must label containers of unwanted materials, as specified. These labeling requirements are necessary to: Demonstrate compliance with Subpart K, alert individuals handling the containers of their contents to ensure proper management, assist trained professionals in making the hazardous waste determination and assigning the appropriate hazardous code(s), ensure emergency responders can quickly ascertain and assess the contents of a container in case of an emergency, and utilize for enforcement and monitoring purposes.

Part 40 CFR 262.207 of Subpart K requires training, commensurate with duties, for all students and laboratory workers working in a laboratory. This training is necessary to ensure that unwanted materials are handled safely and in an environmentally sound manner and in compliance with Subpart K. In addition, eligible academic entities that are LQGs must maintain the training records for laboratory workers.

Under 40 CFR 262.313, eligible academic entities must develop and maintain documentation of laboratory clean-outs to ensure compliance with Subpart K. Also under 40 CFR 262.214, eligible academic entities are required to develop, implement and maintain an LMP to document their practices for complying with the performance-based requirements of Subpart K.

Section 3007(b) of RCRA and 40 CFR part 2, Subpart B, defines EPA's general policy on public disclosure of information, and contains provisions for confidentiality. However, the Agency does not anticipate that eligible academic entities will assert any claims of confidentiality in association with the final rule. If such a claim were asserted, EPA must and will treat the information in accordance with the regulations cited above. EPA also will assure that this information collection complies with the Privacy Act of 1974 and OMB Circular 108.

According to the estimates provided in the ICR for this final rule, the average annual incremental burden of new paperwork requirements to respondents as a result of today's final rule is approximately 12,557 hours and $461,632. These estimates are a total net burden to respondents meaning that the burden relief to eligible academic entities under the existing regulations was subtracted from the new paperwork requirements of Subpart K. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The Agency received one consolidated comment representing six commenters on the ICR for the proposed rule. The comment on burden estimates focused on the notification requirement for Subpart K. In general, the commenters believe the burden estimates for notifying the appropriate authority of an eligible academic entity's decision to opt into or out of Subpart K (see §§ 262.203 and 262.204) were fairly accurate and supported use of the Site Identification Form as the mechanism to be used for notification. The comment specifically stated, ''* * * burden for the college to notify appears to be accurate and would be the same regardless of whether a letter or Site Identification Form is used. However, the burden for the implementer for clerical time should be cut in half, from 0.5 to 0.25.'' In addition the comment stated, '' * * * the proposed notification requirement discussed on **Federal Register** notice page 29727 under section B.3 could be met by using the Site Identification Form (EPA form 8700–12).'' A vast majority of the comments received supported the use of the Site Identification Form over the use of a letter for notification purposes. Thus, the Agency has chosen to finalize the requirement for eligible academic entities to use the Site Identification Form for notification.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

The RFA provides default definitions for each type of small entity. Small entities are defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Under the final rule, no small eligible academic entities are projected to adopt the regulation unless they expect to experience a net decrease in costs associated with managing their laboratory hazardous waste. Based on these findings, we do not believe that this rule will result in significant economic impacts on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. Under § 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, Local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, Section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, Local, or Tribal governments or the private sector. The UMRA generally excludes from the definition of ''Federal intergovernmental mandate,'' duties that arise from participation in a voluntary Federal program. This rule is a voluntary program because the States are not required to adopt these requirements as a condition of authorization (or otherwise). Furthermore, EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, Local, and Tribal governments, in the aggregate, or the private sector in any one year. The total net benefits (cost savings) of this action are estimated to be $396,000 per year. Finally, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and Local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Today's rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Order. The rule focuses on a set of alternative generator requirements for eligible academic entities generating laboratory hazardous wastes, without affecting the relationships between Federal and State governments. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.'' This final rule does not have Tribal implications, as specified in Executive Order 13175. EPA has concluded that this rule may have Tribal implications only to the extent that qualifying academic institutions could be affected if they have laboratories that are in some way affiliated with Tribal lands. However, this rule will neither impose substantial direct compliance costs on Tribal governments nor preempt Tribal law.

EPA did not consult directly with representatives of Tribal governments in the process of developing this rule. However, EPA did conduct an extensive outreach process with States and potentially affected entities. Furthermore, we received no comments from any Tribal governments on the proposed rule. Thus, we believe we have captured the concerns that would have been expressed by representatives of Tribal governments.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria,

the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's final rule is not subject to the Executive Order because it is not economically significant and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Usage

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not an economically significant action under Executive Order 12866. This rule will not seriously disrupt energy supply, distribution patterns, prices, imports or exports. Furthermore, this rule is designed to improve economic efficiency by streamlining the management of laboratory hazardous wastes.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. This final action is designed to ensure more effective and efficient management of laboratory hazardous wastes.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective December 31, 2008.

List of Subjects

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 262

Environmental protection, Exports, Hazardous materials transportation, Hazardous waste, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Dated: November 18, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, Parts 261 and 262 of title 40, chapter I of the Code of Federal Regulations are amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

■ 2. Section 261.5 is amended by removing the period at the end of paragraph (c)(6) and adding in its place a ''semicolon'' and by adding paragraph (c)(7) to read as follows:

§ 261.5 Special requirements for hazardous waste generated by conditionally exempt small quantity generators.

* * * * *

(c) * * *

(7) Is a hazardous waste that is an unused commercial chemical product (listed in 40 CFR part 261, subpart D or exhibiting one or more characteristics in 40 CFR part 261, subpart C) that is generated solely as a result of a laboratory clean-out conducted at an eligible academic entity pursuant to § 262.213. For purposes of this provision, the term eligible academic entity shall have the meaning as defined in § 262.200 of Part 262.

* * * * *

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

■ 3. The authority citation for part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922–6925, 6937, and 6938.

Subpart A—General

■ 4. Section 262.10 is amended by adding paragraph (l) to read as follows:

§ 262.10 Purpose, scope, and applicability.

* * * * *

(l) The laboratories owned by an eligible academic entity that chooses to be subject to the requirements of Subpart K of this part are not subject to (for purposes of this paragraph, the terms ''laboratory'' and ''eligible academic entity'' shall have the meaning as defined in § 262.200 of Subpart K of this part).:

(1) The requirements of § 262.11 or § 262.34(c), for large quantity generators and small quantity generators, except as provided in Subpart K, and

(2) The conditions of § 261.5(b), for conditionally exempt small quantity generators, except as provided in Subpart K.

■ 5. Part 262 is amended by adding Subpart K to read as follows:

Subpart K—Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities

Sec.

262.200 Definitions for this subpart.
262.201 Applicability of this subpart.
262.202 This subpart is optional.

262.203 How an eligible academic entity indicates it will be subject to the requirements of this subpart.
262.204 How an eligible academic entity indicates it will withdraw from the requirements of this subpart.
262.205 Summary of the requirements of this subpart.
262.206 Labeling and management standards for containers of unwanted material in the laboratory.
262.207 Training.
262.208 Removing containers of unwanted material from the laboratory.
262.209 Where and when to make the hazardous waste determination and where to send containers of unwanted material upon removal from the laboratory.
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Subpart K—Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities

§ 262.200 Definitions for this subpart.

The following definitions apply to this subpart:

Central accumulation area means an on-site hazardous waste accumulation area subject to either § 262.34(a) (or 262.34(j) and (k) for Performance Track members) of this part (large quantity generators); or § 262.34(d)–(f) of this part (small quantity generators). A central accumulation area at an eligible academic entity that chooses to be subject to this subpart must also comply with § 262.211 when accumulating unwanted material and/or hazardous waste.

College/University means a private or public, post-secondary, degree-granting, academic institution, that is accredited by an accrediting agency listed annually by the U.S. Department of Education.

Eligible academic entity means a college or university, or a non-profit research institute that is owned by or has a formal written affiliation agreement with a college or university, or a teaching hospital that is owned by or has a formal written affiliation agreement with a college or university.

Formal written affiliation agreement for a non-profit research institute means a written document that establishes a relationship between institutions for the purposes of research and/or education and is signed by authorized representatives, as defined by § 260.10, from each institution. A relationship on a project-by-project or grant-by-grant basis is not considered a formal written affiliation agreement. A *formal written affiliation agreement* for a teaching hospital means a master affiliation agreement and program letter of agreement, as defined by the Accreditation Council for Graduate Medical Education, with an accredited medical program or medical school.

Laboratory means an area owned by an eligible academic entity where relatively small quantities of chemicals and other substances are used on a non-production basis for teaching or research (or diagnostic purposes at a teaching hospital) and are stored and used in containers that are easily manipulated by one person. Photo laboratories, art studios, and field laboratories are considered laboratories. Areas such as chemical stockrooms and preparatory laboratories that provide a support function to teaching or research laboratories (or diagnostic laboratories at teaching hospitals) are also considered laboratories.

Laboratory clean-out means an evaluation of the inventory of chemicals and other materials in a laboratory that are no longer needed or that have expired and the subsequent removal of those chemicals or other unwanted materials from the laboratory. A clean-out may occur for several reasons. It may be on a routine basis (e.g., at the end of a semester or academic year) or as a result of a renovation, relocation, or change in laboratory supervisor/occupant. A regularly scheduled removal of unwanted material as required by § 262.208 does not qualify as a laboratory clean-out.

Laboratory worker means a person who handles chemicals and/or unwanted material in a laboratory and may include, but is not limited to, faculty, staff, post-doctoral fellows, interns, researchers, technicians, supervisors/managers, and principal investigators. A person does not need to be paid or otherwise compensated for his/her work in the laboratory to be considered a laboratory worker. Undergraduate and graduate students in a supervised classroom setting are not laboratory workers.

Non-profit research institute means an organization that conducts research as its primary function and files as a non-profit organization under the tax code of 26 U.S.C. 501(c)(3).

Reactive acutely hazardous unwanted material means an unwanted material that is one of the acutely hazardous commercial chemical products listed in § 261.33(e) for reactivity.

Teaching hospital means a hospital that trains students to become physicians, nurses or other health or laboratory personnel.

Trained professional means a person who has completed the applicable RCRA training requirements of § 265.16 for large quantity generators, or is knowledgeable about normal operations and emergencies in accordance with § 262.34(d)(5)(iii) for small quantity generators and conditionally exempt small quantity generators. A trained professional may be an employee of the eligible academic entity or may be a contractor or vendor who meets the requisite training requirements.

Unwanted material means any chemical, mixtures of chemicals, products of experiments or other material from a laboratory that is no longer needed, wanted or usable in the laboratory and that is destined for hazardous waste determination by a trained professional. Unwanted materials include reactive acutely hazardous unwanted materials and materials that may eventually be determined not to be solid waste pursuant to § 261.2, or a hazardous waste pursuant to § 261.3. If an eligible academic entity elects to use another equally effective term in lieu of ''unwanted material,'' as allowed by § 262.206(a)(1)(i), the equally effective term has the same meaning and is subject to the same requirements as ''unwanted material'' under this subpart.

Working container means a small container (*i.e.*, two gallons or less) that is in use at a laboratory bench, hood, or other work station, to collect unwanted material from a laboratory experiment or procedure.

§ 262.201 Applicability of this subpart.

(a) Large quantity generators and small quantity generators. This subpart provides alternative requirements to the requirements in §§ 262.11 and 262.34(c) for the hazardous waste determination and accumulation of hazardous waste in laboratories owned by eligible academic entities that choose to be subject to this subpart, provided that they complete the notification requirements of § 262.203.

(b) Conditionally exempt small quantity generators. This subpart provides alternative requirements to the conditional exemption in § 261.5(b) for

the accumulation of hazardous waste in laboratories owned by eligible academic entities that choose to be subject to this subpart, provided that they complete the notification requirements of § 262.203.

§ 262.202 This subpart is optional.

(a) Large quantity generators and small quantity generators: Eligible academic entities have the option of complying with this subpart with respect to its laboratories, as an alternative to complying with the requirements of §§ 262.11 and 262.34(c).

(b) Conditionally exempt small quantity generators. Eligible academic entities have the option of complying with this subpart with respect to its laboratories, as an alternative to complying with the conditional exemption of § 261.5(b).

§ 262.203 How an eligible academic entity indicates it will be subject to the requirements of this subpart.

(a) An eligible academic entity must notify the appropriate EPA Regional Administrator in writing, using the RCRA Subtitle C Site Identification Form (EPA Form 8700–12), that it is electing to be subject to the requirements of this subpart for all the laboratories owned by the eligible academic entity under the same EPA Identification Number. An eligible academic entity that is a conditionally exempt small quantity generator and does not have an EPA Identification Number must notify that it is electing to be subject to the requirements of this subpart for all the laboratories owned by the eligible academic entity that are on-site, as defined by § 260.10. An eligible academic entity must submit a separate notification (Site Identification Form) for each EPA Identification Number (or site, for conditionally exempt small quantity generators) that is electing to be subject to the requirements of this subpart, and must submit the Site Identification Form before it begins operating under this subpart.

(b) When submitting the Site Identification Form, the eligible academic entity must, at a minimum, fill out the following fields on the form:

(1) Reason for Submittal.

(2) Site EPA Identification Number (except for conditionally exempt small quantity generators).

(3) Site Name.

(4) Site Location Information.

(5) Site Land Type.

(6) North American Industry Classification System (NAICS) Code(s) for the Site.

(7) Site Mailing Address.

(8) Site Contact Person.

(9) Operator and Legal Owner of the Site.

(10) Type of Regulated Waste Activity.

(11) Certification.

(c) An eligible academic entity must keep a copy of the notification on file at the eligible academic entity for as long as its laboratories are subject to this subpart.

(d) A teaching hospital that is not owned by a college or university must keep a copy of its formal written affiliation agreement with a college or university on file at the teaching hospital for as long as its laboratories are subject to this subpart.

(e) A non-profit research institute that is not owned by a college or university must keep a copy of its formal written affiliation agreement with a college or university on file at the non-profit research institute for as long as its laboratories are subject to this subpart.

§ 262.204 How an eligible academic entity indicates it will withdraw from the requirements of this subpart.

(a) An eligible academic entity must notify the appropriate EPA Regional Administrator in writing, using the RCRA Subtitle C Site Identification Form (EPA Form 8700–12), that it is electing to no longer be subject to the requirements of this subpart for all the laboratories owned by the eligible academic entity under the same EPA Identification Number and that it will comply with the requirements of §§ 262.11 and 262.34(c) for small quantity generators and large quantity generators. An eligible academic entity that is a conditionally exempt small quantity generator and does not have an EPA Identification Number must notify that it is withdrawing from the requirements of this subpart for all the laboratories owned by the eligible academic entity that are on-site and that it will comply with the conditional exemption in § 261.5(b). An eligible academic entity must submit a separate notification (Site Identification Form) for each EPA Identification Number (or site, for conditionally exempt small quantity generators) that is withdrawing from the requirements of this subpart and must submit the Site Identification Form before it begins operating under the requirements of §§ 262.11 and 262.34(c) for small quantity generators and large quantity generators, or § 261.5(b) for conditionally exempt small quantity generators.

(b) When submitting the Site Identification Form, the eligible academic entity must, at a minimum, fill out the following fields on the form:

(1) Reason for Submittal.

(2) Site EPA Identification Number (except for conditionally exempt small quantity generators).

(3) Site Name.

(4) Site Location Information.

(5) Site Land Type.

(6) North American Industry Classification System (NAICS) Code(s) for the Site.

(7) Site Mailing Address.

(8) Site Contact Person.

(9) Operator and Legal Owner of the Site.

(10) Type of Regulated Waste Activity.

(11) Certification.

(c) An eligible academic entity must keep a copy of the withdrawal notice on file at the eligible academic entity for three years from the date of the notification.

§ 262.205 Summary of the requirements of this subpart.

An eligible academic entity that chooses to be subject to this subpart is not required to have interim status or a RCRA Part B permit for the accumulation of unwanted material and hazardous waste in its laboratories, provided the laboratories comply with the provisions of this subpart and the eligible academic entity has a Laboratory Management Plan (LMP) in accordance with § 262.214 that describes how the laboratories owned by the eligible academic entity will comply with the requirements of this subpart.

§ 262.206 Labeling and management standards for containers of unwanted material in the laboratory.

An eligible academic entity must manage containers of unwanted material while in the laboratory in accordance with the requirements in this section.

(a) Labeling: Label unwanted material as follows:

(1) The following information must be affixed or attached to the container:

(i) The words ''unwanted material'' or another equally effective term that is to be used consistently by the eligible academic entity and that is identified in Part I of the Laboratory Management Plan, and

(ii) Sufficient information to alert emergency responders to the contents of the container. Examples of information that would be sufficient to alert emergency responders to the contents of the container include, but are not limited to:

(A) The name of the chemical(s),

(B) The type or class of chemical, such as organic solvents or halogenated organic solvents.

(2) The following information may be affixed or attached to the container, but

must at a minimum be associated with the container:

(i) The date that the unwanted material first began accumulating in the container, and

(ii) Information sufficient to allow a trained professional to properly identify whether an unwanted material is a solid and hazardous waste and to assign the proper hazardous waste code(s), pursuant to § 262.11. Examples of information that would allow a trained professional to properly identify whether an unwanted material is a solid or hazardous waste include, but are not limited to:

(A) The name and/or description of the chemical contents or composition of the unwanted material, or, if known, the product of the chemical reaction,

(B) Whether the unwanted material has been used or is unused,

(C) A description of the manner in which the chemical was produced or processed, if applicable.

(b) Management of Containers in the Laboratory: An eligible academic entity must properly manage containers of unwanted material in the laboratory to assure safe storage of the unwanted material, to prevent leaks, spills, emissions to the air, adverse chemical reactions, and dangerous situations that may result in harm to human health or the environment. Proper container management must include the following:

(1) Containers are maintained and kept in good condition and damaged containers are replaced, overpacked, or repaired, and

(2) Containers are compatible with their contents to avoid reactions between the contents and the container; and are made of, or lined with, material that is compatible with the unwanted material so that the container's integrity is not impaired, and

(3) Containers must be kept closed at all times, except:

(i) When adding, removing or consolidating unwanted material, or

(ii) A working container may be open until the end of the procedure or work shift, or until it is full, whichever comes first, at which time the working container must either be closed or the contents emptied into a separate container that is then closed, or

(iii) When venting of a container is necessary.

(A) For the proper operation of laboratory equipment, such as with in-line collection of unwanted materials from high performance liquid chromatographs, or

(B) To prevent dangerous situations, such as build-up of extreme pressure.

§ 262.207 Training.

An eligible academic entity must provide training to all individuals working in a laboratory at the eligible academic entity, as follows:

(a) Training for laboratory workers and students must be commensurate with their duties so they understand the requirements in this subpart and can implement them.

(b) An eligible academic entity can provide training for laboratory workers and students in a variety of ways, including, but not limited to:

(1) Instruction by the professor or laboratory manager before or during an experiment; or

(2) Formal classroom training; or

(3) Electronic/written training; or

(4) On-the-job training; or

(5) Written or oral exams.

(c) An eligible academic entity that is a large quantity generator must maintain documentation for the durations specified in § 265.16(e) demonstrating training for all laboratory workers that is sufficient to determine whether laboratory workers have been trained. Examples of documentation demonstrating training can include, but are not limited to, the following:

(1) Sign-in/attendance sheet(s) for training session(s); or

(2) Syllabus for training session; or

(3) Certificate of training completion; or

(4) Test results.

(d) A trained professional must:

(1) Accompany the transfer of unwanted material and hazardous waste when the unwanted material and hazardous waste is removed from the laboratory, and

(2) Make the hazardous waste determination, pursuant to § 262.11, for unwanted material.

§ 262.208 Removing containers of unwanted material from the laboratory.

(a) Removing containers of unwanted material on a regular schedule. An eligible academic entity must either:

(1) Remove all containers of unwanted material from each laboratory on a regular interval, not to exceed 6 months; or

(2) Remove containers of unwanted material from each laboratory within 6 months of each container's accumulation start date.

(b) The eligible academic entity must specify in Part I of its Laboratory Management Plan whether it will comply with paragraph (a)(1) or (a)(2) of this section for the regular removal of unwanted material from its laboratories.

(c) The eligible academic entity must specify in Part II of its Laboratory Management Plan how it will comply with paragraph (a)(1) or (a)(2) of this section and develop a schedule for regular removals of unwanted material from its laboratories.

(d) Removing containers of unwanted material when volumes are exceeded.

(1) If a laboratory accumulates a total volume of unwanted material (including reactive acutely hazardous unwanted material) in excess of 55 gallons before the regularly scheduled removal, the eligible academic entity must ensure that all containers of unwanted material in the laboratory (including reactive acutely hazardous unwanted material):

(i) Are marked on the label that is associated with the container (or on the label that is affixed or attached to the container, if that is preferred) with the date that 55 gallons is exceeded; and

(ii) Are removed from the laboratory within 10 calendar days of the date that 55 gallons was exceeded, or at the next regularly scheduled removal, whichever comes first.

(2) If a laboratory accumulates more than 1 quart of reactive acutely hazardous unwanted material before the regularly scheduled removal, then the eligible academic entity must ensure that all containers of reactive acutely hazardous unwanted material:

(i) Are marked on the label that is associated with the container (or on the label that is affixed or attached to the container, if that is preferred) with the date that 1 quart is exceeded; and

(ii) Are removed from the laboratory within 10 calendar days of the date that 1 quart was exceeded, or at the next regularly scheduled removal, whichever comes first.

§ 262.209 Where and when to make the hazardous waste determination and where to send containers of unwanted material upon removal from the laboratory.

(a) Large quantity generators and small quantity generators—an eligible academic entity must ensure that a trained professional makes a hazardous waste determination, pursuant to § 262.11, for unwanted material in any of the following areas:

(1) In the laboratory before the unwanted material is removed from the laboratory, in accordance with § 262.210;

(2) Within 4 calendar days of arriving at an on-site central accumulation area, in accordance with § 262.211; and

(3) Within 4 calendar days of arriving at an on-site interim status or permitted treatment, storage or disposal facility, in accordance with § 262.212.

(b) Conditionally exempt small quantity generators—an eligible academic entity must ensure that a trained professional makes a hazardous

waste determination, pursuant to § 262.11, for unwanted material in the laboratory before the unwanted material is removed from the laboratory, in accordance with § 262.210.

§ 262.210 Making the hazardous waste determination in the laboratory before the unwanted material is removed from the laboratory.

If an eligible academic entity makes the hazardous waste determination, pursuant to § 262.11, for unwanted material in the laboratory, it must comply with the following:

(a) A trained professional must make the hazardous waste determination, pursuant to § 262.11, before the unwanted material is removed from the laboratory.

(b) If an unwanted material is a hazardous waste, the eligible academic entity must:

(1) Write the words ''hazardous waste'' on the container label that is affixed or attached to the container, before the hazardous waste may be removed from the laboratory; and

(2) Write the appropriate hazardous waste code(s) on the label that is associated with the container (or on the label that is affixed or attached to the container, if that is preferred) before the hazardous waste is transported off-site.

(3) Count the hazardous waste toward the eligible academic entity's generator status, pursuant to § 261.5(c) and (d), in the calendar month that the hazardous waste determination was made.

(c) A trained professional must accompany all hazardous waste that is transferred from the laboratory(ies) to an on-site central accumulation area or on-site interim status or permitted treatment, storage or disposal facility.

(d) When hazardous waste is removed from the laboratory:

(1) Large quantity generators and small quantity generators must ensure it is taken directly from the laboratory(ies) to an on-site central accumulation area, or on-site interim status or permitted treatment, storage or disposal facility, or transported off-site.

(2) Conditionally exempt small quantity generators must ensure it is taken directly from the laboratory(ies) to any of the types of facilities listed in § 261.5(f)(3) for acute hazardous waste, or § 261.5(g)(3) for hazardous waste.

(e) An unwanted material that is a hazardous waste is subject to all applicable hazardous waste regulations when it is removed from the laboratory.

§ 262.211 Making the hazardous waste determination at an on-site central accumulation area.

If an eligible academic entity makes the hazardous waste determination, pursuant to § 262.11, for unwanted material at an on-site central accumulation area, it must comply with the following:

(a) A trained professional must accompany all unwanted material that is transferred from the laboratory(ies) to an on-site central accumulation area.

(b) All unwanted material removed from the laboratory(ies) must be taken directly from the laboratory(ies) to the on-site central accumulation area.

(c) The unwanted material becomes subject to the generator accumulation regulations of § 262.34(a) (or § 262.34(j) and (k) for Performance Track members) for large quantity generators or § 262.34(d)–(f) for small quantity generators as soon as it arrives in the central accumulation area, except for the ''hazardous waste'' labeling requirements of § 262.34(a)(3) (or § 262.34(j)(6) for Performance Track members).

(d) A trained professional must determine, pursuant to § 262.11, if the unwanted material is a hazardous waste within 4 calendar days of the unwanted materials' arrival at the on-site central accumulation area.

(e) If the unwanted material is a hazardous waste, the eligible academic entity must:

(1) Write the words ''hazardous waste'' on the container label that is affixed or attached to the container, within 4 calendar days of arriving at the on-site central accumulation area and before the hazardous waste may be removed from the on-site central accumulation area, and

(2) Write the appropriate hazardous waste code(s) on the container label that is associated with the container (or on the label that is affixed or attached to the container, if that is preferred) before the hazardous waste may be treated or disposed of on-site or transported off-site, and

(3) Count the hazardous waste toward the eligible academic entity's generator status, pursuant to § 261.5(c) and (d) in the calendar month that the hazardous waste determination was made, and

(4) Manage the hazardous waste according to all applicable hazardous waste regulations.

§ 262.212 Making the hazardous waste determination at an on-site interim status or permitted treatment, storage or disposal facility.

If an eligible academic entity makes the hazardous waste determination, pursuant to § 262.11, for unwanted material at an on-site interim status or permitted treatment, storage or disposal facility, it must comply with the following:

(a) A trained professional must accompany all unwanted material that is transferred from the laboratory(ies) to an on-site interim status or permitted treatment, storage or disposal facility.

(b) All unwanted material removed from the laboratory(ies) must be taken directly from the laboratory(ies) to the on-site interim status or permitted treatment, storage or disposal facility.

(c) The unwanted material becomes subject to the terms of the eligible academic entity's hazardous waste permit or interim status as soon as it arrives in the on-site treatment, storage or disposal facility.

(d) A trained professional must determine, pursuant to § 262.11, if the unwanted material is a hazardous waste within 4 calendar days of the unwanted materials' arrival at an on-site interim status or permitted treatment, storage or disposal facility.

(e) If the unwanted material is a hazardous waste, the eligible academic entity must:

(1) Write the words ''hazardous waste'' on the container label that is affixed or attached to the container (or on the label that is affixed or attached to the container, if that is preferred) within 4 calendar days of arriving at the on-site interim status or permitted treatment, storage or disposal facility and before the hazardous waste may be removed from the on-site interim status or permitted treatment, storage or disposal facility, and

(2) Write the appropriate hazardous waste code(s) on the container label that is associated with the container (or on the label that is affixed or attached to the container, if that is preferred) before the hazardous waste may be treated or disposed on-site or transported off-site, and

(3) Count the hazardous waste toward the eligible academic entity's generator status, pursuant to § 261.5(c) and (d) in the calendar month that the hazardous waste determination was made, and

(4) Manage the hazardous waste according to all applicable hazardous waste regulations.

§ 262.213 Laboratory clean-outs.

(a) One time per 12 month period for each laboratory, an eligible academic entity may opt to conduct a laboratory clean-out that is subject to all the applicable requirements of this subpart, except that:

(1) If the volume of unwanted material in the laboratory exceeds 55 gallons (or 1 quart of reactive acutely hazardous unwanted material), the eligible academic entity is not required to remove all unwanted materials from the laboratory within 10 calendar days

of exceeding 55 gallons (or 1 quart of reactive acutely hazardous unwanted material), as required by § 262.208. Instead, the eligible academic entity must remove all unwanted materials from the laboratory within 30 calendar days from the start of the laboratory clean-out; and

(2) For the purposes of on-site accumulation, an eligible academic entity is not required to count a hazardous waste that is an unused commercial chemical product (listed in 40 CFR part 261, subpart D or exhibiting one or more characteristics in 40 CFR part 261, subpart C) generated solely during the laboratory clean-out toward its hazardous waste generator status, pursuant to § 261.5(c) and (d). An unwanted material that is generated prior to the beginning of the laboratory clean-out and is still in the laboratory at the time the laboratory clean-out commences must be counted toward hazardous waste generator status, pursuant to § 261.5(c) and (d), if it is determined to be hazardous waste; and

(3) For the purposes of off-site management, an eligible academic entity must count all its hazardous waste, regardless of whether the hazardous waste was counted toward generator status under paragraph (a)(2) of this section, and if it generates more than 1 kg/month of acute hazardous waste or more than 100 kg/month of hazardous waste (i.e., the conditionally exempt small quantity generator limits of § 261.5), the hazardous waste is subject to all applicable hazardous waste regulations when it is transported off-site; and

(4) An eligible academic entity must document the activities of the laboratory clean-out. The documentation must, at a minimum, identify the laboratory being cleaned out, the date the laboratory clean-out begins and ends, and the volume of hazardous waste generated during the laboratory clean-out. The eligible academic entity must maintain the records for a period of three years from the date the clean-out ends; and

(b) For all other laboratory clean-outs conducted during the same 12-month period, an eligible academic entity is subject to all the applicable requirements of this subpart, including, but not limited to:

(1) The requirement to remove all unwanted materials from the laboratory within 10 calendar days of exceeding 55 gallons (or 1 quart of reactive acutely hazardous unwanted material), as required by § 262.208; and

(2) The requirement to count all hazardous waste, including unused hazardous waste, generated during the laboratory clean-out toward its hazardous waste generator status, pursuant to § 261.5(c) and (d).

§ 262.214 Laboratory management plan.

An eligible academic entity must develop and retain a written Laboratory Management Plan, or revise an existing written plan. The Laboratory Management Plan is a site-specific document that describes how the eligible academic entity will manage unwanted materials in compliance with this subpart. An eligible academic entity may write one Laboratory Management Plan for all the laboratories owned by the eligible academic entity that have opted into this subpart, even if the laboratories are located at sites with different EPA Identification Numbers. The Laboratory Management Plan must contain two parts with a total of nine elements identified in paragraphs (a) and (b) of this section. In Part I of its Laboratory Management Plan, an eligible academic entity must describe its procedures for each of the elements listed in paragraph (a) of this section. An eligible academic entity must implement and comply with the specific provisions that it develops to address the elements in Part I of the Laboratory Management Plan. In Part II of its Laboratory Management Plan, an eligible academic entity must describe its best management practices for each of the elements listed in paragraph (b) of this section. The specific actions taken by an eligible academic entity to implement each element in Part II of its Laboratory Management Plan may vary from the procedures described in the eligible academic entity's Laboratory Management Plan, without constituting a violation of this subpart. An eligible academic entity may include additional elements and best management practices in Part II of its Laboratory Management Plan if it chooses.

(a) The eligible academic entity must implement and comply with the specific provisions of Part I of its Laboratory Management Plan. In Part I of its Laboratory Management Plan, an eligible academic entity must:

(1) Describe procedures for container labeling in accordance with § 262.206(a), including:

(i) Identifying whether the eligible academic entity will use the term ''unwanted material'' on the containers in the laboratory. If not, identify an equally effective term that will be used in lieu of ''unwanted material'' and consistently by the eligible academic entity. The equally effective term, if used, has the same meaning and is subject to the same requirements as ''unwanted material.''

(ii) Identifying the manner in which information that is ''associated with the container'' will be imparted.

(2) Identify whether the eligible academic entity will comply with § 262.208(a)(1) or (a)(2) for regularly scheduled removals of unwanted material from the laboratory.

(b) In Part II of its Laboratory Management Plan, an eligible academic entity must:

(1) Describe its intended best practices for container labeling and management, including how the eligible academic entity will manage containers used for in-line collection of unwanted materials, such as with high performance liquid chromatographs and other laboratory equipment (see the required standards at § 262.206).

(2) Describe its intended best practices for providing training for laboratory workers and students commensurate with their duties (see the required standards at § 262.207(a)).

(3) Describe its intended best practices for providing training to ensure safe on-site transfers of unwanted material and hazardous waste by trained professionals (see the required standards at § 262.207(d)(1)).

(4) Describe its intended best practices for removing unwanted material from the laboratory, including:

(i) For regularly scheduled removals—Develop a regular schedule for identifying and removing unwanted materials from its laboratories (see the required standards at § 262.208(a)(1) and (a)(2)).

(ii) For removals when maximum volumes are exceeded:

(A) Describe its intended best practices for removing unwanted materials from the laboratory within 10 calendar days when unwanted materials have exceeded their maximum volumes (see the required standards at § 262.208(d)).

(B) Describe its intended best practices for communicating that unwanted materials have exceeded their maximum volumes.

(5) Describe its intended best practices for making hazardous waste determinations, including specifying the duties of the individuals involved in the process (see the required standards at § 262.11 and §§ 262.209 through 262.212).

(6) Describe its intended best practices for laboratory clean-outs, if the eligible academic entity plans to use the incentives for laboratory clean-outs provided in § 262.213, including:

(i) Procedures for conducting laboratory clean-outs (see the required standards at § 262.213(a)(1) through (3)); and

(ii) Procedures for documenting laboratory clean-outs (see the required standards at § 262.213(a)(4)).

(7) Describe its intended best practices for emergency prevention, including:

(i) Procedures for emergency prevention, notification, and response, appropriate to the hazards in the laboratory; and

(ii) A list of chemicals that the eligible academic entity has, or is likely to have, that become more dangerous when they exceed their expiration date and/or as they degrade; and

(iii) Procedures to safely dispose of chemicals that become more dangerous when they exceed their expiration date and/or as they degrade; and

(iv) Procedures for the timely characterization of unknown chemicals.

(c) An eligible academic entity must make its Laboratory Management Plan available to laboratory workers, students, or any others at the eligible academic entity who request it.

(d) An eligible academic entity must review and revise its Laboratory Management Plan, as needed.

§ 262.215 Unwanted material that is not solid or hazardous waste.

(a) If an unwanted material does not meet the definition of solid waste in § 261.2, it is no longer subject to this subpart or to the RCRA hazardous waste regulations.

(b) If an unwanted material does not meet the definition of hazardous waste in § 261.3, it is no longer subject to this subpart or to the RCRA hazardous waste regulations, but must be managed in compliance with any other applicable regulations and/or conditions.

§ 262.216 Non-laboratory hazardous waste generated at an eligible academic entity.

An eligible academic entity that generates hazardous waste outside of a laboratory is not eligible to manage that hazardous waste under this subpart; and

(a) Remains subject to the generator requirements of §§ 262.11 and 262.34(c) for large quantity generators and small quantity generators (if the hazardous waste is managed in a satellite accumulation area), and all other applicable generator requirements of 40 CFR part 262, with respect to that hazardous waste; or

(b) Remains subject to the conditional exemption of § 261.5(b) for conditionally exempt small quantity generators, with respect to that hazardous waste.

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Part III

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40 CFR Part 60

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

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Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On September 15, 1997, EPA adopted new source performance standards (NSPS) and emission guidelines (EG) for hospital/medical/infectious waste incinerators (HMIWI). The NSPS and EG were established under sections 111 and 129 of the Clean Air Act (CAA or Act). The Sierra Club and the Natural Resources Defense Council (Sierra Club) filed suit in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) challenging EPA's methodology for adopting the regulations. On March 2, 1999, the Court remanded the rule to EPA for further explanation of the Agency's reasoning in determining the minimum regulatory ''floors'' for new and existing HMIWI. The Court did not vacate the regulations, so the NSPS and EG remain in effect and were fully implemented by September 2002.

On February 6, 2007, EPA published a proposed response to the Court's remand and a proposed response to the CAA section 129(a)(5) requirement to review the NSPS and EG every 5 years. However, following recent court decisions and receipt of public comments regarding that proposal, we chose to re-assess our response to the Court's remand. Therefore, this action provides the results of EPA's reassessment in the form of another proposed response to the Court's remand and solicits public comment regarding it. This re-proposal also satisfies the CAA section 129(a)(5) requirement to conduct a review of the standards every 5 years.

DATES: *Comments.* Comments must be received on or before February 17, 2009. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by the Office of Management and Budget (OMB) on or before December 31, 2008. Because of the need to resolve the issues raised in this action in a timely manner, EPA will not grant requests for extensions beyond these dates.

Public Hearing. If anyone contacts EPA by December 22, 2008 requesting to speak at a public hearing, EPA will hold a public hearing on January 15, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2006–0534, by one of the following methods:

http://www.regulations.gov: Follow the on-line instructions for submitting comments.

E-mail: Send your comments via electronic mail to *a-and-r-Docket@epa.gov,* Attention Docket ID No. EPA–HQ–OAR–2006–0534.

Facsimile: Fax your comments to (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2006–0534.

Mail: Send your comments to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Mailcode 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2006–0534. Please include a total of two copies. We request that a separate copy also be sent to the contact person identified below (see **FOR FURTHER INFORMATION CONTACT**).

Hand Delivery: Deliver your comments to: EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA–HQ–OAR–2006–0534. Such deliveries are accepted only during the normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2006–0534. The EPA's policy is that all comments received will be included in the public docket and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail 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.

Public Hearing: If a public hearing is held, it will be held at EPA's Campus located at 109 T.W. Alexander Drive in Research Triangle Park, NC, or an alternate site nearby. Contact Ms. Pamela Garrett at (919) 541–7966 to request a hearing, to request to speak at a public hearing, to determine if a hearing will be held, or to determine the hearing location. If no one contacts EPA requesting to speak at a public hearing concerning this proposed rule by December 22, 2008, the hearing will be cancelled without further notice.

Docket: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2006–0534 and Legacy Docket ID No. A–91–61. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Johnson, Energy Strategies Group, Sector Policies and Programs Division (D243–01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5025; fax number: (919) 541–5450; e-mail address: *johnson.mary@epa.gov.*

SUPPLEMENTARY INFORMATION: Organization of This Document. The following outline is provided to aid in locating information in this preamble.

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B. What should I consider as I prepare my comments?
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I. General Information

A. Does the proposed action apply to me?

Regulated Entities. Categories and entities potentially affected by the proposed action are those which operate HMIWI. The NSPS and EG for HMIWI affect the following categories of sources:

Category	NAICS Code	Examples of potentially regulated entities
Industry	622110 622310 325411 325412 562213 611310	Private hospitals, other health care facilities, commercial research laboratories, commercial waste disposal companies, private universities
Federal Government	622110 541710 928110	Federal hospitals, other health care facilities, public health service, armed services
State/local/Tribal Government.	622110 562213 611310	State/local hospitals, other health care facilities, State/local waste disposal services, State universities

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the proposed action. To determine whether your facility would be affected by the proposed action, you should examine the applicability criteria in 40 CFR 60.50c of subpart Ec and 40 CFR 60.32e of subpart Ce. If you have any questions regarding the applicability of the proposed action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments?

1. Submitting CBI

Do not submit information that you consider to be CBI electronically through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI to only the following address: Ms. Mary Johnson, c/o OAQPS Document Control Officer (Room C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2006–0534. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions. EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period

deadline identified in the preceding section titled **DATES**.

3. Docket

The docket number for the proposed action regarding the HMIWI NSPS (40 CFR part 60, subpart Ec) and EG (40 CFR part 60, subpart Ce) is Docket ID No. EPA–HQ–OAR–2006–0534.

4. Worldwide Web (WWW)

In addition to being available in the docket, an electronic copy of the proposed action is available on the WWW through the Technology Transfer Network Web site (TTN Web). Following signature, EPA posted a copy of the proposed action on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

II. Background

Section 129 of the CAA, entitled ''Solid Waste Combustion,'' requires EPA to develop and adopt NSPS and EG for solid waste incineration units pursuant to CAA sections 111 and 129. Sections 111(b) and 129(a) of the CAA (NSPS program) address emissions from new HMIWI, and CAA sections 111(d) and 129(b) (EG program) address emissions from existing HMIWI. The NSPS are directly enforceable Federal regulations, and under CAA section 129(f)(1) become effective 6 months after promulgation. Under CAA section 129(f)(2), the EG become effective and enforceable the sooner of 3 years after EPA approves a State plan implementing the EG or 5 years after the date they are promulgated.

An HMIWI is defined as any device used to burn hospital waste or medical/infectious waste. Hospital waste means discards generated at a hospital, and medical/infectious waste means any waste generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals (e.g., vaccines, cultures, blood or blood products, human pathological waste, sharps). As explained in EPA's regulations, hospital/medical/infectious waste does not include household waste, hazardous waste, or human and animal remains not generated as medical waste. An HMIWI typically is a small, dual-chamber incinerator that burns on average about 800 pounds per hour (lb/hr) of waste. Smaller units burn as little as 15 lb/hr while larger units burn as much as 3,700 lb/hr, on average.

Incineration of hospital/medical/infectious waste causes the release of a wide array of air pollutants, some of which exist in the waste feed material and are released unchanged during combustion, and some of which are generated as a result of the combustion process itself. These pollutants include particulate matter (PM); heavy metals, including lead (Pb), cadmium (Cd), and mercury (Hg); toxic organics, including chlorinated dibenzo-p-dioxins/dibenzofurans (CDD/CDF); carbon monoxide (CO); nitrogen oxides (NO_X); and acid gases, including hydrogen chloride (HCl) and sulfur dioxide (SO_2). In addition to the use of pollution prevention measures (i.e., waste segregation) and good combustion control practices, HMIWI are typically controlled by wet scrubbers or dry sorbent injection fabric filters (dry scrubbers).

Waste segregation is the separation of certain components of the healthcare waste stream in order to reduce the amount of air pollution emissions associated with that waste when incinerated. The separated waste may include paper, cardboard, plastics, glass, batteries, or metals. Separation of these types of wastes reduces the amount of chlorine- and metal-containing wastes being incinerated, which results in lower potential emissions of HCl, CDD/CDF, Hg, Cd, and Pb.

Combustion control includes the proper design, construction, operation, and maintenance of HMIWI to destroy or prevent the formation of air pollutants prior to their release to the atmosphere. Test data indicate that as secondary chamber residence time and temperature increase, emissions decrease. Combustion control is most effective in reducing CDD/CDF, PM, and CO emissions. The 2-second combustion level, which includes a minimum secondary chamber temperature of 1800°F and residence time of 2 seconds, is considered to be the best level of combustion control (i.e., good combustion) that is applied to HMIWI. Wet scrubbers and dry scrubbers provide control of PM, CDD/CDF, HCl, and metals, but do not influence CO, or NO_X and have little impact on SO_2 at the low concentrations emitted by HMIWI. (See Legacy Docket ID No. A–91–61, item II–A–111; 60 FR 10669, 10671–10677; and 61 FR 31742–31743.)

On September 15, 1997, EPA adopted NSPS (40 CFR part 60, subpart Ec) and EG (40 CFR part 60, subpart Ce) for entities which operate HMIWI. The NSPS and EG are designed to reduce air pollution emitted from new and existing HMIWI, including HCl, CO, Pb, Cd, Hg, PM, CDD/CDF (total, or 2,3,7,8-tetrachlorinated dibenzo-p-dioxin toxic equivalent (TEQ)), NO_X, SO_2, and opacity. The NSPS apply to HMIWI for which construction began after June 20, 1996, or for which modification began after March 16, 1998. The NSPS became effective on March 16, 1998, and apply as of that date or at start-up of a HMIWI, whichever is later. The EG apply to HMIWI for which construction began on or before June 20, 1996, and required compliance by September 2002.

The CAA sets forth a two-stage approach to regulating emissions from incinerators. EPA has substantial discretion to distinguish among classes, types and sizes of incinerator units within a category while setting standards. In the first stage of setting standards, CAA section 129(a)(2) requires EPA to establish technology-based emission standards that reflect levels of control EPA determines are achievable for new and existing units, after considering costs, non-air quality health and environmental impacts, and energy requirements associated with the implementation of the standards. Section 129(a)(5) then directs EPA to review those standards and revise them as necessary every 5 years. In the second stage, section 129(h)(3) requires EPA to determine whether further revisions of the standards are necessary in order to provide an ample margin of safety to protect public health. *See, e.g., NRDC and LEAN* v. *EPA,* 529 F.3d 1077, 1079–80 (D.C. Cir. 2008) (addressing the similarly required two-stage approach under CAA sections 112(d) and (f), and upholding EPA's implementation of same).

In setting forth the methodology EPA must use to establish the first-stage technology-based NSPS and EG, CAA section 129(a)(2) provides that standards ''applicable to solid waste incineration units promulgated under section 111 and this section shall reflect the maximum degree of reduction in emissions of [certain listed air pollutants] that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new and existing units in each category.'' This level of control is referred to as a maximum achievable control technology, or MACT standard.

In promulgating a MACT standard, EPA must first calculate the minimum stringency levels for new and existing solid waste incineration units in a category, generally based on levels of emissions control achieved or required to be achieved by the subject units. The minimum level of stringency is called

the MACT ''floor,'' and CAA section 129(a)(2) sets forth differing levels of minimum stringency that EPA's standards must achieve, based on whether they regulate new and reconstructed sources, or existing sources. For new and reconstructed sources, CAA section 129(a)(2) provides that the ''degree of reduction in emissions that is deemed achievable [* * *] shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator.'' Emissions standards for existing units may be less stringent than standards for new units, but ''shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category.''

The MACT floors form the least stringent regulatory option EPA may consider in the determination of MACT standards for a source category. EPA must also determine whether to control emissions ''beyond-the-floor,'' after considering the costs, non-air quality health and environmental impacts, and energy requirements of such more stringent control. EPA made such MACT floor and beyond-the-floor determinations in the 1997 HMIWI rulemaking, and the Court remanded them in 1999 for further explanation, leaving the standards in force in the meantime. As mentioned above, every 5 years after adopting a MACT standard under section 129, CAA section 129(a)(5) requires EPA to review and, if appropriate, revise the incinerator standards. In addition to responding to the Court's remand in *Sierra Club* v. *EPA,* 167 F.3d 658 (D.C. Cir. 1999), the proposed action constitutes the first 5-year review of the HMIWI standards.

III. Summary

A. Litigation and Proposed Remand Response

1. What is EPA's general methodology for determining MACT?

In general, all MACT analyses involve an assessment of the air pollution control systems or technologies used by the better performing units in a source category. The technology assessment can be based solely on actual emissions data, on knowledge of the air pollution control in place in combination with actual emissions data, or on State regulatory requirements that may enable EPA to estimate the actual performance of the regulated units. For each source category, the assessment of the technology involves a review of actual emissions data with an appropriate accounting for emissions variability. Where there is more than one method or technology to control emissions, the analysis may result in a series of potential regulations (called regulatory options), one of which is selected as MACT.

Each regulatory option EPA may consider must be at least as stringent as the CAA's minimum stringency ''floor'' requirements. However, MACT is not necessarily the least stringent regulatory option. EPA must examine, but is not necessarily required to adopt, more stringent ''beyond-the-floor'' regulatory options to determine MACT. Unlike the floor minimum stringency requirements, EPA must consider various impacts of the more stringent regulatory options in determining whether MACT standards are to reflect ''beyond-the-floor'' requirements. If EPA concludes that the more stringent regulatory options have unreasonable impacts, EPA selects the ''floor-based'' regulatory option as MACT. But if EPA concludes that impacts associated with ''beyond-the-floor'' levels of control are acceptable in light of additional emissions reductions achieved, EPA selects those levels as MACT.

As stated earlier, the CAA requires that MACT for new sources be no less stringent than the emissions control achieved in practice by the best controlled similar unit. Under CAA section 129(a)(2), EPA determines the best control currently in use for a given pollutant and establishes one potential regulatory option at the emission level achieved by that control with an appropriate accounting for emissions variability. More stringent potential regulatory options might reflect controls used on other sources that could be applied to the source category in question.

For existing sources, the CAA requires that MACT be no less stringent than the average emissions limitation achieved by the best performing 12 percent of units in a source category. EPA must determine some measure of the average emissions limitation achieved by the best performing 12 percent of units to form the floor regulatory option. More stringent beyond-the-floor regulatory options reflect other or additional controls capable of achieving better performance.

2. What was EPA's methodology in the 1997 HMIWI rulemaking?

On February 27, 1995, EPA published a notice of proposed rulemaking regarding emissions standards for HMIWI (60 FR 10654). The proposal was the result of several years of reviewing available information. During the public comment period for the proposal, EPA received new information that led EPA to consider the need for numerous changes to the proposed rule, and on June 20, 1996, the Agency published a re-proposal (61 FR 31736). EPA published the final rule on September 15, 1997 (62 FR 48348).

During the data-gathering phase of developing the 1995 proposal, EPA found it difficult to obtain an accurate count of the thousands of HMIWI that then operated nationwide, or to find HMIWI with add-on air pollution control systems in place. A few HMIWI with combustion control were tested to assess performance of combustion control in reducing emissions. One unit with a wet scrubber, and a few units with dry scrubbing systems were tested to determine performance capabilities of add-on controls. (See 61 FR 31738.)

Altogether, data were available from only 7 out of the estimated then-operating 3,700 existing HMIWI (60 FR 10674). EPA developed the proposed regulations with the existing data, but EPA specifically requested comment on EPA's MACT determinations and on EPA's conclusions about the performance capabilities of air pollution control technologies on HMIWI in light of the relatively small database (60 FR 10686).

a. EPA's Methodology in the 1997 Rulemaking for New HMIWI. In determining the MACT floor for new HMIWI in the 1997 rulemaking, EPA first examined the data available for various air pollution control technologies applied to HMIWI to determine the performance capabilities of the technologies (60 FR 10671–73, 61 FR 31741–43). To determine the performance capabilities, EPA grouped all of the test data by control technology and established the numerical value for corresponding emission limitations somewhat higher than the highest test data point for each particular control technology. (See Legacy Docket ID No. A–91–61, items IV–B–46, 47, 48, and 49.) Following the determination of performance capability, EPA identified the best control technology for each air pollutant for each subcategory of HMIWI, and established the numerical values for the floor regulatory option at the emission limitation associated with that particular control technology. (See 60 FR 10673; Legacy Docket ID No. A–91–61, item IV–B–38; 61 FR 31745–46.) Other, more stringent, beyond-the-floor regulatory options were developed reflecting the actual performance of other, more effective, control technologies (61 FR 31766–68).

In EPA's 1997 final standards, EPA selected a regulatory option for new HMIWI that was, overall, more stringent

than the identified MACT floor (62 FR 48365). The final standards were based on emission limits achievable with good combustion and a moderate-efficiency wet scrubber for new small HMIWI (units with maximum waste burning capacity of less than or equal to 200 lb/hr), and good combustion and a combined dry/wet control system with carbon for new medium HMIWI (units with maximum waste burning capacity of more than 200 lb/hr but less than or equal to 500 lb/hr) and new large HMIWI (units with maximum waste burning capacity of more than 500 lb/hr). *Id.* These standards reflected the MACT floor emissions levels for new small and large HMIWI, but were more stringent than the MACT floor for new medium HMIWI, based on the floor-determination methodology EPA used as described above. *Id.* EPA estimated that the standards would reduce emissions from these units of HCl by up to 98 percent, PM and Pb by up to 92 percent, Cd by up to 91 percent, CDD/CDF by up to 87 percent, Hg by up to 74 percent, and CO, SO_2, and NO_X by up to 52 percent (62 FR 48366).

b. EPA's Methodology in the 1997 Rulemaking for Existing HMIWI. For existing units, EPA did not have sufficient emissions data to fully characterize the actual emissions performance of the best performing 12 percent of existing HMIWI. Based exclusively on the data it did have, EPA concluded that it did not have a clear indication of the technology used by the best 12 percent of units. As a result, EPA used emission limits included in State regulations and State-issued permits (hereinafter referred to as regulatory limits) as surrogate information to determine emissions limitations achieved by the best performing 12 percent of units in each subcategory (60 FR 10674). At that time, EPA expected this information reflected levels of performance achieved on a continuous basis by better-controlled units, since the units had to meet these limits or risk violating enforceable requirements. EPA assumed that all HMIWI were achieving their regulatory limits (60 FR 10674). Where there were regulatory limits for more than 12 percent of units in a subcategory, the regulatory limits were ranked from the most stringent to least stringent, and the average of the regulatory limits for the top 12 percent of units in the subcategory was calculated. *Id.*; 61 FR 31744–45. Where the number of units subject to specific emissions limitations did not comprise 12 percent of the population in a subcategory, EPA assumed those units with regulatory limits were the best performing units, and the remaining units in the top 12 percent were assigned an emission value associated with ''combustion control.'' (See 60 FR 10674; 61 FR 31745; Legacy Docket ID No. A–91–61, item IV–B–24 at 2.) In previous **Federal Register** notices regarding HMIWI (60 FR 10654, 61 FR 31736, and 62 FR 48348), this level of control was referred to as ''uncontrolled,'' which is misleading because sources with combustion control emit lesser amounts of CDD/CDF, CO, and PM than would a truly ''uncontrolled'' source. Where regulatory limits did not fill 12 percent of the source category, the average of the regulatory limits plus enough combustion-controlled emission values to account for 12 percent of units in the subcategory was calculated. (See Legacy Docket ID No. A–91–61, item IV–B–24 at 2–4.)

After calculating the averages of regulatory limits and combustion-controlled emission values, EPA examined the resulting calculated values to determine what level of air pollution control would be needed to meet the calculated average values. (See 60 FR 10675–78; 61 FR 31755–56.) For many pollutants, the calculated averages presented no clear indication of the type of air pollution control used by the best performing units. However, the calculated values for three key pollutants, PM, CO, and HCl, did provide a good indication of the type of air pollution control used on the best performing 12 percent of units. The level of air pollution control associated with the calculated average values for PM, CO, and HCl formed the technical basis of the MACT floor regulatory option considered by EPA (61 FR 31756, Table 13). The emission limitations assigned to each pollutant reflected the actual performance of the technology on which they were based. Finally, EPA developed a series of regulatory options based on progressively more stringent technologies and assigned emission limitations to each regulatory option based on the actual performance capabilities of the technologies (61 FR 31757, Table 14).

In EPA's final standards promulgated in 1997, EPA selected a regulatory option for existing HMIWI that was overall more stringent than the floor, based on the floor determination methodology described above (62 FR 48371). The final standards were based on emission limits achievable with good combustion and a low-efficiency wet scrubber for most existing small HMIWI, good combustion and a moderate-efficiency wet scrubber for existing medium HMIWI, and good combustion and a high-efficiency wet scrubber for existing large HMIWI (62 FR 48371). The final standards allow small HMIWI that meet certain rural criteria to meet emissions limits achievable with good combustion alone. *Id.* These standards reflected the identified MACT floor emissions levels for existing small HMIWI meeting rural criteria, medium HMIWI, and large HMIWI, but were more stringent than the MACT floor for most existing small HMIWI (i.e., non-rural), based on the methodology EPA used then (62 FR 48371–72). The final standards for existing medium and large HMIWI were structured so that either a dry scrubber or a wet scrubber could be used to achieve the emission limits. EPA estimated that the final EG would reduce emissions of CDD/CDF by up to 97 percent, Hg by up to 95 percent, PM by up to 92 percent, Pb by up to 87 percent, Cd by up to 84 percent, CO by up to 82 percent, HCl by up to 98 percent, and SO_2 and NO_X by up to 30 percent (62 FR 48372). Table 1 of this preamble summarizes the emission limits for the NSPS and EG promulgated in 1997.

TABLE 1—SUMMARY OF PROMULGATED EMISSION LIMITS

Pollutant (units)	Unit size [1]	Limit for existing HMIWI [2]	Limit for new HMIWI [2]
HCl (parts per million by volume (ppmv)).	L, M, S	100 or 93% reduction	15 or 99% reduction
	SR	3,100	N/A [3]
CO (ppmv)	L, M, S	40	40
	SR	40	N/A
Pb (milligrams per dry standard cubic meter (mg/dscm)).	L, M	1.2 or 70% reduction	0.07 or 98% reduction [3]
	S	1.2 or 70% reduction	1.2 or 70% reduction

TABLE 1—SUMMARY OF PROMULGATED EMISSION LIMITS—Continued

Pollutant (units)	Unit size [1]	Limit for existing HMIWI [2]	Limit for new HMIWI [2]
	SR	10	N/A
Cd (mg/dscm)	L, M	0.16 or 65% reduction	0.04 or 90% reduction
	S	0.16 or 65% reduction	0.16 or 65% reduction
	SR	4	N/A
Hg (mg/dscm)	L, M , S	0.55 or 85% reduction	0.55 or 85% reduction
	SR	7.5	N/A
PM (grains per dry standard cubic foot (gr/dscf)).	L	0.015	0.015
	M	0.03	0.015
	S	0.05	0.03
	SR	0.086	N/A
CDD/CDF, total (nanograms per dry standard cubic meter (ng/dscm)).	L, M	125	25
	S	125	125
	SR	800	N/A
CDD/CDF, TEQ (ng/dscm)	L, M	2.3	0.6
	S	2.3	2.3
	SR	15	N/A
NO_X (ppmv)	L, M, S	250	250
	SR	250	N/A
SO_2 (ppmv)	L, M, S	55	55
	SR	55	N/A
Opacity (%)	L, M, S, SR	10	10

[1] L = Large; M = Medium; S = Small; SR = Small Rural.
[2] All emission limits are measured at 7 percent oxygen.
[3] Not applicable.

c. Compliance by HMIWI. At the time of promulgation (September 1997), EPA estimated that there were approximately 2,400 HMIWI still operating in the United States. Those units combusted approximately 830 thousand tons of hospital/medical/infectious waste annually. Of those existing HMIWI, about 48 percent were small units, 29 percent were medium units, and 20 percent were large units. About 3 percent of the HMIWI were commercial units. EPA projected that no new small or medium HMIWI would be constructed, and that up to 60 new large units and 10 new commercial units would be constructed.

After approximately 98 percent of the HMIWI that were operating in 1997 shut down or obtained exemptions, there remain only 52 existing HMIWI at 47 facilities from the set of 2,400 that operated at promulgation. Additionally, only 5 new HMIWI at 4 facilities began operation following the 1997 rulemaking. The total 57 existing and new units are estimated to combust approximately 146,000 tons of waste annually. Of the 52 existing HMIWI subject to the EG, 33 are large units, 16 are medium units, and 3 are small units (2 of which meet the rural criteria). Twenty-three percent of the existing HMIWI (i.e., 14 units) are commercially owned. Of the five new HMIWI, three are large units, one is a medium unit, and one is a small unit. Two of the new units are county-owned but accept waste from other sources, similar to commercial units. The actual emissions reductions achieved as a result of implementation of the standards exceeded the 1997 projections for all nine of the regulated pollutants. A comparison of the estimated pollutant reductions versus the actual reductions is presented in Table 2 of this preamble.

TABLE 2—COMPARISON OF ESTIMATED POLLUTANT REDUCTIONS VERSUS ACTUAL POLLUTANT REDUCTIONS

Pollutant	Estimated emissions reduction, percent	Actual emissions reduction, percent [1]	Emissions reduction due to shutdowns/exemptions	Emissions reduction due to compliance with standards
HCl	98	98.4	98.3	0.1
CO	75 to 82	98.0	94.8	3.2
Pb	80 to 87	98.2	95.9	2.3
Cd	75 to 84	98.7	95.4	3.3
Hg	93 to 95	97.8	94.6	3.2
PM	88 to 92	95.6	92.8	2.9
CDD/CDF, total	96 to 97	99.4	97.3	2.0
CDD/CDF, TEQ	95 to 97	99.4	97.2	2.2
NO_X	0 to 30	56.7	see footnote 2	
SO_2	0 to 30	76.2	see footnote 2	

[1] Reflects the effect of unit shutdowns and exemptions that were obtained, as well as the effect of compliance with the promulgated standards.
[2] Percentages cannot be accurately calculated because units were not required to conduct emissions testing for NO_X and SO_2.

3. What was the Sierra Club's challenge?

On November 14, 1997, the Sierra Club and the Natural Resources Defense Council (Sierra Club) filed suit in the U.S. Court of Appeals for the District of Columbia Circuit (the Court). The Sierra Club claimed that EPA violated CAA section 129 by setting emission standards for HMIWI that are less stringent than required by section 129(a)(2); that EPA violated section 129 by not including pollution prevention or waste minimization requirements; and that EPA had not adequately considered the non-air quality health and environmental impacts of the standards. For new units, the Sierra Club argued that to satisfy the statutory phrase ''best controlled similar unit'' in CAA section 129(a)(2), EPA should have identified the single best performing unit in each subcategory and based the MACT floor on that particular unit's performance, rather than consider the performance of other units using the same technology. The Sierra Club also argued that EPA erroneously based the new unit floors on the emissions of the worst performing unit using a particular technology. Regarding existing units, the Sierra Club claimed that CAA section 129(a)(2)'s words, ''average emissions limitation achieved by the best performing 12 percent of units,'' preclude the use of regulatory data, and that the legislative history reflects congressional intent to prohibit EPA from relying on regulatory data. Moreover, the Sierra Club claimed that using regulatory data was impossible because such data existed for fewer than 12 percent of HMIWI, and that using it impermissibly imported an achievability requirement into the floor determination. Finally, the Sierra Club argued that EPA failed to require HMIWI to undertake programs to reduce the Hg and chlorinated plastic in their waste streams, in violation of CAA section 129(a)(3).

4. What was the Court's ruling?

On March 2, 1999, the Court issued its opinion in *Sierra Club* v. *EPA*, 167 F.3d 658 (D.C. Cir. 1999). While the Court rejected the Sierra Club's statutory arguments under CAA section 129, the Court remanded the rule to EPA for further explanation regarding how EPA derived the MACT floors for new and existing HMIWI. Furthermore, the Court did not vacate the regulations, and the regulations remain in effect during the remand.

a. The Court's Ruling on New Units. Regarding EPA's treatment of new units, the Court first opined that EPA would be justified in setting the floors at a level that is a reasonable estimate of the performance of the ''best controlled similar unit'' under the worst reasonably foreseeable circumstances. The Court observed that if an emissions standard is as stringent as ''the emissions control that is achieved in practice'' by a particular unit, then that particular unit will not violate the standard. But this would result only if ''achieved in practice'' means ''achieved under the worst foreseeable circumstances.'' The Court then stated that in *National Lime Ass'n* v. *EPA*, 627 F.2d 416, 431 n. 46 (D.C. Cir. 1980), it held that where a statute requires that a standard be ''achievable,'' it must be achievable ''under most adverse circumstances which can reasonably be expected to recur,'' and the same principle should apply when a standard is to be derived from the operating characteristics of a particular unit. *Sierra Club* v. *EPA*, 167 F.3d at 665.

The Court refused to rule that EPA's approach of considering emissions of units other than the single best controlled unit was unlawful, and suggested that considering all units with the same technology might be a justifiable way to predict the worst reasonably foreseeable performance of the best unit. The Court also supposed that EPA may have considered all units with the same technology equally ''well-controlled,'' so that each unit with the best technology is a ''best-controlled unit'' even if they vary in performance. *Sierra Club* v. *EPA*, 167 F.3d at 665.

However, the Court concluded that the possible rationale for this treatment of new units was not presented in the rulemaking record with enough clarity for the Court to determine that EPA's path may reasonably be discerned, and that EPA had not explained why the phrase best controlled similar unit could encompass all units using the same technology as the unit with the best observed performance, rather than just the single best unit. *Sierra Club* v. *EPA*, 167 F.3d at 665. The Court further directed EPA to provide additional explanation regarding how the Agency had calculated the upper bound of the best-controlled unit's performance through rounding. *Id.*

b. The Court's Ruling on Existing Units. With respect to existing units, the Court first rejected the Sierra Club's statutory objections to using regulatory data and ''uncontrolled'' (i.e., combustion-controlled) emissions values. Then, after analyzing and rejecting the Sierra Club's arguments that the plain language of the CAA and its legislative history forbid EPA's methodology, the Court held that the use of regulatory data is permissible as long as it allows a reasonable inference as to the performance of the top 12 percent of units. Similarly, as long as there is a reasonable basis for concluding that some of the best performing 12 percent of units are combustion controlled, EPA may include data points giving a reasonable representation of the performance of those units. *Sierra Club* v. *EPA*, 167 F.3d at 662, 663.

However, the Court concluded that, although EPA said that it believed the combination of regulatory and combustion-controlled data gave an accurate picture of HMIWI performance, EPA did not account for the possibility that HMIWI might be substantially overachieving the permit limits, which would cause permit limits to be of little value in estimating the top 12 percent of HMIWI performance. In addition, EPA did not give a reason for assuming that HMIWI that were not subject to permit requirements did not deploy emission controls of any sort. *Id.*, at 663–664. The Court further questioned the rationality of EPA using the highest of its test run data in cases where the regulatory data did not alone comprise the necessary 12 percent. *Id.*, at 664.

5. What was EPA's methodology in the 2007 proposed remand response?

Following the 1999 remand of the HMIWI MACT floors in *Sierra Club* v. *EPA*, but prior to EPA's February 6, 2007, proposed response to the Court remand, the Court issued a series of rulings in other cases addressing MACT rules that were relevant to and guided EPA's development of the February 2007 proposed response regarding HMIWI. Those rulings and their relevance are fully explained in sections III.A.4.c. and IV.A. of the preamble to EPA's February 2007 proposal (72 FR 5510). The first of these was *Nat'l Lime Ass'n* v. *EPA*, 233 F.3d 625 (D.C. Cir. 2000) (*NLA II*), which involved EPA's MACT standards under CAA section 112(d) for portland cement manufacturing facilities. In that case, the Sierra Club argued that EPA should have based its estimate of the top performing 12 percent of sources on actual emissions data. But the Court determined that EPA's approach of selecting the median performing plant out of the best twelve percent of the plants for which EPA had information and setting the floor at the level of the worst performing plant in the database using the same technology as the median plant had not been shown to be unreasonable. *NLA II*, 233 F.3d at 633.

In addition, the Court partially clarified its position regarding EPA's approach of accounting for emissions

performance variability by setting floors at a level that reasonably estimates the performance of the ''best controlled similar unit'' under the worst reasonably foreseeable circumstances. First, the Court stressed that EPA should not simply set floors at levels reflecting the worst foreseeable circumstances faced by any worst performing unit in a given source category. Second, the Court stated that considering all units with the same technology may be a justifiable way to predict the worst reasonably foreseeable performance of such technology only if pollution control technology were the only factor determining emission levels of that HAP. *NLA II*, 233 F.3d at 633.

In *Cement Kiln Recycling Coalition* v. *EPA*, 255 F.3d 855 (D.C. Cir. 2001) (*CKRC*), the Court again addressed when it is appropriate for EPA to base MACT floors on the performance of air pollution control technology. The Sierra Club challenged EPA's MACT standards for hazardous waste combustors (HWC), and argued that factors other than MACT technology influenced the emissions performance of the best performing sources.

The Court agreed that since the HWC rulemaking record showed that factors besides technological controls significantly influenced HWC emission rates, emissions of the worst-performing source using technology may not reflect what the best-performers actually achieve. *CKRC*, 255 F.3d at 864. EPA had claimed that MACT floors must be achievable by all sources using MACT technology, and that to account for the best-performing sources' operational variability we had to base floors on the worst performers' emissions. But the Court stressed that whether variability in the control technology accurately estimates emissions variability of the best performing sources depends on whether factors other than technological control contribute to emissions. The Court stated that the relevant question is whether the variability experienced by the best-performing sources can be estimated by relying on emissions data from the worst-performing sources using technological controls. *Id.*, at 865. However, the Court also reiterated that if the Agency can demonstrate with substantial evidence that MACT technology significantly controls emissions, or that factors other than technological control have a negligible effect, the MACT approach could be a reasonable means of satisfying the statute's requirements. *Id.*, at 866.

EPA's February 2007 proposed response to the HMIWI remand was based on a reassessment of information and data that were available at the time of promulgation in 1997, in light of the Agency's understanding of the Court's rulings in the Sierra Club, NLA II, CKRC and other cases discussed in our 2007 proposal notice. The proposed response would have revised some of the emission limits in both the NSPS and EG. Relative to the NSPS, the emission limits for CO, Pb, Cd, Hg, PM, and CDD/CDF would have been revised. Relative to the EG, the emission limits for HCl, Pb, Cd, and CDD/CDF would have been revised. EPA believed that the revised emission limits proposed in February 2007 as a result of its response to the remand could be achieved with the same emission control technology currently used by HMIWI to meet the 1997 rule.

a. EPA's Methodology in the 2007 Proposal for New HMIWI. The revised standards for new HMIWI in the 2007 proposal were based on the same technologies upon which the 1997 final standards were based. In general, we proposed emission limits for each air pollutant for each subcategory of new HMIWI based on the highest observed data points associated with the control technologies upon which the emission standards were based, since we identified the ''best controlled similar unit'' as one using the relevant control technologies for each subcategory of new units. This was a similar MACT determination approach to that used at the time of promulgation, with two significant differences—the proposed limits did not include the addition of 10 percent to the highest observed emissions levels, nor did it include the rounding up of those figures. The 2007 proposal's revised MACT determination approach for new HMIWI and its rationale were explained in detail in section IV.A.1. of the preamble to EPA's February 2007 proposal (72 FR 5510).

b. EPA's Methodology in the 2007 Proposal for Existing HMIWI. Although the proposed revised standards for existing HMIWI in the 2007 proposal were generally based on the same technologies upon which the 1997 final standards were based, they also reflected a number of changes to the MACT determination approach used at promulgation. In determining the best performing existing HMIWI, regulatory limits that reflected higher emissions levels than those corresponding to EPA's combustion-controlled emission estimates were not used. Furthermore, where actual emissions test data reflecting emissions performance were available in the 1997 record, those data took precedence over other types of data (i.e., regulatory limits or performance values) and were the initial type of pollutant-specific values considered. Additionally, where we had some indication that add-on controls may have been used but there were no test data or regulatory limits for that source, we did not use combustion-controlled emission estimates in the floor calculations to represent the performance of those sources. Rather, an average of the maximum dry and wet control system performance was determined for each pollutant, and those values were added to the data set towards comprising the best performing 12 percent. These default performance values also were used where regulatory limits existed but were higher than the default performance values.

In the 2007 proposal, the average emission limitation achieved by the best performing 12 percent of existing sources was determined using the median as a measure of central tendency. This approach resulted in the emission level that corresponds to that of the best performing 6 percent of sources (i.e., the 94th percentile) representing the MACT floor control level. MACT floors for each pollutant within each subcategory were based on this approach. We then determined the technology associated with each ''average of the best-performing 12 percent'' value by comparing the average values to average performance data for wet scrubbers, dry injection fabric filters (also known as dry scrubbers), and combustion controls (no add-on air pollution controls). The technology needed to meet the average values reflected the technology used by the 94th percentile unit and served as the basis for the proposed revised MACT floor.

Numerical emission limits were determined by combining the appropriate average emission value for each pollutant within each subcategory of HMIWI with a variability factor. The 2002 compliance test data for HMIWI were used in calculating pollutant-specific variability factors. While these data were not available at the time of promulgation of the 1997 rule, we believed that they were the best data available in 2007 for providing a quantitative assessment of variability of emissions from well-controlled HMIWI. To determine the pollutant-specific variability factors, a statistical analysis was conducted. Specifically, the emission limit for each pollutant was determined based on the combination of actual emissions test data, regulatory data, and estimated performance levels (as described earlier) and a statistics-based variability factor calculated for each pollutant. A detailed explanation of the 2007 proposed revised MACT determination approach for existing

HMIWI and its rationale was set forth in section IV.A.2. of the preamble to EPA's February 2007 proposal (72 FR 5510).

6. Why is EPA re-proposing a response to the remand?

EPA's decision to re-propose its response to the Court's remand is based on a number of factors, including further rulings by the U.S. Court of Appeals that issued after our 2007 proposal was published. In addition, public comments regarding the 2007 proposal raised issues that, upon further consideration, we believe are best addressed through a re-proposal. One issue regards the use of emission limits included in State regulations and State-issued permits as surrogates for estimated actual emissions limitations achieved. As previously stated, EPA used regulatory limits in its MACT floor determinations supporting the 1997 rulemaking for HMIWI. At that time, we believed this information could be expected to reliably reflect levels of performance achieved by HMIWI on a continuous basis. In the 2007 proposed response to the Court's remand, with adjustments to our methodology as described above, we continued to use some of the regulatory limits to determine achieved MACT floor emissions limitations. Upon reassessment of the regulatory limits and minimal emissions test data in the 1997 record, however, it is uncertain how well the regulatory limits represented the performance of each HMIWI. Given the uncertainty regarding whether the regulatory limits that specific HMIWI were subject to at the time of promulgation provided a reasonable estimate of emissions limitations achieved by those HMIWI, the inability to gather additional information regarding non-operational units (approximately 98 percent shut down or obtained exemptions), and the fact that we now have some actual emissions data from the HMIWI remaining in operation, we believe the best course of action is to re-propose a response to the remand based on data from the 57 currently operating HMIWI. This data is the most reliable we have obtained that reflects the emissions levels achieved in practice by the best performing HMIWI.

Another issue regards EPA's previous reliance on control technology performance as the sole indicator of HMIWI performance in making MACT floor determinations, which did not necessarily account for other factors that affect emissions (e.g., waste mix, combustion conditions). Commenters on our 2007 proposal specifically asked that we revisit this issue. Our treatment of this issue also addresses the Court's concern with our 1997 rule's use of highest data points of units with best performing technology, where control technology is not the only factor that affects emissions. As we discuss in detail later in this notice, although our work to-date in regulating HMIWI shows that control technology significantly controls emissions, we are not able to conclude that factors other than the controls have a negligible effect on emissions performance and on the levels achieved in practice by the best performing sources. While it is not possible to precisely quantify the additional emissions reduction that is associated with waste segregation or combustion conditions, we have found that it is possible to account for those measures (and any other emission reduction strategies) through the identification and use of actual emissions levels in floor determinations, since these levels reflect emissions performance resulting from the use of add-on controls and other measures known to be used at HMIWI. Thus, the proposed revised MACT emission limits are based on performance data from the best-performing 12 percent of existing HMIWI and the best-performing unit for new HMIWI.

Following publication of our 2007 proposed remand response, the Court issued a ruling in another case challenging EPA's MACT methodology, specifically as applied to brick and ceramic kilns. In *Sierra Club* v. *EPA*, 479 F.3d 875 (D.C. Cir. 2007), the Court reiterated its holding in *CKRC* that EPA may not justify MACT floors by claiming that floors must be achievable by all sources using MACT technology. *Sierra Club* v. *EPA*, 479 F.3d at 880. The Court concluded that by excluding a certain control technology from the agency's ranking of best-performing kilns, EPA had impermissibly ignored the emission levels actually achieved by best performers in order to ensure that the MACT floor is achievable by all kilns. *Sierra Club*, 479 F.3d at 880–81.

The Court then referred to its ruling in *CKRC* declaring unlawful EPA's method of estimating emissions among best performing sources by basing MACT floors on levels achieved by worst performers using MACT technology, and held that in the kilns rule EPA failed to show that the emission levels achieved by the worst performers using a given pollution control device actually predict the range of emission levels achieved by the best performers using that device. *Sierra Club*, 479 F.3d at 882. The Court distinguished EPA's approach to kilns from the permissible approach the agency had performed in *Mossville Environmental Action Now* v. *EPA*, 370 F.3d 1232 (D.C. Cir. 2004), in which EPA's record evidence demonstrated that the floor reasonably estimated actual emissions variability of the best-performing sources. There, the Court held that MACT floors may legitimately account for variability because each source must meet the specified standard every day and under all operating conditions. *Mossville*, 370 F.3d at 1242.

The *Sierra Club* Court then addressed EPA's approach to considering non-technology factors in the brick and ceramic kiln rule. The Court stressed that EPA may not refuse to consider such factors in the MACT floor merely because it is impossible to reliably quantify their effect on emissions performance. Consequently, the Court rejected EPA's approach in the kiln rule, in which the agency acknowledged that a non-technology factor (clay type) had an appreciable effect on emissions but for which EPA lacked data to quantify such effects. *Sierra Club*, 479 F.3d at 882–83. The Court further rejected EPA's argument that since the non-technology factor in the kiln rule did not reflect a deliberate step taken to reduce emissions, it did not amount to an emission control or limitation achieved by kilns: The Court stated that *NLA II* requires neither an intentional action nor a deliberate strategy to reduce emissions, and that the Clean Air Act requires the EPA to set MACT floors based upon the ''average emission limitation[s] achieved'' without suggesting that this achievement must be the product of a specific intent. *Sierra Club*, 479 F.3d at 883.

The Court's treatment of each of these issues caused us to reassess our MACT floor approach in the HMIWI remand response.

7. Are the emission limits being revised as a result of the re-proposal?

Yes, the proposed response to the remand would revise all of the emission limits in both the NSPS and EG. Table 3 of this preamble summarizes the emission limits being proposed in this action in response to the Court remand for new HMIWI.

TABLE 3—SUMMARY OF EMISSION LIMITS PROPOSED IN RESPONSE TO THE REMAND FOR NEW HMIWI

Pollutant (units)	Unit size [1]	Proposed remand response limit [2]
HCl (ppmv)	L	0.75
	M	1.8
	S	4.5

TABLE 3—SUMMARY OF EMISSION LIMITS PROPOSED IN RESPONSE TO THE REMAND FOR NEW HMIWI—Continued

Pollutant (units)	Unit size [1]	Proposed remand response limit [2]
CO (ppmv)	L	2.9
	M	1.9
	S	8.2
Pb (mg/dscm)	L	0.00047
	M	0.016
	S	0.18
Cd (mg/dscm)	L	0.00012
	M	0.0071
	S	0.012
Hg (mg/dscm)	L	0.00093
	M	0.0020
	S	0.0075
PM (gr/dscf)	L	0.0048
	M	0.0099
	S	0.017
CDD/CDF, total (ng/dscm)	L	0.60
	M	0.35
	S	8.3
CDD/CDF, TEQ (ng/dscm)	L	0.014
	M	0.0097
	S	0.0080
NO_X (ppmv)	L	110
	M, S	38
SO_2 (ppmv)	L	1.9
	M, S	0.78
Opacity (%)	L, M, S	2

[1] L = Large; M = Medium; S = Small
[2] All emission limits are measured at 7 percent oxygen.

Table 4 of this preamble summarizes the emission limits being proposed in this action in response to the Court remand for existing HMIWI.

TABLE 4—SUMMARY OF EMISSION LIMITS PROPOSED IN RESPONSE TO THE REMAND FOR EXISTING HMIWI

Pollutant (units)	Unit size [1]	Proposed remand response limit [2]
HCl (ppmv)	L	2.4
	M	2.5
	S	4.5
	SR	440
CO (ppmv)	L	3.9
	M	3.0
	S	8.2
	SR	12
Pb (mg/dscm)	L	0.013
	M	0.017
	S	0.18
	SR	0.35
Cd (mg/dscm)	L	0.0041
	M	0.0071
	S	0.012
	SR	0.068
Hg (mg/dscm)	L	0.0095
	M	0.0079
	S	0.0075
	SR	0.0040
PM (gr/dscf)	L	0.0056
	M	0.012
	S	0.017
	SR	0.030
CDD/CDF, total (ng/dscm)	L	1.6
	M	0.63
	S	8.3
	SR	130
CDD/CDF, TEQ (ng/dscm)	L	0.029
	M	0.0097
	S	0.0080
	SR	2.6
NO_X (ppmv)	L	140
	M, S	200
	SR	110
SO_2 (ppmv)	L, M, S	2.8
	SR	43
Opacity (%)	L, M, S, SR.	2

[1] L = Large; M = Medium; S = Small; SR = Small Rural
[2] All emission limits are measured at 7 percent oxygen.

B. Proposed CAA Section 129(a)(5) 5-Year Review Response

Section 129(a)(5) of the CAA requires EPA to conduct a review of the NSPS and EG at 5 year intervals and, in accordance with sections 129 and 111, revise the NSPS and EG. We do not interpret section 129(a)(5), together with section 111, as requiring EPA to recalculate MACT floors in connection with this periodic review. See, *e.g.*, 71 FR 27324, 27327–28 (May 10, 2006) (''Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors; Final Rule''); *see* also, *NRDC and LEAN* v. *EPA*, 529 F.3d 1077, 1083–84 (D.C. Cir. 2008) (upholding EPA's interpretation that the periodic review requirement in CAA section 112(d)(6) does not impose an obligation to recalculate MACT floors).

Rather, in conducting such periodic reviews, EPA attempts to assess the performance of and variability associated with control measures affecting emissions performance at sources in the subject source category (including the installed emissions control equipment), along with developments in practices, processes and control technologies, and determines whether it is appropriate to revise the NSPS and EG. This is the same general approach taken by EPA in periodically reviewing CAA section 111 standards, as section 111 contains a similar review and revise provision. Specifically, section 111(b)(1)(B) requires EPA, except in specified circumstances, to review NSPS promulgated under section 111 every 8 years and to revise the standards if EPA determines that it is ''appropriate'' to do so, 42 U.S.C. 7411(b)(1)(B). In light of the explicit reference in section 129(a)(5) to section 111, which contains direct guidance on how to review and revise standards previously promulgated, EPA reasonably interprets section 129(a)(5) to provide that EPA must review and, if appropriate, revise section 129 standards.

Section 129 provides guidance on the criteria to be used in determining whether it is appropriate to revise a section 129 standard. Section 129(a)(3) states that standards under sections 111 and 129 ''shall be based on methods and technologies for removal or destruction of pollutants before, during and after combustion.'' It can be reasonably inferred from the reference to ''technologies'' that EPA is to consider advances in technology, both as to their effectiveness and their costs, as well as the availability of new technologies, in determining whether it is ''appropriate'' to revise a section 129 standard. This inference is further supported by the fact that the standards under review are based, in part, on an assessment of the performance of control technologies currently being used by sources in a category or subcategory.

This approach is also consistent with the approach used in establishing and updating NSPS under section 111. Consistent with the definition of ''standard of performance'' in section 111(a)(1), standards of performance promulgated under section 111 are based on ''the best system of emission reductions'' which generally equates to some type of control technology. Where EPA determines that it is ''appropriate'' to revise section 111 standards, section 111(b)(1)(B) directs that this be done ''following the procedure required by this subsection for promulgation of such standards.'' In updating section 111 standards in accordance with section 111(b)(1)(B), EPA has consistently taken the approach of evaluating advances in existing control technologies, both as to performance and cost, as well as the availability of new technologies and then, on the basis of this evaluation, determined whether it is appropriate to revise the standard. See, for example, 71 FR 9866 (Feb. 27, 2006) (updating the boilers NSPS) and 71 FR 38482 (July 6,

2006) (updating the stationary combustion turbines NSPS). In these reviews, EPA takes into account, among other things, the currently installed equipment and its performance and operational variability. As appropriate, we also consider new technologies and control measures that have been demonstrated to reliably control emissions from the source category.

The approach is similar to the one that Congress spelled out in section 112(d)(6), which is also entitled ''Review and revision.'' Section 112(d)(6) directs EPA to every 8 years ''review, and revise as necessary (taking into account developments in practices, processes, and control technologies)'' emission standards promulgated pursuant to section 112. There are a number of significant similarities between what is required under section 129, which addresses emissions of hazardous air pollutants (HAP) and other pollutants from solid waste incineration units, and section 112, which addresses HAP emissions generally. For example, under both section 112(d)(3) and section 129(a)(2) initial standards applicable to existing sources ''shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category.'' Also, as stated above, both sections require that standards be reviewed at specified intervals of time. Finally, both sections contain a provision addressing ''residual risk'' (sections 112(f) and 129(h)(3)). As a result, EPA believes that section 112(d)(6) is relevant in ascertaining Congress' intent regarding how EPA is to proceed in implementing section 129(a)(5).

Like its counterpart CAA section 112(d)(6), section 129(a)(5) does not state that EPA must conduct a MACT floor analysis every 5 years when reviewing standards promulgated under sections 129(a)(2) and 111. Had Congress intended EPA to conduct a new floor analysis every 5 years, it would have said so expressly by directly incorporating such requirements into section 129(a)(5), for example by referring directly to section 129(a)(2), rather than just to ''this section'' and section 111. It did not do so, however, and, in fact, section 129 encompasses more than just MACT standards under section 129(a)(2)—it also includes risk-based standards under section 129(h)(3), which are not determined by an additional MACT analysis. Reading section 129(a)(5) to require recalculation of the MACT floor would be both inconsistent with Congress' express direction that EPA should revise section 129 standards in accordance with section 111, which plainly provides that such revision should occur only if we determine that it is ''appropriate'' to do so. It would also result in effectively reading the reference to section 111 out of the Act, a circumstance that Congress could not have intended. Required recalculation of floors would completely eviscerate EPA's ability to base revisions to section 129 standards on a determination that it is ''appropriate'' to revise such standards, as EPA's only discretion would be in deciding whether to establish a standard that is more stringent than the recalculated floor. EPA believes that depriving the agency of any meaningful discretion in this manner is at odds with what Congress intended.

Further, required recalculation of floors would have the inexorable effect of driving existing sources to the level of performance exhibited by new sources on a 5-year cycle, a result that is unprecedented and that should not be presumed to have been intended by Congress in the absence of a clear statement to that effect. There is no such clear statement. It is reasonable to assume that if the floor must be recalculated on a 5-year cycle, some, if not most or all, of the sources that form the basis for the floor calculation will be sources that were previously subject to standards applicable to new sources. As a result, over time, existing sources which had not made any changes in their operations would eventually be subject to essentially the same level of regulation as new sources. Such a result would be unprecedented, particularly in the context of a standard that is established under both sections 129 and 111. Under section 111, an existing source only becomes a new source and thus subject to a new source standard when it is either modified (section 111(a)(2)) or reconstructed (40 CFR 60.15). Given this context, it is not reasonable to assume that Congress intended for existing sources subject to section 129 standards to be treated as new sources over time where their circumstances have not changed.

We believe that a reasonable interpretation of section 129(a)(5) is that Congress preserved EPA's discretion in reviewing section 129 standards to revise them when the Agency determines it is ''appropriate'' to do so, and that the D.C. Circuit's recent ruling regarding section 112(d)(6) supports this view (see *NRDC and LEAN* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). In that case, petitioners had ''argued that EPA was obliged to completely recalculate the maximum achievable control technology—in other words, to start from scratch.'' *NRDC and LEAN,* 529 F.3d at 1084. The Court held: ''We do not think the words 'review, and revise as necessary' can be construed reasonably as imposing any such obligation.'' *Id.* The Court's ruling in *NRDC and LEAN* is consistent with our interpretation of section 129(a)(5) as providing a broad range of discretion in terms of whether to revise MACT standards adopted under sections 129(a)(2) and 111.

1. What was EPA's Approach in the 2007 Proposal Regarding the 5-Year Review Requirement?

In the 2007 proposed response to the Court's remand, EPA also proposed amendments that reflected changes determined to be appropriate after completing the 5-year review. Following compliance with the EG in 2002, EPA gathered information on the performance levels actually being achieved by HMIWI that were operating under the guidelines. Those HMIWI that remained in operation either continued operation with their existing configuration or were retrofitted with add-on air pollution control devices in order to meet the 1997 standards. The 2002 compliance test information provided the first quantitative assessment of the performance of the installed control equipment's ability to attain the NSPS and EG limits. The compliance data indicated that the control technologies that were installed and the practices that were implemented to meet the 1997 NSPS and EG achieved reductions somewhat superior to what we had expected, based on the regulatory data we had used to establish the limits, under the 1997 limits for many of the pollutants.

EPA used the compliance test data to develop the revised emission limits proposed in February 2007 in response to the 5-year review requirement. The proposed amendments did not reflect adoption of new control technologies or processes, but reflected more efficient practices in operation of the control technologies that sources used in order to meet the 1997 MACT standards. The proposed amendments also would have resulted in some changes to the performance testing and monitoring requirements based on information received during implementation of the HMIWI NSPS and EG. EPA's approach was explained in detail in sections III.B. and IV.B. of the preamble to EPA's February 2007 proposal (72 FR 5510).

We did not regard the proposed revised amendments under the 5-year review as reflecting a recalculation of the MACT floors for their own sake, or, as some have put it, ''MACT-on-MACT.'' Rather, consistent with our

overall interpretation of the requirements of section 129(a)(5), the proposed revised amendments reflected what we viewed as a more accurate translation into numeric emissions rates of the emissions performance achieved by the MACT technological controls we had identified in the 1997 final rule. This seemed a reasonable approach, since we now had, for the first time, actual emissions data that indicated the emissions levels achieved through application of the MACT technology, rather than just the regulatory data and combustion-control emissions factors to which we have been previously limited, and which, as discussed above, we have since learned did not provide the most accurate estimation of the emissions levels achieved by the best performing sources.

2. Why is EPA Re-Proposing Different Revised Standards under the 5-Year Review?

Although we believe that the approach used in our 2007 proposed response to the 5-year review of the HMIWI emission standards, as promulgated in 1997, correctly addressed the intent of the CAA section 129(a)(5) requirement and resulted in proposed revisions to the emission standards that would have appropriately reflected the emissions levels achieved by the control technologies imposed by the 1997 final rule, we are re-proposing our response to the remand in *Sierra Club* such that the proposed revised MACT standards, reflecting floor levels determined by actual emissions data, would be more stringent than what we proposed in 2007 for both the remand response and the 5-year review, with the exceptions noted and discussed in sections IV.A. and IV.B of this preamble. Consequently, we believe that our obligation to conduct a 5-year review based on implementation of the 1997 emission standards will also be fulfilled through this action's re-proposal of the remand response. This is supported by the fact that the revised MACT floor determinations and emission limits associated with the remand response are based on performance data for the 57 currently operating HMIWI that are subject to the 1997 standards, and by the re-proposal's accounting for non-technology factors that affect HMIWI emissions performance, which the 2007 proposed remand response and 5-year review did not fully consider. Thus, the proposed remand response more than addresses the technology review's goals of assessing the performance efficiency of the installed equipment and ensuring that the emission limits reflect the performance of the technologies required by the MACT standards. In addition, the proposed remand response addresses whether new technologies and processes and improvements in practices have been demonstrated at sources subject to the emissions limitations. Accordingly, the remand response in this proposed action fulfills EPA's obligations regarding the first 5-year review of the HMIWI standards and, therefore, replaces the 2007 proposal's 5-year review proposed revisions.

C. Other Proposed Amendments

This proposed action puts forward the same changes based on information received during implementation of the HMIWI NSPS and EG that were proposed in 2007. The proposal also includes additional changes regarding requirements for NO_X and SO2 emissions testing for all HMIWI, performance testing requirements for small rural HMIWI, monitoring requirements for HMIWI that install selective non-catalytic reduction (SNCR) technology to reduce NO_X emissions, and procedures for test data submittal. A summary of these changes follows.

1. Performance Testing and Monitoring Amendments

The proposed amendments would require all HMIWI to demonstrate initial compliance with the revised NO_X and SO_2 emission limits. Testing and demonstration of compliance with the NO_X and SO_2 emission limits are not currently required by the standards. In addition to demonstrating initial compliance with the NO_X and SO_2 emission limits, small rural HMIWI would be required to demonstrate initial compliance with the other seven regulated pollutants' emission limits and the opacity standard. Currently, small rural HMIWI are only required to demonstrate initial compliance with the PM, CO, CDD/CDF, Hg, and opacity standards. Small rural HMIWI also would be required to determine compliance with the PM, CO, and HCl emission limits by conducting an annual performance test. On an annual basis, small rural HMIWI are currently required to demonstrate compliance with the opacity limit. The proposed amendments would allow sources to use results of their previous emissions tests to demonstrate initial compliance with the proposed revised emission limits as long as the sources certify that the previous test results are representative of current operations. Only those sources who could not so certify and/or whose previous emissions tests do not demonstrate compliance with one or more revised emission limits would be required to conduct another emissions test for those pollutants (note that most sources are already required to test for HCl, CO, and PM on an annual basis, and those annual tests are still required).

The proposed amendments would require, for existing HMIWI, annual inspections of scrubbers, fabric filters, and other air pollution control devices that may be used to meet the emission limits, as well as a one-time Method 22 of appendix A–7 visible emissions test of the ash handling operations to be conducted during the next compliance test. For new HMIWI, the proposed amendments would require CO continuous emissions monitoring systems (CEMS), bag leak detection systems for fabric-filter controlled units, annual inspections of scrubbers, fabric filters, and other air pollution control devices that may be used to meet the emission limits, as well as Method 22 visible emissions testing of the ash handling operations to be conducted during each compliance test. For existing HMIWI, use of CO CEMS would be an approved alternative, and specific language with requirements for CO CEMS is included in the proposed amendments. For new and existing HMIWI, use of PM, HCl, multi-metals, and Hg CEMS, and integrated sorbent trap Hg monitoring and dioxin monitoring (continuous sampling with periodic sample analysis) also would be approved alternatives, and specific language for those alternatives is included in the proposed amendments. HMIWI that install SNCR technology to reduce NO_X emissions would be required to monitor the reagent (e.g., ammonia or urea) injection rate and secondary chamber temperature.

2. Electronic Data Submittal

Compliance test data are necessary for conducting 5-year reviews of CAA section 129 standards, as well as for many other purposes including compliance determinations, development of emission factors, and determining annual emission rates. In conducting 5-year reviews, EPA has found it burdensome and time consuming to collect emission test data because of varied locations for data storage and varied data storage methods. One improvement that has occurred in recent years is the availability of stack test reports in electronic format as a replacement for burdensome paper copies.

In this action, we are taking a step to improve data accessibility. HMIWI sources will have the option of submitting, to an EPA electronic data base, an electronic copy of annual stack

test reports. Data entry requires only access to the internet and is expected to be completed by the stack testing company as part of the work that they are contracted to perform. This option would become available as of December 31, 2011.

Please note that the proposed option to submit source test data electronically to EPA would not require any additional performance testing. In addition, when a facility elects to submit performance test data to WebFIRE, there would be no additional requirements for data compilation; instead, we believe industry would greatly benefit from improved emissions factors, fewer information requests, and better regulation development as discussed below. Because the information that would be reported is already required in the existing test methods and is necessary to evaluate the conformance to the test method, facilities would already be collecting and compiling these data. One major advantage of electing to submit source test data through the Electronic Reporting Tool (ERT), which was developed with input from stack testing companies (who already collect and compile performance test data electronically), is that it would provide a standardized method to compile and store all the documentation required by this rule. Another important benefit of submitting these data to EPA at the time the source test is conducted is that it will substantially reduce the effort involved in data collection activities in the future. Specifically, because EPA would already have adequate source category data to conduct residual risk assessments or technology reviews, there would be fewer data collection requests (e.g., Section 114 letters). This results in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and EPA (in terms of preparing and distributing data collection requests). Finally, another benefit of electing to submit these data to WebFIRE electronically is that these data will greatly improve the overall quality of the existing and new emissions factors by supplementing the pool of emissions test data upon which the emission factor is based and by ensuring that data are more representative of current industry operational procedures. A common complaint we hear from industry and regulators is that emissions factors are out-dated or not representative of a particular source category. Receiving most performance tests would ensure that emissions factors are updated and more accurate. In summary, receiving these test data already collected for other purposes and using them in the emissions factors development program will save industry, state/local/tribal agencies, and EPA time and money.

The electronic data base that will be used is EPA's WebFIRE, which is a Web site accessible through EPA's TTN. The WebFIRE Web site was constructed to store emissions test data for use in developing emission factors. A description of the WebFIRE data base can be found at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*. The ERT will be able to transmit the electronic report through EPA's Central Data Exchange (CDX) network for storage in the WebFIRE data base. Although ERT is not the only electronic interface that can be used to submit source test data to the CDX for entry into WebFIRE, it makes submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html*. The ERT can be used to document the conduct of stack tests data for various pollutants including PM (EPA Method 5 of appendix A–3), SO_2 (EPA Method 6C of appendix A–4), NO_X (EPA Method 7E of appendix A–4), CO (EPA Method 10 of appendix A–4), Cd (EPA Method 29 of appendix A–8), Pb (Method 29), Hg (Method 29), and HCl (EPA Method 26A of appendix A–8). Presently, the ERT does not handle dioxin/furan stack test data (EPA Method 23 of appendix A–7), but the tool is being upgraded to handle dioxin/furan stack test data. The ERT does not currently accept opacity data or CEMS data.

EPA specifically requests comment on the utility of this electronic reporting option and the burden that owners and operators of HMIWI estimate would be associated with this option.

3. Miscellaneous Other Amendments

The proposed amendments would revise the definition of ''Minimum secondary chamber temperature'' to read ''Minimum secondary chamber temperature means 90 percent of the highest 3-hour average secondary chamber temperature (taken, at a minimum, once every minute) measured during the most recent performance test demonstrating compliance with the PM, CO, and dioxin/furan emission limits.''

The proposed amendments would require HMIWI sources to submit, along with each test report, a description, including sample calculations, of how operating parameters are established during the initial performance test and, if applicable, re-established during subsequent performance tests.

D. Proposed Implementation Schedule for Existing HMIWI

Under the proposed amendments to the EG, and consistent with CAA section 129, revised State plans containing the revised existing source emission limits and other requirements in the proposed amendments would be due within 1 year after promulgation of the amendments. That is, revised State plans would have to be submitted to EPA 1 year after the date on which EPA promulgates revised standards.

The proposed amendments to the EG then would allow existing HMIWI to demonstrate compliance with the amended standards within 3 years from the date of approval of a State plan or 5 years after promulgation of the revised standards, whichever is earlier. Consistent with CAA section 129, EPA expects States to require compliance as expeditiously as practicable. However, because we believe that many HMIWI will find it necessary to retrofit existing emission control equipment and/or install additional emission control equipment in order to meet the proposed revised limits, EPA anticipates that States may choose to provide the maximum compliance period allowed by CAA section 129(f)(2).

In revising the emission limits in a State plan, a State would have two options. First, it could include both the current and the new emission limits in its revised State plan, which would allow a phased approach in applying the new limits. That is, the State plan would make it clear that the current emission limits remain in force and apply until the date the new existing source emission limits are effective (as defined in the State plan). States whose existing HMIWI do not find it necessary to improve their performance in order to meet the revised emission limits may want to consider a second approach where the State would insert the revised emission limits in place of the current emission limits, follow procedures in 40 CFR part 60, subpart B, and submit a revised State plan to EPA for approval. If the revised State plan contains only the revised emission limits (i.e., the current emission limits are not retained), then the revised emission limits must become effective immediately since the current limits would be removed from the State plan.

EPA will revise the existing Federal plan to incorporate any changes to existing source emission limits and other requirements that EPA ultimately promulgates. The Federal plan applies to HMIWI in any State without an approved State plan. The proposed amendments to the EG would allow

existing HMIWI subject to the Federal plan up to 5 years after promulgation of the revised standards to demonstrate compliance with the amended standards.

E. Proposed Changes to the Applicability Date of the 1997 NSPS

HMIWI would be treated differently under the amended standards, as proposed, than they were under the 1997 standards in terms of whether they are ''existing'' or ''new'' sources, and there would be new dates defining what are ''new'' sources and imposing compliance deadlines regarding any amended standards. Since under this proposed rule the EG for each pollutant and each subcategory would be more stringent than the NSPS as promulgated in 1997, all NSPS units, with respect to the standards as promulgated in 1997, would become ''existing'' sources under the proposed amended standards and would be required to meet the revised EG by the applicable compliance date for the revised guidelines. However, those sources would continue to be NSPS units subject to the standards as promulgated in 1997, until they become ''existing'' sources under the amended standards. Units for which construction is commenced after the date of this proposal, or modification is commenced on or after the date 6 months after promulgation of the amended standards, would be ''new'' units subject to more stringent NSPS emission limits than units for which construction or modification was completed prior to those dates.

Thus, under these specific proposed amendments, units that commenced construction after June 20, 1996, and on or before December 1, 2008, or that are modified before the date 6 months after the date of promulgation of any revised final standards, would continue to be or would become subject to the 40 CFR part 60, subpart Ec NSPS emission limits that were promulgated in 1997 until the applicable compliance date for the revised EG, at which time those units would become ''existing'' sources. Similarly, EG units under the 1997 rule would need to meet the revised EG by the applicable compliance date for the revised guidelines. HMIWI that commence construction after December 1, 2008 or that are modified 6 months or more after the date of promulgation of any revised standards would have to meet the revised NSPS emission limits being added to the subpart Ec NSPS within 6 months after the promulgation date of the amendments or upon startup whichever is later.

IV. Rationale

A. Rationale for the Proposed Response to the Remand

This action responds to the Court's remand by proposing a response that is based on data from currently operating HMIWI. This proposed action replaces the February 2007 proposal that responded to the remand based on data in the public record that supported the 1997 HMIWI rulemaking.

1. New HMIWI

The Court raised three issues with regard to EPA's treatment of the MACT floor for new units and the achievable emission limitations. First, the Court asked EPA to explain why the floor was based on the highest emissions levels of the ''worst-performing'' unit employing the MACT technology rather than on the lowest observed emissions levels of the best performing unit using the MACT technology. (See *Sierra Club* v. *EPA* , 167 F.3d at 665.) Second, the Court requested further explanation of why EPA considered multiple units employing the MACT technology, rather than identify the single best-performing unit and basing the floor on that particular unit's performance with that technology. *Id.* Third, the Court requested further explanation of EPA's procedure for determining the achievable emission limitation from the available data, where EPA selected a numerical value somewhat higher than the highest observed data point. *Id.*

The methodology used to determine the MACT floor and proposed revised emission limits for new HMIWI addresses the three issues raised by the Court. The methodology that supports this action does not base the MACT floor for new units on the highest emissions levels of the ''worst-performing'' unit employing the MACT technology, nor does it consider multiple units employing the MACT technology. As explained in section III of this preamble, EPA relied on control technology performance as the sole indicator of unit performance in making MACT floor determinations that supported the 1997 rulemaking as well as the 2007 proposal. However, based on recently obtained information, we now understand that factors other than the controls (e.g., waste mix and combustion conditions) affect HMIWI performance, and those emission reduction strategies must be accounted for in MACT floor determinations.

In November 2007, we solicited information regarding waste segregation practices from nine entities that own or operate HMIWI. The nine entities chosen include various: (1) Types of facilities (i.e., hospitals, pharmaceutical operations, universities, and commercial operations), (2) incinerator sizes (i.e., large, medium, and small HMIWI), (3) incinerator ages (i.e., existing versus new), and (4) control techniques (e.g., dry control systems, wet control systems, and combustion controls). The responses to EPA's request for information indicate that waste segregation is a common practice at HMIWI facilities. Onsite waste segregation is practiced at the six hospitals, the pharmaceutical facility, and the university that responded to the questionnaire. Materials separated from the waste stream include batteries, fluorescent light bulbs, paper and/or cardboard, glass, and plastics. The commercial operations that dispose of waste generated offsite indicated in their responses that they encourage waste segregation from their clients through various efforts, including waste management plans, contract requirements, and waste acceptance protocols.

a. Development of the MACT Floors and Proposed Emission Limits for New Units. Section 129(a)(2) of the CAA requires that EPA determine the emissions control that is achieved in practice by the ''best controlled similar unit'' when establishing the MACT floors for new units. Section 129 requires EPA to develop standards based on emission levels already achieved in practice by one or more units. Thus, the MACT floor for new units is based on the ''emissions control'' that is attained by any emission reduction strategies at the best similar unit. The use of actual emissions levels in the MACT floor determinations supporting the proposed emission limits for new HMIWI accounts for all emission reduction strategies (i.e., add-on controls or other emission reducing measures) used by individual HMIWI.

MACT floors were determined for each air pollutant for each subcategory of HMIWI using emissions data from the 57 currently operating HMIWI. As explained in section III of this preamble, we believe it is appropriate to re-propose a response to the remand based on data from the currently operating HMIWI given the uncertainty regarding the reliability of the regulatory limits for units operating in 1997 and the lack of other more reliable data for those units. We are retaining the large, medium, and small subcategories from the 1997 rulemaking. We continue to consider these subcategories to be ''classes'' of similar units in that all units within each ''class'' have been subject to the same regulatory requirements in the 1997 HMIWI standards. Thus, when

determining MACT floors and proposed emission limits using data for HMIWI within each ''class,'' we believe it is appropriate to continue to apply those emission limits to HMIWI of similar size (e.g., data from existing medium HMIWI would be used to determine emission limits for new medium HMIWI).

Within each subcategory and for each pollutant, EPA determined the best performing HMIWI based on an examination of the average emissions levels for each HMIWI. That is, the MACT floor for each pollutant is based on one unit (i.e., the unit with the lowest average emissions level). MACT floors for each pollutant within each subcategory, with the exceptions of NO_X and SO_2 for small HMIWI, were based on this approach. We do not have any NO_X or SO_2 emissions data for the two small HMIWI because they have not tested for NO_X or SO_2 and are not required to do so by the 1997 HMIWI standards. Both small units use wet scrubbers. The best performing medium HMIWI with respect to NO_X and SO_2 use wet scrubbers as well. In both of these instances, the NO_X and SO_2 emission limits being proposed for new medium HMIWI also are being proposed for new small units. Although use of data from the medium units does not account for any control strategies in addition to the wet scrubbers being used by the small units, we believe that using the NO_X and SO_2 emission limits for new medium HMIWI as surrogate emission limits for new small HMIWI is the most appropriate way to address these two instances. A summary of the add-on control technologies used, in addition to any other emission reductions measures, by the single best performing HMIWI on a pollutant-specific basis within each subcategory is presented in Table 5 of this preamble.

TABLE 5—SUMMARY OF ADD-ON CONTROL TECHNOLOGIES FOR BEST PERFORMING HMIWI

Pollutant	Large HMIWI	Medium HMIWI	Small HMIWI
HCl	Wet scrubber	Wet scrubber	Wet scrubber.
CO	Wet scrubber	Dry scrubber	Wet scrubber.
Pb	Carbon adsorber/wet scrubber	Dry scrubber	Wet scrubber.
Cd	Carbon adsorber/wet scrubber	Dry scrubber	Wet scrubber.
Hg	Fabric filter	Wet scrubber	Wet scrubber.
PM	Dry scrubber	Dry scrubber	Wet scrubber.
CDD/CDF	Dry scrubber	Wet scrubber	Wet scrubber.
NO_X	Carbon adsorber/wet scrubber	Wet scrubber	Wet scrubber.
SO_2	Dry scrubber	Wet scrubber	Wet scrubber.

We then used emissions data for those best performing HMIWI to determine emission limits to be proposed, with an accounting for variability. EPA must exercise its judgment, based on an evaluation of the relevant factors and available data, to determine the level of emissions control that has been achieved by the best performing HMIWI under variable conditions. The Court has recognized that EPA may consider variability in estimating the degree of emission reduction achieved by best-performing sources and in setting MACT floors. See *Mossville Envt'l Action Now* v. *EPA,* 370 F.3d 1232, 1241–42 (D.C. Cir 2004) (holding EPA may consider emission variability in estimating performance achieved by best-performing sources and may set the floor at level that best-performing source can expect to meet ''every day and under all operating conditions'').

MACT and other technology-based standards are necessarily derived from short-term emissions test data, but such data are not representative of the range of operating conditions that the best performing facilities face on a day-to-day basis. In statistical terms, each test produces a limited data sample, not a complete enumeration of the available data for performance of the unit over a long period of time. (See Natrella, *Experimental Statistics,* National Bureau of Standards Handbook 91, chapter 1 (revised ed., 1966).) EPA, therefore, often needs to adjust the short-term data to account for these varying conditions. The types of variability that EPA attempts to account for include operational distinctions between and within tests at the same unit.

''Between-test variability'' can occur even where conditions appear to be the same when two or more tests are conducted. Variations in emissions may be caused by different settings for emissions testing equipment, different field teams conducting the testing, differences in sample handling, or different laboratories analyzing the results. Identifying an achieved emissions level needs to account for these differences between tests, in order for ''a uniform standard [to] be capable of being met under most adverse conditions which can reasonably be expected to recur[.]'' (See *NLA I,* 627 F.2d at 431, n. 46.) (See also *Portland Cement Ass'n,* 486 F.2d at 396 (noting industry point that ''a single test offered a weak basis'' for inferring that plants could meet the standards).)

The same types of differences leading to between-test variability also cause variations in results between various runs comprising a single test, or ''within-test variability.'' A single test at a unit usually includes at least three separate test runs. (See 40 CFR 63.7(e)(3) (for MACT standards under section 112 of the CAA), and 40 CFR 60.8(f) (for NSPS under CAA section 111).) Each data point should be viewed as a snapshot of actual performance. Along with an understanding of the factors that may affect performance, each of these snapshots gives information about the normal, and unavoidable, variation in emissions that would be expected to recur over time.

To account for pollutant-specific variability at the best performing HMIWI, we used emissions data for each test run conducted by the best performing units. The amount of pollutant-specific test data for the single best performing HMIWI within each subcategory varies from 3 data points to 18 data points for large units; 3 data points to 21 data points for medium units; and 3 data points to 12 data points for small units (excluding NO_X and SO_2 for which there is no data for small units). Given the limited amount of test data and the uncertainty regarding that short-term emissions test data, we determined use of the 99.9 percent upper confidence level (UCL) to be an appropriate method of estimating variability. The UCL represents the statistical likelihood that a value, in this case an emission value from the best performing source, will fall at or below the UCL value. The average (or sample mean) and sample standard deviation, which are two statistical measures calculated from the sample data, are used to calculate the UCL. The average

is the central value of a data set and the standard deviation is the common measure of the dispersion of the data set around the average. The 99.9 percent UCL is appropriate for use in this analysis because sources must meet the standards at all times, and as mentioned above, the limited amount of test data introduces a degree of uncertainty.

To calculate the achieved emission limit, including variability, we used the equation: 99.9 percent UCL = mean + 3.09 * standard deviation. The mean and standard deviation are based on the test runs for the single best performing HMIWI for each pollutant. Accounting for variability using the 99.9 percent UCL means: ''For each pollutant, the performance of the best performing HMIWI, on average, is estimated to meet (i.e., not exceed) the emission limit 99.9 percent of the time.'' The emission values adjusted for variability are presented with two significant figures according to standard engineering practices, and these values represent the MACT floor-based emission limits being proposed. The second significant figure was rounded up to the next place value. EPA has, at times, presented emission limits with either two or three significant figures. For the low concentrations being proposed, two significant figures provide the appropriate precision. In all cases, the significant figure approach and associated rounding does not meaningfully change the proposed emission limits.

After determining the MACT floor-based emission limits for each pollutant, EPA examined additional measures that could be taken to further reduce emissions, but as discussed in section IV.A.1.b of this preamble, EPA determined that these additional ''beyond-the-floor'' measures are not reasonable based on the high costs that would be incurred and the minimal additional emissions reductions that could be achieved. Therefore, all of the emission limits proposed in this action for new HMIWI are based on the MACT floor level of control.

A summary of the pollutant-specific average emissions associated with the best performing HMIWI, the emission values adjusted for variability, and the emission limits being proposed for new HMIWI are presented in Table 6 of this preamble.

TABLE 6—SUMMARY OF AVERAGE EMISSION VALUES, EMISSION VALUES WITH VARIABILITY, AND EMISSION LIMITS FOR NEW HMIWI

Pollutant (units)	Unit size [1]	Average emission value [2]	Emission value with variability [2]	Proposed emission limit [2]
HCl (ppmv)	L	0.190	0.745	0.75
	M	0.46	1.73	1.8
	S	1.03	4.47	4.5
CO (ppmv)	L	0.87	2.88	2.9
	M	0.68	1.86	1.9
	S	2.27	8.18	8.2
Pb (mg/dscm)	L	0.000296	0.000470	0.47
	M	0.0040	0.0154	0.016
	S	0.073	0.174	0.18
Cd (mg/dscm)	L	0.000106	0.000116	0.12
	M	0.00106	0.00807	[3] 0.0071
	S	0.0026	0.0115	0.012
Hg (mg/dscm)	L	0.000695	0.000925	0.00093
	M	0.00084	0.00200	0.0020
	S	0.00292	0.00742	0.0075
PM (gr/dscf)	L	0.00106	0.00471	0.0048
	M	0.00294	0.00983	0.0099
	S	0.0076	0.0167	0.017
CDD/CDF, total (ng/dscm)	L	0.152	0.594	0.60
	M	0.097	0.344	0.35
	S	2.89	8.28	8.3
CDD/CDF, TEQ (ng/dscm)	L	0.0038	0.0135	0.014
	M	0.00291	0.00972	[3] 0.0097
	S	0.00453	0.00792	0.0080
NO_X (ppmv)	L	66.9	101.0	110
	M	15.0	37.8	38
	S	[4] 15.0	[4] 37.8	[4] 38
SO_2 (ppmv)	L	0.46	1.82	1.9
	M	0.336	0.773	0.78
	S	[4] 0.336	[4] 0.773	[4] 0.78

[1] L = Large; M = Medium; S = Small.
[2] All values are measured at 7 percent oxygen.
[3] Proposed emission limit reflects the proposed emission limit for existing HMIWI.
[4] Emission value reflects data from best performing medium HMIWI.

Using the procedure described above for Cd and CDD/CDF, TEQ for new medium units would result in emission limits slightly less stringent than the proposed emission limits for existing medium units. In these two instances, the proposed emission limits have been lowered to reflect the Cd and CDD/CDF, TEQ emission limits for existing medium HMIWI. Cadmium has been lowered from 0.0081 mg/dscm to 0.0071 mg/dscm, and CDD/CDF, TEQ has been lowered from 0.0098 ng/dscm to 0.0097 ng/dscm. These are not significant differences that we are adjusting for and the differences are functions of the emissions data and data operations (e.g., statistical procedures). The adjustments, however, are necessary such that the MACT standards for new sources are no less stringent than the MACT standards for existing sources.

Table 7 of this preamble summarizes the emission limits promulgated in

1997, the emission limits proposed in 2007 in response to the Court's remand, and the emission limits being proposed in this action in response to the Court's remand for new HMIWI.

TABLE 7—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS, EMISSION LIMITS PROPOSED IN 2007 IN RESPONSE TO THE REMAND, AND EMISSION LIMITS CURRENTLY BEING PROPOSED IN RESPONSE TO THE REMAND FOR NEW HMIWI

Pollutant (units)	Unit size [1]	Promulgated limit [2]	Remand response limit proposed in 2007 [2]	Proposed remand response limit [2]
HCl (ppmv)	L	15 or 99% reduction	15 or 99% reduction	0.75
	M	15 or 99% reduction	15 or 99% reduction	1.8
	S	15 or 99% reduction	15 or 99% reduction	4.5
CO (ppmv)	L	40	25	2.9
	M	40	25	1.9
	S	40	25	8.2
Pb (mg/dscm)	L	0.07 or 98% reduction	0.060 or 98% reduction	0.00047
	M	0.07 or 98% reduction	0.060 or 98% reduction	0.016
	S	1.2 or 70% reduction	0.64 or 71% reduction	0.18
Cd (mg/dscm)	L	0.04 or 90% reduction	0.030 or 93% reduction	0.00012
	M	0.04 or 90% reduction	0.030 or 93% reduction	0.0071
	S	0.16 or 65% reduction	0.060 or 74% reduction	0.012
Hg (mg/dscm)	L	0.55 or 85% reduction	0.33 or 96% reduction	0.00093
	M	0.55 or 85% reduction	0.33 or 96% reduction	0.0020
	S	0.55 or 85% reduction	0.33 or 96% reduction	0.0075
PM (gr/dscf)	L	0.015	0.0090	0.0048
	M	0.015	0.0090	0.0099
	S	0.03	0.018	0.017
CDD/CDF, total (ng/dscm).	L	25	20	0.60
	M	25	20	0.35
	S	125	111	8.3
CDD/CDF, TEQ (ng/dscm).	L	0.6	0.53	0.014
	M	0.6	0.53	0.0097
	S	2.3	2.0	0.0080
NO_X (ppmv)	L	250	212	110
	M, S	250	212	38
SO_2 (ppmv)	L	55	28	1.9
	M, S	55	28	0.78

[1] L = Large; M = Medium; S = Small
[2] All emission limits are measured at 7 percent oxygen.

With one exception, the emission limits for new HMIWI being proposed in this action are more stringent than the emission limits proposed in 2007. The PM emission limit for new medium units being proposed in this action is slightly higher than the limit proposed in 2007 (0.0090 gr/dscf versus 0.0099 gr/dscf). There are several potential causes for this difference in emission limits. There are three fewer medium HMIWI now, we have more emissions data to consider, and, most importantly, the methodology used to determine the MACT floors and emission limits in this action is different than in the 2007 proposal.

b. Consideration of Options More Stringent Than the MACT Floor for New HMIWI. After establishing the MACT floor emission level for each pollutant for new sources, EPA is required to look ''beyond-the-floor'' at additional measures that that could be taken to further reduce emissions, considering the cost of achieving such additional reduction and any non-air quality health and environmental impacts and energy requirements associated with imposing additional requirements. For each subcategory, EPA looked for control measures not anticipated to be required by the new source floors, and where options were identified, EPA estimated costs of the options for a model unit in each subcategory. For large units, SNCR was identified as a potential option to reduce NO_X emissions. For this beyond-the-floor option, total NO_X reductions for new large HMIWI are estimated at 7,900 lb/yr at a cost of $110,000 per year. For medium units, the floor level of control includes all known measures for reducing emissions, and, consequently, no beyond-the-floor options were identified. For small units, addition of a dry injection fabric filter (DIFF) and activated carbon injection were identified as potential options to reduce emissions of lead, mercury, and dioxin. For this beyond-the-floor option, the total cost for a new small HMIWI is $210,000, and EPA estimates emissions reductions of 0.45 lb/yr of lead, 0.0073 lb/yr of mercury, and 0.0091 grams/yr of total CDD/CDF. A memorandum entitled ''Analysis of Beyond-the-Floor Options'' is included in the docket, and presents detailed results of the beyond-the-floor options, including estimates of reductions of air pollutants, costs, and secondary impacts. Considering the cost-effectiveness (for all pollutants) of the beyond-the-floor control measures, which averaged $27,000 per ton for large units and $940 million per ton for small units, EPA determined that the beyond-the-floor measures were not reasonable and, therefore, MACT for new units is based on the MACT floor level of control for all of the subcategories.

2. Existing Units

The Court raised three specific concerns regarding EPA's approach for existing units in concluding that EPA had not adequately explained why the combination of regulatory and uncontrolled (i.e., combustion-controlled) data provided a ''reasonable

estimate'' of HMIWI performance. First, the Court ruled that EPA did not discuss the possibility that HMIWI might be substantially overachieving the regulatory limits, which would result in those limits having little value in estimating the top 12 percent of HMIWI performance (167 F.3d at 663). Second, the Court found that EPA gave no reason for believing that HMIWI that were not subject to regulatory limits did not employ any emission controls. Without this, the Court concluded it was unable to assess the rationality in using ''uncontrolled'' (i.e., combustion-controlled) data for the units that were not subject to regulatory requirements (167 F.3d at 664). Third, the Court held that even if the regulatory data was a good proxy for the better controlled units and there were shortfalls in reaching the necessary 12 percent, EPA did not explain why it was reasonable to use the highest of its test run data to make up the gap. *Id.*

With regard to the Court's first concern, additional Court rulings issued after EPA's 2007 proposed response to the remand and public comments regarding the 2007 proposal gave us reason to revisit our MACT floor methodology, including the use of State regulations and State-issued permits as a surrogate for estimated actual emission limitations achieved. A comparison between the regulatory limits and emissions test data in the 1997 record indicate that in some instances the emissions data was higher than or about the same as the regulatory limit, but in most instances the regulatory limit was higher than the emissions data. Thus, we are no longer confident that the regulatory limits in the 1997 record provided a reasonable estimate of emission limitations for HMIWI operating at that time. Use of those particular regulatory limits as surrogates for actual emissions levels achieved also would not account for factors other than control technology that we have since learned in fact affect HMIWI performance. These uncertainties are two of the reasons that this action's proposed remand response is not based on information in the 1997 record but, rather, on data for the 57 currently operating HMIWI. This is not to say that as a general matter it is inappropriate to use regulatory limits as a means to estimate the emissions limitations achieved by best performing sources. In some cases, it may be that such regulatory limits can be shown to reflect the emissions performance achieved by both add-on controls and other measures that affect such performance. In the case of HMIWI, however, the regulatory data used in support of the 1997 rule was not adequate for this, and cannot be used to support a MACT floor determination that comports with the requirements of the CAA as interpreted by the Court.

The Court's second concern was that EPA had not made a finding that HMIWI that were not subject to regulatory requirements did not use emissions controls of any kind. The Court viewed such a finding as a necessary prerequisite to using uncontrolled (i.e., combustion-controlled) data for units not subject to regulatory requirements. EPA continues to view the 1997 record as showing that most HMIWI were not at that time equipped with add-on air pollution control. Therefore, the use of uncontrolled emission estimates for units for which where there was no indication air pollution control technology was in place and applicable regulatory limits allowed higher levels of emissions than our combustion-controlled emissions values reflected, was warranted for purposes of identifying emissions levels achieved by combustion-control alone. However, it did not necessarily reflect emissions levels as influenced by measures other than the use (or lack of use) of add-on control technology, such as waste segregation. EPA's decision to use data for the 57 currently operating HMIWI to re-propose a response to the Court remand fully addresses the Court's concern, in that the data reflect all measures, add-on control technology or otherwise, that affect the emissions levels achieved by the best performing sources. For each HMIWI, we have detailed information regarding control technologies used, as well as actual emissions data resulting from the use of those technologies and any other measures.

The Court's third concern regarded our use of the highest of the test run data to reflect uncontrolled (i.e., combustion-controlled) emissions in cases where regulatory data did not comprise the necessary 12 percent of best performing sources. As described below, the methodology that supports this action does not continue that approach.

a. Development of the MACT Floors and Proposed Emission Limits for Existing Units. When establishing the MACT floors for existing units, section 129(a)(2) of the CAA requires that EPA determine the average emissions limitation achieved by the ''best performing 12 percent of units'' in a source category. Thus, EPA must determine some measure of the average emissions limitation achieved by the best performing 12 percent of HMIWI within each subcategory for each pollutant to be regulated. The MACT floor for existing units is based on the level of ''emissions control'' that is attained by any emission reduction strategies used by the best performing 12 percent of HMIWI. As is the case with new HMIWI, the use of actual emissions levels in the MACT floor determinations supporting the proposed emission limits for existing HMIWI accounts for all emission reduction strategies (i.e., add-on controls or other emission reducing measures) used by individual HMIWI.

We are retaining the large, medium, small, and small rural subcategories from the 1997 rulemaking. As previously explained, we continue to consider these subcategories to be ''classes'' of similar units in that all units within each ''class'' have been subject to the same regulatory requirements in the 1997 HMIWI standards. Thus, we believe it is appropriate to determine MACT floors and proposed emission limits using data for HMIWI within each ''class'' and to then apply those revised emission limits to those same HMIWI within each ''class.''

Within each subcategory and for each pollutant, EPA determined the best performing 12 percent of HMIWI based on an examination of average emissions levels for each HMIWI. (Note that section 129 of the CAA does not include the section 112 text regarding the MACT floor for existing sources being based on the best performing 5 sources where there are fewer than 30 sources in the category or subcategory.) In determining how many HMIWI comprise the best performing 12 percent, we rounded up the number of sources to the next whole number. This ensures that the CAA section 129 requirement to consider the best performing 12 percent of sources is met, as not rounding up would result in a number of sources that would be less than 12 percent. Further, rounding of a sample size is a common sampling technique (Cochran, William G. Sampling Techniques. Third Edition. John Wiley & Sons, 1977. page 76 and pages 72–87).

Table 8 of this preamble presents the total number of HMIWI in each subcategory and the number of HMIWI that comprise the best performing 12 percent of units (i.e., the MACT floor pool) for each subcategory.

TABLE 8—NUMBER OF HMIWI THAT ARE IN EACH SUBCATEGORY AND THAT COMPRISE THE MACT FLOORS

Unit size	Total number of HMIWI	Number of HMIWI in MACT floor pool
Large	36	5
Medium	17	3
Small	2	1
Small Rural	2	1

The next step in the MACT analysis for existing HMIWI was to determine the average emission limitation achieved by the best-performing 12 percent of existing sources. Our general approach to identifying the average emission limitation has been to use a measure of central tendency, such as the arithmetic mean or the median. First, unit average emissions for each pollutant within each subcategory were ranked from lowest to highest. Then, a MACT floor emissions level for each pollutant was identified based on the arithmetic mean of the emissions values for the best performing 12 percent of HMIWI within each subcategory. MACT floors for each pollutant within each subcategory, with the exceptions of NO_X and SO_2 for small HMIWI, were based on this approach. As previously explained, we do not have any NO_X or SO_2 emissions data for the two small HMIWI because they have not tested for NO_X or SO_2 and are not required to do so by the 1997 HMIWI standards. Both small units use wet scrubbers, as do the best performing 12 percent of medium HMIWI (3 units) with respect to NO_X and SO_2. In both of these instances, the NO_X and SO_2 emission limits being proposed for existing medium HMIWI also are being proposed for existing small units, since they employ the same emissions control technology, and we do not have information suggesting that the small units are employing other measures that would further affect their emissions performance. A summary of the various add-on control technologies used, in addition to any other emission reduction measures, by the best performing 12 percent HMIWI on a pollutant-specific basis for existing large and medium HMIWI is presented in Table 9 of this preamble.

TABLE 9—SUMMARY OF ADD-ON CONTROL TECHNOLOGIES FOR BEST PERFORMING 12 PERCENT OF LARGE AND MEDIUM HMIWI

Pollutant	Large HMIWI	Medium HMIWI
HCl	wet scrubber	wet scrubber
CO	wet scrubber; dry scrubber; fabric filter.	dry scrubber; wet scrubber
Pb	carbon adsorber/wet scrubber; dry scrubber.	dry scrubber
Cd	carbon adsorber/wet scrubber; dry scrubber.	dry scrubber
Hg	fabric filter; wet scrubber; carbon adsorber/wet scrubber; dry scrubber.	wet scrubber
PM	dry scrubber; dry scrubber/wet scrubber; fabric filter.	dry scrubber; wet scrubber
CDD/CDF.	dry scrubber; carbon adsorber/wet scrubber; wet scrubber.	wet scrubber
NO_X	carbon adsorber/wet scrubber; wet scrubber; dry scrubber.	wet scrubber
SO_2	dry scrubber; wet scrubber.	wet scrubber

Table 10 of this preamble presents the same information for existing small HMIWI and for existing small HMIWI meeting the rural criteria.

TABLE 10—SUMMARY OF ADD-ON CONTROL TECHNOLOGIES FOR BEST PERFORMING 12 PERCENT OF SMALL AND SMALL RURAL HMIWI

Pollutant	Small HMIWI	Small Rural HMIWI
HCl	wet scrubber	combustion control
CO	wet scrubber	combustion control
Pb	wet scrubber	combustion control
Cd	wet scrubber	combustion control
Hg	wet scrubber	combustion control
PM	wet scrubber	combustion control
CDD/CDF.	wet scrubber	combustion control
NO_X	wet scrubber	combustion control
SO_2	wet scrubber	combustion control

We then used emissions data for those best performing 12 percent HMIWI to determine emission limits to be proposed, with an accounting for variability. As previously explained in this preamble with respect to development of emission limits for new HMIWI, EPA must exercise its judgment, based on an evaluation of the relevant factors and available data, to determine the level of emissions control that can be customarily achieved by the best performing HMIWI under variable conditions. To account for pollutant-specific variability at the best performing HMIWI, we used emissions data for each test run conducted by the best performing 12 percent of HMIWI within each subcategory. The amount of pollutant-specific test data for the best performing 12 percent HMIWI within each subcategory varies from 33 data points to 60 data points for large units; 9 data points to 70 data points for medium units; 3 data points to 12 data points for small units (excluding NO_X and SO_2 for which there is no data for small units); and 3 data points to 4 data points for small rural units. Similar to the analyses for new HMIWI, we determined use of the 99.9 percent UCL to be an appropriate method of estimating variability. The UCL represents the statistical likelihood that a value, in this case an emission value from the average source in the best performing 12 percent of sources, will fall at or below the UCL value. The 99.9 percent UCL is appropriate for use in this analysis because sources must meet the standards at all times, and the limited amount of test data introduces a degree of uncertainty. To calculate the emission limit, including variability, we used the equation: 99.9 percent UCL = mean + 3.09 * standard deviation. The mean and standard deviation are based on the test runs for the best performing 12 percent HMIWI for each pollutant. Accounting for variability using the 99.9 percent UCL means: ''For each pollutant, the performance of the average HMIWI within the best performing 12 percent HMIWI is estimated to meet (i.e., not exceed) the emission limit 99.9 percent of the time.'' As described for new HMIWI, the emission values adjusted for variability are presented with two significant figures. After determining the MACT floor-based emission limits for each pollutant, EPA examined additional measures that could be taken to further reduce emissions. Table 11 of this preamble presents a summary of the emissions reductions and costs associated with the beyond-the-floor options for each subcategory.

TABLE 11—SUMMARY OF BEYOND-THE-FLOOR EMISSIONS REDUCTIONS AND COSTS FOR EXISTING HMIWI

Pollutant	Large HMIWI reductions, lb/yr [a]	Medium HMIWI reductions, lb/yr [a]	Small HMIWI Reductions, lb/yr [a]	Small rural HMIWI reductions, lb/yr [a]
HCl	8,000	110	0	570
CO	1,900	160	57	0
Pb	47	0.23	3.4	0.32
Cd	11	0	0	0.18
Hg	39	0.8	0.12	0
PM	5,400	1,100	180	0
Total CDD/CDF	1.9	0.032	0.033	0.21
TEQ	0.027	0	0	0.0047
NO_X	280,000	30,000	3,400	190
SO_2	6,700	1,000	140	58
Total	300,000	32,000	3,800	820
BTF Cost	$14,000,000	$1,200,000	$500,000	$390,000

[a] Sums of individual numbers may not equal totals due to internal rounding. CDD/CDF and TEQ emissions in grams per year.

As discussed in section IV.A.2.b of this preamble, EPA determined that these additional beyond-the-floor measures are not reasonable based on the high costs that would be incurred and the minimal additional emissions reductions that could be achieved. Therefore, all of the emission limits proposed in this action for existing HMIWI are based on the MACT floor level of control.

A summary of the pollutant-specific average emissions associated with the best performing 12 percent HMIWI, the emission values adjusted for variability, and the emission limits being proposed for existing HMIWI are presented in Table 12 of this preamble.

TABLE 12—SUMMARY OF AVERAGE EMISSION VALUES, EMISSION VALUES WITH VARIABILITY, AND EMISSION LIMITS FOR EXISTING HMIWI

Pollutant (units)	Unit size[1]	Average emission value[2]	Emission value with variability[2]	Proposed emission limit [2]
HCl (ppmv)	L	0.47	2.38	2.4
	M	0.60	2.50	2.5
	S	1.03	4.47	4.5
	SR	135	432	440
CO (ppmv)	L	1.03	3.88	3.9
	M	0.95	2.96	3.0
	S	2.27	8.18	8.2
	SR	5.4	11.9	12
Pb (mg/dscm)	L	0.0032	0.0130	0.013
	M	0.0041	0.0163	0.017
	S	0.073	0.174	0.18
	SR	0.226	0.346	0.35
Cd (mg/dscm)	L	0.00077	0.00408	0.0041
	M	0.00116	0.00701	0.0071
	S	0.0026	0.0115	0.012
	SR	0.0380	0.0671	0.068
Hg (mg/dscm)	L	0.00210	0.00943	0.0095
	M	0.00136	0.00782	0.0079
	S	0.00292	0.00742	0.0075
	SR	0.00158	0.00391	0.0040
PM (gr/dscf)	L	0.00143	0.00559	0.0056
	M	0.0036	0.0119	0.012
	S	0.0076	0.0167	0.017
	SR	0.0128	0.0294	0.030
CDD/CDF, total (ng/dscm)	L	0.37	1.54	1.6
	M	0.158	0.621	0.63
	S	2.89	8.28	8.3
	SR	30	122	130
CDD/CDF, TEQ (ng/dscm)	L	0.0074	0.0282	0.029
	M	0.00306	0.00970	0.0097
	S	0.00453	0.00792	0.0080
	SR	0.62	2.59	2.6
NO_X (ppmv)	L	73	135	140
	M	63	193	200
	S	63	[3] 193	[3] 200
	SR	95	110	110
SO_2 (ppmv)	L	0.80	2.71	2.8
	M	0.90	2.79	2.8
	S	0.90	[3] 2.8	[3] 2.8

TABLE 12—SUMMARY OF AVERAGE EMISSION VALUES, EMISSION VALUES WITH VARIABILITY, AND EMISSION LIMITS FOR EXISTING HMIWI—Continued

Pollutant (units)	Unit size[1]	Average emission value[2]	Emission value with variability[2]	Proposed emission limit[2]
	SR	22.6	42.7	43

[1] L = Large; M = Medium; S = Small; SR = Small Rural.
[2] All values are measured at 7 percent oxygen.
[3] Emission value reflects data from best performing medium HMIWI.

Table 13 of this preamble summarizes the emission limits promulgated in 1997, the emission limits proposed in 2007 in response to the Court's remand, and the emission limits being proposed in this action in response to the Court's remand for existing HMIWI.

TABLE 13—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS, EMISSION LIMITS PROPOSED IN 2007 IN RESPONSE TO THE REMAND, AND EMISSION LIMITS CURRENTLY BEING PROPOSED IN RESPONSE TO THE REMAND FOR EXISTING HMIWI

Pollutant (units)	Unit size[1]	Promulgated limit[2]	Remand response limit proposed in 2007[2]	Proposed remand response limit[2]
HC1 (ppmv)	L	100 or 93% reduction	78 or 93% reduction	2.4
	M	100 or 93% reduction	78 or 93% reduction	2.5
	S	100 or 93% reduction	78 or 93% reduction	4.5
	SR	3,100	3,100	440
CO (ppmv)	L	40	40	3.9
	M	40	40	3.0
	S	40	40	8.2
	SR	40	40	12
Pb (mg/dscm)	L	1.2 or 70% reduction	0.78 or 71% reduction	0.013
	M	1.2 or 70% reduction	0.78 or 71% reduction	0.017
	S	1.2 or 70% reduction	0.78 or 71% reduction	0.18
	SR	10	8.9	0.35
Cd (mg/dscm)	L	0.16 or 65% reduction	0.11 or 66% reduction	0.0041
	M	0.16 or 65% reduction	0.11 or 66% reduction	0.0071
	S	0.16 or 65% reduction	0.11 or 66% reduction	0.012
	SR	4	4	0.068
Hg (mg/dscm)	L	0.55 or 85% reduction	0.55 or 87% reduction	0.0095
	M	0.55 or 85% reduction	0.55 or 87% reduction	0.0079
	S	0.55 or 85% reduction	0.55 or 87% reduction	0.0075
	SR	7.5	6.6	0.0040
PM (gr/dscf)	L	0.015	0.015	0.0056
	M	0.03	0.030	0.012
	S	0.05	0.050	0.017
	SR	0.086	0.086	0.030
CDD/CDF, total (ng/dscm).	L	125	115	1.6
	M	125	115	0.63
	S	125	115	8.3
	SR	800	800	130
CDD/CDF, TEQ (ng/dscm).	L	2.3	2.2	0.029
	M	2.3	2.2	0.0097
	S	2.3	2.2	0.0080
	SR	15	15	2.6
NO_X (ppmv)	L	250	250	140
	M, S	250	250	200
	SR	250	250	110
SO_2 (ppmv)	L, M, S	55	55	2.8
	SR	55	55	43

[1] L = Large; M = Medium; S = Small; SR = Small Rural.
[2] All emission limits are measured at 7 percent oxygen.

b. Consideration of Options More Stringent than the MACT Floor for Existing HMIWI. As discussed earlier regarding new HMIWI, after establishing the MACT floor emission level for each pollutant for existing sources, EPA is required to look ''beyond-the-floor'' at additional measures that could be taken to further reduce emissions. The beyond-the-floor options for large and medium HMIWI included the addition of wet scrubber or DIFF controls (for units not already projected to be operating both types of controls based on the MACT floor requirements); replacement of DIFF controls; increased activated carbon, sodium bicarbonate, and/or caustic usage; combustion improvements; and addition of SNCR. For some units, no beyond-the-floor measures were identified because we

estimated that to achieve the MACT floor limits, those units would have to use all available add-on controls and other control measures. The beyond-the-floor options for small units included addition of DIFF controls, increased activated carbon and/or caustic usage, combustion improvements, and addition of SNCR. EPA analyzed the additional air pollutant reductions, costs, and secondary impacts for the beyond-the-floor options, and detailed information on the analyses are available in a memorandum entitled ''Analysis of Beyond-the Floor Options'' that is included in the docket. Considering the cost-effectiveness (for all pollutants) of the beyond-the-floor control measures, which averaged $167,000 per ton for large units, $118,000 per ton for medium units, $325,000 for small units, and $1.3 million per ton for small rural units, EPA determined that the beyond-the-floor measures were not reasonable and, therefore, MACT is based on the floor level of control for all of the subcategories.

3. Opacity Limits for New and Existing Units

EPA also is proposing a revised opacity standard for new and existing HMIWI as part of responding to the Court's remand. The 1997 standards require that opacity testing be conducted according to EPA Test Method 9 of appendix A–4 of 40 CFR part 60. Method 9 specifies that opacity shall be determined as an average of 24 consecutive observations recorded at 15-second intervals (i.e., 6-minute block average). Method 9 also specifies that opacity observations shall be recorded to the nearest 5 percent at 15-second intervals. The opacity data that we have is in terms of averages rather than single opacity readings. Based on these averages alone, without any accounting for variability, the MACT floor for new units, as well as existing units, would be 0 percent. We then considered how to appropriately account for variability given the differences in opacity testing versus testing for the 9 regulated pollutants. We have continuous opacity monitoring system (COMS) data for an HMIWI that is in the MACT floor pool for PM for existing medium units. In that instance, we can determine the single highest opacity reading. Because the level of opacity can be impacted by the amount, type, and particle characteristics of PM in the gas stream, as well as process operation, we believe that using the highest opacity reading from one of the best performing HMIWI with respect to PM is an appropriate method for determining the opacity level that has been achieved under variable conditions. While opacity may not be a reliable indicator of short-term mass emissions, opacity can serve as an indicator of and provide qualitative information on the operation and maintenance of particulate control equipment (Current Knowledge of Particulate Matter (PM) Continuous Emission Monitoring, EPA–454/R–00–039, September 2000). When PM emissions control devices are operated and maintained in the same manner as during successful PM emissions testing, our expectation is that PM emissions from those sources meet the standards. Therefore, as a continuous check on proper operation and maintenance of PM control devices, opacity can serve as an appropriate surrogate for PM emissions. The single highest COMS reading for the HMIWI that is in the MACT floor pool for PM is 1.1 percent. EPA commonly sets opacity standards based on whole numbers, and rounding down would cause the unit upon which the standard is based to have demonstrated performance at a level that would not meet the standard. Thus, we rounded up and are proposing a MACT-floor based opacity limit of 2 percent for both new and existing HMIWI.

4. Percent Reduction Limits for New and Existing Units

The 1997 standards included percent reduction limits for HCl, Pb, Cd, and Hg for new and existing HMIWI. For those pollutants, sources have had the option of demonstrating compliance by meeting the emission limits (expressed as emissions rates) or the percent reduction limits. For the 1997 rule, the percent reduction limits were developed using the pollutant concentrations at the inlet and outlet of a control device and reflected only the efficiency of the control device in reducing specific pollutants. Because, as previously explained in this preamble, factors other than control technology affect pollutant emissions from HMIWI, and because we did not take these factors into account when we set the 1997 standards based on percent reduction, we now believe it is inappropriate to provide in this rule percent reduction limits based only on control technology performance. Moreover, not many HMIWI determined the efficiency of their control devices, and none of the HMIWI used the percent reduction limits to demonstrate compliance with the 1997 rule. None of the HMIWI demonstrated compliance with the Pb, Cd, or Hg percent reduction limits or even conducted the testing necessary to determine the efficiency of their control devices. No medium or small HMIWI demonstrated compliance with the HCl percent reduction limits or conducted control device inlet and outlet testing. Eight large HMIWI tested for HCl at their control device inlets and outlets, but all of those units were in compliance with the HCl emission limit and, therefore, didn't need to rely on their control technology efficiency calculations to show that, alternatively, they were in compliance with the HCl percent reduction limit. None of these eight large HMIWI are among the best performing 12 percent of large units for HCl (*i.e.*, HCl emissions based only on control technology outlet testing). Therefore, this action does not propose revised percent reduction limits, and proposes to eliminate the continued use of the 1997 percent reduction limits after the compliance date of the proposed revised emission limits.

B. Rationale for the Proposed CAA Section 129(a)(5) 5-Year Review Response

Earlier in today's notice, we explained that section 129(a)(5) provides the Agency with broad discretion to revise MACT standards for incinerators.

As we explained, we do not interpret section 129(a)(5) as requiring that EPA in each round of review re-calculate MACT floors, and we regard the D.C. Circuit's recent ruling in *NRDC and LEAN* v. *EPA,* in which the Court held that the similar review requirement in section 112(d)(6) does not require a MACT floor re-calculation, as supporting our view. Nevertheless, given the unique facts of this rulemaking, in which due to issues with respect to the 1997 rulemaking record we have had to re-calculate MACT floors based on more recent data in response to the remand at a point in time following the statutory deadline for conducting the section 129(a)(5) review, it may appear that we are performing the ''MACT-on-MACT'' review that we believe is not statutorily required by section 129(a)(5). We stress that our proposed revised standards are the result of what we now think is necessary to satisfy our initial duties under section 129(a)(2) to have set MACT limits for HMIWI, in response to the Court's remand. Our action today does not reflect an independent MACT floor reassessment performed only under section 129(a)(5). However, since today's proposed revised standards do reflect the emissions levels currently achieved in practice by the best performing HMIWI, and we have no other information that would cause us to reach different conclusions were a section 129(a)(5) review to be conducted in isolation, we believe that this

rulemaking responding to the Court's remand, based on the most current HMIWI emissions information, will necessarily discharge our instant duty under section 129(a)(5) to review and revise the current standards.

In performing future 5-year reviews of the HMIWI standards, we do not intend to recalculate new MACT floors, but will instead propose to revise the emission limits to reflect the actual performance of the emission reduction techniques that formed the basis of MACT, consistent with our interpretation as presented earlier in today's notice. We believe this approach reflects the most reasonable interpretation of the review requirement of CAA section 129(a)(5), and is consistent with how we have interpreted the similar review requirement of CAA section 112(d)(6) regarding MACT standards promulgated under section 112.

We believe that this action's proposed remand response fulfills our obligations regarding the first 5-year review of the HMIWI standards because the revised MACT floor determinations and emission limits associated with the remand response are based on performance data for the 57 currently operating HMIWI that are subject to the 1997 standards and account for all non-technology factors that affect HMIWI performance. The proposed remand response also addresses whether new technologies and processes and improvements in practices have been demonstrated at HMIWI subject to the 1997 standards. Table 14 of this preamble provides a comparison between the emission limits promulgated in 1997, the emission limits proposed in 2007 in response to the 5-year review requirement, and the emission limits being proposed in this action in response to the Court's remand for new HMIWI.

TABLE 14—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS, EMISSION LIMITS PROPOSED IN 2007 IN RESPONSE TO THE 5-YEAR REVIEW REQUIREMENT, AND EMISSION LIMITS CURRENTLY BEING PROPOSED IN RESPONSE TO THE REMAND FOR NEW HMIWI

Pollutant (units)	Unit size [1]	Promulgated limit [2]	5-Year review limit proposed in 2007 [2]	Proposed remand response limit [2]
HCl (ppmv)	L	15 or 99% reduction	15 or 99% reduction	0.75
	M	15 or 99% reduction	15 or 99% reduction	1.8
	S	15 or 99% reduction	15 or 99% reduction	4.5
CO (ppmv)	L	40	25	2.9
	M	40	25	1.9
	S	40	25	8.2
Pb (mg/dscm)	L	0.07 or 98% reduction	0.060 or 99% reduction	0.00047
	M	0.07 or 98% reduction	0.060 or 99% reduction	0.016
	S	1.2 or 70% reduction	0.64 or 71% reduction	0.18
Cd (mg/dscm)	L	0.04 or 90% reduction	0.0050 or 99% reduction	0.00012
	M	0.04 or 90% reduction	0.0050 or 99% reduction	0.0071
	S	0.16 or 65% reduction	0.060 or 74% reduction	0.012
Hg (mg/dscm)	L	0.55 or 85% reduction	0.19 or 96% reduction	0.00093
	M	0.55 or 85% reduction	0.19 or 96% reduction	0.0020
	S	0.55 or 85% reduction	0.33 or 96% reduction	0.0075
PM (gr/dscf)	L	0.015	0.0090	0.0048
	M	0.015	0.0090	0.0099
	S	0.03	0.018	0.017
CDD/CDF, total (ng/dscm).	L	25	16	0.60
	M	25	16	0.35
	S	125	111	8.3
CDD/CDF, TEQ (ng/dscm).	L	0.6	0.21	0.014
	M	0.6	0.21	0.0097
	S	2.3	2.0	0.0080
NO_X (ppmv)	L	250	212	110
	M, S	250	212	38
SO_2 (ppmv)	L	55	21	1.9
	M	55	21	0.78
	S	55	28	0.78

[1] L = Large; M = Medium; S = Small.
[2] All emission limits are measured at 7 percent oxygen.

With two exceptions, the emission limits for new HMIWI being proposed in this action are more stringent than the 5-year review emission limits proposed in 2007. The Cd and PM emission limits for new medium units being proposed in this action are higher than the 5-year review limits proposed in 2007 (0.0050 mg/dscm versus 0.0081 mg/dscm for Cd; and 0.0090 gr/dscf versus 0.0099 gr/dscf for PM). As explained with respect to PM emissions in Table 7 of this preamble, there are several potential causes for these differences in emission limits. There are three fewer medium HMIWI now and we have more emissions data to consider.

Table 15 of this preamble provides a comparison between the emission limits promulgated in 1997, the emission limits proposed in 2007 in response to the 5-year review requirement, and the emission limits being proposed in this action in response to the Court's remand for existing HMIWI.

TABLE 15—SUMMARY OF 1997 PROMULGATED EMISSION LIMITS, EMISSION LIMITS PROPOSED IN 2007 IN RESPONSE TO THE 5-YEAR REVIEW REQUIREMENT, AND EMISSION LIMITS CURRENTLY BEING PROPOSED IN RESPONSE TO THE REMAND FOR EXISTING HMIWI

Pollutant (units)	Unit size[1]	Promulgated limit[2]	5-Year review limit proposed in 2007[2]	Proposed remand response limit[2]
HCl (ppmv)	L	100 or 93% reduction	51 or 94% reduction	2.4
	M	100 or 93% reduction	51 or 94% reduction	2.5
	S	100 or 93% reduction	51 or 94% reduction	4.5
	SR	3,100	398	440
CO (ppmv)	L	40	25	3.9
	M	40	25	3.0
	S	40	25	8.2
	SR	40	25	12
Pb (mg/dscm)	L	1.2 or 70% reduction	0.64 or 71% reduction	0.013
	M	1.2 or 70% reduction	0.64 or 71% reduction	0.017
	S	1.2 or 70% reduction	0.64 or 71% reduction	0.18
	SR	10	0.60	0.35
Cd (mg/dscm)	L	0.16 or 65% reduction	0.060 or 74% reduction	0.0041
	M	0.16 or 65% reduction	0.060 or 74% reduction	0.0071
	S	0.16 or 65% reduction	0.060 or 74% reduction	0.012
	SR	4	0.050	0.068
Hg (mg/dscm)	L	0.55 or 85% reduction	0.33 or 96% reduction	0.0095
	M	0.55 or 85% reduction	0.33 or 96% reduction	0.0079
	S	0.55 or 85% reduction	0.33 or 96% reduction	0.0075
	SR	7.5	0.25	0.0040
PM (gr/dscf)	L	0.015	0.015	0.0056
	M	0.03	0.030	0.012
	S	0.05	0.030	0.017
	SR	0.086	0.030	0.030
CDD/CDF, total (ng/dscm).	L	125	115	1.6
	M	125	115	0.63
	S	125	115	8.3
	SR	800	800	130
CDD/CDF, TEQ (ng/dscm).	L	2.3	2.0	0.029
	M	2.3	2.0	0.0097
	S	2.3	2.0	0.0080
	SR	15	15	2.6
NO_X (ppmv)	L	250	212	140
	M, S	250	212	200
	SR	250	212	110
SO_2 (ppmv)	L, M, S	55	28	2.8
	SR	55	28	43

[1] L = Large; M = Medium; S = Small; SR = Small Rural.
[2] All emission limits are measured at 7 percent oxygen.

With four exceptions, the emission limits for existing HMIWI being proposed in this action are more stringent than the 5-year review emission limits proposed in 2007. The HCl, Cd, and SO_2 emission limits for existing small rural units being proposed in this action are higher than the 5-year review limits proposed in 2007 (398 ppm versus 440 ppm for HCl; 0.050 mg/dscm versus 0.068 mg/dscm for Cd; and 28 ppm versus 43 ppm for SO_2). The PM emission limit being proposed for small rural HMIWI is the same as the 5-year review emission limit proposed in 2007. These differences in emission limits are likely due to the fact that there are now four fewer small rural HMIWI (leaving only two rural units).

C. Rationale for Other Proposed Amendments

1. Performance Testing and Monitoring Requirements

We are proposing some adjustments to the performance testing and monitoring requirements that were promulgated in 1997. For existing large, medium, and small HMIWI (i.e., all currently operating large, medium, and small HMIWI), we are proposing retaining the current requirements of the rule and adding the following requirements:

- Demonstration of initial compliance with the revised NO_X and SO_2 emission limits;
- Annual inspections of scrubbers, fabric filters, and other air pollution control devices that may be used to meet the emission limits; and
- One-time testing of the ash handling operations at the time of the next compliance test using EPA Method 22 of appendix A–7 of 40 CFR part 60.

For existing small rural HMIWI, who have been subject to fewer performance testing and monitoring requirements, we are proposing retaining the current requirements of the rule and adding the following requirements:

- Demonstration of initial compliance with the revised NO_X, SO_2, HCl, Cd, and Pb emission limits;
- Annual compliance testing for PM, CO, and HCl;
- Annual inspections of scrubbers, fabric filters, and other air pollution control devices that may be used to meet the emission limits; and

• One-time testing of the ash handling operations at the time of the next compliance test using EPA Method 22 of appendix A–7 of 40 CFR part 60.

Currently, existing HMIWI are not required to conduct initial emissions testing for NO_X or SO_2. Existing small rural HMIWI are not currently required to conduct initial compliance testing for HCl, Pb, Cd, NO_X, or SO_2, and are also not required to conduct annual compliance testing for any of the nine regulated pollutants. In addition, existing HMIWI are not currently required to conduct any testing of the ash handling. These proposed requirements were selected to provide additional assurance that sources continue to operate at the levels established during their initial performance test. The proposed amendments would allow sources to use the results of previous emissions tests to demonstrate compliance with the revised emission limits as long as the sources certify that the previous test results are representative of current operations. Those sources whose previous emissions tests do not demonstrate compliance with one or more of the revised emission limits would be required to conduct another emissions test for those pollutants (note that most sources are already required to test for HCl, CO, and PM on an annual basis).

Additional requirements also are proposed for new HMIWI. For new sources, we are proposing retaining the current requirements and adding the following requirements:

• Demonstration of initial compliance with the revised NO_X and SO_2 emission limits;

• Annual inspections of scrubbers, fabric filters, and other air pollution control devices that may be used to meet the emission limits;

• Use of CO CEMS;

• Use of bag leak detection systems for fabric-filter controlled units; and

• Annual testing of the ash handling operations using EPA Method 22 of appendix A–7 of 40 CFR part 60.

For existing sources, we also are proposing to allow for the optional use of bag leak detection systems. We also are clarifying that the rule allows for the following optional CEMS use: CO CEMS for existing sources; and PM CEMS, HCl CEMS, multi-metals CEMS, Hg CEMS, integrated sorbent trap Hg monitoring, and integrated sorbent trap dioxin monitoring for existing and new sources. The optional use of HCl CEMS, multi-metals CEMS, integrated sorbent trap Hg monitoring, and integrated sorbent trap dioxin monitoring will be available on the date a final performance specification for these monitoring systems is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. The proposed monitoring provisions are discussed below.

a. Monitoring Provisions for SNCR. The proposed amendments would require monitoring of secondary chamber temperature and reagent (e.g., ammonia or urea) injection rate for HMIWI that install SNCR as a method of reducing NO_X emissions. All HMIWI are currently required to monitor secondary chamber temperature.

b. Bag Leak Detection Systems. The proposed amendments would provide, as an alternative PM monitoring technique for existing sources, and a requirement for new sources, the use of bag leak detection systems on HMIWI controlled with fabric filters. Bag leak detection systems have been applied successfully at many industrial sources. EPA is proposing to remove the opacity testing requirements for HMIWI that use bag leak detection systems.

c. CO CEMS. The proposed amendments would require the use of CO CEMS for new sources, and allow the use of CO CEMS on existing sources. Owners and operators that use CO CEMS would be able to discontinue their annual CO compliance test as well as their monitoring of the secondary chamber temperature, unless the source uses SNCR technology. The continuous monitoring of CO emissions is an effective way of ensuring that the combustion unit is operating properly. The proposed amendments incorporate the use of performance specification (PS)–4B (Specifications and Test Procedures for Carbon Monoxide and Oxygen Continuous Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60.

The proposed CO emission limits are based on data from infrequent (normally annual) stack tests and compliance would be demonstrated by stack tests. The change to use of CO CEMS for measurement and enforcement of the same emission limits must be carefully considered in relation to an appropriate averaging period for data reduction. In past EPA rulemakings for incineration units, EPA has selected averaging times between 4 hours and 24 hours. Because sufficient CO CEMS data are unavailable for HMIWI, EPA concluded that the use of a 24-hour block average was appropriate to address potential changes in CO emissions that cannot be accounted for with short term stack test data. The 24-hour block average would be calculated following procedures in EPA Method 19 of appendix A–7 of 40 CFR part 60. Facilities electing to use CO CEMS as an optional method would be required to notify EPA 1 month before starting use of CO CEMS and 1 month before stopping use of the CO CEMS. In addition, EPA specifically requests comment on whether continuous monitoring of CO emissions should be required for all existing HMIWI.

d. PM CEMS. The proposed amendments would allow the use of PM CEMS as an alternative testing and monitoring method. Owners or operators who choose to rely on PM CEMS would be able to discontinue their annual PM compliance test. In addition, because units that demonstrate compliance with the PM emission limits with a PM CEMS would clearly be meeting the opacity standard, compliance demonstration with PM CEMS would be considered a substitute for opacity testing. Owners and operators that use PM CEMS also would be able to discontinue their monitoring of minimum wet scrubber pressure drop, horsepower, or amperage. The proposed amendments incorporate the use of PS–11 (Specifications and Test Procedures for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources) of appendix B of 40 CFR part 60 for PM CEMS, and PS–11 QA Procedure 2 to ensure that PM CEMS are installed and operated properly and produce good quality monitoring data.

The proposed PM emission limits are based on data from infrequent (normally annual) stack tests and compliance would be demonstrated by stack tests. The use of PM CEMS for measurement and enforcement of the same emission limits must be carefully considered in relation to an appropriate averaging period for data reduction. Because PM CEMS data are unavailable for HMIWI, EPA concluded that the use of a 24-hour block average was appropriate to address potential changes in PM emissions that cannot be accounted for with short term stack test data. The 24-hour block average would be calculated following procedures in EPA Method 19 of appendix A–7 of 40 CFR part 60. An owner or operator of an HMIWI unit who wishes to use PM CEMS would be required to notify EPA 1 month before starting use of PM CEMS and 1 month before stopping use of the PM CEMS.

e. Other CEMS and Monitoring Systems. EPA also is proposing the optional use of HCl CEMS, multi-metals CEMS, Hg CEMS, integrated sorbent trap Hg monitoring, and integrated sorbent trap dioxin monitoring as alternatives to the existing methods for demonstrating compliance with the HCl, metals (Pb, Cd, and Hg), and CDD/CDF

emissions limits. Because CEMS data for HMIWI are unavailable for HCl and metals, EPA concluded that the use of a 24-hour block average was appropriate to address potential changes in emissions of HCl and metals that cannot be accounted for with short term stack test data. EPA has concluded that the use of 24-hour block averages would be appropriate to address emissions variability, and EPA has included the use of 24-hour block averages in the proposed rule. The 24-hour block averages would be calculated following procedures in EPA Method 19 of appendix A of 40 CFR part 60. Although final performance specifications are not yet available for HCl CEMS and multi-metals CEMS, EPA is considering development of performance specifications. The proposed rule specifies that these options will be available to a facility on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan.

The use of HCl CEMS would allow the discontinuation of HCl sorbent flow rate monitoring, scrubber liquor pH monitoring, and the annual testing requirements for HCl. EPA has proposed PS–13 (Specifications and Test Procedures for Hydrochloric Acid Continuous Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60 and believes that performance specification can serve as the basis for a performance specification for HCl CEMS use at HMIWI. In addition to the procedures used in proposed PS–13 for initial accuracy determination using the relative accuracy test, a comparison against a reference method, EPA is taking comment on an alternate initial accuracy determination procedure, similar to the one in section 11 of PS–15 (Performance Specification for Extractive FTIR Continuous Emissions Monitor Systems in Stationary Sources) of appendix B of 40 CFR part 60 using the dynamic or analyte spiking procedure.

EPA believes multi-metals CEMS can be used in many applications, including HMIWI. EPA has monitored side-by-side evaluations of multi-metals CEMS with EPA Method 29 of appendix A–8 of 40 CFR part 60 at industrial waste incinerators and found good correlation. EPA also approved the use of multi-metals CEMS as an alternative monitoring method at a hazardous waste combustor. EPA believes it is possible to adapt proposed PS–10 (Specifications and Test Procedures for Multi-metals Continuous Monitoring Systems in Stationary Sources) of appendix B of 40 CFR part 60 or other EPA performance specifications to allow the use of multi-metals CEMS at HMIWI. In addition to the procedures used in proposed PS–10 for initial accuracy determination using the relative accuracy test, a comparison against a reference method, EPA is taking comment on an alternate initial accuracy determination procedure, similar to the one in section 11 of PS–15 using the dynamic or analyte spiking procedure.

Relative to the use of Hg CEMS and integrated sorbent trap Hg monitoring, EPA believes that the specifications and procedures described in the May 18, 2005 **Federal Register** notice that promulgated standards of performance for new and existing electric utility steam generating units (70 FR 28606) could provide the technical basis for site-specific monitoring plans. The options of using Hg CEMS or an integrated sorbent trap Hg monitoring system would take effect on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. An owner or operator of an HMIWI unit who wishes to use Hg CEMS would be required to notify EPA 1 month before starting use of Hg CEMS and 1 month before stopping use of the Hg CEMS. The use of multi-metals CEMS or Hg CEMS would allow the discontinuation of wet scrubber outlet flue gas temperature monitoring. Mercury sorbent flow rate monitoring could not be eliminated in favor of a multi-metals CEMS or Hg CEMS because it also is an indicator of CDD/CDF control. Additionally, there is no annual metals test that could be eliminated.

The integrated sorbent trap monitoring of Hg would entail use of a continuous automated sampling system with analysis of the samples at set intervals using any suitable determinative technique that can meet appropriate criteria. The option to use a continuous automated sampling system would take effect on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. Integrated sorbent trap monitoring of Hg would allow the discontinuation of wet scrubber outlet flue gas temperature monitoring. Mercury sorbent flow rate monitoring could not be eliminated in favor of integrated sorbent trap monitoring of Hg because it also is an indicator of CDD/CDF control. Additionally, there is no annual Hg test that could be eliminated.

The integrated sorbent trap monitoring of dioxin would entail use of a continuous automated sampling system and analysis of the sample according to EPA Reference Method 23 of appendix A–7 of 40 CFR part 60. The option to use a continuous automated sampling system would take effect on the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. Integrated sorbent trap monitoring of dioxin would allow the discontinuation of fabric filter inlet temperature monitoring. Dioxin/furan sorbent flow rate monitoring could not be eliminated in favor of integrated sorbent trap monitoring of dioxin because it also is an indicator of Hg control. Additionally, there is no annual CDD/CDF test that could be eliminated. If integrated sorbent trap monitoring of dioxin as well as multi-metals CEMS, Hg CEMS, or integrated sorbent trap Hg monitoring are used, Hg sorbent flow rate monitoring and CDD/CDF sorbent flow rate monitoring (in both cases activated carbon is the sorbent) could be eliminated. EPA requests comment on other parameter monitoring requirements that could be eliminated upon use of any or all of the optional CEMS discussed above. Table 16 of this preamble presents a summary of the HMIWI operating parameters, the pollutants influenced by each parameter, and alternative monitoring options for each parameter.

TABLE 16—SUMMARY OF HMIWI OPERATING PARAMETERS, POLLUTANTS INFLUENCED BY EACH PARAMETER, AND ALTERNATIVE MONITORING OPTIONS FOR EACH PARAMETER

Operating parameter/ monitoring requirement	Pollutants influenced by operating parameter (by control device type)			Alternative monitoring options
	Dry scrubber	Wet scrubber	Combined system	
Maximum charge rate	All	All	All	None.

TABLE 16—SUMMARY OF HMIWI OPERATING PARAMETERS, POLLUTANTS INFLUENCED BY EACH PARAMETER, AND ALTERNATIVE MONITORING OPTIONS FOR EACH PARAMETER—Continued

Operating parameter/ monitoring requirement	Pollutants influenced by operating parameter (by control device type)			Alternative monitoring options
	Dry scrubber	Wet scrubber	Combined system	
Minimum secondary chamber temperature.	PM, CO, CDD/CDF	PM, CO, CDD/CDF	PM, CO, CDD/CDF	CO CEMS.[1,2]
Maximum fabric filter inlet temperature.	CDD/CDF		CDD/CDF	Integrated sorbent trap dioxin monitoring system (ISTDMS).
Minimum CDD/CDF sorbent flow rate.	CDD/CDF		CDD/CDF	ISTDMS and multi-metals CEMS, Hg CEMS or integrated sorbent trap mercury monitoring system (ISTMMS).
Minimum Hg sorbent flow rate.	Hg		Hg	
Minimum HCl sorbent flow rate.	HCl		HCl	HCl CEMS.
Minimum scrubber pressure drop/ horsepower amperage.		PM	PM	PM CEMS.
Minimum scrubber liquor flow rate.		HCl, PM, Cd, Pb, Hg, CDD/CDF.	HCl, PM, Cd, Pb, Hg, CDD/CDF.	HCl CEMS, PM CEMS, multi-metals CEMS, ISTDMS, and ISTMMS.
Minimum scrubber liquor pH.		HCl	HCl	HCl CEMS.
Maximum flue gas temperature (wet scrubber outlet).		Hg		Hg CEMS, ISTMMS, or multi-metals CEMS.
Do not use bypass stack (except during startup, shutdown, and malfunction).	All	All	All	None.
Air pollution control device inspections.	All	All	All	None.

[1] Optional method for existing sources; required for new sources.
[2] Monitoring secondary chamber temperature could not be eliminated if the source uses SNCR technology.

Table 17 of this preamble presents a summary of the HMIWI test methods and approved alternative compliance methods.

TABLE 17—SUMMARY OF HMIWI TEST METHODS AND APPROVED ALTERNATIVE METHODS

Pollutant/parameter	Test method(s) [1]	Approved alternative method(s)	Comments
PM	Method 5, Method 29	PM CEMS	PM CEMS are optional for all sources in lieu of annual PM test.
CO	Method 10	CO CEMS	CO CEMS are optional for existing sources in lieu of annual CO test; CO CEMS are required for new sources.
HCl	Method 26 or Method 26A	HCl CEMS	HCl CEMS are optional for all sources in lieu of annual HCl test.
Cd	Method 29	Multi-metals CEMS.	
Pb	Method 29	Multi-metals CEMS.	
Hg	Method 29	ASTM D6784–02, multi-metals CEMS, Hg CEMS, or integrated sorbent trap mercury monitoring system.	
CDD/CDF	Method 23	Integrated sorbent trap dioxin monitoring system.	
Opacity	Method 22	Bag leak detection system or PM CEMS.	Bag leak detection systems are optional for existing sources; and are required for new sources in lieu of annual opacity test.
Flue and exhaust gas analysis.	Method 3, 3A, or 3B	ASME PTC 19–10–1981 Part 10.	
Opacity from ash handling.	Method 22	None.	

[1] EPA Reference Methods in appendix A of 40 CFR part 60.

V. Impacts of the Proposed Action for Existing Units

Over the last 3 years, about 25 percent (19 of 76 units) of the existing HMIWI have ceased operation. This trend is not surprising, and supports EPA's analysis, which shows that even in the absence of increased regulatory requirements, less expensive alternative waste disposal options are available for almost all facilities that operate HMIWI. Therefore, EPA expects this trend of unit closures to continue even in the absence of the proposed regulatory changes. The additional costs that would be imposed by this action are likely to accelerate the trend towards alternative waste disposal options, and our analysis suggests that sources are likely to respond to the proposed increased regulatory requirements by choosing to shut down existing HMIWI and utilizing alternative waste disposal options rather than incurring the costs of continued operation and compliance.

The EPA's objective is not to discourage continued use of HMIWI; EPA's objective is to adopt EG for existing HMIWI that fulfill the requirements of CAA section 129. In doing so, the primary outcome associated with adoption of these EG may be an increase in the use of alternative waste disposal and a decrease in the use of HMIWI. Consequently, EPA's impact analyses of the proposed rule include complete analyses of two potential scenarios. The first scenario, which will be referred to as the ''MACT compliance'' option for the remainder of this preamble, assumes that all units continue operation and take the necessary steps to achieve compliance. The second scenario, which will be referred to as the ''alternative disposal'' option for the remainder of this preamble, assumes that all facilities choose to discontinue operation of their HMIWI in favor of an alternative waste disposal option. While several different disposal options, such as sending waste to a municipal waste combustor or commercial HMIWI, may be available to some facilities, EPA assessed the impacts of one alternative waste disposal option. This option involves on-site sterilization of the waste using an autoclave followed by landfilling of the sterilized waste. EPA selected the autoclave/landfilling option because it is widely available. The results of both options are provided in the discussion of impacts. While the likely outcome of the proposed rule revisions is somewhere in between the two options that EPA selected for analysis (some units will comply with the standards and some will discontinue operations), EPA's analyses provide a broad picture of potential impacts.

As explained in section IV.A.2 of this preamble, the proposed emission limits for existing HMIWI are based on the average of the best performing 12 percent of sources for each pollutant in each subcategory. This proposed action would require varying degrees of improvements in performance by almost all HMIWI. Depending on the current configuration of each unit and air pollution controls, the improvements could be achieved either through the addition of add-on air pollution control devices (APCD), improvement of existing add-on APCD, increase in sorbent usage rates, and various combustion improvements. More specifically, the improvements anticipated include: most wet scrubber-controlled units adding a fabric filter-based system for improved control of PM and metals; most units with fabric filter-based systems adding a packed bed wet scrubber for improved control of HCl; adding activated carbon injection or increasing activated carbon usage rate for improved Hg and dioxin control; upgrading fabric filter performance for improved control of PM and metals; increasing lime use for improved control of HCl and, in a few instances, SO_2; and combustion improvements primarily associated with decreasing CO and CDD/CDF emissions. We also project that a few units may require add-on controls (SNCR) to meet the proposed NO_X emission levels. Facilities may resubmit their most recent compliance test data for each pollutant if the data show that their HMIWI meets the proposed emission limits. In these instances, facilities must certify that the test results are representative of current operations. Those facilities would then not be required to test for those pollutants to prove initial compliance with the revised emission limits.

A. What are the primary air impacts?

EPA estimates that reductions of approximately 468,000 pounds per year (lb/yr) of the regulated pollutants would be achieved if all existing HMIWI improved performance to meet the proposed emissions limits. If all HMIWI selected an alternative disposal method, reductions of approximately 1.52 million lb/yr would be achieved. Table 18 shows the estimated reductions by pollutant for the two scenarios.

TABLE 18—PROJECTED EMISSION REDUCTIONS FOR MACT COMPLIANCE AND ALTERNATIVE DISPOSAL OPTIONS FOR EXISTING HMIWI

Pollutant	Reductions achieved through meeting MACT (lb/yr)	Reductions achieved through alternative disposal (lb/yr)
HCl	184,000	198,000
CO	6,860	20,200
Pb	361	420
Cd	22	35.1
Hg	637	682
PM	27,300	89,900
CDD/CDF	0.0907	0.0985
NO_X ..	148,000	1,080,000
SO_2 ...	100,000	126,000
Total ..	468,000	1,520,000

B. What are the water and solid waste impacts?

EPA estimates that, based on the MACT compliance option, approximately 4,420 tpy of additional solid waste and 187,000 gallons per year of additional wastewater would be generated as a result of operating additional controls or using increased amounts of various sorbents.

EPA estimates that, based on the alternative disposal option, approximately 15,100 tpy of additional solid waste would be sent to landfills. This option would result in no additional waste water impacts.

C. What are the energy impacts?

EPA estimates that approximately 29,100 megawatt-hours per year of additional electricity would be required to support the increased control requirements associated with the MACT compliance option.

For the alternative disposal option, EPA estimates that approximately 12,400 megawatt-hours per year of additional electricity would be required to operate the autoclaves.

D. What are the secondary air impacts?

Secondary air impacts associated with the MACT compliance option are direct impacts that result from the increase in natural gas and/or electricity use that we estimate may be required to enable facilities to achieve the proposed emission limits. We estimate that the adjustments could result in emissions of 941 lb/yr of PM; 8,870 lb/yr of CO; 9,290 lb/yr of NO_X; and 1,880 lb/yr of SO_2 from the increased electricity and natural gas usage.

For the alternative disposal option, EPA estimates secondary air impacts of 692 lb/yr of PM; 5,040 lb/yr of CO; 2,550

lb/yr of NO_X; and 4,980 lb/yr of SO_2 from the additional electricity that would be required to operate the autoclaves. In addition, EPA estimates that landfilling would result in an additional 626 tpy of methane and 0.03 lb/yr of mercury emissions.

E. What are the cost and economic impacts?

EPA estimates that for the MACT compliance option, the national total costs for the 57 existing HMIWI to comply with this proposed action would be approximately $21.1 million in each of the first 3 years of compliance. This estimate includes the costs that would be incurred based on the anticipated performance improvements (i.e., costs of new APCD and improvements in performance of existing APCD), and the additional monitoring (i.e., annual control device inspections), testing (i.e., initial EPA Method 22 of appendix A–7 test and initial compliance testing), and recordkeeping and reporting costs that would be incurred by all 57 HMIWI as a result of this proposed action. Approximately 96 percent of the estimated total cost in the first year is for emissions control, and the remaining 4 percent is for monitoring, testing, recordkeeping and reporting.

EPA estimates that for the alternative disposal option, the national total costs for the 57 existing HMIWI to dispose of their solid waste by autoclaving and landfilling would be approximately $10.6 million per year. This estimate includes the costs that would be incurred based on the purchase and operation of autoclaves and the projected landfill tipping fees that would be incurred based on the volume of waste to be landfilled.

Currently, there are 57 existing HMIWI at 51 facilities. They may be divided into two broad categories: (1) Captive HMIWI, which are co-owned and co-located with generating facilities and provide on-site incineration services for waste generated by the hospital, research facility, university, or pharmaceutical operations; and (2) commercial HMIWI, which provide commercial incineration services for waste generated off-site by firms unrelated to the firm that owns the HMIWI. EPA analyzed the impacts on captive HMIWI and commercial HMIWI using different methods. Of the 57 HMIWI, 14 are commercial and 43 are captive.

Owners of captive HMIWI may choose to incur the costs of complying with the proposed revised HMIWI standards or close the HMIWI and switch to another disposal technology like autoclaving and landfilling or have their waste handled by a commercial disposal service. EPA's estimate of autoclaving and landfilling costs indicate that even without additional regulatory costs, the costs of autoclaving and landfilling may be lower than the costs of incinerating. However, even if all owners of captive HMIWI choose to continue to operate with the additional regulatory cost, the cost-to-sales ratios for firms owning captive HMIWI are low. This reflects the relatively small share of overall costs that are associated with hospital/medical/infectious waste management at these firms. Of the 35 firms owning captive HMIWI, 22 have costs of compliance that are less than 0.1 percent of firm sales. Of the 13 with costs exceeding 0.1 percent of sales, only one, a hospital, has costs exceeding 1 percent of sales, and their cost-to-sales ratio is 1.01 percent. Therefore, EPA expects no significant impact on the prices and quantities of the underlying services of the owners of the captive HMIWI, whether the costs are passed on or absorbed.

Impacts on commercial HMIWI are analyzed using the simplifying assumption that they operate as regional monopolists (in general, only one HMIWI is considered as a treatment option by generators located nearby). The approach to modeling the impact for commercial HMIWI seems very appropriate for all of the facilities except for one. The other commercial HMIWI facilities have costs of compliance that are no more than 6.1 percent of revenues. That one facility has a ratio of 28.5 percent. Even with monopoly pricing power and the highest estimated waste throughput, it is not clear whether the company will be able to acquire the capital and pass on such a large price increase. Additional information and modeling would be required to project the outcome for this facility with confidence. For more details regarding EPA's analysis of the economic impacts, see the docket entry entitled ''Economic Impacts of Revised MACT Standards for Hospital/Medical/Infectious Waste Incinerators.''

VI. Impacts of the Proposed Action for New Units

Information provided to EPA indicates that negative growth has been the trend for HMIWI for the past several years. While existing units continue to shut down, since promulgation of the HMIWI NSPS in 1997, four new units have been constructed and one unit has been reconstructed. This information indicates that in the absence of further regulation, new HMIWI may be built. However, based on the stringency of revisions being proposed for the NSPS, sources would likely respond to the proposed rule by choosing not to construct new HMIWI and would utilize alternative waste disposal options rather than incur the costs of compliance.

Considering this information, EPA does not anticipate any new HMIWI, and therefore, no impacts of the proposed NSPS for new units. For purposes of demonstrating that emissions reductions would result from the NSPS in the unlikely event that a new unit is constructed, EPA estimated emissions reductions and other impacts expected for each of the three HMIWI model plants.

A. What are the primary air impacts?

EPA estimated emissions reductions for each of the model plants to demonstrate that the NSPS would, if a new unit were built, reduce emissions compared to an HMIWI meeting the current NSPS. Table 19 of this preamble presents the emissions reductions for the HMIWI model plants. The three model plants (with capacities of 100 lb/hr, 400 lb/hr, and 4,000 lb/hr) represent typical HMIWI. For pollutants where a ''zero'' value is shown, the model plant performance estimate meets the proposed new source limit, which is not surprising since the models are based on the performance of the newest sources, which are among the best performers in the industry.

TABLE 19—EMISSIONS REDUCTIONS ON A MODEL PLANT BASIS

Pollutant	Emission reduction for HMIWI model plants (lb/yr)		
	100 lb/hr capacity	400 lb/hr capacity	4,000 lb/hr capacity
HCl	0	262	2,340
CO	30.5	5.15	124

TABLE 19—EMISSIONS REDUCTIONS ON A MODEL PLANT BASIS—Continued

Pollutant	Emission reduction for HMIWI model plants (lb/yr)		
	100 lb/hr capacity	400 lb/hr capacity	4,000 lb/hr capacity
Pb	0	0	3.82
Cd	0	0	0.296
Hg	0	0.245	2.51
PM	0	0	2,360
Dioxins/furans, TEQ	0	6.15×10^{-6}	0
NO_X	863	3,120	0
SO_2	49	72	0
Total	942	3,460	4,840

B. What are the water and solid waste impacts?

While EPA believes it is unlikely that any new HMIWI will be constructed, we estimated the following water or solid waste impacts associated with the proposed NSPS for three different HMIWI model sizes: for large units, we estimate 7,120 gallons per year of additional wastewater and 51 tpy of additional solid waste; for medium units, we estimate 877 gallons per year of additional wastewater and 5.7 tpy of additional solid waste; and, for small units, we estimate 30 gallons per year of additional wastewater and no additional solid waste.

C. What are the energy impacts?

While EPA believes it is unlikely that any new HMIWI will be constructed, we estimated the following energy impacts associated with the proposed NSPS for three different HMIWI model sizes: For large units, we estimate that 3,980 megawatt-hours per year of additional electricity would be required to support the increased control requirements; for medium units, we estimate 448 megawatt-hours per year; and, for small units, we estimate 107 megawatt-hours per year.

D. What are the secondary air impacts?

Secondary air impacts for new HMIWI are direct impacts that would result from the increase in natural gas and/or electricity use that we estimate may be required to enable facilities to achieve the proposed emission limits. While EPA believes it is unlikely that any new HMIWI will be constructed, we estimated the secondary air impacts associated with the proposed NSPS for three different HMIWI model sizes. For large units, we estimate that the adjustments could result in emissions of 40 lb/yr of PM; 1,180 lb/yr of CO; 1,320 lb/yr of NO_X; and 120 lb/yr of SO_2. For medium units, we estimate that the adjustments could result in emissions of 4.5 lb/yr of PM; 132 lb/yr of CO; 149 lb/yr of NO_X; and 14 lb/yr of SO_2. For small units, we estimate that the adjustments could result in emissions of 1.2 lb/yr of PM; 32 lb/yr of CO; 35 lb/yr of NO_X; and 4.2 lb/yr of SO_2.

For the alternative disposal option, EPA estimated secondary air impacts from the additional electricity that would be required to operate autoclaves in lieu of each size of HMIWI. For large units, we estimate secondary emissions of 66 lb/yr of PM; 478 lb/yr of CO; 241 lb/yr of NO_X; and 471 lb/yr of SO_2. For medium units, we estimate secondary emissions of 5.0 lb/yr of PM; 36 lb/yr of CO; 18 lb/yr of NO_X; and 36 lb/yr of SO_2. For small units, we estimate secondary emissions of 1.2 lb/yr of PM; 9.1 lb/yr of CO; 4.6 lb/yr of NO_X; and 9.0 lb/yr of SO_2. In addition, EPA estimates that an additional 59 tpy of methane and 0.003 lb/yr of mercury emissions would result from landfilling waste that would have been processed in a large HMIWI, 3.3 tpy of methane and 0.0002 lb/yr of mercury emissions would result from landfilling waste that would have been processed in a medium HMIWI, and 0.5 tpy of methane and 0.00003 lb/yr of mercury emissions would result from landfilling waste that would have been processed in a small HMIWI.

E. What are the cost and economic impacts?

While EPA projects that three new HMIWI would be constructed in the absence of the proposed revisions, we believe that, in response to the proposed revisions, sources may decide against constructing new HMIWI. Nevertheless, we estimated the following costs associated with installation and operation of air pollution controls needed to meet the proposed NSPS: For new large units, $476,000 per year; for new medium units, $195,000 per year; and, for new small units, $120,000 per year.

EPA's analysis of impacts of the proposed revisions to the HMIWI standards on potential new HMIWI sources compares the with-regulation estimated prices that would be charged by new large, medium, and small HMIWI to the range of with-regulation prices estimated to be charged by existing commercial HMIWI in various regional markets. This comparison indicates that new large and medium commercial HMIWI may be viable, but new small commercial HMIWI probably would not be viable. On the other hand, generators of hospital/medical/infectious waste could have reasons to purchase and install a new small HMIWI. Comparison of autoclave treatment coupled with off-site landfill disposal shows that, for new facilities as for existing ones, autoclave/landfill treatment and disposal is generally less costly than incineration. Thus, the motivation to improve waste segregation to minimize the waste that must be incinerated is likely to continue.

VII. Relationship of the Proposed Action to Section 112(c)(6) of the CAA

Section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). EPA has identified HMIWI as a source category that emits five of the seven CAA section 112(c)(6) pollutants: polycyclic organic matter (POM), dioxins, furans, Hg, and polychlorinated biphenyls (PCBs). (The POM emitted by HMIWI is composed of 16 polyaromatic hydrocarbons (PAH) and extractable organic matter (EOM).) In the **Federal Register** notice *Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements,* 63 FR 17838, 17849, Table 2 (1998), EPA identified medical waste incinerators (now referred to as HMIWI) as a source category ''subject to regulation'' for purposes of CAA section 112(c)(6) with

respect to the CAA section 112(c)(6) pollutants that HMIWI emit. HMIWI are solid waste incineration units currently regulated under CAA section 129. For purposes of CAA section 112(c)(6), EPA has determined that standards promulgated under CAA section 129 are substantively equivalent to those promulgated under CAA section 112(d). (See *Id.* at 17845; see also 62 FR 33625, 33632 (1997).) As discussed in more detail below, the CAA section 129 standards effectively control emissions of the five identified CAA section 112(c)(6) pollutants. Further, since CAA section 129(h)(2) precludes EPA from regulating these substantial sources of the five identified CAA section 112(c)(6) pollutants under CAA section 112(d), EPA cannot further regulate these emissions under that CAA section. As a result, EPA considers emissions of these five pollutants from HMIWI ''subject to standards'' for purposes of CAA section 112(c)(6).

As required by the statute, the CAA section 129 HMIWI standards include numeric emission limitations for the nine pollutants specified in section 129(a)(4). The combination of waste segregation, good combustion practices, and add-on air pollution control equipment (dry sorbent injection fabric filters, wet scrubbers, or combined fabric filter and wet scrubber systems) effectively reduces emissions of the pollutants for which emission limits are required under CAA section 129: Hg, CDD/CDF, Cd, Pb, PM, SO_2, HCl, CO, and NO_X. Thus, the NSPS and EG specifically require reduction in emissions of three of the CAA section 112(c)(6) pollutants: dioxins, furans, and Hg. As explained below, the air pollution controls necessary to comply with the requirements of the HMIWI NSPS and EG also effectively reduce emissions of the following CAA section 112(c)(6) pollutants that are emitted from HMIWI: POM and PCBs. Although the CAA section 129 HMIWI standards do not have separate, specific emissions standards for PCBs and POM, emissions of these two CAA section 112(c)(6) pollutants are effectively controlled by the same control measures used to comply with the numerical emissions limits for the pollutants enumerated in section 129(a)(4). Specifically, as byproducts of combustion, the formation of PCBs and POM is effectively reduced by the combustion and post-combustion practices required to comply with the CAA section 129 standards. Any PCBs and POM that do form during combustion are further controlled by the various post-combustion HMIWI controls. The add-on PM control systems (either fabric filter or wet scrubber) and activated carbon injection in the fabric filter-based systems further reduce emissions of these organic pollutants, and also reduce Hg emissions, as is evidenced by HMIWI performance data. Specifically, the post-MACT compliance tests at currently operating HMIWI that were also operational at the time of promulgation of the 1997 standards show that, for those units, the 1997 HMIWI MACT regulations reduced Hg emissions by about 60 percent and CDD/CDF emissions by about 80 percent from pre-MACT levels. (Note that these reductions do not reflect unit shutdowns, units for which exemptions were granted, or new units.) Moreover, similar controls have been demonstrated to effectively reduce emissions of POM and PCBs from another incineration source category (municipal solid waste combustors). It is, therefore, reasonable to conclude that POM and PCB emissions are substantially controlled at all 57 HMIWI. Thus, while the proposed rule does not identify specific limits for POM and PCB, emissions of those pollutants are, for the reasons noted above, nonetheless ''subject to regulation'' for purposes of section 112(c)(6) of the CAA.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735; October 4, 1993), this action is a ''significant regulatory action'' because it is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866, and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) documents prepared by EPA have been assigned EPA ICR number 2335.01 for subpart Ce, 40 CFR part 60, and 1730.07 for subpart Ec, 40 CFR part 60.

The requirements in this proposed action result in industry recordkeeping and reporting burden associated with review of the amendments for all HMIWI, EPA Method 22 of appendix A–7 testing for all HMIWI, and inspections of scrubbers, fabric filters, and other air pollution control devices that may be used to meet the emission limits for all HMIWI. Stack testing and development of new parameter limits would be necessary for HMIWI that need to make performance improvements in order to meet the proposed emission limits and for HMIWI that, prior to this proposed action, have not been required to demonstrate compliance with certain pollutants. Any new HMIWI would also be required to continuously monitor CO emissions. New HMIWI equipped with fabric filters would also be required to purchase bag leak detectors.

The annual average burden associated with the EG over the first 3 years following promulgation of this proposed action is estimated to be 44,275 hours at a total annual labor cost of $1,873,286. The total annualized capital/startup costs and operation and maintenance (O&M) costs associated with the monitoring requirements, EPA Method 22 of appendix A–7 testing, storage of data and reports, and photocopying and postage over the 3-year period of the ICR are estimated at $1,457,506 and $687,398 per year, respectively. (The annual inspection costs are included under the recordkeeping and reporting labor costs.) The annual average burden associated with the NSPS over the first 3 years following promulgation of this proposed action is estimated to be 2,705 hours at a total annual labor cost of $102,553. The total annualized capital/startup costs are estimated at $137,058, with total operation and maintenance costs of $116,190 per year. Burden is defined at 5 CFR 1320.3(b)

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it currently displays a valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this action, which includes these ICR documents, under Docket ID No. EPA–HQ–OAR–2006–0534. Submit any comments related to the ICR documents for this proposed action to EPA and OMB. See **ADDRESSES** section at the beginning of this action for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA.

Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 1, 2008, a comment to OMB is best assured of having its full effect if OMB receives it by December 31, 2008. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies that the proposed action will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small government organizations, and small government jurisdictions.

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as follows: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The one small entity directly regulated by this proposed action is a small governmental jurisdiction that owns two HMIWI. We have determined that this one small entity may experience an impact of approximately $1.56 million per year to comply with the proposed rule, resulting in a cost-to-sales ratio of approximately 6.1 percent. The one small entity is a commercial facility owned by a county in Texas. Because there are only nine other commercial facilities and the closest are in Tennessee and Kansas, the entity is a regional monopolist and is able to raise the price by more than the per unit cost increase. We expect there to be a reduction in the amount of its services demanded due to the price change. Because of closures of captive HMIWI there may also be an increase in the demand for its services that may reduce the decrease in revenues associated with the price increase.

Three other entities are defined as borderline small: Their parent company sales or employment in 2007 are above the SBA size-cutoff for small entities in their NAICS codes, but are near enough to the size cut-off that variations in sales or employment over time might move them below the small business criterion. One of them is the facility with a cost-to-sale a ratio of 28.5 percent. Additional information and modeling would be required to project the outcome for this facility with confidence.

Although the proposed rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. For each subcategory of HMIWI, we are proposing emission limits that are based on the MACT floor level of control, which is the minimum level of stringency that can be considered in establishing MACT standards. Although under the CAA and the case law EPA can set standards no less stringent than the MACT floor and, therefore, we were unable to reduce the impact of the emission limits on the small entity that would be regulated by the proposed rule, EPA worked to minimize the costs of testing and monitoring requirements to the extent possible under the statute. We continue to be interested in the potential impacts of this proposed action on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. This proposed action imposes no enforceable duty on any State, local or tribal governments or the private sector.

Therefore, this proposed action is not subject to the requirements of sections 202 or 205 of the UMRA.

This proposed action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. There are 2 HMIWI owned by one small governmental jurisdiction that would be regulated by this proposed action. For each subcategory of HMIWI, we are proposing emission limits that are based on the MACT floor level of control, which is the minimum level of stringency that can be considered in establishing MACT standards. EPA can set standards no less stringent than the MACT floor and, under this proposed action, all HMIWI would be subject to emission limits based on the MACT floors. Thus, the regulatory requirements being proposed would not be considered as significantly or uniquely affecting the small entity that would be impacted by the proposed rule because it would be subject to standards based on the same minimum levels of stringency as all other HMIWI.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255; August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed action will not impose substantial direct compliance costs on State or local governments, and will not preempt State law. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, (65 FR 67249; November 9, 2000). EPA is not aware of any HMIWI owned or operated by Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885; April 23, 1997) as applying to those regulatory actions that

concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA estimates that the requirements in this proposed action would cause most HMIWI to modify existing air pollution control devices (e.g., increase the horsepower of their wet scrubbers) or install and operate new control devices, resulting in approximately 29,100 megawatt-hours per year of additional electricity being used.

Given the negligible change in energy consumption resulting from this proposed action, EPA does not expect any significant price increase for any energy type. The cost of energy distribution should not be affected by this proposed action at all since the action would not affect energy distribution facilities. We also expect that any impacts on the import of foreign energy supplies, or any other adverse outcomes that may occur with regards to energy supplies would not be significant. We, therefore, conclude that if there were to be any adverse energy effects associated with this proposed action, they would be minimal.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This proposed rulemaking involves technical standards. EPA has decided to use two VCS in this proposed rule. One VCS, ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses,'' is cited in this proposed rule for its manual method of measuring the content of the exhaust gas as an acceptable alternative to EPA Method 3B of appendix A–2. This standard is available from the American Society of Mechanical Engineers (ASME), P.O. Box 2900, Fairfield, NJ 07007–2900; or Global Engineering Documents, Sales Department, 15 Inverness Way East, Englewood, CO 80112.

Another VCS, ASTM D6784–02, ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),'' is cited in this proposed rule as an acceptable alternative to EPA Method 29 of appendix A–8 (portion for mercury only) for measuring mercury. This standard is available from the American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106.

While the Agency has identified 16 VCS as being potentially applicable to this proposed rule, we have decided not to use these VCS in this rulemaking. The use of these VCS would be impractical because they do not meet the objectives of the standards cited in this rule. See the docket for this proposed rule for the reasons for these determinations.

Under 40 CFR 60.13(i) of the NSPS General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule and any amendments.

EPA welcomes comments on this aspect of the proposed rulemaking and specifically invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629) (February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income populations. This action would establish national standards that would result in reductions in emissions of HCl, CO, Cd, Pb, Hg, PM, CDD/CDF, NO_X and SO_2 from all HMIWI and thus decrease the amount of such emissions to which all affected populations are exposed.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 14, 2008.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 60 of the Code of Federal Regulations is proposed to be amended as follows:

PART 60—[AMENDED]

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart Ce—[Amended]

2. Section 60.32e is amended by revising paragraph (a) and adding paragraph (j) to read as follows:

§ 60.32e Designated facilities.

(a) Except as provided in paragraphs (b) through (h) of this section, the designated facility to which the guidelines apply is each individual HMIWI:

(1) For which construction was commenced on or before June 20, 1996, or for which modification was commenced on or before March 16, 1998.

(2) For which construction was commenced on or before December 1, 2008, or for which modification is commenced on or before [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

* * * * *

(j) The requirements of this subpart as promulgated on September 15, 1997,

shall apply to the designated facilities defined in paragraph (a)(1) of this section until the applicable compliance date of the requirements of this subpart, as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]. Upon the compliance date of the requirements of this subpart, designated facilities as defined in paragraph (a)(1) of this section are no longer subject to the requirements of this subpart, as promulgated on September 15, 1997, but are subject to the requirements of this subpart, as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

3. Section 60.33e is revised to read as follows:

§ 60.33e Emission guidelines.

(a) For approval, a State plan shall include the requirements for emission limits at least as protective as the following requirements, as applicable:

(1) For a designated facility as defined in § 60.32e(a)(1), the requirements listed in Table 1 of this subpart, except as provided in paragraph (b) of this section.

(2) For a designated facility as defined in § 60.32e(a)(2), the requirements listed in Table 1A of this subpart, except as provided in paragraph (b) of this section.

(b) For approval, a State plan shall include the requirements for emission limits for any small HMIWI constructed on or before June 20, 1996, which is located more than 50 miles from the boundary of the nearest Standard Metropolitan Statistical Area (defined in § 60.31e) and which burns less than 2,000 pounds per week of hospital waste and medical/infectious waste that are at least as protective as the requirements in paragraphs (b)(1) and (b)(2) of this section, as applicable. The 2,000 lb/week limitation does not apply during performance tests.

(1) For a designated facility as defined in § 60.32e(a)(1), the requirements listed in Table 2 of this subpart.

(2) For a designated facility as defined in § 60.32e(a)(2), the requirements listed in Table 2A of this subpart.

(c) For approval, a State plan shall include the requirements for stack opacity at least as protective as the following, as applicable:

(1) For a designated facility as defined in § 60.32e(a)(1), the requirements in § 60.52c(b)(1) of subpart Ec of this part.

(2) For a designated facility as defined in § 60.32e(a)(2), the requirements in § 60.52c(b)(2) of subpart Ec of this part.

4. Section 60.36e is amended as follows:

a. By revising paragraph (a) introductory text;

b. By revising paragraph (b);

c. By adding paragraph (c); and

d. By adding paragraph (d).

§ 60.36e Inspection guidelines.

(a) For approval, a State plan shall require each small HMIWI subject to the emission limits under § 60.33e(b) and each HMIWI subject to the emission limits under § 60.33e(a)(2) to undergo an initial equipment inspection that is at least as protective as the following within 1 year following approval of the State plan:

* * * * *

(b) For approval, a State plan shall require each small HMIWI subject to the emission limits under § 60.33e(b) and each HMIWI subject to the emission limits under § 60.33e(a)(2) to undergo an equipment inspection annually (no more than 12 months following the previous annual equipment inspection), as outlined in paragraph (a) of this section.

(c) For approval, a State plan shall require each small HMIWI subject to the emission limits under § 60.33e(b)(2) and each HMIWI subject to the emission limits under § 60.33e(a)(2) to undergo an initial air pollution control device inspection, as applicable, that is at least as protective as the following within 1 year following approval of the State plan:

(1) At a minimum, an inspection shall include the following:

(i) Inspect air pollution control device(s) for proper operation, if applicable;

(ii) Ensure proper calibration of thermocouples, sorbent feed systems, and any other monitoring equipment; and

(iii) Generally observe that the equipment is maintained in good operating condition.

(2) Within 10 operating days following an air pollution control device inspection, all necessary repairs shall be completed unless the owner or operator obtains written approval from the State agency establishing a date whereby all necessary repairs of the designated facility shall be completed.

(d) For approval, a State plan shall require each small HMIWI subject to the emission limits under § 60.33e(b)(2) and each HMIWI subject to the emission limits under § 60.33e(a)(2) to undergo an air pollution control device inspection, as applicable, annually (no more than 12 months following the previous annual air pollution control device inspection), as outlined in paragraph (c) of this section.

5. Section 60.37e is amended as follows:

a. By revising paragraph (a);

b. By revising paragraphs (b) introductory text and (b)(1);

c. By redesignating paragraphs (c) and (d) as paragraphs (d) and (e);

d. By redesignating paragraphs (b)(2) through (b)(5) as paragraphs (c)(1) through (c)(4);

e. By adding a new paragraph (b)(2);

f. By adding paragraph (c) introductory text;

g. By revising newly redesignated paragraphs (c)(3) and (c)(4);

h. By revising newly redesignated paragraph (d);

i. By revising newly redesignated paragraph (e) introductory text;

j. By revising newly redesignated paragraph (e)(3); and

k. By adding paragraph (f).

§ 60.37e Compliance, performance testing, and monitoring guidelines.

(a) Except as provided in paragraph (b) of this section, for approval, a State plan shall include the requirements for compliance and performance testing listed in § 60.56c of subpart Ec of this part, with the following exclusions:

(1) For a designated facility as defined in § 60.32e(a)(1) subject to the emission limits in § 60.33e(a)(1), excluding the test methods listed in § 60.56c(b)(7) and (8), the fugitive emissions testing requirements under § 60.56c(b)(14) and (c)(3), the CO CEMS requirements under § 60.56c(c)(4), and the compliance requirements for monitoring listed in § 60.56c(c)(5)(ii) through (v), (c)(6), (c)(7), (e)(6) through (10), (f)(7) through (10), (g)(6) through (10), and (h).

(2) For a designated facility as defined in § 60.32e(a)(2) subject to the emission limits in § 60.33e(a)(2), excluding the annual fugitive emissions testing requirements under § 60.56c(c)(3), the CO CEMS requirements under § 60.56c(c)(4), and the compliance requirements for monitoring listed in § 60.56c(c)(5)(ii) through (v), (c)(6), (c)(7), (e)(6) through (10), (f)(7) through (10), and (g)(6) through (10). Sources subject to the emission limits under § 60.33e(a)(2) may, however, elect to use CO CEMS as specified under § 60.56c(c)(4) or bag leak detection systems as specified under § 60.57c(h).

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, for approval, a State plan shall require each small HMIWI subject to the emission limits under § 60.33e(b) to meet the performance testing requirements listed in § 60.56c of subpart Ec of this part. The 2,000 lb/week limitation under § 60.33e(b) does not apply during performance tests.

(1) For a designated facility as defined in § 60.32e(a)(1) subject to the emission limits under § 60.33e(b)(1), excluding the test methods listed in § 60.56c(b)(7), (8), (12), (13) (Pb and Cd), and (14), the annual PM, CO, and HCl emissions testing requirements under § 60.56c(c)(2), the annual fugitive emissions testing requirements under § 60.56c(c)(3), the CO CEMS requirements under § 60.56c(c)(4), and the compliance requirements for monitoring listed in § 60.56c(c)(5) through (7), and (d) through (k).

(2) For a designated facility as defined in § 60.32e(a)(2) subject to the emission limits under § 60.33e(b)(2), excluding the annual fugitive emissions testing requirements under § 60.56c(c)(3), the CO CEMS requirements under § 60.56c(c)(4), and the compliance requirements for monitoring listed in § 60.56c(c)(5)(ii) through (v), (c)(6), (c)(7), (e)(6) through (10), (f)(7) through (10), and (g)(6) through (10). Sources subject to the emission limits under § 60.33e(b)(2) may, however, elect to use CO CEMS as specified under § 60.56c(c)(4) or bag leak detection systems as specified under § 60.57c(h).

(c) For approval, a State plan shall require each small HMIWI subject to the emission limits under § 60.33e(b) that is not equipped with an air pollution control device to meet the following compliance and performance testing requirements:

* * * * *

(3) Except as provided in paragraph (c)(4) of this section, operation of the designated facility above the maximum charge rate and below the minimum secondary chamber temperature (each measured on a 3-hour rolling average) simultaneously shall constitute a violation of the PM, CO, and dioxin/furan emission limits.

(4) The owner or operator of a designated facility may conduct a repeat performance test within 30 days of violation of applicable operating parameter(s) to demonstrate that the designated facility is not in violation of the applicable emission limit(s). Repeat performance tests conducted pursuant to this paragraph must be conducted using the identical operating parameters that indicated a violation under paragraph (c)(3) of this section.

(d) For approval, a State plan shall include the requirements for monitoring listed in § 60.57c of subpart Ec of this part for HMIWI subject to the emission limits under § 60.33e(a) and (b), except as provided for under paragraph (e) of this section.

(e) For approval, a State plan shall require small HMIWI subject to the emission limits under § 60.33e(b) that are not equipped with an air pollution control device to meet the following monitoring requirements:

* * * * *

(3) The owner or operator of a designated facility shall obtain monitoring data at all times during HMIWI operation except during periods of monitoring equipment malfunction, calibration, or repair. At a minimum, valid monitoring data shall be obtained for 75 percent of the operating hours per day for 90 percent of the operating hours per calendar quarter that the designated facility is combusting hospital waste and/or medical/infectious waste.

(f) The owner or operator of a designated facility as defined in § 60.32e(a)(2) subject to emission limits under § 60.33e(a)(2) or (b)(2) may use the results of previous emissions tests to demonstrate compliance with the emission limits, provided that the conditions in paragraphs (f)(1) through (f)(3) of this section are met:

(1) The designated facility's previous emissions tests must have been conducted using the applicable procedures and test methods listed in § 60.56c(b) of subpart Ec of this part. Previous emissions test results obtained using EPA-accepted voluntary consensus standards are also acceptable.

(2) The HMIWI at the designated facility shall currently be operated in a manner (e.g., with charge rate, secondary chamber temperature, etc.) that would be expected to result in the same or lower emissions than observed during the previous emissions test(s), and the HMIWI may not have been modified such that emissions would be expected to exceed (notwithstanding normal test-to-test variability) the results from previous emissions test(s).

(3) The previous emissions test(s) must have been conducted in 1996 or later.

6. Section 60.38e is amended as follows:

a. By revising paragraph (a);

b. By revising paragraph (b) introductory text; and

c. By revising paragraph (b)(1).

§ 60.38e Reporting and recordkeeping guidelines.

(a) Except as provided in paragraphs (a)(1) and (a)(2) of this section, for approval, a State plan shall include the reporting and recordkeeping requirements listed in § 60.58c(b) through (g) of subpart Ec of this part.

(1) For a designated facility as defined in § 60.32e(a)(1) subject to emission limits under § 60.33e(a)(1) or (b)(1), excluding § 60.58c(b)(2)(ii) (fugitive emissions), (b)(2)(viii) (NO_X reagent), (b)(2)(xvii) (air pollution control device inspections), (b)(2)(xviii) (bag leak detection system alarms), (b)(2)(xix) (CO CEMS data), and (b)(7) (siting documentation).

(2) For a designated facility as defined in § 60.32e(a)(2) subject to emission limits under § 60.33e(a)(2) or (b)(2), excluding § 60.58c(b)(2)(xviii) (bag leak detection system alarms), (b)(2)(xix) (CO CEMS data), and (b)(7) (siting documentation).

(b) For approval, a State plan shall require the owner or operator of each HMIWI subject to the emission limits under § 60.33e to:

(1) As specified in § 60.36e, maintain records of the annual equipment inspections that are required for each HMIWI subject to the emission limits under § 60.33e(a)(2) and (b), and the annual air pollution control device inspections that are required for each HMIWI subject to the emission limits under § 60.33e(a)(2) and (b)(2), any required maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the State regulatory agency; and

* * * * *

7. Section 60.39e is amended as follows:

a. By revising paragraph (a);

b. By revising paragraph (c) introductory text;

c. By revising paragraph (c)(1);

d. By revising paragraph (d)(3); and

e. By revising paragraph (f).

§ 60.39e Compliance times.

(a) Each State in which a designated facility is operating shall submit to the Administrator a plan to implement and enforce the emission guidelines as specified in paragraphs (a)(1) and (a)(2) of this section:

(1) Not later than September 15, 1998, for the emission guidelines as promulgated on September 15, 1997.

(2) Not later than [DATE 1 YEAR AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], for the emission guidelines as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

* * * * *

(c) State plans that specify measurable and enforceable incremental steps of progress towards compliance for designated facilities planning to install the necessary air pollution control equipment may allow compliance on or before the date 3 years after EPA approval of the State plan (but not later than September 16, 2002), for the emission guidelines as promulgated on

September 15, 1997, and not later than [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] for the emission guidelines as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]. Suggested measurable and enforceable activities to be included in State plans are:

(1) Date for submitting a petition for site-specific operating parameters under § 60.56c(j) of subpart Ec of this part.

* * * * *

(d) * * *

(3) If an extension is granted, require compliance with the emission guidelines on or before the date 3 years after EPA approval of the State plan (but not later than September 16, 2002), for the emission guidelines as promulgated on September 15, 1997, and not later than [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] for the emission guidelines as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

* * * * *

(f) The Administrator shall develop, implement, and enforce a plan for existing HMIWI located in any State that has not submitted an approvable plan within 2 years after September 15, 1997, for the emission guidelines as promulgated on September 15, 1997, and within 2 years after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] for the emission guidelines as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]. Such plans shall ensure that each designated facility is in compliance with the provisions of this subpart no later than 5 years after September 15, 1997, for the emission guidelines as promulgated on September 15, 1997, and no later than 5 years after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] for the emission guidelines as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

8. The heading to Table 1 to subpart Ce is revised to read as follows:

Table 1 to Subpart Ce of Part 60-Emission Limits for Small, Medium, and Large HMIWI at Designated Facilities As Defined in § 60.32e(a)(1)

9. Amend Subpart Ce by adding Table 1A to subpart Ce to read as follows:

TABLE 1A—TO SUBPART Ce OF PART 60-EMISSION LIMITS FOR SMALL, MEDIUM, AND LARGE HMIWI AT DESIGNATED FACILITIES AS DEFINED IN § 60.32e(a)(2)

Pollutant	Units (7 percent oxygen, dry basis)	Emission limits		
		HMIWI size		
		Small	Medium	Large
Particulate matter	Milligrams per dry standard cubic meter (mg/dscm) (grains per dry standard cubic foot (gr/dscf)).	39 (0.017)	28 (0.012)	13 (0.0056)
Carbon monoxide	Parts per million by volume (ppmv)	8.2	3.0	3.9
Dioxins/furans	Nanograms per dry standard cubic meter total dioxins/furans (ng/dscm) (grains per billion dry standard cubic feet (gr/10^9 dscf)) or ng/dscm TEQ (gr/10^9 dscf).	8.3 (3.7) or 0.0080 (0.0035)	0.63 (0.28) or 0.0097 (0.0043)	1.6 (0.70) or 0.029 (0.013)
Hydrogen chloride	Ppmv	4.5	2.5	2.4
Sulfur dioxide	Ppmv	2.8	2.8	2.8
Nitrogen oxides	Ppmv	200	200	140
Lead	mg/dscm (grains per thousand dry standard cubic feet (gr/10^3 dscf)).	0.18 (0.079)	0.017 (0.0075)	0.013 (0.0057)
Cadmium	mg/dscm (gr/10^3 dscf)	0.012 (0.0053)	0.0071 (0.0031)	0.0041 (0.0018)
Mercury	mg/dscm (gr/10^3 dscf)	0.0075 (0.0033)	0.0079 (0.0035)	0.0095 (0.0042)

10. The heading to Table 2 to subpart Ce is revised to read as follows:

Table 2 to Subpart Ce of Part 60. Emission Limits for Small HMIWI which Meet the Criteria under § 60.33e(b)(1)

11. Amend Subpart Ce by adding Table 2A to subpart Ce to read as follows:

TABLE 2A TO SUBPART Ce OF PART 60-EMISSION LIMITS FOR SMALL HMIWI WHICH MEET THE CRITERIA UNDER § 60.33e(b)(2)

Pollutant	Units (7 percent oxygen, dry basis)	HMIWI emission limits
Particulate matter	mg/dscm (gr/dscf)	69 (0.030)
Carbon monoxide	Ppmv	12
Dioxins/furans	ng/dscm total dioxins/furans (gr/10^9 dscf) or ng/dscm TEQ (gr/10^9 dscf)	130 (57) or 2.6 (1.2)
Hydrogen chloride	Ppmv	440
Sulfur dioxide	Ppmv	43
Nitrogen oxides	Ppmv	110
Lead	Mg/dscm (gr/10^3 dscf)	0.35 (0.16)
Cadmium	Mg/dscm (gr/10^3 dscf)	0.068 (0.030)
Mercury	Mg/dscm (gr/10^3 dscf)	0.0040 (0.0018)

Subpart Ec—[Amended]

12. Section 60.50c is amended as follows:

a. By revising paragraph (a);

b. By adding paragraph (m); and

c. By adding paragraph (n).

§ 60.50c Applicability and delegation of authority.

(a) Except as provided in paragraphs (b) through (h) of this section, the affected facility to which this subpart applies is each individual hospital/medical/infectious waste incinerator (HMIWI):

(1) For which construction is commenced after June 20, 1996 but no later than December 1, 2008; or

(2) For which modification is commenced after March 16, 1998 but no later than [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

(3) For which construction is commenced after December 1, 2008; or

(4) For which modification is commenced after [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

* * * * *

(m) The requirements of this subpart as promulgated on September 15, 1997, shall apply to the affected facilities defined in paragraph (a)(1) and (2) of this section until the applicable compliance date of the requirements of subpart Ce of this part, as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]. Upon the compliance date of the requirements of the amended subpart Ce of this part, affected facilities as defined in paragraph (a) of this section are no longer subject to the requirements of this subpart, but are subject to the requirements of subpart Ce of this part, as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]. Compliance with subpart Ce of this part, as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] is required on or before the date 3 years after EPA approval of the State plan for States in which an affected facility as defined in paragraph (a) of this section is located (but not later than the date 5 years after promulgation of the amended subpart).

(n) The requirements of this subpart, as amended on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], shall become effective [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

13. Section 60.51c is amended by adding definitions for ''Bag leak detection system'' and ''Minimum reagent flow rate'' in alphabetical order and revising the definition for ''Minimum secondary chamber temperature'' to read as follows:

§ 60.51c Definitions.

Bag leak detection system means an instrument that is capable of monitoring PM loadings in the exhaust of a fabric filter in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light-scattering, light-transmittance, or other effects to monitor relative PM loadings.

* * * * *

Minimum reagent flow rate means 90 percent of the highest 3-hour average reagent flow rate at the inlet to the selective noncatalytic reduction technology (taken, at a minimum, once every minute) measured during the most recent performance test demonstrating compliance with the NO_X emission limit.

* * * * *

Minimum secondary chamber temperature means 90 percent of the highest 3-hour average secondary chamber temperature (taken, at a minimum, once every minute) measured during the most recent performance test demonstrating compliance with the PM, CO, dioxin/furan, and NO_X emission limits.

* * * * *

14. Section 60.52c is amended as follows:

a. By revising paragraph (a);

b. By revising paragraph (b); and

c. By revising paragraph (c).

§ 60.52c Emission limits.

(a) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8, whichever date comes first, no owner or operator of an affected facility shall cause to be discharged into the atmosphere:

(1) From an affected facility as defined in § 60.50c(a)(1) and (2), any gases that contain stack emissions in excess of the limits presented in Table 1 to this subpart.

(2) From an affected facility as defined in § 60.50c(a)(3) and (4), any gases that contain stack emissions in excess of the limits presented in Table 1A to this subpart.

(b) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8, whichever date comes first, no owner or operator of an affected facility shall cause to be discharged into the atmosphere:

(1) From an affected facility as defined in § 60.50c(a)(1) and (2), any gases that exhibit greater than 10 percent opacity (6-minute block average).

(2) From an affected facility as defined in § 60.50c(a)(3) and (4), any gases that exhibit greater than 2 percent opacity (6-minute block average).

(c) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8, whichever date comes first, no owner or operator of an affected facility as defined in § 60.50c(a)(1) and (2) and utilizing a large HMIWI, and in § 60.50c(a)(3) and (4), shall cause to be discharged into the atmosphere visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) in excess of 5 percent of the observation period (i.e., 9 minutes per 3-hour period), as determined by EPA Reference Method 22 of appendix A–1 of this part, except as provided in paragraphs (d) and (e) of this section.

* * * * *

15. Section 60.56c is amended as follows:

a. By revising paragraph (b) introductory text;

b. By revising paragraphs (b)(4) and (b)(6);

c. By redesignating paragraphs (b)(7) through (b)(12) as paragraphs (b)(9) through (b)(14);

d. By adding paragraphs (b)(7) and (b)(8);

e. By revising newly redesignated paragraphs (b)(9) and (b)(10);

f. By revising newly redesignated paragraph (b)(11) introductory text;

g. By revising newly redesignated paragraphs (b)(12) and (b)(13);

h. By revising paragraphs (c)(2) and (c)(3);

i. By redesignating paragraph (c)(4) as paragraph (c)(5);

j. By revising newly redesignated paragraph (c)(5);

k. By adding paragraphs (c)(4), (c)(6), and (c)(7);

l. By revising paragraph (d) introductory text;

m. By revising paragraph (e) introductory text;

n. By adding paragraphs (e)(6) through (e)(10);

o. By revising paragraph (f) introductory text;

p. By adding paragraphs (f)(7) through (f)(10);

q. By revising paragraph (g) introductory text;

r. By adding paragraphs (g)(6) through (g)(10);

s. By redesignating paragraphs (h) through (j) as paragraphs (i) through (k);

t. By adding paragraph (h); and

u. By revising newly redesignated paragraphs (i) and (j).

§ 60.56c Compliance and performance testing.

* * * * *

(b) The owner or operator of an affected facility as defined in § 60.50c(a)(1) and (2), shall conduct an initial performance test as required under § 60.8 to determine compliance with the emission limits using the procedures and test methods listed in paragraphs (b)(1) through (b)(6) and (b)(9) through (b)(14) of this section. The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4), shall conduct an initial performance test as required under § 60.8 to determine compliance with the emission limits using the procedures and test methods listed in paragraphs (b)(1) through (b)(14). The use of the bypass stack during a performance test shall invalidate the performance test.

* * * * *

(4) EPA Reference Method 3, 3A, or 3B of appendix A–2 of this part shall be used for gas composition analysis, including measurement of oxygen concentration. EPA Reference Method 3, 3A, or 3B of appendix A–2 of this part shall be used simultaneously with each of the other EPA reference methods. As an alternative to EPA Reference Method 3B, ASME PTC–19–10–1981 Part 10 may be used.

* * * * *

(6) EPA Reference Method 5 of appendix A–3 or Method 29 of appendix A–8 of this part shall be used to measure the particulate matter emissions. As an alternative, PM CEMS may be used as specified in paragraph (c)(5) of this section.

(7) EPA Reference Method 7E of appendix A–4 of this part shall be used to measure NO_X emissions.

(8) EPA Reference Method 6C of appendix A–4 of this part shall be used to measure SO_2 emissions.

(9) EPA Reference Method 9 of appendix A–4 of this part shall be used to measure stack opacity. As an alternative, demonstration of compliance with the PM standards using bag leak detection systems as specified in § 60.57c(h) or PM CEMS as specified in paragraph (c)(5) of this section is considered demonstrative of compliance with the opacity requirements.

(10) EPA Reference Method 10 or 10B of appendix A–4 of this part shall be used to measure the CO emissions. As specified in paragraph (c)(4) of this section, use of CO CEMS are required for affected facilities under § 60.50c(a)(3) and (4).

(11) EPA Reference Method 23 of appendix A–7 of this part shall be used to measure total dioxin/furan emissions. As an alternative, an owner or operator may elect to sample dioxins/furans by installing, calibrating, maintaining, and operating a continuous automated sampling system for monitoring dioxin/furan emissions as specified in paragraph (c)(6) of this section. For Method 23 of appendix A–7 sampling, the minimum sample time shall be 4 hours per test run. If the affected facility has selected the toxic equivalency standards for dioxins/furans, under § 60.52c, the following procedures shall be used to determine compliance:

* * * * *

(12) EPA Reference Method 26 or 26A of appendix A–8 of this part shall be used to measure HCl emissions. As an alternative, HCl CEMS may be used as specified in paragraph (c)(5) of this section.

(13) EPA Reference Method 29 of appendix A–8 of this part shall be used to measure Pb, Cd, and Hg emissions. As an alternative, Hg emissions may be measured using ASTM D6784–02. As an alternative for Pb, Cd, and Hg, multi-metals CEMS or Hg CEMS, may be used as specified in paragraph (c)(5) of this section. As an alternative, an owner or operator may elect to sample Hg by installing, calibrating, maintaining, and operating a continuous automated sampling system for monitoring Hg emissions as specified in paragraph (c)(7) of this section.

* * * * *

(c) * * *

(2) Except as provided in paragraphs (c)(4) and (c)(5) of this section, determine compliance with the PM, CO, and HCl emission limits by conducting an annual performance test (no more than 12 months following the previous performance test) using the applicable procedures and test methods listed in paragraph (b) of this section. If all three performance tests over a 3-year period indicate compliance with the emission limit for a pollutant (PM, CO, or HCl), the owner or operator may forego a performance test for that pollutant for the subsequent 2 years. At a minimum, a performance test for PM, CO, and HCl shall be conducted every third year (no more than 36 months following the previous performance test). If a performance test conducted every third year indicates compliance with the emission limit for a pollutant (PM, CO, or HCl), the owner or operator may forego a performance test for that pollutant for an additional 2 years. If any performance test indicates noncompliance with the respective emission limit, a performance test for that pollutant shall be conducted annually until all annual performance tests over a 3-year period indicate compliance with the emission limit. The use of the bypass stack during a performance test shall invalidate the performance test.

(3) For an affected facility as defined in § 60.50c(a)(1) and (2) and utilizing a large HMIWI, and in § 60.50c(a)(3) and (4), determine compliance with the visible emission limits for fugitive emissions from flyash/bottom ash storage and handling by conducting a performance test using EPA Reference Method 22 of appendix A–7 on an annual basis (no more than 12 months following the previous performance test).

(4) For an affected facility as defined in § 60.50c(a)(3) and (4), determine compliance with the CO emission limit using a CO CEMS according to paragraphs (c)(4)(i) through (c)(4)(iii) of this section:

(i) Determine compliance with the CO emission limit using a 24-hour block average, calculated as specified in section 12.4.1 of EPA Reference Method 19 of appendix A–7 of this part.

(ii) Operate the CO CEMS in accordance with the applicable procedures under appendices B and F of this part.

(iii) Use of a CO CEMS may be substituted for the CO annual performance test and minimum secondary chamber temperature to demonstrate compliance with the CO emission limit.

(5) Facilities using CEMS to demonstrate compliance with any of the emission limits under § 60.52c shall:

(i) For an affected facility as defined in § 60.50c(a)(1) and (2), determine compliance with the appropriate emission limit(s) using a 12-hour rolling average, calculated each hour as the average of the previous 12 operating hours (not including startup, shutdown, or malfunction).

(ii) For an affected facility as defined in § 60.50c(a)(3) and (4), determine compliance with the appropriate emission limit(s) using a 24-hour block average, calculated as specified in section 12.4.1 of EPA Reference Method 19 of appendix A–7 of this part.

(iii) Operate all CEMS in accordance with the applicable procedures under appendices B and F of this part. For those CEMS for which performance specifications have not yet been promulgated (HCl, multi-metals), this option for an affected facility as defined in § 60.50c(a)(3) and (4) takes effect on

the date a final performance specification is published in the **Federal Register** or the date of approval of a site-specific monitoring plan.

(iv) For an affected facility as defined in § 60.50c(a)(3) and (4), be allowed to substitute use of an HCl CEMS for the HCl annual performance test, minimum HCl sorbent flow rate, and minimum scrubber liquor pH to demonstrate compliance with the HCl emission limit.

(v) For an affected facility as defined in § 60.50c(a)(3) and (4), be allowed to substitute use of a PM CEMS for the PM annual performance test and minimum pressure drop across the wet scrubber, if applicable, to demonstrate compliance with the PM emission limit.

(6) An affected facility as defined in § 60.50c(a)(3) and (4) using a continuous automated sampling system to demonstrate compliance with the dioxin/furan emission limits under § 60.52c shall record the output of the system and analyze the sample according to EPA Reference Method 23 of appendix A–7 of this part. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to dioxin/furan from monitors is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4) who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Reference Method 23 of appendix A–7 shall install, calibrate, maintain, and operate a continuous automated sampling system and shall comply with the requirements specified in § 60.58b(p) and (q) of subpart Eb of this part.

(7) An affected facility as defined in § 60.50c(a)(3) and (4) using a continuous automated sampling system to demonstrate compliance with the Hg emission limits under § 60.52c shall record the output of the system and analyze the sample at set intervals using any suitable determinative technique that can meet appropriate performance criteria. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to Hg from monitors is published in the **Federal Register** or the date of approval of a site-specific monitoring plan. The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4) who elects to continuously sample Hg emissions instead of sampling and testing using EPA Reference Method 29 of appendix A–8 of this part, or an approved alternative method for measuring Hg emissions, shall install, calibrate, maintain, and operate a continuous automated sampling system and shall comply with the requirements specified in § 60.58b(p) and (q) of subpart Eb of this part.

(d) Except as provided in paragraphs (c)(4) through (c)(7) of this section, the owner or operator of an affected facility equipped with a dry scrubber followed by a fabric filter, a wet scrubber, or a dry scrubber followed by a fabric filter and wet scrubber shall:

* * * * *

(e) Except as provided in paragraph (i) of this section, for affected facilities equipped with a dry scrubber followed by a fabric filter:

* * * * *

(6) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the CO emission limit as measured by the CO CEMS specified in paragraph (c)(4) of this section shall constitute a violation of the CO emission limit.

(7) For an affected facility as defined in § 60.50c(a)(3) and (4), failure to initiate corrective action within 1 hour of a bag leak detection system alarm; or failure to operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period shall constitute a violation of the PM emission limit. If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm is counted as a minimum of 1 hour. If it takes longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action. If the bag leak detection system is used to demonstrate compliance with the opacity limit, this would also constitute a violation of the opacity emission limit.

(8) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the PM, HCl, Pb, Cd, and/or Hg emission limit as measured by the CEMS specified in paragraph (c)(5) of this section shall constitute a violation of the applicable emission limit.

(9) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the CDD/CDF emission limit as measured by the continuous automated sampling system specified in paragraph (c)(6) of this section shall constitute a violation of the CDD/CDF emission limit.

(10) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the Hg emission limit as measured by the continuous automated sampling system specified in paragraph (c)(7) of this section shall constitute a violation of the Hg emission limit.

(f) Except as provided in paragraph (i) of this section, for affected facilities equipped with a wet scrubber:

* * * * *

(7) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the CO emission limit as measured by the CO CEMS specified in paragraph (c)(4) of this section shall constitute a violation of the CO emission limit.

(8) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the PM, HCl, Pb, Cd, and/or Hg emission limit as measured by the CEMS specified in paragraph (c)(5) of this section shall constitute a violation of the applicable emission limit.

(9) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the CDD/CDF emission limit as measured by the continuous automated sampling system specified in paragraph (c)(6) of this section shall constitute a violation of the CDD/CDF emission limit.

(10) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the Hg emission limit as measured by the continuous automated sampling system specified in paragraph (c)(7) of this section shall constitute a violation of the Hg emission limit.

(g) Except as provided in paragraph (i) of this section, for affected facilities equipped with a dry scrubber followed by a fabric filter and a wet scrubber:

* * * * *

(6) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the CO emission limit as measured by the CO CEMS specified in paragraph (c)(4) of this section shall constitute a violation of the CO emission limit.

(7) For an affected facility as defined in § 60.50c(a)(3) and (4), failure to initiate corrective action within 1 hour of a bag leak detection system alarm; or failure to operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period shall constitute a violation of the PM emission limit. If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm is counted as a minimum of 1 hour. If it takes longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action. If the bag leak detection system is used to demonstrate compliance with the opacity limit, this would also constitute a violation of the opacity emission limit.

(8) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the PM, HCl, Pb, Cd, and/or Hg emission limit as measured by the CEMS specified in paragraph (c)(5) of this section shall constitute a violation of the applicable emission limit.

(9) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the CDD/CDF emission limit as measured by the continuous automated sampling system specified in paragraph (c)(6) of this section shall constitute a violation of the CDD/CDF emission limit.

(10) Operation of the affected facility as defined in § 60.50c(a)(3) and (4) above the Hg emission limit as measured by the continuous automated sampling system specified in paragraph (c)(7) of this section shall constitute a violation of the Hg emission limit.

(h) The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4) equipped with selective noncatalytic reduction technology shall:

(1) Establish the maximum charge rate, the minimum secondary chamber temperature, and the minimum reagent flow rate as site specific operating parameters during the initial performance test to determine compliance with the emission limits;

(2) Following the date on which the initial performance test is completed or is required to be completed under § 60.8, whichever date comes first, ensure that the affected facility does not operate above the maximum charge rate, or below the minimum secondary chamber temperature or the minimum reagent flow rate measured as 3-hour rolling averages (calculated each hour as the average of the previous 3 operating hours) at all times except during periods of startup, shutdown and malfunction. Operating parameter limits do not apply during performance tests.

(3) Except as provided in paragraph (i) of this section, operation of the affected facility above the maximum charge rate, below the minimum secondary chamber temperature, and below the minimum reagent flow rate simultaneously shall constitute a violation of the NO_X emission limit.

(i) The owner or operator of an affected facility may conduct a repeat performance test within 30 days of violation of applicable operating parameter(s) to demonstrate that the affected facility is not in violation of the applicable emission limit(s). Repeat performance tests conducted pursuant to this paragraph shall be conducted using the identical operating parameters that indicated a violation under paragraph (e), (f), (g), or (h) of this section.

(j) The owner or operator of an affected facility using an air pollution control device other than a dry scrubber followed by a fabric filter, a wet scrubber, a dry scrubber followed by a fabric filter and a wet scrubber, or selective noncatalytic reduction technology to comply with the emission limits under § 60.52c shall petition the Administrator for other site-specific operating parameters to be established during the initial performance test and continuously monitored thereafter. The owner or operator shall not conduct the initial performance test until after the petition has been approved by the Administrator.

* * * * *

16. Section 60.57c is amended as follows:

a. By revising paragraph (a);

b. By redesignating paragraphs (b) through (d) as paragraphs (c) through (e);

c. By adding paragraph (b);

d. By revising newly redesignated paragraphs (d) and (e); and

e. By adding paragraphs (f), (g), and (h).

§ 60.57c Monitoring requirements

(a) Except as provided in § 60.56c(c)(4) through (c)(7), the owner or operator of an affected facility shall install, calibrate (to manufacturers' specifications), maintain, and operate devices (or establish methods) for monitoring the applicable maximum and minimum operating parameters listed in Table 3 to this subpart (unless CEMS are used as a substitute for certain parameters as specified) such that these devices (or methods) measure and record values for these operating parameters at the frequencies indicated in Table 3 of this subpart at all times except during periods of startup and shutdown.

(b) The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4) that uses selective noncatalytic reduction technology shall install, calibrate (to manufacturers' specifications), maintain, and operate devices (or establish methods) for monitoring the operating parameters listed in §1A60.56c(h) such that the devices (or methods) measure and record values for the operating parameters at all times except during periods of startup and shutdown. Operating parameter values shall be measured and recorded at the following minimum frequencies:

(1) Maximum charge rate shall be measured continuously and recorded once each hour;

(2) Minimum secondary chamber temperature shall be measured continuously and recorded once each minute; and

(3) Minimum reagent flow rate shall be measured hourly and recorded once each hour.

* * * * *

(d) The owner or operator of an affected facility using an air pollution control device other than a dry scrubber followed by a fabric filter, a wet scrubber, a dry scrubber followed by a fabric filter and a wet scrubber, or selective noncatalytic reduction technology to comply with the emission limits under § 60.52c shall install, calibrate (to manufacturers' specifications), maintain, and operate the equipment necessary to monitor the site-specific operating parameters developed pursuant to § 60.56c(j).

(e) The owner or operator of an affected facility shall obtain monitoring data at all times during HMIWI operation except during periods of monitoring equipment malfunction, calibration, or repair. At a minimum, valid monitoring data shall be obtained for 75 percent of the operating hours per day for 90 percent of the operating days per calendar quarter that the affected facility is combusting hospital waste and/or medical/infectious waste.

(f) The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4) shall ensure that each HMIWI subject to the emission limits in § 60.52c undergoes an initial air pollution control device inspection that is at least as protective as the following:

(1) At a minimum, an inspection shall include the following:

(i) Inspect air pollution control device(s) for proper operation, if applicable;

(ii) Ensure proper calibration of thermocouples, sorbent feed systems, and any other monitoring equipment; and

(iii) Generally observe that the equipment is maintained in good operating condition.

(2) Within 10 operating days following an air pollution control device inspection, all necessary repairs shall be completed unless the owner or operator obtains written approval from the Administrator establishing a date whereby all necessary repairs of the designated facility shall be completed.

(g) The owner or operator of an affected facility as defined in § 60.50c(a)(3) and (4) shall ensure that each HMIWI subject to the emission limits under § 60.52c undergoes an air pollution control device inspection

annually (no more than 12 months following the previous annual air pollution control device inspection), as outlined in paragraphs (f)(1) and (f)(2) of this section.

(h) For affected facilities as defined in § 60.50c(a)(3) and (4) that use an air pollution control device that includes a fabric filter and are not demonstrating compliance using PM CEMS, determine compliance with the PM emission limit using a bag leak detection system and meet the requirements in paragraphs (h)(1) through (h)(12) of this section for each bag leak detection system.

(1) Each triboelectric bag leak detection system shall be installed, calibrated, operated, and maintained according to the ''Fabric Filter Bag Leak Detection Guidance,'' (EPA–454/R–98–015, September 1997). This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality Planning and Standards; Sector Policies and Programs Division; Measurement Policy Group (D–243–02), Research Triangle Park, NC 27711. This document is also available on the Technology Transfer Network (TTN) under Emission Measurement Center Continuous Emission Monitoring. Other types of bag leak detection systems shall be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(2) The bag leak detection system shall be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(3) The bag leak detection system sensor shall provide an output of relative PM loadings.

(4) The bag leak detection system shall be equipped with a device to continuously record the output signal from the sensor.

(5) The bag leak detection system shall be equipped with an audible alarm system that will sound automatically when an increase in relative PM emissions over a preset level is detected. The alarm shall be located where it is easily heard by plant operating personnel.

(6) For positive pressure fabric filter systems, a bag leak detector shall be installed in each baghouse compartment or cell.

(7) For negative pressure or induced air fabric filters, the bag leak detector shall be installed downstream of the fabric filter.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(9) The baseline output shall be established by adjusting the range and the averaging period of the device and establishing the alarm set points and the alarm delay time according to section 5.0 of the ''Fabric Filter Bag Leak Detection Guidance.''

(10) Following initial adjustment of the system, the sensitivity or range, averaging period, alarm set points, or alarm delay time may not be adjusted. In no case may the sensitivity be increased by more than 100 percent or decreased more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection that demonstrates that the fabric filter is in good operating condition. Each adjustment shall be recorded.

(11) Record the results of each inspection, calibration, and validation check.

(12) Initiate corrective action within 1 hour of a bag leak detection system alarm; operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period. If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm is counted as a minimum of 1 hour. If it takes longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action.

17. Section 60.58c is amended as follows:

a. By revising paragraph (a)(2)(iv);

b. By redesignating paragraphs (b)(2)(viii) through (b)(2)(xv) as paragraphs (b)(2)(ix) through (b)(2)(xvi);

c. By adding paragraph (b)(2)(viii);

d. By revising newly designated paragraph (b)(2)(xvi);

e. By adding paragraphs (b)(2)(xvii) through (b)(2)(xix);

f. By revising paragraphs (b)(6) and (b)(11);

g. By revising paragraph (c) introductory text;

h. By revising paragraphs (c)(1) and (c)(2);

i. By adding paragraph (c)(4);

j. By revising paragraph (d) introductory text;

k. By revising paragraphs (d)(1) through (d)(3);

l. By adding paragraphs (d)(9) through (d)(11); and

m. By adding paragraph (g).

§ 60.58c Reporting and recordkeeping requirements.

(a) * * *

(2) * * *

(iv) If applicable, the petition for site-specific operating parameters under § 60.56c(j).

* * * * *

(b) * * *

(2) * * *

(viii) For affected facilities as defined in § 60.50c(a)(3) and (4), amount and type of NO_X reagent used during each hour of operation, as applicable;

* * * * *

(xvi) For affected facilities complying with § 60.56c(j) and § 60.57c(d), the owner or operator shall maintain all operating parameter data collected;

(xvii) For affected facilities as defined in § 60.50c(a)(3) and (4), records of the annual air pollution control device inspections, any required maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the Administrator.

(xviii) For affected facilities as defined in § 60.50c(a)(3) and (4), records of each bag leak detection system alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken, as applicable.

(xix) For affected facilities as defined in § 60.50c(a)(3) and (4), concentrations of CO as determined by the continuous emission monitoring system.

* * * * *

(6) The results of the initial, annual, and any subsequent performance tests conducted to determine compliance with the emission limits and/or to establish or re-establish operating parameters, as applicable, and a description, including sample calculations, of how the operating parameters were established or re-established, if applicable.

* * * * *

(11) Records of calibration of any monitoring devices as required under § 60.57c(a) through (d).

(c) The owner or operator of an affected facility shall submit the information specified in paragraphs (c)(1) through (c)(4) of this section no later than 60 days following the initial performance test. All reports shall be signed by the facilities manager.

(1) The initial performance test data as recorded under § 60.56c(b)(1) through (b)(14), as applicable.

(2) The values for the site-specific operating parameters established pursuant to § 60.56c(d), (h), or (j), as applicable, and a description, including sample calculations, of how the operating parameters were established during the initial performance test.

* * * * *

(4) For each affected facility as defined in § 60.50c(a)(3) and (4) that uses a bag leak detection system, analysis and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems in § 60.57c(h).

(d) An annual report shall be submitted 1 year following the submission of the information in paragraph (c) of this section and subsequent reports shall be submitted no more than 12 months following the previous report (once the unit is subject to permitting requirements under title V of the Clean Air Act, the owner or operator of an affected facility must submit these reports semiannually). The annual report shall include the information specified in paragraphs (d)(1) through (11) of this section. All reports shall be signed by the facilities manager.

(1) The values for the site-specific operating parameters established pursuant to § 60.56(d), (h), or (j), as applicable.

(2) The highest maximum operating parameter and the lowest minimum operating parameter, as applicable, for each operating parameter recorded for the calendar year being reported, pursuant to § 60.56(d), (h), or (j), as applicable.

(3) The highest maximum operating parameter and the lowest minimum operating parameter, as applicable, for each operating parameter recorded pursuant to § 60.56(d), (h), or (j) for the calendar year preceding the year being reported, in order to provide the Administrator with a summary of the performance of the affected facility over a 2-year period.

* * * * *

(9) For affected facilities as defined in § 60.50c(a)(3) and (4), records of the annual air pollution control device inspection, any required maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the Administrator.

(10) For affected facilities as defined in § 60.50c(a)(3) and (4), records of each bag leak detection system alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken, as applicable.

(11) For affected facilities as defined in § 60.50c(a)(3) and (4), concentrations of CO as determined by the continuous emission monitoring system.

* * * * *

(g) For affected facilities, as defined in § 60.50c(a)(3) and (4), that choose to submit an electronic copy of stack test reports to EPA's WebFIRE data base, as of December 31, 2011, the owner or operator of an affected facility shall enter the test data into EPA's data base using the Electronic Reporting Tool located at *http://www.epa.gov/ttn/chief/ert/ert_tool.html.*

18. The heading to Table 1 to subpart Ec is revised to read as follows:

Table 1 to Subpart Ec of Part 60–Emission Limits for Small, Medium, and Large HMIWI at Affected Facilities as Defined in § 60.50c(a)(1) and (2)

19. Amend Subpart Ec by adding Table 1A to subpart Ec to read as follows:

TABLE 1A—TO SUBPART EC OF PART 60–EMISSION LIMITS FOR SMALL, MEDIUM, AND LARGE HMIWI AT AFFECTED FACILITIES AS DEFINED IN § 60.50C(a)(3) AND (4)

Pollutant	Units (7 percent oxygen, dry basis)	Emission limits		
		HMIWI size		
		Small	Medium	Large
Particulate matter	Milligrams per dry standard cubic meter (grains per dry standard cubic foot).	39 (0.017)	23 (0.0099)	11 (0.0048)
Carbon monoxide	Parts per million by volume	8.2	1.9	2.9
Dioxins/ furans	Nanograms per dry standard cubic meter total dioxins/furans (grains per billion dry standard cubic feet) or nanograms per dry standard cubic meter TEQ (grains per billion dry standard cubic feet).	8.3 (3.7) or 0.0080 (0.0035)	0.35 (0.16) or 0.0097 (0.0043)	0.60 (0.27) or 0.014 (0.0062)
Hydrogen chloride	Parts per million by volume	4.5	1.8	0.75
Sulfur dioxide	Parts per million by volume	0.78	0.78	1.9
Nitrogen oxides	Parts per million by volume	38	38	110
Lead	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet.	0.18 (0.079)	0.016 (0.070)	0.00047 (0.00021)
Cadmium	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.012 (0.0053)	0.0071 (0.0031)	0.00012 (0.000 053)
Mercury	Milligrams per dry standard cubic meter (grains per thousand dry standard cubic feet) or percent reduction.	0.0075 (0.0033)	0.0020 (0.0088)	0.00093 (0.0041)

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Part IV

Department of Education

34 CFR Part 300

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 300

[DOCKET ID ED–2008–OSERS–0005]

RIN 1820–AB60

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations governing the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities Program. These regulations are needed to clarify and strengthen current regulations in 34 CFR Part 300 governing the Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities Program, as published in the **Federal Register** on August 14, 2006, in the areas of parental consent for continued special education and related services; non-attorney representation in due process hearings; State monitoring, technical assistance, and enforcement; and allocation of funds. The regulations also incorporate a statutory requirement relating to positive efforts to employ and advance in employment individuals with disabilities that was inadvertently omitted from the 2006 regulations.

DATES: These regulations take effect on December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Tracy R. Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., room 5107, Potomac Center Plaza, Washington, DC 20202–2600, Telephone: (202) 245–7605. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay System (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: These regulations implement changes in the regulations governing the Assistance to States for Education of Children with Disabilities Program and the Preschool Grants for Children with Disabilities Program that we have determined are necessary for effective implementation and administration of the programs.

On May 13, 2008, the Secretary published a notice of proposed rulemaking in the **Federal Register** (73 FR 27690) (NPRM) to amend the regulations in 34 CFR Part 300 governing these programs. In the preamble to the NPRM, the Secretary discussed, on pages 27691 through 27697, the changes being proposed; specifically, (1) parental revocation of consent after consenting to the initial provision of services; (2) a State's or local educational agency's (LEA) obligation to make positive efforts to employ qualified individuals with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) State monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under sections 611 and 619 of the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA), to LEAs that are not serving any children with disabilities.

Major Changes in the Regulations

The following is a summary of the major changes in these final regulations from the regulations proposed in the NPRM (the rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section of this preamble):

- Section 300.300(b)(4) has been revised to require that parental revocation of consent for the continued provision of special education and related services must be in writing and that upon revocation of consent a public agency must provide the parent with prior written notice in accordance with § 300.503.
- The exception clause in § 300.512(a)(1), regarding the right to be represented by non-attorneys, has been revised to apply to any party to a hearing, not just parents.
- The timeline in § 300.602(b)(1)(i)(A), regarding the State's public reporting on the performance of each LEA located in the State, has been changed from 60 days to 120 days following the State's submission of the annual performance report to the Secretary.

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 700 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately follows this introduction. The perspectives of parents, individuals with disabilities, teachers, related services providers, State and local officials, and others were very important in helping us identify where changes to the proposed regulations were necessary, and in formulating the changes. In light of the comments received, a number of changes are reflected in these final regulations.

We discuss substantive issues under the pertinent section. The analysis generally does not address—

(a) Minor changes, including technical changes made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority;

(c) Suggested changes that are beyond the scope of the changes proposed in the NPRM; and

(d) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, such as requests for information about innovative instructional methods or matters that are within the purview of State and local decision-makers.

Consent (§ 300.9)

Comment: A few commenters supported proposed § 300.9(c)(3), which states that if a parent revokes consent for his or her child's receipt of special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent. The commenters stated that this revision provides clear direction to schools regarding the management of student records when a parent revokes consent. The commenters stated that schools must have the ability to keep accurate records pertaining to the child and the child's receipt of special education and related services. One commenter recommended that proposed § 300.9(c)(3) would be more appropriately placed in either §§ 300.618 or 300.624, regarding the amendment of education records and the destruction of information, respectively.

Discussion: We appreciate the commenters' support for this provision. Concerning the recommendation that the substance of proposed § 300.9(c)(3) be placed in either §§ 300.618 or 300.624, we have included the provision in § 300.9 because the provision specifically relates to the definition of *consent.* Section 300.9(c) addresses revocation of consent, explaining that consent is voluntary and

may be revoked at any time. Further, § 300.9(c) states that the parent's revocation of consent is not retroactive in that revocation does not negate an action that has occurred after the consent was given and before the consent was revoked. Proposed § 300.9(c)(3) further defines the effect of a parent's revocation of consent on the content of his or her child's education records. A parent's revocation of consent is not retroactive; consequently, the public agency would not be required to amend the child's education records to remove any references to the child's receipt of special education and related services in the event the child's parent revokes consent. Therefore, we decline to follow the commenters' recommendation to remove § 300.9(c)(3) and include the content of this provision in either §§ 300.618 or 300.624.

Changes: None.

Comment: One commenter recommended adding a rule of construction in § 300.9 to clarify that nothing in proposed § 300.9(c)(3) reduces a parent's right to request an amendment of their child's record in accordance with the confidentiality provisions in §§ 300.618 through 300.621. Another commenter requested that the language in proposed § 300.9(c)(3) be clarified to require public agencies to maintain a child's special education records to ensure that public agencies are not allowed to amend the child's records or remove information at their sole discretion.

Discussion: Proposed § 300.9(c)(3) specifies that if a parent revokes consent for the child's receipt of special education and related services, the public agency is not required to remove any references to the child's receipt of special education and related services because of the parent's revocation of consent. This provision does not affect the rights provided to parents in §§ 300.618 through 300.621, including the opportunity to request amendments to information in education records that is inaccurate or misleading, or violates the privacy or other rights of a child. Additionally, proposed § 300.9(c)(3) does not affect a public agency's responsibilities under § 300.613, concerning a parent's right to inspect and review any education records relating to his or her children that are collected, maintained, or used by the agency under Part B of the Act, or § 300.624, requiring a public agency to (a) inform parents when personally identifiable information collected, maintained, or used under Part B of the Act is no longer needed to provide educational services to the child, and (b) destroy, at the request of the parent, such information. Given the protections available to parents to monitor the information in education records, to amend records, to be notified if the public agency intends to destroy information in education records, and to ultimately have the records destroyed, adding a rule of construction to § 300.9(c)(3), as requested by the commenter, is not necessary.

We also decline to make the change recommended regarding a public agency's maintenance of a child's special education records, as the regulations already provide sufficient protection of the child's and parents' interests with regard to monitoring, amending, and removing information from the child's records. Parents have the right, under § 300.613, to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under Part B of the Act. If a parent believes that information in the education records collected, maintained, or used under Part B of the Act is inaccurate or misleading or violates the privacy or other rights of the child, the parent may request that the participating agency amend the information in the records. Additionally, under § 300.619, the agency must, on request, provide the parent with an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate.

Further, § 300.624 requires that a public agency inform parents when personally identifiable information is no longer needed to provide educational services to a child. This notice would normally be given after a child graduates or otherwise leaves the agency. In instances when an agency intends to destroy personally identifiable information that is no longer needed to provide educational services to a child and informs the parents of that determination, the parents may want to exercise their right, under § 300.613, to access those records and request copies of the records they may need to acquire post-school benefits.

Changes: None.

Comment: One commenter requested that the word ''parents'' in proposed § 303.9(c)(3) be replaced with the word ''parent'' because the word ''parent'' has a particular meaning under the IDEA, and because both the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g) and the implementing regulations (34 CFR Part 99) and IDEA give rights to each individual parent.

Discussion: We agree with the commenter that the word ''parent'' is more consistent with the language of the other IDEA parental consent provisions; therefore, we have made the requested change.

Changes: The word ''parents'' in § 300.9(c)(3) has been changed to ''parent.''

Parental Revocation of Consent for Special Education Services (§ 300.300)

Comment: Some commenters, including parents, teachers, and State educational agencies (SEAs), supported the requirements in proposed § 300.300(b)(4) that would allow a parent of a child receiving special education and related services to revoke consent for those services. Commenters stated that if a parent has the right to initially consent to special education and related services, the parent also should have the right to revoke consent for special education and related services, particularly given that the plain language in § 300.9(c)(1) states that consent may be revoked at any time. Other commenters stated that parents are the ultimate experts on their children and have a fundamental right to direct their education. One commenter stated that schools should not have the right to force evaluations or services on a child through legal processes. Another commenter stated that a student should have every right to attempt to become independent and take responsibility for his or her academic achievement, without the assistance of an individualized education program (IEP).

Some commenters generally supported a parent's right to revoke consent, but only if changes were made to proposed § 300.300(b)(4). Their recommendations included giving a parent the right to revoke consent at any time while still ensuring that the parent receives the time and information needed to make informed decisions regarding his or her child's continued need for services. Several commenters recommended procedures that could be implemented when a parent unilaterally revokes consent for special education and related services. For example, commenters suggested requiring—that a parent's revocation be in writing; a meeting between the parent and the public agency to discuss the parent's decision to revoke consent for special education and related services; a timeline from the revocation of consent through discontinuation of services and a specific deadline for convening a meeting with the parent and providing prior written notice to the parent; written notice of the receipt of the

parent's revocation and the public agency's intent to discontinue services; and that the parent be given an opportunity to meet with the State's Parent Training Information center (PTI) to receive additional information concerning the potential impact of the parent's decision. Other suggested procedures included requiring a parent to acknowledge in writing that the parent has been fully informed of the educational services and supports that their child will no longer receive. In contrast, a few commenters stated that no additional procedures should be required when a parent revokes consent.

Discussion: We appreciate the commenters' support for this provision. We agree with the commenters that revocation of consent for special education and related services must be in writing to ensure that both the public agency and the parent have documentation that the child will no longer receive special education and related services. Therefore, we have revised §§ 300.9(c)(3) and 300.300(b)(4) to require that consent be revoked in writing.

Concerning the comments about written notice of the receipt of a parent's revocation and the public agency's intent to discontinue services and the comment concerning an opportunity to meet with the State's PTI center to receive additional information about the potential effect of the parent's decision, we have not adopted additional procedures for parental revocation of consent for special education and related services because the regulations already provide sufficient notice protections to enable parents to understand the implications of the decision they are making. To clarify this point, we have revised § 300.300(b)(4)(i) to specify that prior written notice consistent with § 300.503 be provided to parents before a public agency discontinues special education and related services to their child. Public agencies, under § 300.503, are required to give the parents of a child with a disability written notice that meets the requirements in § 300.503(b) within a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child. Once a public agency receives a parent's written revocation of consent for a child's receipt of special education and related services, the public agency, under § 300.503, must provide prior written notice to the parent regarding the change in educational placement and services that will result from the revocation of consent. The notice must include, among other matters, information on sources for the parents to contact that can assist the parents in understanding the requirements of Part B of the Act and its implementing regulations. Section 300.503(c)(1)(i) also requires that this prior notice be written in language understandable to the general public. It is imperative that the public agency provide the required prior notice in a meaningful manner. Accordingly, § 300.503(c)(1)(ii) requires that any notice required by § 300.503 must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. Additionally, if the parent's native language or other mode of communication is not a written language, § 300.503(c)(2) requires the public agency to take additional measures to communicate the information contained in the notice. These measures involve taking steps to ensure that the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, that the parent understands the content of the notice, and that there is written evidence that the requirements of § 300.503(c) have been met.

Concerning the comment about ensuring that the parent receives the time and information needed to make informed decisions regarding their child's continued need for services, a public agency cannot discontinue services until prior written notice consistent with § 300.503 has been provided to the parents. Therefore, we expect public agencies to promptly respond to receipt of written revocation of consent by providing prior written notice to the parents under § 300.503. Section 300.503 specifies that, within a reasonable time before a public agency discontinues services, the public agency must provide the parents of a child with a disability written notice of the proposal to discontinue services based on receipt of the parent's written revocation of consent. Providing such notice a reasonable time before the public agency discontinues services gives parents the necessary information and time to fully consider the change and determine if they have any additional questions or concerns regarding the discontinuation of services.

While the notice required under § 300.503 provides sufficient information to parents regarding revocation of consent for special education and related services, a State may choose to establish additional procedures for implementing § 300.300(b)(4), such as requiring a public agency to offer to meet with parents to discuss concerns for their child's education. However, the State must ensure that any additional procedures are voluntary for the parents, do not delay or deny the discontinuation of special education and related services, and are otherwise consistent with the requirements under Part B of the Act and its implementing regulations. For example, while a public agency may inquire as to why a parent is revoking consent for special education and related services, a public agency may not require a parent to provide an explanation, either orally or in writing, prior to ceasing the provision of special education and related services.

Concerning the suggestion that the Department establish a timeline from revocation of consent through discontinuation of services with a specific deadline for convening a meeting with the parent and providing prior written notice to the parent, we expect the discontinuation of services to occur in a timely manner. However, we understand that the specific timeline may differ, to some extent, due to parent-specific factors, such as whether the parent wants to meet with the public agency or another entity prior to the discontinuation of services. Thus, to provide needed flexibility, we have not mandated a specific timeline.

With regard to the comment about ensuring parents acknowledge in writing that they have been fully informed of the educational services and supports that they are declining, it is the Department's position that the prior written notice informs parents of the educational services and supports that they are declining and establishes a sufficient record that parents have been appropriately informed.

We also note that under § 300.504, public agencies must provide parents, at least annually, a procedural safeguards notice that includes a full explanation of the procedural safeguards available to the parents of a child with a disability. This notice must explain the requirements in § 300.300, including that a parent has the right to revoke consent, in writing, to his or her child's continued receipt of special education and related services.

Changes: We have added the phrase ''in writing'' after the words ''revokes consent'' in §§ 300.9(c)(3) and 300.300(b)(4). We also have revised § 300.300(b)(4)(i) to clarify that a public agency must provide prior written notice in accordance with § 300.503

before ceasing the provision of special education and related services.

Comment: Many commenters opposed the requirements in proposed § 300.300(b)(4) that would allow a parent to revoke consent for special education and related services. These commenters stated that the decision to terminate services should be made by the IEP Team because the IEP Team includes both the parent and professionals. Some commenters stated that children cannot be placed unilaterally into special education because eligibility for special education and related services is determined by a group of qualified individuals and the parent; therefore, if a parent believes special education services are not needed, the parent should consult with the IEP Team rather than making that determination unilaterally.

Other commenters suggested that when a parent believes his or her child is not progressing, an IEP Team meeting should be held so that the IEP Team, as a whole and not just the parent, can determine whether the level of services is appropriate for the child. The commenters stated that allowing the IEP Team to determine whether the child needs special education and related services, rather than allowing parental revocation of consent, would be in the child's best interest.

One commenter stated that revoking consent should be treated differently than refusing to provide initial consent because revoking consent results in changing the status quo (i.e., terminating services that are currently being provided to the child). This commenter argued that the party seeking a change in the status quo should bear the burden of showing that the change is warranted. One commenter expressed concern specifically about a situation in which a parent revokes consent for special education and related services for a child placed in a residential setting.

Another commenter expressed concern that allowing a parent to revoke consent goes too far beyond providing for meaningful parental participation because it gives the parent a right to veto the IEP Team.

Discussion: We agree with the commenters that the IEP Team (defined in § 300.23, which includes the child's parents) plays an important role in the special education decision-making process. For example, through the development, review and revision of the child's IEP, the IEP Team determines how to make FAPE available to a child with a disability. However, the IEP Team does not have the authority to consent to the provision of special education and related services to a child. That authority is given exclusively to the parent under section 614(a)(1)(D)(i)(II) of the Act. The Secretary strongly believes that a parent also has the authority to revoke that consent, thereby ending the provision of special education and related services to their child. Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

We expect that after a parent revokes consent for the continued provision of special education and related services, the parent will continue to work with the child's school to support the child in the general education curriculum. Parents of nondisabled children serve as partners in their children's education in the same manner as parents of children with disabilities.

We agree that an IEP Team meeting should be convened if any member of the IEP Team, including a parent, believes the child is not progressing. Section 300.324(b)(1)(i) and (ii)(A) requires each public agency to review a child's IEP periodically, but not less than annually, and revise the IEP as appropriate to address any lack of expected progress. However, the review of a child's IEP by the IEP Team does not replace a parent's right to revoke consent for the continued provision of special education and related services to his or her child.

Concerning the comment that revoking consent should be treated differently than refusing to provide initial consent because the parent is seeking to terminate special education services that are presently provided, thus seeking to change the status quo and the comment expressing concern about revoking consent for a child whose current placement is in a residential setting, we appreciate that there are differences between consent for special education and related services and revocation of such consent. However, at their core, both issues entail a parent's decision of whether a child will receive special education and related services. Thus, section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, which provides a parent unilateral authority to refuse special education and related services, informs our decision on the related issue of revocation of consent for the continued provision of special education and related services.

Lastly, we disagree with the comments that allowing parents to revoke consent exceeds the parental participation requirements in Part B of the Act. As previously discussed, a parent's right to revoke consent is consistent with the parent's right, in section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, to determine if his or her child should receive special education and related services.

Changes: None.

Comment: Many commenters stated that parents may revoke consent for various reasons or beliefs that are not in the best interest of the child. Commenters provided specific examples such as conflicts between the parent and school personnel; an insufficient understanding or knowledge of the importance of special education and related services; a belief that continued participation in the special education program would hinder the child's success in life or stigmatize the child; and concerns that the special education program is not appropriate. The commenters expressed concern that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, as well as the academic future and safety of children in the general education classroom.

Other commenters expressed concern that allowing a parent to unilaterally revoke consent for the continued provision of special education and related services is not in the best interest of the child because these children may not receive instruction from trained professionals.

Discussion: A parent, under section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, has the authority to consent to the initial provision of special education and related services, and this parental right applies regardless of the parent's reasons. As previously discussed, the Secretary believes that a parent also should have the authority to revoke that consent, thereby ending the provision of special education and related services to their child. Allowing parents to revoke consent for special education and related services at any time is consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

Concerning the comments asserting that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, the Act presumes that a parent acts in the best interest of their child. If a child

experiences academic difficulties after a parent revokes consent to the continued provision of special education and related services, nothing in the Act or the implementing regulations would prevent a parent from requesting an evaluation to determine if the child is eligible, at that time, for special education and related services.

Safety of all students in the classroom is of primary concern to the Secretary. The Department expects that schools will continue to maintain the safety of all students in all classrooms regardless of whether children are receiving special education and related services.

We do not agree with the commenters that students whose parents revoke consent for the continued provision of special education and related services will no longer receive instruction from trained professionals. The Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (ESEA), requires that all teachers in a State who are teaching core academic subjects be ''highly qualified.'' Therefore, States are required to ensure that students in both general and special education programs are receiving instruction in core academic subjects from highly qualified teachers, as that term is defined in section 9101 of the ESEA and 34 CFR 200.56.

Changes: None.

Comment: A few commenters expressed concern that proposed § 300.300(b)(4) may result in students removing themselves from services when they reach the age of majority. Other commenters asked whether a child who reaches the age of majority can hold a school responsible for lost services. One commenter suggested adding a new paragraph to § 300.300(b)(4) that would grant immunity to an LEA if a child with a disability attains the age of majority and seeks to sue the LEA for failure to make FAPE available because the child's parent revoked consent for the continued provision of special education and related services. Another commenter asked whether unilaterally withdrawing a child with a disability from special education releases the LEA from any liability, past or future, with regard to providing FAPE to the child and the remedies available for denial of FAPE.

Discussion: Section 615(m)(1) of the Act allows, but does not require, a State to transfer all rights accorded to parents under Part B of the Act to children who have reached the age of majority under State law. If State law grants a child who has reached the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) all rights previously granted to parents, then the parents' rights are transferred to the child as provided in § 300.520(a), enabling that child to revoke consent for special education and related services under § 300.300(b)(4). However, in accordance with section 615(m)(1) of the Act and § 300.520(a)(1)(i), the public agency must provide any notice required under Part B of the Act to the child and the parents. Therefore, the parents would receive prior written notice, consistent with § 300.503, of the public agency's proposal to discontinue special education and related services based on receipt of the written revocation of consent from a child to whom rights transferred under § 300.520(a). This parental notice could facilitate discussion between the child and parent of the decision to revoke consent and the potential ramifications of that decision.

Concerning the comments about a student who reaches the age of majority holding a school responsible for loss of Part B services, § 300.300(b)(4)(iii) provides that, if the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services. Therefore, granting the public agency immunity is not necessary because the public agency will not be considered to be in violation of the requirement to make FAPE available to the child if the parent revokes consent for special education and related services. Revocation of parental consent releases the LEA from liability for providing FAPE from the time the parent revokes consent for special education and related services until the time, if any, that the child is evaluated and deemed eligible, once again, for special education and related services.

Changes: None.

Comment: Several commenters stated that the right to FAPE is a child's right and allowing parents to revoke consent for special education and related services undermines that right.

Discussion: We do not agree with the commenters that § 300.300(b)(4) undermines a child's right to FAPE. Section 300.101 requires that FAPE must be available to all children with disabilities residing in a State between the ages of 3 and 21, inclusive, except that public agencies are not required to serve children aged 3 through 5 and aged 18 through 21 if serving such children is inconsistent with State law, practice or the order of any court with respect to the provision of public education to children of those ages. The child's parents, under the Act, are afforded rights regarding the provision of FAPE to their child, including the right to determine whether their child will receive special education and related services. Specifically, under section 614(a)(1)(D)(i)(II) and (ii)(II) of the Act, a parent has the authority to determine whether a public agency may begin to provide special education and related services to their child. As discussed previously, it is the Department's position that a parent also should have the authority to revoke consent to the continued provision of special education and related services to their child. The Act presumes that parents act in the best interest of their child. Therefore, affording a parent the right to consent to the initial provision of special education and related services or the right to revoke consent, in writing, to the continued provision of special education and related services is consistent with the Act and does not undermine a child's right to FAPE under § 300.101.

Changes: None.

Comment: A few commenters expressed concern about how the revocation of consent provisions would affect children who live in foster homes, or where guardianship is in dispute. Another commenter proposed replacing the words ''the parent'' in § 300.300(b)(4) with the words ''each parent'' because when custody of a child is in dispute the provision should require that each legally responsible parent revoke consent before special education and related services are discontinued.

Discussion: Certain provisions in the Part 300 regulations, such as the definition of *parent* in § 300.30 and the requirements regarding surrogate parents in § 300.519, ensure that a child with a disability has an individual who can act as a parent to make educational decisions on behalf of the child. *Parent*, as defined in § 300.30, means a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally

responsible for the child's welfare. The definition of *parent* also includes a surrogate parent who has been appointed in accordance with § 300.519 and section 639(a)(5) of the Act. The duty to appoint a surrogate parent under § 300.519 arises when no parent can be identified, the public agency, after reasonable efforts, cannot locate a parent, the child is a ward of the State, or the child is an unaccompanied homeless youth, as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434(a)(6)).

The language in § 300.300(b)(4) is consistent with other regulatory language concerning parental rights in the Part B regulations. Under § 300.30, when guardianship or custody of a child with a disability is at issue, the parental rights established by the Act apply to both parents, unless a court order or State law specifies otherwise. Therefore, we decline to make the change requested by the commenter.

Changes: None.

Comment: A few commenters questioned whether a parent may revoke consent for the continued provision of some services and not others and, therefore, require the public agency to continue to provide only those services for which the parent has not revoked consent.

Discussion: Section 300.300(b)(4) allows a parent at any time after the initial provision of special education and related services to revoke consent for the continued provision of special education and related services to their child in their entirety. Under § 300.300(b)(1), parental consent is for the initial provision of special education and related services generally, not for a particular service or services. Once a public agency receives a parental revocation of consent, in writing, for all special education and related services for a child and provides prior written notice in accordance with § 300.503, the public agency must, within a reasonable time, discontinue all special education and related services to the child. In this circumstance, the public agency may not use the procedures in subpart E of these regulations, including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516, to obtain agreement or a ruling that the services may be provided to the child.

In situations where a parent disagrees with the provision of a particular special education or related service and the parent and public agency agree that the child would be provided with FAPE if the child did not receive that service, the public agency should remove the service from the child's IEP and would not have a basis for using the procedures in subpart E to require that the service be provided to the child.

If, however, the parent and public agency disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service, the parent may use the due process procedures in subpart E of these regulations to obtain a ruling that the service with which the parent disagrees is not appropriate for their child.

Additionally, under the regulations in § 300.300(d)(2), States are free to create additional parental consent rights, such as requiring parental consent for particular services, or allowing parents to revoke consent for particular services, but in those cases, the State must ensure that each public agency in the State has effective procedures to ensure that the parents' exercise of these rights does not result in a failure to provide FAPE to the child.

Changes: None.

Comment: Some commenters asked how proposed § 300.300(b)(4) will affect a school district's adequate yearly progress (AYP) reporting under the ESEA and whether children who previously received special education and related services would be counted in the special education subgroup. The commenters requested clarification as to whether the student will remain in the students with disabilities subgroup if services are discontinued after school has begun but before the State assessment is administered and whether or not the State will be required to provide accommodations on assessments to the student. Another commenter expressed concern that teachers will be blamed if a child fails to succeed after a parent revokes consent for the continued provision of special education and related services because educators are ''liable'' for all students under the ESEA. One commenter expressed concern about an LEA's and State's ability to accurately track the progress of students with disabilities over time, especially if large numbers of parents choose to exercise their right to revoke consent. Lastly, another commenter expressed concern that a parent who unilaterally withdraws his or her child from special education and related services may sue an LEA if a student fails to make progress.

Discussion: Once a parent revokes consent for a child to receive special education and related services, the child is considered a general education student and will be considered a general education student under the ESEA. Therefore, if a parent revokes consent after the school year begins but before administration of the annual State assessment required under the ESEA, the child is considered a general education student who has exited special education for accountability purposes. Section 200.20(f) of the Title I regulations allows States to include, for a period of up to two AYP determination cycles, the scores of students who were previously identified with a disability under the Act, but who no longer receive special education services, in the special education subgroup for purposes of calculating AYP (but not for reporting purposes). Therefore, the State may continue to include a child whose parent revokes consent for special education and related services in the special education subgroup for purposes of calculating AYP for two years following parental revocation of consent. While the State may continue to include the child in the students with disabilities subgroup for purposes of calculating AYP for up to two years, the child will not have an IEP; therefore, the State will no longer be required under the IDEA to provide accommodations that were previously included in the child's IEP.

Concerning the suggestion that teachers are ''liable'' and will be blamed if a child fails to succeed after a parent revokes consent for special education and related services, we disagree. Teachers play a critical role in ensuring that all children progress academically regardless of whether a child receives special education and related services. The majority of children who receive special education and related services receive their special education services in the general education classroom; therefore, general education teachers have a vital role in promoting their educational progress. These general education teachers will continue to have an important role in fostering the educational progress of all children, regardless of whether they receive special education and related services.

We disagree that LEAs and States will not have the ability to accurately track the progress of students with disabilities over time. LEAs currently track the progress of all students through student records, report cards, progress reports, and State assessments. Students who no longer receive special education and related services due to a parent revoking consent will have their progress tracked in the same manner as students who do not receive special education and related services.

Lastly, concerning the comment that a parent who revokes consent for special education and related services may sue an LEA if their child fails to make

progress, § 300.300(b)(4)(iii) states that a public agency will not be considered in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services based on the parent's revocation of consent. Additionally, there is no private right of action under the ESEA for a parent to sue an LEA if a child fails to make progress.

Changes: None.

Comment: One commenter asked if a teacher is required to provide the accommodations listed in a child's IEP in the general education environment for any child for whom consent for special education and related services is revoked. Another commenter expressed concern that the children whose parents revoke consent for special education and related services may not receive needed accommodations and modifications thereby compromising the child's success in school and perhaps in later life.

Discussion: Once a parent revokes consent in writing under § 300.300(b)(4) for the continued provision of special education and related services, a teacher is not required to provide the previously identified IEP accommodations in the general education environment. However, general education teachers often provide classroom accommodations for children who do not have IEPs. Nothing in § 300.300(b)(4) would prevent a general education teacher from providing a child whose parent has revoked consent for the continued provision of special education and related services with accommodations that are available to non-disabled children under relevant State standards.

Changes: None.

Comment: A few commenters requested that the Department clarify that the right of a parent to revoke consent for special education and related services does not relieve the LEA of its obligation under child find to identify, locate, and evaluate all children with disabilities, including children whose parents revoke consent for special education and related services. Other commenters requested clarification as to the time frame that applies for an LEA to comply with the child find and service obligations for a child who exits special education without the agreement of the IEP Team and whether the child should be referred for services each school year. One commenter expressed concern that allowing revocation of parental consent would potentially create a disincentive for general educators to refer students to special education because teachers would be reluctant to repeatedly refer a student for special education if a parent previously revoked consent for services.

Discussion: The child find provisions in section 612(a)(3) of the Act and § 300.111 require each State to have in effect policies and procedures to ensure that all children with disabilities residing in the State and who are in need of special education and related services are identified, located, and evaluated. Children who have previously received special education and related services and whose parents subsequently revoke consent should not be treated any differently in the child find process than any other child, including a child who was determined eligible and whose parent refused to provide initial consent for services. A parent who previously revoked consent for special education and related services may continue to refuse services; however, this does not diminish a State's responsibility under § 300.111 to identify, locate and evaluate a child who is suspected of having a disability and being in need of special education and related services. A public agency must obtain informed written parental consent, consistent with § 300.300(a), before conducting an initial evaluation. A parent who previously revoked consent for the continued provision of special education and related services, like any parent of a child suspected of having a disability, may refuse to provide consent for an initial evaluation.

Concerning the request for clarification of the child find timeline, child find is an ongoing process. The Department expects that children whose parents revoke consent will be identified, located and offered an evaluation in the same manner as any other child if the child is suspected of having a disability and being in need of special education and related services. Similarly, we do not agree with the commenter that general education teachers will not refer children who previously received special education and related services. States are required to have policies and procedures in place to ensure effective child find. Ensuring that general education teachers make appropriate referrals of children suspected of having a disability, which would include the referral of children whose parents have previously revoked consent for such services, is consistent with this responsibility.

Changes: None.

Comment: One commenter requested that § 300.300 be amended to specifically state that, for discipline purposes, a public agency will not consider the child to be a child with a disability if the parent refuses consent, fails to respond to a request for consent, or revokes consent for special education and related services. Other commenters stated that revocation of consent for special education and related services should not impact discipline protections for children whose parents have revoked consent because the school has prior knowledge that the child is a child with a disability and the child has been determined eligible for services. The commenters stated that § 300.534, consistent with section 615(k)(5) of the Act, applies to children not yet determined to be eligible for special education and related services who have engaged in behavior in violation of a code of student conduct. One commenter expressed concern that subjecting previously eligible students to general education discipline procedures would leave these students without any education.

Discussion: Section 300.534 generally provides protections for children not yet determined eligible for special education and related services in instances when the public agency is deemed to have knowledge that a child is a child with a disability before the behavior that precipitated the disciplinary action occurred. However, § 300.534(c)(1)(ii) states that a public agency is not deemed to have knowledge under this section if the parent of the child has refused services under the regulations implementing Part B of the Act. When a parent revokes consent for special education and related services under § 300.300(b), the parent has refused services as described in § 300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act's discipline protections.

We do not agree that additional clarification of the discipline procedures is needed in § 300.300 or with the comment that revocation of consent for special education and related services should not affect discipline protections because the school has prior knowledge that the child has been determined eligible for services. The provisions in § 300.534(c), which mirror the language in section 615(k)(5)(C) of the Act, are clear that once a parent refuses services the public agency will not be deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students.

We also disagree that previously eligible students who are subject to general education discipline procedures will be left without any education. Students who are no longer receiving special education and related services due to the revocation of parental consent to the continued provision of special education and related services will be subject to the LEA's discipline procedures without the discipline protections provided in the Act. However, students will continue to receive the full benefit of education provided by the LEA as long as they have not committed any disciplinary violations that affect access to education (*e.g.*, violations that result in suspension). We expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services.

Changes: None.

Comment: One commenter asked whether a school will be able to place a student with a disability whose parent has revoked consent for special education and related services in a general education classroom that is co-taught by a special education teacher. Another commenter asked if a child must meet all the statewide assessment and credit requirements for graduation applicable to students in the general education setting if a parent revokes consent for special education and related services when the child is a high school senior.

Discussion: Once a parent revokes consent for special education and related services under § 300.300(b), the child is a general education student. Consequently, the child may be placed in any classroom where other general education students are placed. If a child whose parent has revoked consent is placed in a classroom that is co-taught by a general education teacher and a special education teacher, then that child is placed in the classroom as a general education student and should be treated the same as all other general education students in that classroom.

High school graduation requirements are within the purview of each State. However, it is reasonable to assume that any student, regardless of whether they are receiving special education and related services, will be required to meet statewide assessment and credit requirements for graduation with a regular diploma.

Changes: None.

Comment: Some commenters raised questions about the protections under Section 504 of the Rehabilitation Act of 1973, as amended (Section 504), and Title II of the Americans with Disabilities Act of 1990, as amended (ADA), and their relationship to children with disabilities whose parents revoke consent for special education and related services under the Act. Some commenters questioned whether the Section 504 and ADA protections would continue to apply, and the relationship between a Section 504 or ADA plan and an IEP, whenever a parent withdraws consent for continued services under the IDEA. One commenter asked whether students would remain eligible for discipline protections under Section 504 even after a parent revokes consent for special education and related services. Another commenter maintained that, under Section 504 and the Fourteenth Amendment to the U.S. Constitution, a child with a disability has a right not to be discriminated against by imposing disciplinary sanctions for behavior that is a manifestation of his disability. Several commenters cited the statement in the Department's March 12, 1999 Analysis of Comments and Changes to the Final Part B regulations that ''[u]nder Section 504 of the Rehabilitation Act of 1973, children with disabilities may not be disciplined for behavior that is a manifestation of their disability if that disciplinary action constitutes a change of placement'' (see 64 FR 12626), and asked how this interpretation affects the use of disciplinary measures for students with disabilities, protected under Section 504 and the ADA, but whose parent has revoked consent for services under Part B of the Act.

Discussion: These final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.

Changes: None.

Comment: A few commenters asked whether § 300.300(b)(4) would affect supplemental security income (SSI) or accommodations in college.

Discussion: If a parent revokes consent for the provision of special education and related services pursuant to § 300.300(b)(4), the child's eligibility for other programs, such as SSI, may be affected. A parent may seek additional information concerning eligibility requirements for other programs from the agency responsible for implementing those programs. Regarding accommodations in postsecondary educational institutions, Office for Civil Rights (OCR) offers helpful guidance on the transition of individuals with disabilities to postsecondary education, which is available on OCR's Web page: *http://www.ed.gov/about/offices/list/ocr/transitionguide.html*.

Changes: None.

Comment: Some commenters expressed concern that a parent could assert that the public agency should have done more to convince the parent not to unilaterally revoke consent for special education and related services under § 300.300(b)(4).

Discussion: A public agency does not have any obligation to ''convince'' parents to accept the special education and related services that are offered to a child. Section 300.300(b)(3)(iii) and (4)(iii) provides that the public agency will not be considered to be in violation of the requirement to make FAPE available to the child if the parent of a child revokes consent for the continued provision of special education and related services. No provision in the Act or implementing regulations imposes an obligation on public agencies to dissuade parents from revoking consent.

Changes: None.

Comment: One commenter recommended that if a parent revokes consent, the LEA should be required to offer FAPE thereafter, including three year reevaluations, progress monitoring, and an annual IEP until the LEA and the responsible SEA report under the ESEA that 80 percent or more of the students with disabilities in the LEA are meeting State standards and graduating with a regular high school diploma.

Discussion: Section 300.300(b)(4)(iii) through (iv) makes clear that once a parent revokes consent for special education and related services, the public agency (a) will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education and related services, and (b) will not be required to convene an IEP Team meeting or develop an IEP, under §§ 300.320 through 300.324. As noted earlier, a child whose parent has revoked consent should be treated the same as any other child in the LEA's child find process.

We do not agree that a State should be required to offer FAPE, triennial reevaluations, or an annual IEP until a certain percentage of students with disabilities meet State standards and graduate with a regular high school diploma. Decisions concerning the provision of FAPE and special educational services are individualized and made by an IEP Team, which includes the child's parents. If a parent revokes consent for special education and related services, the child will be treated as a general education student

and will not be eligible for FAPE, triennial evaluations, or an annual IEP.

Changes: None.

Comment: Some commenters expressed concern that school district personnel may encourage a parent to remove their child from special education and related services, and a few of these commenters requested that the regulations be amended to prohibit a school district from doing so. One commenter requested that the regulations require LEAs to track the number of children whose parents revoke consent in each LEA (including a child's name, identifying information, and school name) and report that information to the SEA each year.

Discussion: It is inappropriate for school personnel to encourage a parent to revoke consent for special education and related services. If school personnel believe a child no longer qualifies as a child with a disability, Part B of the Act and its implementing regulations provide a process for making that determination. Specifically § 300.305(e), consistent with section 614(c)(5) of the Act, requires that an LEA evaluate a child before determining that the child is no longer a child with a disability. This provision applies when eligibility is in question and an LEA believes a child may no longer be eligible for special education services. A public agency must follow this long-standing procedure if the agency believes a child should no longer receive special education and related services.

Concerning the commenter's request that the Department require LEAs to track the number of children whose parents withdraw consent in each LEA, we decline to impose additional data collection requirements on LEAs to track the number of children whose parents revoke consent in each LEA because we believe the number of children whose parents revoke consent will be small. However, nothing in these regulations prevents a State from separately tracking the number of children whose parents revoke consent in each LEA.

Changes: None.

Comment: One commenter requested that the Department clarify in these regulations that the placement of a child in a private school when FAPE is at issue, pursuant to § 300.148 and section 612(a)(10)(C) of the Act, does not constitute a revocation of consent under § 300.300(b)(4).

Discussion: We agree with the commenter that the placement of a child in a private school when FAPE is at issue does not constitute a revocation of consent under § 300.300(b). However, the provisions concerning the placement of a child in a private school when FAPE is at issue do not need to be referenced in § 300.300, as suggested by the commenter, because those provisions are clearly outlined in § 300.148. Section 300.148 addresses the steps a parent must take when enrolling a child with a disability in a private school when FAPE is at issue. If the parent seeks reimbursement for the cost of the private school, then the parent must follow the procedures in § 300.148(c) through (e). The parent must inform the IEP Team at the most recent IEP Team meeting that he or she is rejecting the placement proposed by the public agency and must inform the IEP Team of his or her intent to enroll the child in a private school at public expense or give written notice 10 business days prior to the removal of the child from the public school. These actions, which are required in response to a disagreement between the parent and public agency about the provision of FAPE, do not constitute parental revocation of consent for special education and related services.

Changes: None.

Comment: Some commenters expressed concern that allowing parents to revoke consent for special education and related services would result in parents pulling their children in and out of special education and related services. The commenters noted that pulling children in and out of special education and related services would have a negative effect on student progress, would cause a loss of instructional time, and could affect the provision of FAPE. Other commenters expressed concern that parents, who previously revoked consent for services, will ask for special education and related services when the child has a discipline issue or is at risk of not graduating. A few commenters requested that there be a limit to how frequently a parent can revoke consent and then subsequently request reinstatement in special education for their child.

Discussion: Section 300.300(b)(4) clarifies that parents have the right to withdraw their child from special education and related services. After revoking consent for his or her child, a parent always maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services. Nothing in the Act or the implementing regulations prevents a parent from requesting an evaluation when their child has a discipline issue or is at risk of not succeeding in school. This is because, consistent with § 300.101, the public agency has an affirmative obligation to make FAPE available to a child with a disability. The child's right to have FAPE available does not cease to exist upon the revocation of consent. Therefore, a parent may consider discipline and graduation requirements when determining whether to request special education and related services for their child.

We do not agree with the commenter that the Department should limit how frequently a parent may revoke consent and then subsequently request reinstatement in special education services because retaining flexibility to address the unique and individualized circumstances surrounding each child's education is important. A public agency will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education services following a parent's revocation of consent. We understand the commenter's concern that placing a child in and out of special education services may affect the provision of FAPE; however, a public agency is only responsible for providing FAPE during the time period that the parent has provided consent for special education and related services.

Changes: None.

Comment: One commenter expressed concern about potential staffing implications, especially for small school districts that may have hired a teacher with unique expertise for a child whose parent subsequently revokes consent for the continued provision of special education and related services.

Discussion: The Department appreciates that a parent's revocation of consent could affect staffing at the school and district levels and that there may be instances where staff members are no longer providing special education and related services. However, such issues should not affect a parent's right to revoke consent for special education and related services because a parent's right to determine whether his or her child will receive special education and related services is paramount.

Changes: None.

Comment: Some commenters requested that the Department clarify the procedures to be followed when a parent provides consent for special education and related services after previously revoking consent (re-enrollment), including whether re-enrollment would be considered an initial evaluation that would trigger the 60-day or other State-imposed evaluation timeline. Another commenter expressed concern about the

expenditure of resources toward a ''new'' initial evaluation and IEP for a student for whom consent for special education and related services has been revoked and then granted again.

Discussion: If a parent who revoked consent for special education and related services later requests that his or her child be re-enrolled in special education, an LEA must treat this request as a request for an initial evaluation under § 300.301 (rather than a reevaluation under § 300.303). However, depending on the data available, a new evaluation may not always be required. An initial evaluation, under § 300.305, requires a review of existing evaluation data that includes classroom based, local, or State assessments, and classroom based observations by teachers and related services providers. On the basis of that review and input from the child's parents, the IEP Team and other qualified professionals must identify what additional data, if any, are needed to determine whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child. Therefore, a public agency may not always have to expend resources on a ''new'' initial evaluation.

Changes: None.

Comment: A few commenters argued that the Department does not have the authority to issue regulations that allow a parent to revoke consent for special education and related services. One commenter argued that there is no statutory language in section 614(a)(1)(D)(ii) of the Act that authorizes a parent to revoke consent once services have been provided. Other commenters argued that the Department does not have the authority to regulate in this manner because doing so violates the requirements of section 607 of the Act, which prohibits the adoption of any regulation that procedurally or substantively lessens the protections provided to children with disabilities as embodied in the regulations in effect on July 20, 1983 unless the regulation ''reflects the clear and unequivocal intent of Congress in legislation.'' These commenters noted that the current regulations (i.e., without provisions permitting the parent to revoke consent) are designed to safeguard the rights of the child, not the unilateral preferences of the parent.

Discussion: As discussed elsewhere in this preamble, although section 614(a)(1)(D) of the Act does not explicitly state that parents have the right to revoke consent for special education and related services, the parent's right to revoke consent for special education and related services at any time is consistent with the Act's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.

We also disagree that allowing a parent to revoke consent for the provision of special education and related services under § 300.300(b)(4) procedurally or substantively lessens protections provided to children with disabilities as embodied in regulations in effect on July 20, 1983. As previously stated in response to other comments, a parent is recognized under the Act as the party responsible for protecting the child's interest in obtaining appropriate educational services. It is the Department's position that the protections provided to children with disabilities are enlarged rather than lessened by amending the regulations to provide that a parent's decision to revoke consent for the continued provision of special education and related services cannot be challenged by the public agency. Furthermore, the change reflected in § 300.300(b)(4) is consistent with the legislative changes made to the Act in 2004, which included adding to section 614(a)(1)(D)(ii)(II) of the Act the requirement that parental consent be obtained before the public agency begins to provide special education and related services to their child. In our view, the better reading of the Act, especially in light of the Department's long-standing regulatory definition of ''consent,'' which has included the concept that consent can be revoked at any time, is that a parent's revocation of consent for the continued provision of services cannot be challenged by a public agency any more than a parent's refusal to provide consent for the initial provision of special education and related services can be.

Changes: None.

Comment: One commenter suggested that allowing parents to discontinue special education and related services without a reevaluation is inconsistent with the requirement in section 614(c)(5) of the Act that a public agency conduct a reevaluation of a child before determining that the child is no longer a child with a disability.

Discussion: We disagree with the commenter that allowing a parent to revoke consent for special education and related services is inconsistent with the requirements in section 614(c)(5) of the Act. Section 614(c)(5) of the Act requires that an LEA evaluate a child before determining that the child is no longer a child with a disability. This provision applies when eligibility is in question and the LEA believes the child may no longer be eligible for special education services. Section 300.300(b)(4) allows a parent to revoke consent for the continued provision of special education and related services and does not trigger an LEA's obligation to conduct an evaluation for a child that is receiving services before determining that a child is no longer a child with a disability. If a parent revokes consent for the continued provision of special education and related services for his or her child, the public agency is not determining that the child is no longer a child with a disability as contemplated by section 614(c)(5) of the Act and § 300.305(e). Instead, the public agency is discontinuing the provision of special education and related services pursuant to the decision of the parent and there is no obligation for the LEA to evaluate the child.

Changes: None.

Comment: Some commenters requested that the final regulations provide dispute resolution options for public agencies when a parent revokes consent for special education and related services. The commenters cited various reasons as to why dispute resolution options should be included in § 300.300(b)(4) such as: The ability to strike a suitable balance among the interests of the public agency, parent, and child with a disability; the need for proposed § 300.300(b)(4) to be consistent with section 615(b)(6)(A) of the Act and § 300.507, providing that a parent or a public agency may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child; and the ability of a public agency to determine that a child is no longer a child with a disability.

Lastly, some commenters requested that public agencies be allowed to initiate the mediation process when a parent revokes consent, while another commenter stated that public agencies should, at least, be able to offer mediation and that parents can refuse to participate, at their sole discretion.

Discussion: While the dispute resolution mechanisms in section 615 of the Act generally are appropriate to resolve disputes between a parent and the public agency, it is the Department's position that they are not appropriate when a parent revokes consent for all special education and related services. Section 615(b)(6)(A) of the Act and § 300.507 allow a parent or public agency to file a due process complaint on any matter relating to the identification, evaluation, and educational placement of a child with a

disability, or the provision of FAPE to the child. However, section 614(a)(1)(D)(ii)(II) of the Act does not allow an LEA to use the due process procedures under section 615 of the Act, including mediation, if a parent refuses to provide consent for the initial provision of services. If an LEA cannot use the due process procedures in section 615(b)(6)(A) of the Act and § 303.507 to override a parent's refusal to provide initial consent for services, then an LEA also should not be allowed to use these due process procedures to override a parent's revocation of consent for the continued provision of services. As discussed throughout this preamble, the Secretary believes that protecting the interest of parents to make the decision as to whether or not their child receives special education and related services is consistent with the intent of the Act.

We agree that the application of the due process procedures to disputes between parents and public agencies generally balances the interests of public agencies, parents, and children. However, as evidenced by section 614(a)(1)(D)(ii)(II) of the Act, which prohibits LEAs from using the due process procedures under section 615 of the Act if a parent refuses to provide consent for the initial provision of services, a public agency's right to use the due process procedures in section 615(b)(6)(A) of the Act and § 303.507 is not absolute. Similarly, a public agency should not have the ability to override a parent's revocation of consent for the continued provision of special education services and related services.

Moreover, we do not agree with the commenter who suggested that allowing a parent to revoke consent will affect a public agency's ability to determine that a child is no longer a child with a disability. If a public agency believes a child is no longer a child with a disability then, as required in § 300.305(e), a public agency must evaluate the child before making that determination. If the parent disagrees with the eligibility determination, then the parent may challenge the decision using the due process procedures in section 615 of the Act.

Lastly, mediation, pursuant to § 300.506(a), may be used to resolve any disputes under Part B of the Act and its implementing regulations before a parent revokes consent for the continued provision of special education and related services. However, for the same reasons that mediation is not allowed when a parent refuses to provide initial consent for services, mediation is not appropriate once a parent revokes consent for the provision of special education and related services.

Changes: None.

Comment: One commenter expressed concern that allowing a parent to remove their child from special education and related services will affect LEAs' and SEAs' ability to meet their State Performance Plans (SPP) and the Annual Performance Report (APR) targets for graduation in Indicator 1 and the targets for the participation and performance of children with disabilities on statewide assessments in Indicator 3. The commenter also expressed concern about the potential failure of students with disabilities whose parents revoke consent for special education and related services to participate fully in post-school opportunities, reflected in Indicators 13 and 14, regarding secondary transition and post-school outcomes, respectively.

Discussion: Section 616(a)(3) of the Act requires the Secretary to monitor the States, and the States to monitor LEAs, using quantifiable indicators in the following priority areas: The provision of FAPE in the LRE; the State's exercise of general supervisory authority; and disproportionate representation of racial and ethnic groups in special education and related services to the extent the representation is the result of inappropriate identification. As required by the Act, the Secretary established, with broad stakeholder input, 20 indicators. States established rigorous targets for each indicator and developed activities to improve performance to meet those targets in their SPPs. States report to the Department in their APR on their performance in meeting their targets.

Generally, if a parent revokes consent for his or her child to receive special education and related services, the child is no longer required to be included in calculations for children with disabilities for indicators in the SPP/APR. States may choose to handle students whose parents revoke consent to the continued provision of special education and related services in graduation rate calculations for purposes of the SPPs/APRs in the same way that they treat other students who exit from special education and related services prior to graduation. Additionally, students whose parents revoke consent to the continued provision of special education and related services are no longer children with disabilities whose participation in post-school opportunities would be tracked by the SPP/APR Indicators 13 and 14.

Changes: None.

Comment: One commenter noted that some States' mandatory reporting requirements for abuse and neglect may be triggered when a parent revokes consent for special education and related services, especially in cases where a child may require medical services.

Discussion: The commenter is correct that each State has established reporting requirements and professional codes of conduct concerning suspected abuse and neglect. Nothing in these regulations will alter any responsibilities under those State laws.

Changes: None.

States' Sovereign Immunity and Positive Efforts To Employ and Advance Qualified Individuals With Disabilities (§ 300.177)

Comment: A few commenters requested clarification of the term ''positive efforts,'' as it is used in § 300.177(b). One commenter recommended that the regulations clarify that the term ''positive efforts'' includes making reasonable accommodations during the recruitment and interview process, and ensuring that assistive technology devices are provided in the workplace.

Discussion: Consistent with section 606 of the Act, positive efforts must be made to recruit and advance qualified individuals with disabilities in programs assisted under Part B of the Act. We decline to define the term ''positive efforts'' in these regulations because the positive efforts taken by States will vary based on the unique and individual needs of a State and public agency, and those needs may change over time. For example, a public agency's positive efforts might include participating in an employment fair that is targeted at individuals with disabilities, sending vacancy announcements to organizations for individuals with disabilities and ensuring that employees with disabilities are aware of promotion opportunities. As a separate obligation under Section 504, each recipient of assistance must provide reasonable accommodations, which may include assistive technology devices, to each qualified individual with a disability who applies for employment, or is employed in programs assisted under Part B of the Act.

Changes: None.

Comment: One commenter opposed proposed § 300.177 because, according to the commenter, section 606 of the Act is silent on the Department's authority to issue regulations relating to the employment of individuals with disabilities. The commenter argued that

doing so would be contrary to Congress' intent, in section 607(a) of the Act, that the Secretary issue regulations only to the extent that such regulations are necessary to ensure compliance with the specific requirements of the IDEA. The commenter further noted that proposed § 300.177(b) is unnecessary because in order to receive a grant under Part B of the IDEA, each State must already have on file with the Department a description of the steps the State proposes to take to ensure equitable access to, and participation in, activities conducted under Part B of the Act, as required by section 427 of the General Education Provisions Act (GEPA).

Another commenter opposed this provision because the changes pertain to employment requirements rather than to the provision of special education. The commenter suggested that the Department provide guidance on this issue rather than include it in the regulations.

Discussion: Section 606 of the Act requires the Secretary to ensure that each recipient of assistance under Part B of the Act makes positive efforts to employ and advance in employment qualified individuals with disabilities in programs assisted under the Act. Section 300.177(b), consistent with section 606 of the Act, makes clear that this requirement applies to each recipient of Part B funds, including both SEAs and LEAs. This provision does not replace or contradict protections afforded to individuals with disabilities under other State or Federal laws, including requirements under GEPA, Section 504, Title II of the ADA, and applicable employment laws. Additionally, § 300.177(b) implements statutory provisions; the fact that it addresses employment matters rather than the provision of special education services does not mean that it should not be included in the regulations. The Department therefore declines to adopt the suggestion that this matter be addressed through guidance rather than through the regulations.

Changes: None.

Comment: One commenter questioned whether the Department might add the provision in § 300.177(b) as one of the Secretary's monitoring priorities for reporting by SEAs and LEAs in the SPP and APR.

Discussion: As previously discussed in this preamble, section 616(a)(3) of the Act specifies the Department's IDEA monitoring priorities and requires the Secretary to monitor the States' performance in these priority areas using quantifiable indicators. At this time, the Department does not expect to include an additional indicator to monitor the implementation of the requirements in § 300.177(b).

Changes: None.

Hearing Rights (§ 300.512)

Comment: Several commenters supported proposed § 300.512 stating that a parent's right to be represented by non-attorneys at due process hearings is best decided by State law. Other commenters disagreed with our statement in the preamble to the NPRM that the language of the Act is not clear about whether non-attorneys can represent parties in due process hearings. These commenters stated that the Act and its implementing regulations both provide that any party to a hearing shall be accorded the right to be accompanied and advised ''by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities * * *.'' The commenters stated that because the term ''counsel'' is referenced separately and distinguished from ''individuals with special knowledge or training'' in both the Act and the regulations, the Department should conclude that such ''individuals'' may, in fact, be other than counsel (i.e., attorneys) and represent a parent in a due process hearing. One commenter noted that experienced advocates can be very helpful to parents who represent themselves in due process hearings. Another commenter stated that proposed § 300.512 should not permit a State's rules related to the unauthorized practice of law to prohibit a parent from being ''accompanied and advised'' by a lay advocate because this would be contrary to the actual text of the Act. Moreover, several commenters stated that proposed § 300.512 violates the intent of the Act, which they describe as providing parents with the broadest opportunities for assistance in due process hearings. These commenters stated further that nothing in the language or intent of the Act permits the Department's interpretation that States have the authority to decide whether parents can be represented by non-attorneys in due process hearings under the Act.

Discussion: Section 615(h)(1) of the Act is clear that parties to a due process hearing may be ''accompanied and advised'' by counsel and by individuals, such as non-attorney advocates, who have special knowledge or training regarding the problems of children with disabilities. Nothing in these regulations or State law can limit this right. However, neither the Act nor the current regulations implementing Part B of the Act address the issue of whether individuals who are not attorneys, but have special knowledge or training regarding the problems of children with disabilities, may ''represent'' parties in due process hearings under the Act. Congress considered the question of non-attorney representation during the 2003–2004 IDEA reauthorization process. The version of H.R. 1350 passed by the House of Representatives in 2003 included a provision giving a party the ''right to be represented by counsel and by non-attorney advocates and to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities'' (63 Cong. Rec. H3458 and H3495 (daily ed. Apr. 30, 2003)). The final version of the bill enacted in 2004, however, did not adopt this language. In other areas, though, the Act, as revised in 2004, now specifically addresses duties applicable to ''either party, or the attorney representing a party'' (see section 615(b)(7)(A) and (B) of the Act). Given that the Act is silent regarding the representational role of non-attorneys in IDEA due process hearings, the issue of whether non-attorneys may ''represent'' parties to a due process hearing is a matter that is left, by the statute, to each State to decide. As the commenter notes, even if a State law prohibits non-attorney representation in due process hearings, the Act still affords parties to due process hearings the right to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities.

Changes: None.

Comment: Several commenters expressed dissatisfaction with proposed § 300.512 because it would give too much deference to States, permit inconsistent rules across States, and would limit a party's right under Federal law to be represented by a non-attorney in a due process hearing based on States' interest in regulating the practice of law. Other commenters stated that federalism concerns should not override the national interest, reflected in the Act, in the equal opportunity of children with disabilities to appropriate education.

Discussion: As noted elsewhere in this preamble, the Act does not state that parties to a due process hearing have a right to representation in those hearings by non-attorney advocates. Given the Act's silence in this regard, the Act does not prevent States from regulating whether non-attorneys may ''represent'' parties in due process hearings.

Changes: None.

Comment: One commenter requested that the final regulations clarify whether

it is sufficient for an SEA to provide by regulation or procedural rule that a lay advocate may represent parties at due process hearings or whether the ability of a lay advocate to represent a party at a due process hearing instead is controlled by State law regarding the unauthorized practice of law. Another commenter requested that we add a provision to the regulations to clarify that nothing in the Act authorizes parents to be represented by non-attorneys if State law is silent on the issue.

Discussion: Whether an SEA may have a State regulation or procedural rule permitting non-attorney advocates to represent parties at due process hearings or whether that issue is controlled by State attorney practice laws is determined by State law. If State law is silent on the question of whether non-attorney advocates can represent parties in due process hearings, there is no prohibition under the Act or its implementing regulations on non-attorney advocates assuming a representational role in due process hearings.

Changes: None.

Comment: Many commenters asserted that the proposed changes to § 300.512 would negatively affect future cases as parents unable to afford attorneys' fees, or unable to find an attorney knowledgeable about special education law, will be faced with the choice of either representing themselves or foregoing a due process hearing. Other commenters suggested that the proposed regulatory change has the potential to disrupt the State system of administrative due process hearings when lay advocates are not available to assist parents. One commenter noted that lay advocates are necessary to help represent parents because school officials are more knowledgeable about the law than parents, and there are more school lawyers than there are lawyers willing to represent parents in due process hearings. Some commenters noted that publicly funded programs providing legal representation to persons with disabilities are not funded at the level that meets the need for free or low-cost assistance. Another commenter noted that non-attorney advocates provide a necessary and valuable service to children with disabilities, and that limiting the role of non-attorney advocates will adversely affect the rights of children with disabilities in due process hearings. Other commenters argued that lay advocates serve an important function and are an excellent resource for families.

Discussion: We agree with the commenters that non-attorney advocates can perform a valuable service to parties in due process hearings. As just one example, non-attorney advisors with special knowledge of or training in the problems of children with disabilities who speak languages other than English can play an important role in accompanying and advising parents who do not speak English at due process hearings. However, because the Act is silent about the representational role of non-attorneys in due process hearings, States are not prohibited by the Act from regulating on that issue. Therefore, we make clear, in § 300.512, that whether non-attorneys can ''represent'' parties in due process hearings is a matter that is controlled by State law. There currently are States that prohibit non-attorney representation in due process hearings, and parties to due process hearings in those States need to understand that they may not be ''represented'' in a due process hearing by a non-attorney, although they may be ''accompanied and advised'' by a non-attorney in the due process hearing if that individual has special knowledge or training respecting the problems of children with disabilities.

Changes: None.

Comment: A few commenters recommended that States be required to provide parents with a list of available and affordable attorneys if State law does not allow for non-attorney representation in due process hearings. The commenters also recommended that the Department identify strategies to ensure that parents have access to free or reduced-fee representation by knowledgeable attorneys when legal counsel is necessary, such as appealing due process decisions in court.

Discussion: Current § 300.507 requires public agencies to inform a parent of any free or low-cost legal and other relevant services in the area if the parent requests the information or if the parent or public agency files a due process complaint. We expect States to work to ensure that parents for whom legal counsel under Part B of the Act is necessary have easy access to information about free or low-cost legal or other relevant services available in their area. Each State is in the best position to determine effective strategies to ensure that parents have access to information about free or low-cost assistance. For these reasons, we decline to make the requested changes to these regulations.

Changes: None.

Comment: One commenter opposed the proposed changes to § 300.512 and expressed concern that these changes will limit parents' representation during the IEP process. Another commenter stated that parents are intended to be ''equal partners'' in the educational decision-making process for their child under the Act, and therefore, should be able to utilize non-attorney assistance whenever necessary. Some commenters stated that effective advocacy is necessary to ensure that children have access to the services and programs necessary to develop an appropriate IEP.

Discussion: We agree with commenters that parents should be equal partners in the educational decision-making process for their child and that parents should be able to utilize assistance from non-attorney advocates whenever necessary, such as in securing an appropriate IEP for their child and, as noted previously in this preamble, in preparing for and participating in due process hearings. The proposed changes to § 300.512 only address whether a party can be represented by a non-attorney in a due process hearing, specifying that this matter is determined by State law. Whether parents may be ''represented'' by non-attorney advocates at other stages of the process is not addressed by the Act and also depends on State law. That said, under § 300.321(a)(6), the IEP Team may include, at the discretion of the parent or public agency, individuals who have knowledge or special expertise regarding the child, including non-attorney advocates. While these individuals are members of the IEP Team, their role is not to ''represent'' or speak for the parents.

Changes: None.

Comment: Several commenters expressed concern that proposed § 300.512 could lead to confusion because not all States have a clear position as to whether lay advocates can represent parents at due process hearings. Some of these commenters noted that 10 States currently bar lay advocates, 12 States permit lay advocates to represent parents in due process hearings, and that the positions of the remaining States are unclear. Given this disparity across States, these commenters expressed concern that leaving the decision to States could lead to more confusion and litigation, not less. A few commenters questioned whether States would be required to amend their laws to specify whether lay advocates can represent parties in due process hearings.

One commenter stated that proposed § 300.512 raises an issue to the national level that is only a problem in a few jurisdictions, and would lead to increased, and tangential, disputes. Another commenter stated that

appropriate representation should remain a matter of State law, but that the Department should not make the changes proposed to § 300.512 in the NPRM.

Discussion: We disagree with commenters that confusion will result from the changes reflected in proposed § 300.512. To the contrary, we expect that the effect of this amended provision will be to reduce confusion and the potential for litigation because parties will know to look to State law to determine whether non-attorneys can represent parties in due process hearings; States will know they are free to continue to permit or prohibit such representation. In the absence of State law on this point, there is nothing in the Act or these regulations that would prohibit non-attorneys with special knowledge or training respecting the problems of children with disabilities from representing parties in due process hearings. Nothing in proposed § 300.512 requires States to adopt changes to State law to address this issue.

Even though a relatively small number of States may prohibit non-attorneys from representing parties in IDEA due process hearings, it is still important for the Department to address this issue in its regulations. In the absence of that clarification, parties may not consider this issue at the time they are making decisions about how to proceed in a due process hearing, or may mistakenly rely on the April 8, 1981 letter from Theodore Sky, Acting General Counsel of the Department of Education, to the Honorable Frank B. Brouillet, in which the Department interpreted section 615 of the Act and implementing regulations to mean that attorneys and lay advocates may perform the same functions at due process hearings. As noted in the NPRM, the Department no longer interprets section 615 of the Act and implementing regulations in this manner. Nothing in amended § 300.512 should increase disputes, or raise an issue that is not already an issue under State law.

Changes: None.

Comment: One commenter noted that non-attorney lay advocates have long represented underprivileged persons in a variety of administrative hearings, including those concerning veterans' benefits, welfare benefits, and social security benefits.

Discussion: The programs cited by the commenter are Federal programs under which administrative hearings are conducted before the Federal agency. Due process hearings under IDEA, however, are conducted before a local or State hearing officer, as determined under State law. Absent specific statutory authority to require States to permit non-attorney representation, we do not believe we should impose such a requirement on States.

Changes: None.

Comment: A number of commenters stated that in some States school districts are represented by lay advocates and expressed concern that a rule applying only to parents would be both inconsistent and unfair. Some commenters stated that State regulations of the practice of law should affect equally parents and school districts. One commenter reported that lay advocates commonly represent a school district, but are not subject to license-based sanctions or censure or held to the legal profession's standards of candor and fair dealing. Others noted that school districts are often ''represented'' at hearings by agency representatives, including special education directors or other administrators, rather than attorneys.

Discussion: We agree with the commenters that a further change is needed to § 300.512 to specify that State law controls whether non-attorneys can represent any party in a due process hearing under the Act. We are persuaded by commenters who pointed out that public agencies also retain non-attorney advocates, and agree that the Act's silence on the matter of non-attorney representation in a due process hearing means that State law applies to all parties to a due process hearing.

Changes: We have revised the exception clause in § 300.512(a)(1) to specify that whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law.

Comment: Several commenters stated that proposed § 300.512 violates section 607 of the Act, which prohibits the adoption of any regulation that procedurally or substantively lessens the protections provided to children with disabilities in the regulations in effect on July 20, 1983 unless the regulation reflects the clear and unequivocal intent of Congress in legislation. These commenters noted that proposed § 300.512 was not in effect in 1983 and that no legislative change has been made to the right ''to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.''

Discussion: We disagree that the change reflected in proposed § 300.512 violates the provisions of section 607 of the Act. As the regulations that were in effect on July 20, 1983 did not address whether non-attorneys could ''represent'' parties to due process hearings, the regulations in effect at that time did not embody a right to representation by non-attorneys. Section 607 of the Act does not prevent the Department from addressing rights that were not in the regulations that were in effect on July 20, 1983.

Changes: None.

Comment: One commenter asked who proposed the changes to § 300.512, on what data the changes were based, and whether the Protection and Advocacy system was involved in proposing the changes to this section.

Discussion: The Department proposed the changes to § 300.512 because we came to accept, after the Delaware Supreme Court's decision in *In re Arons*, 756 A.2d 867 (Del. 2000), *cert. denied sub nom*, *Arons* v. *Office of Disciplinary Counsel*, 532 U.S. 1065 (2001), that the interpretation of the regulations in the 1981 letter from the Acting General Counsel of the Department was not persuasive, and that, because the Act does not specifically address non-attorney representation in due process hearings, State law controls whether non-attorneys can represent parties to due process hearings. The Protection and Advocacy system was not involved in proposing the change.

Changes: None.

Comment: One commenter expressed concern that the proposed changes in § 300.512 would increase the number of lawsuits against school districts by requiring the use of a lawyer and court action.

Discussion: We disagree with this comment because § 300.512 does not require the use of lawyers and does not concern court actions.

Changes: None.

Comment: A number of commenters stated that the issue of whether to allow parents to be represented by non-lawyers in IDEA due process hearings should be left to Congress to resolve. Many of these commenters stated that given the pending reauthorization of the Act, regulating on this topic is premature. Some commenters stated that this issue should be reviewed in Congressional oversight hearings. Many commenters argued that there is a need for review and consideration of available research data, or that research should first be conducted on the special education administrative due process systems of States and districts, before a change is made. Others called for research on the availability of legal representation for parents in due process hearings before a change in the Department's policy is made.

Discussion: We disagree with commenters that this matter should be left to Congress to resolve or that it is premature to address this issue given the pending reauthorization of the Act. Participants in due process hearings should understand that, under the current state of the law, the Act does not prohibit States from determining whether parties to due process hearings can be represented in those hearings by non-attorneys. We also disagree with commenters that additional research is needed to better understand the current state of State law on this issue before amending § 300.512. That said, we agree that additional information about the availability of legal representation for parties might be useful in helping Congress decide whether a change in the statute is advisable.

Changes: None.

Comment: A number of commenters remarked that Congressional inaction on the issue of lay advocate representation of parties in due process hearings after the *Arons* decision indicates that Congress did not mean to reverse the Department's longstanding policy that the Act permits non-attorney representation.

Discussion: We do not agree that Congressional acquiescence in the Department's prior interpretation can be inferred in this case. The commenters' assessment of the reasons that Congress decided to take no action in this regard is speculative. Congress was aware, at the time of the 2004 reauthorization, that non-attorneys were not permitted to represent parties in due process hearings in at least one State, Delaware. Therefore, we cannot assume that Congressional inaction meant that Congress viewed the Department's prior interpretation as controlling. Lack of congressional action could also mean that Congress believed that the *Arons* case was correctly decided, and that State law should control the representational role of non-attorneys in IDEA due process hearings.

Changes: None.

State Monitoring and Enforcement (§ 300.600)

C*omment:* None.

Discussion: In the course of our internal review of this provision, we noted that § 300.600(e) implied, but did not clearly state, that the one-year timeline for correction begins with the State's identification of the noncompliance.

Changes: We have revised § 300.600(e) to specify that correction of noncompliance must be completed no later than one year after the State's identification of the noncompliance.

Comment: A few commenters acknowledged that there are some areas of noncompliance that can be corrected within one year of identification; however, the commenters expressed concern that the one-year timeline is not realistic for findings of systemic noncompliance in substantive areas such as the provision of FAPE, placement in the least restrictive environment (LRE), and child find. Other commenters requested that proposed § 300.600(e) be revised to reflect ''degrees'' of noncompliance. For example, one commenter suggested that some instances of noncompliance (e.g., those related to a specific child's IEP implementation) should not take one year to correct; whereas instances of noncompliance related to systemic issues may take longer than one year to correct. The commenter also questioned how proposed § 300.600(e) will address situations involving longstanding noncompliance. Lastly, one commenter agreed with the intent of proposed § 300.600(e) but requested that the timeline be modified to allow for exceptions, such as allowing a State to initiate appropriate action to correct noncompliance within one year of identification or as soon as possible thereafter.

Discussion: Section 300.600(e) requires that all noncompliance related to the implementation of Part B of the Act be corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. These changes are necessary to ensure that children with disabilities are provided with the FAPE to which they are entitled so that they are able to make progress towards meeting IEP goals and statewide achievement standards.

While we agree with the commenters that some areas of noncompliance are more difficult to correct than others, we do not agree that the timeline should be extended beyond one year. Our experience has been that most States can correct noncompliance, including noncompliance that is spread broadly across a system, in less than one year from identification of the noncompliance. For example, States have required the implementation of short-term correction strategies while they are developing and implementing a plan for long-term change to ensure sustained compliance. An example of a short-term correction strategy coupled with a longer-term change might include contracting with speech therapists to provide the speech pathology services needed by current students while developing an in-district program to support speech pathology assistants to become certified speech language pathologists. Therefore, § 300.600(e) provides an appropriate timeline for correcting noncompliance, including systemic and long-standing noncompliance. In cases where a State is unable to correct noncompliance within one year of identification, as provided in § 300.600(e), a State may enter into a compliance agreement with the Department under section 457 of GEPA (Compliance Agreement), if the Department deems a Compliance Agreement appropriate. The purpose of a Compliance Agreement is to allow a State the time needed to correct long-standing systemic noncompliance and come into full compliance with the applicable requirements of the Federal program as soon as feasible, but not later than three years from the date of the Compliance Agreement. A Compliance Agreement allows a State to continue to receive its grant award under Part B of the Act while it works toward achieving full compliance under the terms of the agreement. Section 300.600(e), when read together with the provisions in section 457 of GEPA, adequately address the commenters' concerns.

We decline to amend the regulations to distinguish between or stratify types of noncompliance. Any noncompliance with the provisions in 34 CFR Part 300 is subject to the provisions in § 300.600(e), and, therefore, must be corrected as soon as possible, and in no case later than one year from identification. However, we do agree with the commenter who suggested that some instances of noncompliance, e.g., those related to child-specific IEP timelines, may be corrected far more quickly than one year from identification. We expect that all noncompliance in those instances will be corrected as soon as possible. We recognize, though, that not all noncompliance can be corrected immediately. In our more than 30 year experience in implementing Part B of the Act, we have found that one year is a reasonable outside time limit for States for correcting noncompliance.

For reasons previously stated in this preamble and because a State must initiate appropriate corrective actions immediately upon the identification of noncompliance, we decline to amend the regulations to allow for exceptions to the timely correction timeline in § 300.600(e) or to indicate that a State must only initiate appropriate action to correct noncompliance within one year or as soon as possible thereafter. The one-year timeline to correct noncompliance will ensure that most cases of noncompliance are corrected in one year or less, thereby facilitating the

provision of FAPE to children with disabilities.

Changes: None.

Comment: One commenter expressed concern that proposed § 300.600(e) contradicts the logic of § 300.604(b)(2)(ii), which allows compliance agreements if the Secretary has reason to believe that the State cannot correct the problem within one year. Additionally, the commenter stated that proposed § 300.600(e) will be problematic for data collection and analysis purposes because the strict one-year timeline may impede the SEA's ability to use the most current LEA data in determining whether or not a systemic violation has been corrected. The commenter noted that an SEA could erroneously determine, based on outdated data, that an LEA has corrected its noncompliance, allowing for the continuation of the violation and ultimately poor student outcomes.

Discussion: We do not agree that the provisions in § 300.600(e) contradict the provisions in § 300.604(b)(2)(ii). These two regulatory sections address two separate and distinct processes. While § 300.600(e) addresses the standard for the timely correction of noncompliance, § 300.604(b)(2)(ii) addresses enforcement actions available to the Secretary if the Secretary determines, for three or more consecutive years, that a State needs intervention under § 300.603(b)(1)(iii) in implementing the requirements of Part B of the Act. In situations where the Secretary determines, for three or more consecutive years, that a State needs intervention in implementing the requirements of Part B of the Act, the Secretary may require a State to enter into a Compliance Agreement if the Secretary has reason to believe that the State cannot correct noncompliance that has existed for multiple years, within one year.

We do not agree with the commenter that a one-year timeline will in any way impede the use of data in determining the correction of systemic noncompliance or contribute to diminished student outcomes. Many States collect compliance data using a real-time database. Therefore, correction of systemic noncompliance, or the continuation of noncompliance, can be determined at any time.

Changes: None.

Comment: One commenter stated that there is no statutory authority that requires correction of noncompliance within one year after the State's identification. The commenter further noted that under Indicator 15 in the State Performance Plan (SPP), a State must report on the percentage of noncompliance corrected within one year of identification and for any noncompliance not corrected within one year, the State must describe those actions, including technical assistance and enforcement actions the State has taken. The commenter noted that proposed § 300.600(e) appears to give a State two different policies to follow with respect to noncompliance.

Discussion: Section 612(a)(11) of the Act and § 300.149 require States to ensure that each educational program for children with disabilities administered within the State is under the general supervision of individuals responsible for educational programs for children with disabilities in the SEA. Section 616(a)(1)(C) of the Act and section 441a(b)(3)(A) of GEPA require a State to monitor implementation of Part B of the Act in each of its LEAs. Additionally, § 300.100, consistent with section 612(a) of the Act, requires that all States receiving funds under Part B of the Act provide assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the requirements of Part B of the Act, including the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608.

The Act is silent regarding a timeline for correction of noncompliance with the requirements of Part B of the Act. However, the Department recognizes that full, continuous compliance with Part B of the Act may not be possible. Therefore, the Department allows States, through § 300.600(e), a reasonable timeframe for correcting noncompliance; that is, any noncompliance must be corrected as soon as possible and in no case later than one year from identification. It is the Department's position that specifying a one-year timeline for correcting noncompliance is necessary to ensure proper and effective implementation of the requirements of Part B of the Act.

As noted previously, section 616(a)(3) of the Act requires the Secretary to monitor the States, and the States to monitor their LEAs, using quantifiable indicators in several priority areas, including a State's exercise of its general supervisory authority. As required by the Act, the Secretary established 20 indicators to monitor these priority areas.

Indicator 15 in the SPP measures the effectiveness of a State's general supervision by determining the percentage of noncompliance that was corrected within one year of identification. It is the Department's longstanding position, as reflected in Indicator 15 of the SPP, that when a State identifies noncompliance with the requirements of Part B of the Act by its LEAs, the noncompliance must be corrected as soon as possible, and in no case later than one year after the State identifies the noncompliance. The Department has established a target of 100 percent for Indicator 15, meaning States are expected to correct 100 percent of noncompliance as soon as possible, and in no case later than one year. Further, in our experience, when a State makes a good faith effort to correct noncompliance, the needed corrective actions can be accomplished and their effectiveness verified within one year. Finally, we expect that in the limited circumstances where correction does not occur within one year of the State's identification, the State will take specific enforcement actions with the LEA that are designed to achieve compliance. Section 300.600(e) is consistent with the Department's policy and guidance concerning the State's monitoring and enforcement responsibilities under Part B of the Act and the reporting requirements for Indicator 15.

Changes: None.

Comment: One commenter requested that the regulations include a more uniform process for States to follow in making annual determinations on the performance of LEAs because current practice differs from State to State.

Discussion: It is the Department's position that States should have some discretion in making annual determinations on the performance of their LEAs and, therefore, decline to establish, in regulation, a uniform process for making annual determinations under section 616(b)(2)(C)(ii)(I) of the Act. We have advised States that, at a minimum, a State's annual determination process must include consideration of the following: an LEA's performance on all SPP compliance indicators (e.g., Indicators 9, 10, 11, 12, 13, 15, 16, 17, and 20), whether an LEA submitted valid and reliable data for each indicator, LEA-specific audit findings, and any uncorrected noncompliance from any source. Additionally, we have advised States to consider performance on results indicators, such as an LEA's graduation and dropout rates, or the participation rate of students with disabilities in State assessments.

Changes: None.

Comment: One commenter recommended requiring the participation of federally funded Parent Training and Information Centers, Community Parent Resource Centers, Protection and Advocacy Agencies, and

parent and advocacy organizations and coalitions in the Federal and State monitoring processes.

Discussion: The Department encourages States to involve all stakeholders, including those noted by the commenter, in monitoring the implementation of Part B of the Act and these regulations. However, regulating, as the commenter requested, is not necessary because the commenter's concern is adequately addressed through other means. The Department engaged a number of stakeholders, including parent and advocacy organizations, in developing the Federal monitoring system, and continues to ensure that States include broad stakeholder input in the development of State targets and improvement activities. Additionally, under §§ 300.167 through 300.169, regarding the State Advisory Panel, States must establish and maintain an advisory panel with broad membership for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State. Section 300.169 specifies many duties of the State Advisory Panel, including advising the SEA of unmet needs in the education of children with disabilities within the State, developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act, and developing and implementing policies relating to the coordination of services for children with disabilities. All of these activities are integral to the effective ongoing monitoring of the full implementation of Part B of the Act.

Changes: None.

Timeframe for Public Reporting About LEA Performance Public Reporting and Privacy (§ 300.602(b))

Comment: Several commenters requested that we change the public reporting timeline in proposed § 300.602(b)(1)(i)(A). Some of these commenters argued that the Secretary does not have the statutory authority to establish a timeline and that meeting the timeline would be an excessive burden on States. Other commenters agreed with the concept of a timeline and offered suggestions as to what the timeline should be. Some commenters suggested that the regulations allow for State-determined timelines; others recommended timelines ranging from 90 to 120 days following a State's submission of its APR to the Secretary; still others recommended a 60 day timeline beginning with a State's receipt of its annual determination from the Secretary. Commenters stated that a State-determined timeline or a timeline triggered by the State's receipt of it annual determination from the Secretary would allow for a more careful analysis of individual LEA data, thereby ensuring more accurate public reporting on the performance of each LEA.

Discussion: Section 300.602(b)(1)(i)(A) implements section 616(b)(2)(C)(ii)(I) of the Act. Although the Act is silent on the timeline for public reporting, section 607(a) of the Act provides that the Secretary shall issue regulations to the extent that such regulations are necessary to ensure that there is compliance with specific requirements of the Act. We proposed a timeline for public reporting in the NPRM because there was uncertainty in the field about reporting requirements. Specifically, following the publication of the Part B regulations in 2006, the Department received many informal inquiries from SEA personnel and other interested parties regarding the timeline for reporting information to the public about LEAs' performance relative to its State's targets. It is still the Department's position, after consideration of the comments, that establishing a definitive timeline is necessary to ensure that each State provides timely information to the public.

We agree, however, with the commenters who suggested that an extended timeline would allow for more accurate analysis of LEA data, thereby improving the quality of information reported to the public and, ultimately, contributing to improved outcomes for children with disabilities and their families. Additionally, extending the timeline will reduce the burden associated with establishing a timeline for public reporting. Therefore, we have revised the timeline in § 300.602(b)(1)(i)(A) to require a State to report annually on the performance of each LEA located in the State on the targets in the State's SPP as soon as practicable but no later than 120 days following the submission of its APR to the Secretary under § 300.602(b)(2).

Changes: We have replaced the 60 day timeline in § 300.602(b)(2) with the requirement that the State report on the performance of each LEA located in the State on the targets in the State's SPP as soon as practicable but no later than 120 days following the State's submission of its APR to the Secretary.

Comment: One commenter suggested that changes to § 300.602 are not necessary and that issuing administrative guidance on public reporting requirements, including timelines, would be more appropriate.

Discussion: Public accountability is served by requiring States to make the documents referenced in § 300.602(b)(1)(i)(B) available to the public within a specific timeframe. A regulation provides a degree of certainty on the timing of notice to the public that administrative guidance would not. We are aware that a number of States did not post public reports on LEA performance for FFY 2005 year by the time they submitted their APRs on FFY 2006. Therefore, regulatory action, rather than non-regulatory guidance is needed to ensure the proper and effective implementation of the requirements of Part B of the Act.

Changes: None.

Comment: One commenter noted that proposed § 300.602(b)(1)(i)(B) differs from current § 300.602(b) in that it refers to the State's Web site as opposed to the SEA's Web site. This commenter requested that the Department clarify whether the information must be posted on the SEA's or the State's Web site in instances where SEAs have Web sites that are separate from State government Web sites.

Discussion: We agree that the reference in the regulations should be to the SEA's Web site, rather than to the State's Web site, and have made this change.

Changes: Sections 300.602(b)(1)(i)(B) and 300.606 have been revised to require posting on the SEA's Web site, rather than the State Web site.

Comment: Another commenter requested that the Department clarify each State's obligation to make public any former reports on the performance of the LEAs within the State as well as the time frame when this information must be made available to the public.

Discussion: Neither the Act nor the regulations address the public posting of reports on the performance of the LEAs that were issued prior to the promulgation of these regulations. Posting historical documents related to the implementation of the IDEA on an SEA's Web site may be beneficial, but it is not required by the Act or the regulations implementing Part B of the Act. The decision to post historical documents and a timeline for posting these reports and notices would be most appropriately decided by each State.

Changes: None.

Additional Information To Be Made Available to the Public (§ 300.602)

Comment: One commenter suggested that the requirement in § 300.602(b)(1)(i)(B) to distribute the State's SPP, the State's APR, and the State's annual reports on the performance of LEAs to the media and public agencies represents an undue paperwork burden on SEAs and would

result in the excessive distribution of paper.

Discussion: Neither § 300.602(b)(1)(i)(B) nor section 616(b)(2)(C)(ii)(I) of the Act requires the distribution of paper copies of the SPP and APRs to the media and public agencies. Therefore, we do not agree that implementing this requirement would result in an excessive distribution of paper copies of these reports.

Changes: None.

Notifying the Public of Enforcement Actions (§ 300.606)

Comment: One commenter requested that the Department require SEAs to report to the public any enforcement actions taken against their LEAs pursuant to § 300.604 because doing so would be consistent with publication of enforcement actions against the State by the Secretary of Education.

Discussion: Neither the Act nor these regulations require SEAs to publicly report on enforcement actions taken against LEAs in the State. The decision to report to the public on enforcement actions imposed on an LEA is best left to each State to decide because individual LEA circumstances vary across each State and no one set of requirements is appropriate in every situation. For example, publicly reporting enforcement actions taken against an LEA with limited numbers of children with disabilities would not be appropriate if that public reporting would in any way reveal personally identifiable information of children with disabilities in that LEA. However, in the interest of transparency and public accountability, the Department encourages States, where appropriate, to report to the public on any enforcement actions taken against LEAs under § 300.604.

Changes: None.

Comment: One commenter stated that increasing public accountability is important and requested that the regulations require States and districts to publicly post and make available to the public the Department's SPP/APR determination letters as well as Federal- or State-required corrective actions and enforcement actions.

Discussion: We encourage States to post all information, including corrective actions and enforcement actions related to their SPP/APR, on their Web sites. However, regulating on this issue, as the commenter requested, is not necessary because this information is posted on the Department's Web site when the Department responds to States' SPP/APR submission. These response letters are typically issued in June of each year following the States' submission of their SPP/APR and posted on the Department's Web site at: *http://www.ed.gov/fund/data/report/idea/partbspap/index.html.*

Changes: None.

Comment: One commenter requested that the phrase ''proposing to take'' in proposed § 300.606 be clarified or eliminated. The commenter recommended using the language from page 27694 of the NPRM stating that a State must provide public notice when the Secretary ''takes'' an enforcement action as a result of annual determinations under § 300.604.

Discussion: The language in § 300.606 is accurate and we decline to make the requested change for the following reasons. Section 300.606 implements section 616(e)(7) of the Act, and requires a State that has received notice, under section 616(d)(2) of the Act, of a pending enforcement action against the State under section 616(e) of the Act to provide public notice of the pendency of that action. Pursuant to section 616(d)(2)(B) of the Act, a State that has been determined to ''need intervention'' for three consecutive years or ''need substantial intervention'' in implementing the requirements of Part B of the Act, faces enforcement actions and is entitled to reasonable notice and an opportunity for a hearing on such a determination. If a State requests a hearing on a determination, the Department's final determination would not be made until after that hearing. In this situation, the enforcement action also would depend on the outcome of the hearing and final determination. Therefore, in a case such as this, the public must be notified that the Secretary is proposing to take, but has not yet taken, an enforcement action pursuant to § 300.604.

Changes: None.

Comment: One commenter stated that the changes in proposed § 300.606 are unnecessary because current § 300.606 already requires the public to be notified of an action ''taken pursuant to § 300.604.'' The commenter stated that specifying in these regulations that ''public notice'' consists of posting information on a Web site and distributing information to the media and public agencies is unnecessary to ensure compliance with IDEA.

Discussion: We disagree with the commenter. We have received numerous inquiries regarding current § 300.606 and whether this provision requires public notification of each determination of ''needs assistance'', ''needs intervention'' and ''needs substantial intervention'' or whether it merely requires States to notify the public of enforcement actions taken by the Secretary. We intend for § 300.606, as proposed in the NPRM, to clarify the public reporting requirements by indicating that a State must provide public notice of any enforcement action taken by the Secretary pursuant to § 300.604 by posting the notice on the SEA's Web site and distributing the notice to the media and through public agencies. This clarification is further designed to minimize a State's reporting burden while providing the public with appropriate notice of the actions taken by the Secretary as a result of the determinations required by section 616(d) of the Act and § 300.603. For these reasons, we decline to make any regulatory changes based on this comment.

Changes: None.

Subgrants to LEAs (§ 300.705(a))

Comment: A few commenters supported the proposed changes to § 300.705(a) clarifying that States are required to make a subgrant under section 611(f) of the Act to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities, because all LEAs have a responsibility to identify and provide services to children with disabilities. The commenters stated that the Department should ensure that a newly created LEA not serving any children with disabilities in the first year would still be eligible for some IDEA funds (e.g., based on enrollment and the number of students in poverty) to allow the new LEA to conduct child find activities and serve any students who are identified as eligible for special education services later in the year.

Some commenters opposed this provision and recommended that given the current level of IDEA Federal funding, funds should be used for direct services for students who are currently eligible for special education and related services. Additionally, one of these commenters expressed concern that § 300.705(a) would require revising current State and local funding processes, which would place accounting and administrative burdens on both State and local systems. A few commenters stated that the proposed change to § 300.705(a) is unnecessary because States have been successful in ensuring that small school districts receive allocations when they enroll a student with a disability. Lastly, one commenter suggested that the proposed changes could be handled through administrative guidance, rather than regulations.

Discussion: Section 300.705(a), consistent with section 611(f)(1) of the Act, requires each State to provide subgrants to LEAs, including public charter schools that operate as LEAs in the State, that have established their eligibility under section 613 of the Act. Section 613(a) of the Act states that an LEA is eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act. There is no requirement in section 613(a) of the Act that an LEA must be serving children with disabilities for an LEA to be eligible for a subgrant. Requiring States to make a subgrant to all eligible LEAs, including public charter schools that operate as LEAs, will ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve children with disabilities who subsequently enroll or are identified during the year. Regardless of the level of funding made available for the Part B program under the Act, neither the Act nor the implementing regulations require that Part B funds be spent only for direct services for students who are currently eligible for special education and related services. As in the past, LEAs may use Part B funds for direct services to children with disabilities or for other permissible activities, such as child find, professional development, and more recently, for coordinated early intervening services in accordance with § 300.226.

The Grants to States and Preschool Grants for Children with Disabilities Programs are forward-funded programs and LEAs generally receive a subgrant at the beginning of the school year to cover the costs of providing special education and related services to children with disabilities during the school year. Ensuring that all LEAs, including those that have no children with disabilities enrolled at the beginning of the school year, have section 611 and section 619 funds available will enable LEAs to meet their responsibilities under the Act during the school year if a child with a disability subsequently enrolls or a child is subsequently identified as having a disability.

We understand the commenter's concern that this change in the regulations may require States to revise their procedures for distributing Part B funds, and that there may be some administrative burden associated with these changes. However, the importance of ensuring consistency across States concerning the distribution of section 611 and section 619 funds outweighs the potential administrative burden. As previously stated in this preamble, making these funds available to LEAs is critical to ensure that each LEA is able to fulfill its responsibilities under the Act. We agree with commenters that some States have been successful in ensuring small LEAs receive allocations when they enroll students with disabilities after the school year has begun. However, given that the Act and the implementing regulations are silent on whether an SEA must make a subgrant to an LEA that is not serving any children with disabilities, clarification is necessary in §§ 300.705(a) and 300.815 to remove any ambiguity in this regard. Revising the regulations, rather than remaining silent on the issue or issuing guidance, will ensure that all States treat LEAs in the same manner, including those LEAs that are not serving any children with disabilities, when allocating Part B funds.

Changes: None.

Comment: A few commenters recommended that the proposed regulations be modified to give States the option of making subgrants to eligible LEAs, including public charter schools that operate as LEAs, when an LEA is not currently serving any students with disabilities. The commenters stated that States have different needs and some have policies in place to help new charter schools meet their child find obligations.

Discussion: We recognize that States are in a unique position to assist new LEAs, including charter schools that operate as LEAs. However, requiring States to make a subgrant under section 611(f) and section 619(g) of the Act to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities, ensures consistency across States and an equitable distribution of Part B funds. We also recognize that some States may not assign child find responsibility to public charter schools that operate as LEAs. However, all LEAs, including public charter schools that operate as LEAs, have other responsibilities under the IDEA that may need to be carried out during the school year, such as serving a child with a disability who is identified during the school year. It is the Department's position that it is necessary to require States to make (rather than give them the option of making) subgrants to eligible LEAs not currently serving any students with disabilities, to ensure that all States treat LEAs in the same manner, including those LEAs that are not serving any children with disabilities, when allocating Part B funds.

Changes: None.

Comment: One commenter recommended that the Department withdraw the proposed changes and add, if necessary, a new paragraph in §§ 300.705 and 300.815 that would allow a new or expanded charter school to receive an allocation under §§ 300.705 and 300.815, respectively, if the school demonstrates to the SEA that the school is serving children with disabilities in accordance with the requirements of Part B of the Act within the time frame established by the SEA under 34 CFR 76.788(b)(2)(i), which provides that once a charter school LEA has opened or significantly expanded its enrollment, the charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require.

Discussion: We do not agree that the change suggested by the commenter is necessary. An eligible public charter school LEA has the responsibility to meet the requirements of the Act during the school year regardless of whether the LEA is serving children with disabilities at the time the subgrant is calculated based on actual enrollment and eligibility data. In recognition of these responsibilities, requiring an SEA to make an initial subgrant to a new or expanded public charter school LEA is appropriate, even if it is not serving any children with disabilities at the time actual enrollment and eligibility data are provided to the SEA.

Changes: None.

Reallocation of LEA Funds (§ 300.705(c))

Comment: One commenter supported proposed § 300.705(c). Another commenter requested clarification as to the types of activities that could be supported with the Part B funds that an LEA does not need to provide FAPE, if a State chooses to retain the funds, instead of reallocating the funds to other LEAs in the State. One commenter recommended that the State be authorized to reallocate the funds intended to be allocated to an LEA or retain them for State-level activities only after consulting with the LEA to assess the LEA's needs and after determining that the LEA does not need the funds.

Discussion: A State, under § 300.705(c), may use funds from an LEA that does not need the funds for any allowable activities permitted under § 300.704, to the extent that the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704(a) and (b). To the extent the State has not reserved the maximum

amount for administration, the State may use those funds for administrative costs consistent with § 300.704(a). To the extent the State has not reserved the maximum amount of funds available for other State-level activities, the State may use those funds for any allowable activities permitted under § 300.704(b)(3) and (4) including, but not limited to, technical assistance, personnel preparation, and assisting LEAs in providing positive behavioral interventions and supports. Additionally, if the State has opted to finance a high-cost fund under § 300.704(c) and has not reserved the maximum amount available for the fund, the State may use those funds for the LEA high-cost fund consistent with § 300.704(c).

In response to the commenter that recommended that the State be permitted to reallocate funds only after consulting with the LEA to assess the LEA's needs, nothing in these regulations prohibits a State from working with an LEA to assess the needs of the LEA before determining that the LEA will not be able to use the funds prior to the end of the carryover period. However, we believe it would be burdensome and unnecessary to require that an SEA consult with an LEA to assess the LEA's needs prior to a reallocation of the LEA's remaining unobligated funds. The LEA would have already had sufficient time and incentive during the carryover period of availability to assess its own needs and make appropriate obligations for needed expenditures.

Changes: None.

Subgrants to LEAs (§ 300.815)

Comment: One commenter supported the changes proposed to § 300.815. Another commenter opposed this provision, which would require States to allocate funds under section 619 of the Act to an LEA even if the LEA is not serving children with disabilities; this commenter stated that the funds should be directed toward serving preschool children with disabilities.

Discussion: Section 300.815, consistent with section 619(g) of the Act, requires that each State provide subgrants to LEAs, including public charter schools that operate as LEAs in the State, that are responsible for providing education to children aged three through five years and have established their eligibility under section 613 of the Act. Section 613(a) of the Act states that an LEA is eligible for assistance under Part B of the Act for a fiscal year if the LEA submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in section 613(a) of the Act. There is no requirement in section 613(a) of the Act that an LEA must be serving preschool children with disabilities for an LEA to be eligible for a subgrant. Requiring States to make a subgrant to all eligible LEAs responsible for providing education to preschool children, including public charter schools that operate as LEAs, will help ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve preschool children with disabilities who subsequently enroll or are identified during the school year. As in the past, LEAs may use section 619 funds for direct services to preschool children with disabilities or for other permissible activities, such as child find and professional development.

Changes: None.

Reallocation of LEA Funds (§ 300.817)

Comment: One commenter supported the changes reflected in proposed § 300.817. Another commenter opposed the changes, stating that the time and effort needed for States to monitor LEAs as provided in § 300.817 could be better used elsewhere.

Discussion: We understand the commenter's concern that this provision will require States to revise their procedures for monitoring the obligation of funds. However, requiring an SEA, after it distributes Part B funds to an LEA that is not serving any children with disabilities, to determine, within a reasonable period of time prior to the end of the carryover period in § 300.709, whether the LEA has obligated those funds will prevent the funds from lapsing and enable the State to use those funds for other purposes. Therefore, the benefit of this provision outweighs the potential administrative burden.

Changes: None.

Executive Order 12866

Costs and Benefits

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive Order and review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive Order.

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action as required by Executive Order 12866.

Summary of Public Comments

The Department received one comment on the analysis of costs and benefits included in the NPRM. These commenters suggested that the Department should only propose new regulations in conjunction with the reauthorization of the Act because any subsequent regulations would require States to amend their regulations and this process is expensive and time consuming. These comments were considered in conducting the analysis of the costs and benefits of the final regulations. The Department's estimates and assumptions included in the analysis are described in the following paragraphs.

1. Summary of Costs and Benefits

The potential costs associated with these final regulations are those resulting from statutory requirements and those we have determined are necessary to administer these programs effectively and efficiently. In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs. We also have determined that this regulatory action will not unduly interfere with State, local, private, and tribal governments in the exercise of their governmental functions.

The following is an analysis of the costs and benefits of the most significant changes reflected in these final regulations. In conducting this analysis, the Department examined the extent the changes made by these regulations add to or reduce the costs for States, LEAs, and others, as compared to the costs of implementing the current Part B program regulations. Variations in practice from State to State and a lack of pertinent data make it difficult to predict the effect of these changes. However, based on the following analysis, the Secretary has concluded

that the changes reflected in the final regulations will not impose significant net costs on the States, LEAs, and others.

Parental Revocation of Consent for Special Education Services (§§ 300.9 and 300.300)

Section 300.300(b)(4) allows a parent, at any time subsequent to the initial provision of special education and related services, to revoke consent in writing for the continued provision of special education and related services. Once the parent revokes consent for special education and related services the public agency must provide the parent with prior written notice consistent with § 300.503. The final regulations do not allow public agencies to take steps to override a parent's refusal to consent to further services.

We do not agree with the commenters who recommended that the Department postpone making these regulatory revisions until the next reauthorization of IDEA. The changes reflected in §§ 300.9 and 300.300 were made in response to comments received on the consent provisions proposed in the notice of proposed rulemaking for Part B of the Act that was published in the **Federal Register** on June 21, 2005 (70 FR 35782), including comments requesting that we address situations when a child's parent wants to discontinue special education and related services because he or she believes that the child no longer needs those services. In response to these comments, we indicated that we would solicit comment on this suggested change in a subsequent notice of proposed rulemaking. While States may have to revise some of their regulations to conform with the changes in §§ 300.9 and 300.300, the provisions related to parental revocation of consent may reduce burden on, and costs to, LEAs by relieving them of the obligation to override a parent's refusal to consent subsequent to the initiation of special education services through informal means or through due process procedures. Therefore, the Department's position is that allowing parents to revoke consent for special education and related services will not have a significant cost impact on States, LEAs, or others.

2. Clarity of the Regulations

The Department received one comment concerning the clarity of the regulations proposed in the NPRM. The commenter stated that the regulations are written at an advanced reading level, not written in plain language, and are in a font that is too small. We have reviewed the regulations to ensure that they are easy to understand and written in plain language. Additionally, the final regulations will be posted on the Department's Web site and the Department's Web site meets the accessibility standards included in section 508 of the Rehabilitation Act of 1973, as amended.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), we have assessed the information collections in these regulations that are subject to review by the Office of Management and Budget. Based on this analysis, the Secretary has concluded that these amendments to the Part B IDEA regulations do not impose additional information collection requirements. The changes to § 300.602(b)(1)(i)(B) add the State's APR to the list of documents that a State must make available through public means, and specify that the SEA must make the State's SPP/APR and the State's annual reports on the performance of each LEA in the State available to the public by posting the documents on the SEA's Web site and distributing the documents to the media and through public agencies. Each State already is required to report to the Secretary on the annual performance of the State as a whole in the APR. We expect the additional time for reporting to the public to be minimal because the APR is a completed document. Additionally, this reporting requirement is within the established reporting and recordkeeping estimate of current information collection 1820–0624 (71 FR 46751–46752). States already are required by current § 300.602(a) and (b)(1)(i)(A) to analyze the performance of each LEA on the State's targets, and to report annually to the public on the performance of each LEA in meeting the targets. Requiring that these documents be posted on the SEA's Web site and be distributed to the media and through public agencies merely adds specificity about the means of public reporting. The additional time for reporting to the public through these means will be minimal and is within the established reporting and recordkeeping estimate of current information collection 1820–0624 (71 FR 46751–46752).

Intergovernmental Review

This program is subject to requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of Federal financial assistance.

In accordance with this order, we intend this document to provide early notification of the Department's specific plans and actions for these programs.

Assessment of Educational Impact

In the NPRM, and in accordance with section 411 of GEPA, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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List of Subjects in 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: November 21, 2008.

Margaret Spellings,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

* * * * *

■ 2. Section 300.9 is amended by adding a new paragraph (c)(3).

The addition reads as follows:

§ 300.9 Consent.

* * * * *

(c) * * *

(3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

* * * * *

■ 3. Section 300.177 is revised to read as follows:

§ 300.177 States' sovereign immunity and positive efforts to employ and advance qualified individuals with disabilities.

(a) *States' sovereign immunity.*

(1) A State that accepts funds under this part waives its immunity under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of this part.

(2) In a suit against a State for a violation of this part, remedies (including remedies both at law and in equity) are available for such a violation in the suit against any public entity other than a State.

(3) Paragraphs (a)(1) and (a)(2) of this section apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990.

(b) *Positive efforts to employ and advance qualified individuals with disabilities.* Each recipient of assistance under Part B of the Act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.

(Authority: 20 U.S.C. 1403, 1405)

■ 4. Section 300.300 is amended by:

■ A. Revising paragraphs (b)(3) and (b)(4).

■ B. In paragraph (d)(2), removing the words ''paragraph (a)'' and inserting, in their place, the words ''paragraphs (a), (b), and (c)''.

■ C. In paragraph (d)(3), adding after the words ''paragraphs (a)'' the words '', (b), (c),''.

The revision reads as follows:

§ 300.300 Parental consent.

* * * * *

(b) * * *

(3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency—

(i) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

(iii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child.

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

(i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with § 300.503 before ceasing the provision of special education and related services;

(ii) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.

* * * * *

■ 5. Section 300.512 is amended by revising paragraph (a)(1) to read as follows:

§ 300.512 Hearing rights.

(a) * * *

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except that whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law;

* * * * *

■ 6. Section 300.600 is amended by:

■ A. Revising paragraph (a).

■ B. Adding a new paragraph (e).

The revision and addition read as follows:

§ 300.600 State monitoring and enforcement.

(a) The State must—

(1) Monitor the implementation of this part;

(2) Make determinations annually about the performance of each LEA using the categories in § 300.603(b)(1);

(3) Enforce this part, consistent with § 300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA), and (c)(2) (withholding funds, in whole or in part, by the SEA); and

(4) Report annually on the performance of the State and of each LEA under this part, as provided in § 300.602(b)(1)(i)(A) and (b)(2).

* * * * *

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance.

* * * * *

■ 7. Section 300.602(b)(1)(i) is revised to read as follows:

§ 300.602 State use of targets and reporting.

* * * * *

(b) * * *

(1) * * *

(i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(A) Report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan as soon as practicable but no later than 120 days following the State's submission of its annual performance report to the Secretary under paragraph (b)(2) of this section; and

(B) Make each of the following items available through public means: the State's performance plan, under § 300.601(a); annual performance reports, under paragraph (b)(2) of this section; and the State's annual reports on the performance of each LEA located in the State, under paragraph (b)(1)(i)(A)

of this section. In doing so, the State must, at a minimum, post the plan and reports on the SEA's Web site, and distribute the plan and reports to the media and through public agencies.

* * * * *

■ 8. Section 300.606 is revised to read as follows:

§ 300.606 Public attention.

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to § 300.604, the State must, by means of a public notice, take such actions as may be necessary to notify the public within the State of the pendency of an action pursuant to § 300.604, including, at a minimum, by posting the notice on the SEA's Web site and distributing the notice to the media and through public agencies.

(Authority: 20 U.S.C. 1416(e)(7))

■ 9. Section 300.705 is amended by:
■ A. Revising paragraph (a).
■ B. In paragraph (b)(2)(ii), removing the word ''and'' at the end of the paragraph.
■ C. In paragraph (b)(2)(iii), removing the punctuation ''.'' and adding, in its place, the words ''; and''.
■ D. Adding a new paragraph (b)(2)(iv).
■ E. Revising paragraph (c).

The revisions and addition read as follows:

§ 300.705 Subgrants to LEAs.

(a) *Subgrants required.* Each State that receives a grant under section 611 of the Act for any fiscal year must distribute any funds the State does not reserve under §300.704 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act for use in accordance with Part B of the Act. Effective with funds that become available on the July 1, 2009, each State must distribute funds to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities.

(b) * * *

(2) * * *

(iv) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. The State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.

* * * * *

(c) *Reallocation of LEA funds.* (1) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under this part that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.

(2) After an SEA distributes funds under this part to an eligible LEA that is not serving any children with disabilities, as provided in paragraph (a) of this section, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.704.

* * * * *

■ 10. Section 300.815 is revised to read as follows:

§ 300.815 Subgrants to LEAs.

Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds the State does not reserve under § 300.812 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act. Effective with funds that become available on July 1, 2009, each State must distribute funds to eligible LEAs that are responsible for providing education to children aged three through five years, including public charter schools that operate as LEAs, even if the LEA is not serving any preschool children with disabilities.

(Authority: 20 U.S.C. 1419(g)(1))

■ 11. Section 300.816 is amended by:
■ A. In paragraph (b)(2), removing the word ''and''.
■ B. In paragraph (b)(3), removing the punctuation ''.'' and adding, in its place, the words ''; and''.
■ C. Adding a new paragraph (b)(4) to read as follows:

§ 300.816 Allocations to LEAs.

* * * * *

(b) * * *

(4) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities aged three through five years. The State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities aged three through five years now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities aged three through five years currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.

* * * * *

■ 12. Section 300.817 is revised to read as follows:

§ 300.817 Reallocation of LEA funds.

(a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five years residing in the area served by the LEA with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

(b) After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in § 300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not

obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to § 300.812.

(Authority: 20 U.S.C. 1419(g)(2))

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Part V

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 229
List of Fisheries for 2009; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 080204115–8832–02]

RIN 0648–AW48

List of Fisheries for 2009

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

ACTION: Final rule.

SUMMARY: The National Marine Fisheries Service (NMFS) publishes its final List of Fisheries (LOF) for 2009, as required by the Marine Mammal Protection Act (MMPA). The final LOF for 2009 reflects new information on interactions between commercial fisheries and marine mammals. NMFS must categorize each commercial fishery on the LOF into one of three categories under the MMPA based upon the level of serious injury and mortality of marine mammals that occurs incidental to each fishery. The categorization of a fishery in the LOF determines whether participants in that fishery are subject to certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements.

DATES: This final rule is effective on January 1, 2009.

ADDRESSES: *See* **SUPPLEMENTARY INFORMATION** for a listing of all Regional Offices.

Comments regarding the burden-hour estimates, or any other aspect of the collection of information requirements contained in this final rule, should be submitted in writing to Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or to David Rostker, OMB, by fax to 202–395–7285 or by e-mail to *David_Rostker@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Melissa Andersen, Office of Protected Resources, 301–713–2322; David Gouveia, Northeast Region, 978–281–9328; Laura Engleby, Southeast Region, 727–824–5312; Elizabeth Petras, Southwest Region, 562–980–3238; Brent Norberg, Northwest Region, 206–526–6733; Bridget Mansfield, Alaska Region, 907–586–7642; Lisa Van Atta, Pacific Islands Region, 808–944–2257. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Availability of Published Materials

Information regarding the LOF and the Marine Mammal Authorization Program, including registration procedures and forms, current and past LOFs, observer requirements, and marine mammal injury/mortality reporting forms and submittal procedures, may be obtained at: *http://www.nmfs.noaa.gov/pr/interactions/lof/*, or from any NMFS Regional Office at the addresses listed below.

Regional Offices

NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930–2298, *Attn:* Marcia Hobbs;

NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, *Attn:* Teletha Mincey;

NMFS, Southwest Region, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213, *Attn:* Lyle Enriquez;

NMFS, Northwest Region, 7600 Sand Point Way, NE., Seattle, WA 98115, *Attn:* Permits Office;

NMFS, Alaska Region, Protected Resources, P.O. Box 22668, 709 West 9th Street, Juneau, AK 99802, *Attn:* Bridget Mansfield; or

NMFS, Pacific Islands Region, Protected Resources, 1601 Kapiolani Boulevard, Suite 1100, Honolulu, HI 96814–4700, *Attn:* Lisa Van Atta.

What Is the List of Fisheries?

Section 118 of the MMPA requires NMFS to place all U.S. commercial fisheries into one of three categories based on the level of incidental serious injury and mortality of marine mammals occurring in each fishery (16 U.S.C. 1387(c)(1)). The categorization of a fishery in the LOF determines whether participants in that fishery may be required to comply with certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements. NMFS must reexamine the LOF annually, considering new information in the Marine Mammal Stock Assessment Reports (SAR) and other relevant sources, and publish in the **Federal Register** any necessary changes to the LOF after notice and opportunity for public comment (16 U.S.C. 1387 (c)(1)(C)).

How Does NMFS Determine in Which Category a Fishery Is Placed?

The definitions for the fishery classification criteria can be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2). The criteria are also summarized here.

Fishery Classification Criteria

The fishery classification criteria consist of a two-tiered, stock-specific approach that first addresses the total impact of all fisheries on each marine mammal stock, and then addresses the impact of individual fisheries on each stock. This approach is based on consideration of the rate, in numbers of animals per year, of incidental mortalities and serious injuries of marine mammals due to commercial fishing operations relative to the potential biological removal (PBR) level for each marine mammal stock. The MMPA (16 U.S.C. 1362 (20)) defines the PBR level as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. This definition can also be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2).

Tier 1: If the total annual mortality and serious injury of a marine mammal stock, across all fisheries, is less than or equal to 10 percent of the PBR level of the stock, all fisheries interacting with the stock would be placed in Category III (unless those fisheries interact with other stock(s) in which total annual mortality and serious injury is greater than 10 percent of PBR). Otherwise, these fisheries are subject to the next tier (Tier 2) of analysis to determine their classification.

Tier 2, Category I: Annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the PBR level.

Tier 2, Category II: Annual mortality and serious injury of a stock in a given fishery is greater than 1 percent and less than 50 percent of the PBR level.

Tier 2, Category III: Annual mortality and serious injury of a stock in a given fishery is less than or equal to 1 percent of the PBR level.

While Tier 1 considers the cumulative fishery mortality and serious injury for a particular stock, Tier 2 considers fishery-specific mortality and serious injury for a particular stock. Additional details regarding how the categories were determined are provided in the preamble to the proposed rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995).

Because fisheries are categorized on a per-stock basis, a fishery may qualify as one Category for one marine mammal stock and another Category for a different marine mammal stock. A fishery is typically categorized on the

LOF at its highest level of classification (e.g., a fishery qualifying for Category III for one marine mammal stock and for Category II for another marine mammal stock will be listed under Category II).

Other Criteria That May Be Considered

In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, NMFS will determine whether the incidental serious injury of mortality is ''occasional'' by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator for Fisheries (50 CFR 229.2). Further, eligible commercial fisheries not specifically identified on the LOF are deemed to be Category II fisheries until the next LOF is published.

How Does NMFS Determine Which Species or Stocks Are Included as Incidentally Killed or Seriously Injured in a Fishery?

The LOF includes a list of marine mammal species or stocks incidentally killed or seriously injured in each commercial fishery, based on the level of mortality or serious injury in each fishery relative to the PBR level for each stock. To determine which species or stocks are included as incidentally killed or seriously injured in a fishery, NMFS annually reviews the information presented in the current SARs. The SARs are based upon the best available scientific information and provide the most current and inclusive information on each stock's PBR level and level of mortality or serious injury incidental to commercial fishing operations. NMFS also reviews other sources of new information, including observer data, stranding data, and fisher self-reports.

In the absence of reliable information on the level of mortality or serious injury of a marine mammal stock, or insufficient observer data, NMFS will determine whether a species or stock should be added to, or deleted from, the list by considering other factors such as: changes in gear used, increases or decreases in fishing effort, increases or decreases in the level of observer coverage, and/or changes in fishery management that are expected to lead to decreases in interactions with a given marine mammal stock (such as a fishery management plan or a take reduction plan). NMFS will provide case-specific justification in the LOF for changes to the list of species or stocks incidentally killed or seriously injured.

How Does NMFS Determine the Level of Observer Coverage in a Fishery?

Data obtained from observers and the level of observer coverage are important tools in estimating the level of marine mammal mortality and serious injury in commercial fishing operations. The best available information on the level of observer coverage, and the spatial and temporal distribution of observed marine mammal interactions, is presented in the SARs. Starting with the 2005 SARs, each SAR includes an appendix with detailed descriptions of each Category I and II fishery in the LOF, including observer coverage. The SARs generally do not provide detailed information on observer coverage in Category III fisheries because, under the MMPA, Category III fisheries are not required to accommodate observers aboard vessels due to the remote likelihood of mortality and serious injury of marine mammals. Information presented in the SARs' appendices includes: level of observer coverage, target species, levels of fishing effort, spatial and temporal distribution of fishing effort, characteristics of fishing gear and operations, management and regulations, and interactions with marine mammals. Copies of the SARs are available on the NMFS Office of Protected Resource's Web site at: *http://www.nmfs.noaa.gov/pr/sars/*. Additional information on observer programs in commercial fisheries can be found on the NMFS National Observer Program's Web site: *http://www.st.nmfs.gov/st4/nop/*.

How Do I Find Out if a Specific Fishery Is in Category I, II, or III?

This final rule includes three tables that list all U.S. commercial fisheries by LOF Category. Table 1 lists all of the fisheries in the Pacific Ocean (including Alaska); Table 2 lists all of the fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean; Table 3 lists all U.S.-authorized fisheries on the high seas. A fourth table, Table 4, lists all fisheries managed under applicable take reduction plans or teams.

Are High Seas Fisheries Included on the LOF?

Beginning with the 2009 LOF, NMFS includes high seas fisheries in Table 3 of the LOF, along with the number of valid High Sea Fishing Compliance Act (HSFCA) permits in each fishery. Many fisheries operate in both U.S. waters and on the high seas, creating some overlap between the fisheries listed in Tables 1 and 2 and those in Table 3. In these cases, the high seas component of the fishery is not a separate fishery, but an extension of a fishery operating within U.S. waters (listed in Table 1 or 2). NMFS designates those fisheries in Tables 1, 2, and 3 by an ''*'' after the fishery's name. The number of HSFCA permits listed in Table 3 for the high seas components of these fisheries operating in U.S. waters do not necessarily represent additional fishers that are not accounted for in Tables 1 and 2. Many fishers holding these permits also fish within U.S. waters and are included in the number of vessels and participants operating within those fisheries in Table 1 and 2.

How Does NMFS Authorize U.S. Vessels To Participate in High Seas Fisheries?

NMFS issues high seas fishing permits, valid for five years, under the HSFCA. To fish under a high seas permit, a fisher must also possess any required permits issued under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (with the exception of the South Pacific Tuna Treaty fisheries, the Pacific Tuna Fisheries (Eastern Tropical Pacific purse seine vessels) and the South Pacific Albacore Troll fishery), and any permits issued by NMFS to fish within the convention area of a Regional Fishery Management Organization. Under the current permitting system, however, a fisher can obtain a high seas permit prior to obtaining any necessary MSA permits. Similarly, a fisher may have a HSFCA permit that was issued prior to changes in permits issued under the MSA. Therefore, some fishers possess valid HSFCA permits without the ability to fish under the permit. For this reason, the number of HSFCA permits displayed in Table 3 of this final rule is likely higher than the actual fishing effort by U.S. vessels on the high seas.

As of 2004, NMFS issues HSFCA permits only for high seas fisheries analyzed in accordance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). There are currently seven U.S.-authorized high seas fisheries: Atlantic Highly Migratory Species Fisheries, Pacific Highly Migratory Species Fisheries, Western Pacific Pelagic Fisheries, South Pacific Albacore Troll Fishing, Pacific Tuna Fisheries, South Pacific Tuna Fisheries, and Antarctic Marine Living Resources. The LOF does not include the ''Pacific (Eastern Tropical) Tuna Fisheries'' because these fisheries are managed under Title III of the MMPA, separate from those fisheries subject to the LOF under section 118. Permits obtained prior to 2004 for

fisheries that are no longer authorized by the HSFCA, but for which the 5-year permit is still valid, are included on the LOF as ''unspecified.'' The ''unspecified'' fisheries will be removed from the LOF once those permits have expired, and the permit holder is required to renew the permit under one of the seven authorized fisheries.

The authorized high seas fisheries are broad in scope and encompass multiple specific fisheries identified by gear type. Therefore, the seven U.S.-authorized high seas fisheries, exclusive of the ''Pacific (Eastern Tropical) Tuna Fisheries,'' are subdivided on the LOF based on gear type (e.g., trawl, longline, purse seine, gillnet, troll, etc.), as listed on each fisher's permit application, to provide more detail on composition of effort within these fisheries.

How Does NMFS Categorize High Seas Fisheries on the LOF?

As discussed in the previous sections of this preamble, commercial fisheries operating within U.S. waters are categorized on the LOF based on the level of mortality and serious injury of marine mammal stocks incidental to commercial fishing as related to the stock's PBR level. PBR levels are calculated based on the stock's abundance using data presented in the SARs. Section 117 of the MMPA (16 U.S.C. 1386) requires NMFS to prepare SARs for marine mammal stocks occurring ''in waters under the jurisdiction of the United States.'' NMFS does not develop SARs or calculate PBR levels for marine mammal stocks on the high seas; therefore, NMFS does not possess the same information to categorize high seas fisheries as is used to categorize fisheries operating within U.S. waters.

For this reason, NMFS categorizes the majority of high seas fisheries on the LOF as Category II. As discussed previously in this preamble, Category II is the appropriate category for commercial fisheries not currently on the LOF (e.g., new fisheries) and for which NMFS does not have adequate information to indicate the frequency of incidental mortality and serious injury. Classifying a fishery in Category II allows NMFS to place observers on vessels in that fishery, providing NMFS the opportunity to obtain information needed to assess the frequency of bycatch in that fishery. For fisheries that operate both within U.S. waters and on the high seas, the high seas component of the fishery is classified according to the fishery's status in U.S. waters because it is not a separate fishery, but an extension of the fishery. Therefore, for a Category I or Category III fishery operating within U.S. waters, the high seas component would also be classified as Category I or Category III, accordingly. NMFS will continue to gather available information on the authorized high seas fisheries and reclassify fisheries in Table 3, if necessary, as more information becomes available.

How Does NMFS Determine Which Species or Stocks To Include as Incidentally Killed or Seriously Injured in a High Seas Fishery?

All serious injury and mortality of marine mammals incidental to commercial fishing operations, both in U.S. waters and on the high seas, must be reported to NMFS. High seas fishers are provided with Marine Mammal Take Reporting Forms to record such incidents. (Very few marine mammal takes by U.S. vessels participating in high seas fisheries, however, have been reported on these forms to date.) Observer programs for fisheries operating within U.S. waters also collect data on the high seas if the vessel should cross into high seas waters. Additionally, some fisheries that operate exclusively on the high seas have formal observer programs that provide data on interactions. In these cases, the MSA, NEPA, or ESA documents supporting the authorization of the seven U.S.-authorized high seas fisheries review observer documented interactions and list the marine mammal species taken in those fisheries. This information is used to identify marine mammals killed or injured in these fisheries in Table 3 on the LOF. For other fisheries without observer data, the MSA, NEPA, and ESA documents supporting the authorization of the seven U.S.-authorized high seas fisheries present information on marine mammal interactions from anecdotal and other reports, which do not always specify the marine mammal species involved in the interactions. Therefore, marine mammal species killed or injured in the high seas fisheries without observer data that are listed in Table 3 are designated as ''undetermined'' until additional information on marine mammal populations and fishery interactions on the high seas becomes available.

For high seas fisheries that are extensions of fisheries operating within U.S. waters, as discussed above, Table 3 lists the same marine mammal species killed or injured in the high seas components of fisheries (excluding coastal species that would not be found on the high seas) as those killed or injured by the component of the fishery operating within U.S. waters (Tables 1 and 2). NMFS assumes that these vessels pose the same risk to the species on both sides of the Exclusive Economic Zone (EEZ) boundary. NMFS will add and delete species from the LOF as additional information becomes available.

Am I Required To Register Under the MMPA?

Owners of vessels or gear engaging in a Category I or II fishery are required under the MMPA (16 U.S.C. 1387(c)(2)), as described in 50 CFR 229.4, to register with NMFS and obtain a marine mammal authorization to lawfully take a marine mammal incidental to commercial fishing. Owners of vessels or gear engaged in a Category III fishery are not required to register with NMFS or obtain a marine mammal authorization.

How Do I Register?

NMFS has integrated the MMPA registration process, the Marine Mammal Authorization Program (MMAP), with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Participants in these fisheries are automatically registered under the MMAP, and NMFS will issue vessel or gear owners an authorization certificate. Participants in these fisheries are not required to submit registration or renewal materials directly under the MMAP. The authorization certificate, or a copy, must be on board the vessel while it is operating in a Category I or II fishery, or for non-vessel fisheries, in the possession of the person in charge of the fishing operation (50 CFR 229.4(e)). Although efforts are made to limit the issuance of authorization certificates to only those vessel or gear owners that participate in Category I or II fisheries, not all state and Federal permit systems distinguish between fisheries as classified by the LOF. Therefore, some vessel or gear owners in Category III fisheries may receive authorization certificates even though they are not required for Category III fisheries. Individuals fishing in Category I and II fisheries for which no state or Federal permit is required must register with NMFS by contacting their appropriate Regional Office (*see* **ADDRESSES**).

How Do I Receive My Authorization Certificate and Injury/Mortality Reporting Forms?

All vessel or gear owners that participate in Pacific Islands, Northwest, or Alaska regional fisheries will receive their authorization certificates and/or injury/mortality

reporting forms via U.S. mail, or with their State or Federal license at the time of renewal. Vessel or gear owners participating in Southwest regional fisheries or the Northeast and Southeast Regional Integrated Registration Program will receive their authorization certificates as follows:

1. Northeast Region vessel or gear owners participating in Category I or II fisheries for which a state or Federal permit is required may receive their authorization certificate and/or injury/mortality reporting form by contacting the Northeast Regional Office at 978–281–9300 x6505 or by visiting the Northeast Regional Office Web site (*http://www.nero.noaa.gov/prot_res/mmap/certificate.html*) and following instructions for printing the necessary documents.

2. Southeast Region vessel or gear owners participating in Category I or II fisheries for which a Federal permit is required, as well as fisheries permitted by the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas may receive their authorization certificate and/or injury/mortality reporting form by contacting the Southeast Regional Office at 727–824–5312 or by visiting the Southeast Regional Office Web site (*http://sero.nmfs.noaa.gov/pr/pr.htm*) and following instructions for printing the necessary documents.

3. Southwest Region vessel or gear owners participating in Category I or II fisheries listed in the final 2008 LOF (72 FR 66048, published November 27, 2007) will receive their authorization certificate and/or injury/mortality reporting form as described above in the integrated MMPA registration process. A number of California state fisheries are being re-categorized as Category II fisheries in this final rule, and NMFS is working with the State of California to streamline the process of registering vessel or gear owners participating in these fisheries and issuing authorization certificates, as required under MMPA section 118. Fishermen may contact the Southwest Regional Office at 562–980–4025 for more information. The Southwest Region plans to fully integrate all California State Category I and II fisheries for the 2009/2010 fishing season.

How Do I Renew My Registration Under the MMPA?

Vessel or gear owners that participate in Pacific Islands, Southwest, or Alaska regional fisheries are automatically renewed and should receive an authorization certificate by January 1 of each new year. Vessel or gear owners in Washington and Oregon fisheries receive authorization with each renewed state fishing license, the timing of which varies based on target species. Vessel or gear owners who participate in these regions and have not received authorization certificates by January 1 or with renewed fishing licenses must contact the appropriate NMFS Regional Office (*see* **ADDRESSES**).

Vessel or gear owners participating in Southeast or Northeast regional fisheries may receive their authorization certificates by calling the relevant NMFS Regional Office or visiting the relevant NMFS Regional Office Web site (*see* How Do I Receive My Authorization Certificate and Injury/Mortality Reporting Forms).

Am I Required To Submit Reports When I Injure or Kill a Marine Mammal During the Course of Commercial Fishing Operations?

In accordance with the MMPA (16 U.S.C. 1387(e)) and 50 CFR 229.6, any vessel owner or operator, or gear owner or operator (in the case of non-vessel fisheries), participating in a Category I, II, or III fishery must report to NMFS all incidental injuries and mortalities of marine mammals that occur during commercial fishing operations. ''Injury'' is defined in 50 CFR 229.2 as a wound or other physical harm. In addition, any animal that ingests fishing gear or any animal that is released with fishing gear entangling, trailing, or perforating any part of the body is considered injured, regardless of the presence of any wound or other evidence of injury, and must be reported. Injury/mortality reporting forms and instructions for submitting forms to NMFS can be downloaded from: *http://www.nmfs.noaa.gov/pr/pdfs/interactions/mmap_reporting_form.pdf*. Reporting requirements and procedures can be found in 50 CFR 229.6.

Am I Required To Take an Observer Aboard My Vessel?

Fishers participating in a Category I or II fishery are required to accommodate an observer aboard vessel(s) upon request. MMPA Section 118 states that an observer will not be placed on a vessel if the facilities for quartering an observer or performing observer functions are inadequate or unsafe, thereby exempting vessels too small to accommodate an observer from this requirement. Observer requirements can be found in 50 CFR 229.7.

Am I Required To Comply With Any Take Reduction Plan Regulations?

Fishers participating in a Category I or II fishery are required to comply with any applicable take reduction plans. Table 4 in this final rule provides a list of fisheries affected by take reduction teams and plans. Take reduction plan regulations can be found at 50 CFR 229.30–35.

Sources of Information Reviewed for the Final 2009 LOF

NMFS reviewed the marine mammal incidental serious injury and mortality information presented in the SARs for all observed fisheries to determine whether changes in fishery classification were warranted. The SARs are based on the best scientific information available at the time of preparation, including the level of serious injury and mortality of marine mammals that occurs incidental to commercial fisheries and the PBR levels of marine mammal stocks. The information contained in the SARs is reviewed by regional Scientific Review Groups (SRGs) representing Alaska, the Pacific (including Hawaii), and the U.S. Atlantic, Gulf of Mexico, and Caribbean. The SRGs were created by the MMPA to review the science that informs the SARs, and to advise NMFS on marine mammal population status, trends, and stock structure, uncertainties in the science, research needs, and other issues.

NMFS also reviewed other sources of new information, including marine mammal stranding data, observer program data, fisher self-reports, fishery management plans, and ESA documents.

The final LOF for 2009 was based, among other things, on information provided in the NEPA and ESA documents analyzing authorized high seas fisheries, and the final SARs for 1996 (63 FR 60, January 2, 1998), the final SARs for 2001 (67 FR 10671, March 8, 2002), the final SARs for 2002 (68 FR 17920, April 14, 2003), the final SARs for 2003 (69 FR 54262, September 8, 2004), the final SARs for 2004 (70 FR 35397, June 20, 2005), the final SARs for 2005 (71 FR 26340, May 4, 2006), the final SARs for 2006 (72 FR 12774, March 19, 2007), the final SARs for 2007 (73 FR 21111, April 18, 2008), and the draft SARs for 2008 (73 FR 40299, July 14, 2008). The SARs are available at: *http://www.nmfs.noaa.gov/pr/sars/*.

Fishery Descriptions

NMFS described each Category I and II fishery on the 2008 LOF in the final 2008 LOF (72 FR 66048, November 27, 2007). Below, NMFS describes the fisheries classified as Category I or II fisheries on the 2009 LOF that were not so categorized on the 2008 LOF. Additional details for Category I and II fisheries operating in U.S. waters are

included in the SARs, fishery management plans (FMPs), and take reduction plans (TRPs), or through state agencies. Additional details for Category I and II fisheries operating on the high seas are included in various FMPs, NEPA, or ESA documents.

High Seas Atlantic Highly Migratory Species Fisheries

The Atlantic Highly Migratory Species (HMS) high seas fisheries are virtually the same as fisheries targeting Atlantic HMS within U.S. waters, but primarily use pelagic longline gear. Atlantic swordfish and bigeye tuna are the primary target species on the high seas, with Atlantic yellowfin, albacore and skipjack tunas, and pelagic sharks also caught and retained for sale. Bluefin tuna are caught incidental to pelagic longline operations, both on the high seas and within U.S. waters, and may be retained subject to specific target catch requirements.

Within U.S. Atlantic waters, HMS commercial fishers use several gear types. Authorized gear for tuna include rod and reel, handlines, bandit gear, harpoon, pelagic longline, trap (pound net and fish weir), and purse seine. Purse seines used to target bluefin tuna must have a mesh size of less than or equal to 4.5 in (11.4 cm) and at least 24-count thread throughout the net. Only rod and reel gear may be used to target billfish and commercial possession of Atlantic billfish is prohibited. Authorized gear for sharks includes rod and reel, handline, bandit gear, longline, and gillnet. Gillnets must be less than or equal to 2.5 km (1.6 mi) in length and must remain attached to the vessel except during net checks. Authorized gear for swordfish includes handline, handgear (including buoy gear), and longline for north Atlantic swordfish, and longline for south Atlantic swordfish. North Atlantic swordfish incidentally taken in squid trawls may be retained by federally permitted vessels. The fishery management area for Atlantic HMS includes U.S. waters and the adjacent high seas.

Atlantic HMS are managed under regulations implementing the Consolidated Atlantic HMS FMP (2006), under the authority of the MSA and the Atlantic Tunas Convention Act (ATCA). Regulations issued under the MSA address the target fish species, as well as bycatch of species protected by the ESA, MMPA, and Migratory Bird Treaty Act. The MSA regulations (50 CFR part 635) require vessel owners and operators targeting Atlantic HMS with longline or gillnet gear to complete protected species (sea turtles and marine mammals) safe handling, release, and identification workshops. The regulations also require shark dealers to complete an Atlantic shark identification workshop.

The high seas components of Atlantic HMS fisheries (Table 3) are extensions of various Category I, II, and III fisheries operating in U.S. waters (Table 2). The longline fishery targeting Atlantic HMS in U.S. waters is the Category I, ''Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline fishery.'' NMFS has issued proposed regulations to implement the Pelagic Longline Take Reduction Plan (PLTRP) for this fishery (73 FR 35623, June 24, 2008). The gillnet fishery targeting Atlantic HMS in U.S. waters is the Category II, ''Southeastern U.S. Atlantic shark gillnet'' fishery. In U.S. waters only, this fishery is subject to the Bottlenose Dolphin TRP (BDTRP) (50 CFR 229.35), for coastal gillnetting only, and the Atlantic Large Whale TRP (ALWTRP) (50 CFR 229.32). The purse seine fishery targeting Atlantic HMS in U.S. waters is the Category III, ''Atlantic tuna purse seine fishery.''

For more information on the Atlantic HMS fisheries and details on the management and regulations of these fisheries, please see the Consolidated Atlantic HMS FMP (*http://www.nmfs.noaa.gov/sfa/hms/hmsdocument_files/FMPs.htm*) and the regulations for Atlantic HMS fisheries in 50 CFR part 635.

High Seas Pacific Highly Migratory Species Fisheries

The Pacific HMS high seas fisheries are virtually the same as fisheries targeting Pacific HMS within U.S. waters. Pacific HMS fisheries target tunas (North Pacific albacore, yellowfin, bigeye, skipjack, and bluefin), billfish (striped marlin), sharks (common thresher, pelagic thresher, bigeye thresher, shortfin mako, and blue), swordfish, and dorado (i.e., dolphinfish) using several gear types. Authorized gear include surface hook-and-line (including troll, rod and reel, handline, albacore jig, and live bait), harpoon (non-mechanical), drift gillnet (14 in (35.5 cm) stretch mesh or greater), pelagic longline, and purse seine (including ring, drum, and lampara nets). Pacific HMS incidentally caught by unauthorized gear may be landed under certain circumstances. Species prohibited in Pacific HMS fisheries include any salmon species, great white shark, basking shark, megamouth shark, and Pacific halibut. The fishery management area for Pacific HMS covers U.S. waters from the U.S.-Mexico border to the U.S.-Canada border, and the adjacent high seas.

Pacific HMS are managed under regulations implementing the FMP for U.S. West Coast Fisheries for HMS, adopted in April 2004. The MSA regulations (50 CFR part 660, subpart K) address the target fish species as well as species protected by the ESA and MMPA. The MSA regulations lay out multiple restrictions for fishing for Pacific HMS with longline gear. Vessels fishing longline gear may not target HMS within U.S. waters. Targeting swordfish with shallow set longline gear or possessing a light stick on board the vessel west of 150° W. long. and north of the equator is prohibited. From April 1–May 31, longline gear is prohibited in the area bounded on the south by the equator, north by 15° N. lat., east by 145° W. long., and west by 180° long. Longline vessels must have a valid protected species workshop certificate onboard, along with safe handling and release tools for sea turtles and seabirds. The use of shallow set longline gear to target HMS east of 150° W. long. is prohibited under a rule promulgated through the ESA to protect threatened loggerhead sea turtles.

Along with the MSA requirements, including area closures for marine mammal and sea turtle protection, drift gillnet fishing for Pacific HMS is managed under the MMPA through the Pacific Offshore Cetacean Take Reduction Plan (POCTRP) (50 CRF 229.31), both in U.S. waters and on the high seas. The POCTRP regulations require multiple gear modifications during the May 1–January 31 fishing season, including a requirement that all extenders (buoy lines) be at least 6 fathoms (36 ft; 10.9 m) in length, all floatlines be fished at a minimum of 36 ft (10.9 m) below the surface, and all nets have operational pingers to a water depth of a least 100 fathoms (600 ft; 182.9 m). Also, after notification from NMFS, all drift gillnet vessel operators must attend skipper education workshops before each fishing season.

The high seas components of Pacific HMS fisheries are extensions of various Category I, II, and III fisheries operating within U.S. waters (Tables 1 and 2). The drift gillnet fishery targeting Pacific HMS within U.S. waters, the Category I ''CA/OR thresher shark/swordfish drift gillnet (≥14 in. mesh) fishery,'' is managed under the POCTRP. The purse seine fishery targeting Pacific HMS within U.S. waters is the Category II ''CA tuna purse seine fishery.'' While longline fishing for Pacific HMS is prohibited within U.S. waters, the LOF includes the Category II ''CA pelagic longline fishery'' to account for HMS caught outside U.S. waters, but landed into the U.S. West coast. The troll

fishery targeting Pacific HMS within U.S. waters is the Category III ''AK North Pacific halibut, AK bottom fish, WA/OR/CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries.''

For more information on the Pacific HMS fisheries and details on the management and regulations of these fisheries, please see the Pacific HMS FMP (*http://www.pcouncil.org/hms/hmsfmp.html#final*), the Pacific HMS FMP Biological Opinion (BiOp) (*http://swr.nmfs.noaa.gov/HMS_FMP_Opinion_Final.pdf*), and the regulations for Pacific HMS in 50 CFR part 660, subpart K.

High Seas Western Pacific Pelagic Fisheries

The Western Pacific pelagic high seas fisheries are virtually the same as fisheries targeting Western Pacific pelagic species in U.S. waters. Western Pacific pelagic fisheries target tunas (albacore, bigeye, yellowfin, bluefin, and skipjack), billfish (Indo-Pacific blue marlin, black marlin, striped marlin, shortbill spearfish), sharks (pelagic thresher, bigeye thresher, common thresher, silky, oceanic whitetip, blue, shortfin mako, longfin mako, and salmon), swordfish, sailfish, wahoo, kawakawa, moonfish, pomfret, oilfish, and other tuna relatives. The main gear types used to fish in the Western Pacific Pelagic fisheries are pelagic longline, troll, and handline. The Western Pacific Pelagic fisheries take place in the Western Pacific Fishery Management Area (including waters shoreward of the EEZ boundary around American Samoa, Guam, Hawaii, the Northern Mariana Islands, Midway, Johnston and Palmyra Atolls, Kingman Reef, and Wake, Jarvis, Baker, and Howland Islands) and the adjacent high seas waters.

Western Pacific Pelagic fisheries are managed under regulations implementing the FMP for the Pelagic Fisheries of the Western Pacific Region developed by the Western Pacific Fishery Management Council (WPFMC). The MSA regulations (50 CFR part 665, subpart C) address target fish species as well as bycatch of species protected under the ESA, MMPA, and Migratory Bird Treaty Act. The MSA regulations outline restrictions on effort, observer coverage requirements, longline fishing prohibited areas, sea turtle and seabird bycatch mitigation measures, annual fleetwide limits on interactions with leatherback and loggerhead sea turtles, and a requirement for owners of longline vessels to participate in annual protected species workshops. Drift gillnet fishing in the fishery management area is prohibited, except where authorized by an experimental fishery permit.

The high seas components of the Western Pacific Pelagic longline fishery are extensions of the Category I ''HI deep-set (tuna target) longline/set line fishery'' and the Category II ''HI shallow-set (swordfish target) longline/set line fishery'' operating within U.S. waters. All requirements for vessels fishing longline gear in these two fisheries operating within U.S. waters remain effective in high seas waters (as described in the above paragraph).

For more information on the Western Pacific Pelagic fisheries and details on the management and regulations of these fisheries, please see the Western Pacific Pelagic FMP BiOp (*http://www.fpir.noaa.gov/Library/PUBDOCs/*), the Western Pacific Pelagic FMP Environmental Impact Statement (EIS) (*http://www.fpir.noaa.gov/Library/PUBDOCs/*), and the regulations for Western Pacific Pelagic fisheries in 50 CFR 665, subpart C.

High Seas South Pacific Albacore Troll Fisheries

The South Pacific albacore troll high seas fisheries target South Pacific albacore using mostly longline or troll gear in waters solely outside of any nation's EEZ. Longline gear, set with 1,000 or more hooks suspended from a horizontally buoyed mainline several miles long, accounts for 86 percent of the catch. Trolling vessels (including jigs or live bait) attach 10–20 fishing lines of various lengths to the vessel's outriggers on a slow-moving boat (5–6 knots). The total U.S. catch of South Pacific albacore has accounted for less than 5 percent of the total international catch in recent years.

U.S. vessels fish in the South Pacific albacore fishery from November/December–April. Many vessels then participate in the larger North Pacific albacore fishery from April–October. South Pacific albacore fishing occurs outside any nation's EEZ in an area bounded by approximately 110° W. long. and 180° W. long., and by 25° S. lat. and 45° S. lat. Most U.S. troll vessels depart from the U.S. West Coast or Hawaii and land catch in American Samoa, Fiji, or Tahiti.

The South Pacific albacore troll fishery is not managed by regulations implementing any FMP. The WPFMC and NMFS have concluded that conservation and management measures for this fishery are not warranted because the albacore stock in not overfished and there are no known protected species interactions. Sea turtles and marine mammals do not prey on the bait species used by these vessels and vessels are typically slow-moving and would therefore likely be able to avoid a collision with a large whale. As of 2001, the HSFCA requires U.S. albacore troll vessel operators to file logbooks with NMFS for fishing in the South Pacific.

For more information on the South Pacific albacore troll fishery, please see the 2004 U.S. South Pacific albacore troll fishery Environmental Assessment (EA) (*http://www.fpir.noaa.gov/Library/PUBDOCs/*).

High Seas South Pacific Tuna Fisheries

The South Pacific Tuna Treaty (SPTT) manages access of U.S. purse seine vessels targeting tuna (skipjack and yellowfin) within the EEZs of 16 Pacific Island Countries in the Western and Central Pacific Ocean that are party to the Treaty. The SPTT Area includes the waters from north of 60° S. lat. and east of 90° E. long. subject to the fishing jurisdiction of Pacific Island parties to the Treaty, and all waters within rhumb lines connecting multiple geographic coordinates, and north along the 152° E. long. out to Australia's EEZ border. The Treaty Area includes portions of waters in the EEZs of most of the Pacific Island Countries included in the Treaty. The SPTT was intended to apply only to U.S. purse seine vessels; however, provisions have been made to accommodate fishing by U.S. albacore tuna troll and U.S. longline vessels within the Treaty Area. Both a SPTT and a HSFCA permit are required to fish in SPTT waters.

Under the SPTT, observers are recruited from the Pacific Island Countries and then trained and deployed by the Forum Fisheries Agency (FFA) in Honiara in the Solomon Islands. Many of the FFA deployed observers serve in and have experience from domestic observer programs active in each observer's respective country. The target observer level coverage is 20 percent of U.S. purse seine vessels, the full costs of which are the responsibility of the U.S. purse seine vessel owners. Observers collect a range of data, including a form for recording information on interactions with seabirds, sea turtles, marine mammals, and sharks. Fishery observers undergo training in species identification for target and bycatch species; however, marine mammal species identification has only recently been placed as a priority matter for reporting. Observer data from January 1997–June 2002 show that 11 sets resulted in interactions with marine mammals. However, the data indicate only that the animals were ''unidentified whales, marine mammals,

or dolphin/porpoise.'' The International Fisheries Division of the NMFS Pacific Islands Region is working with the FFA observer program to better train observers in marine mammal identification.

For additional information on the SPTT and details on the management and regulations of these fisheries, see the South Pacific Tuna Treaty EA (*http://www.fpir.noaa.gov/Library/PUBDOCs/*) and the regulations for the SPTT in 50 CFR 300, subpart D.

High Seas Antarctic Living Marine Resources Fisheries

The Commission for the Conservation of Antarctic Marine Living Resources (Convention or CCAMLR) conserves and manages Antarctic marine living resources (AMLR) in waters surrounding Antarctica. The Convention applies to AMLR in the waters from 60° S. lat. south to the Antarctic Convergence, with limited exceptions, covering 32.9 million square kilometers. Both an AMLR and a HSFCA permit are required to fish in CCAMLR waters. There are multiple gear types used to target multiple species in the Convention Area. Gear types include pelagic and bottom trawl, trap/pot, gillnet, and longline. Target species include krill and Antarctic finfish (rockcod species, toothfish species, icefish species, silverfish, cod, and lanternfish), mollusks, and crustaceans. CCAMLR Conservation Measures require or recommend several measures for fisheries in the Convention area. Mandatory measures include requirements for reporting; operating a Vessel Monitoring System while in the Convention area; longline gear modifications to reduce seabird interactions; and mesh sizes restrictions for trawl gear. Recommendations include seal bycatch mitigation measures, such as a seal excluder device in trawl fisheries.

CCAMLR has identified two types of scientifically trained observers to collect information required in CCAMLR-managed fisheries, including information on entanglements and incidental mortality of seabirds and marine mammals. The first type of observer is a ''national observer,'' such as a U.S. observer placed on a U.S. vessel by the U.S. government. The second type of observer is an ''international observer,'' or an observer operating in accordance with bilateral arrangements between the nation whose vessel is fishing and the nation providing the observer. CCAMLR Conservation measures require all fishing vessels in the Convention area (except vessels fishing for krill) to carry at least one international observer and, where possible, an additional observer. The United States requires all of its vessels fishing in the CCAMLR area, for any target species and with any gear, to carry an observer. In certain exploratory toothfish fisheries, the vessel must carry two observers, with at least one being an international observer.

For additional information on the fishing activities in the CCAMLR region and details on the management and regulations of these fisheries, see the CCAMLR Programmatic EIS (*http://www.nmfs.noaa.gov/sfa/domes_fish/news_of_note.htm#ccamlr*), the CCAMLR Schedule of Conservation Measures in Force (*http://www.ccamlr.org*), and the regulations for the harvesting of AMLR in 50 CFR 300, subpart D.

CA Spot Prawn Pot Fishery

The Category II ''CA spot prawn pot fishery'' operates from Central CA southward to the Mexican border. Strings of 10–50 oblong cylindrical traps are commonly fished at depths usually greater than 100 fathoms. This is a limited access fishery managed by the state of CA. A tiered permit system allows a maximum of 150 or 500 traps to be fished at one time depending on the fishing history associated with the permit. A maximum of 300 traps may be located within state waters (inside 3 miles), regardless of the permit tier. North of Point Arguello, the season is open from August 1–April 30. South of Point Arguello, the season runs from February 1–October 30.

CA Dungeness Crab Pot Fishery

The Category II ''CA Dungeness crab pot fishery'' operates in the central and northern coastal waters of CA in depths typically from 10–40 fathoms. The cylindrical or rectangular pots used in the fishery are fished singly, or individually, such that each pot has its own buoy; although, fishing multiple traps connected together (called ''strings'') is allowed in the central region. There is no limit on the number of traps which may be operated by a fisher at one time. This is a limited access fishery managed by the state of CA and pursuant to the Tri-State Committee agreement for Dungeness crab, which also includes the states of OR and WA. The fishery is divided into two management areas. The fishing season in the central region (south of the Mendocino-Sonoma county line) is open November 15–June 30. The fishing season in the northern region (north of the Mendocino-Sonoma county line) can open on December 1, but may be delayed by the California Department of Fish and Game based on the condition of market crabs, and continues until July 15.

OR Dungeness Crab Pot Fishery

The Category II ''OR Dungeness crab pot fishery'' operates in the coastal waters of OR in depths typically from 10–40 fathoms. The cylindrical or rectangular pots used in the fishery are fished singly, or individually, such that each pot has its own buoy. This is a limited access fishery managed by the OR Department of Fish and Wildlife and pursuant to the Tri-State Committee agreement for Dungeness crab, which also includes the states of CA and WA. A three-tiered pot limitation system, based on previous landing history, allows a maximum 200, 300, or 500 single pots to be fished by a fisher at once. The Dungeness crab season runs from December 1–August 14, although the Oregon Department of Fish and Wildlife may delay the opening based on the condition of the market crabs. Additionally, the state may close the season after the end of May, if catch rates are still high, to protect molting crab. Logbook reporting of effort and catch data to the state is required.

WA/OR/CA Sablefish Pot Fishery

The Category II ''CA/OR/WA sablefish pot fishery'' operates in waters past the 100 fathom curve off the West coast of the U.S. In CA, gear is set outside 150 fathoms, with an average depth of 190 fathoms. There are two separate trap fisheries, open access and limited entry, and both have quotas. Open access fishers will usually fish 1 to 8 strings of 3–4 pots, each with a float line and buoy stick. The gear sometimes soaks for long periods. Fishers in the limited entry fishery will normally fish 20–30 pot strings. As with most pot gear fished out in deeper waters, sablefish traps are set in strings of multiple traps. The fishery operates year round and effort varies from southern CA to the Canadian border.

This fishery is managed under regulations implementing the West Coast Groundfish FMP developed by Pacific Fishery Management Council. Access to the limited entry fishery is granted under a limited entry permit system, in addition to gear endorsements required by the individual states. Open access privileges are currently available to any fisher with the requisite state gear endorsement, but involve much more restrictive limitations in catch quotas and additional area closures than the primary limited entry permit. Open access quotas vary based upon the area being fished. The limited entry fishery

is open from April 1–October 31, while open access is available year-round. Limited entry permits are tiered based on the annual cumulative landings allowed by each permit. Permits are transferable, but the tier category remains fixed. Up to three limited entry permits may be stacked on a single vessel.

Comments and Responses

NMFS received 10 comment letters on the proposed 2009 LOF (73 FR 33760, June 13, 2008). Comments were received from the Marine Mammal Commission, Center for Biological Diversity (CBD), Western Pacific Regional Fishery Management Council (WPFMC), Mid-Atlantic Fishery Management Council (MAFMC), North Carolina Division of Marine Fisheries (NCDMF), Oregon Department of Fish and Wildlife (ODFW), California Department of Fish and Game (CDFG), Garden State Seafood Association, Hawaii Longline Association (HLA), and California Wetfish Producers Association. Comments on issues outside the scope of the LOF were noted, but are not responded to in this final rule.

General Comments

Comment 1: The Marine Mammal Commission reiterated comments made on the 2005 through 2008 LOFs recommending that NMFS describe the level of observer coverage for each fishery as part of the LOF. NMFS indicated in its response to the comments on the 2008 LOF that it ''feels that it will be of limited use to include observer coverage data or percentages in the LOF without also including the confidence associated with mortality/serious injury estimates generated from the observer data.'' The Commission would welcome inclusion of information on mortality and serious injury estimates within the LOF, as they recommended in comments on the 2005 LOF that such information be included. The Commission continues to believe observer coverage information is important in itself, particularly for evaluating cases where no marine mammal interactions are reported. Fisheries without recorded interactions are not reported in the SARs and, without information on observer coverage, it is impossible to determine whether a given fishery was adequately observed and no marine mammals were taken or the fishery was not adequately observed and mortality and serious injury may have occurred but were not documented.

Response: NMFS continues to feel that the LOF is not the appropriate venue for reporting this data because it will confuse rather than clarify if presented without all the associated information supplied in the SARs. However, NMFS agrees that observer coverage information would be useful for the reader to reference when determining whether a given fishery was adequately observed and no marine mammals were taken or the fishery was not adequately observed and mortality and serious injury may have occurred but were not documented. Therefore, NMFS is exploring other options for providing information on observer coverage as it applies to the LOF and will notify readers of these sources in subsequent LOFs. In addition, NMFS is preparing to release the National Bycatch Report (NBR). The NBR will provide a comprehensive summary of regional and national bycatch estimates, based on observer data and fisher reports, of fish, marine mammals, sea turtles, and sea birds in U.S. commercial fisheries that have a Federal nexus. The NBR will include observer coverage information that can be referenced while reviewing the LOF. NMFS also continues to refer readers to the SARs and the National Observer Program for information on observer coverage. The SARs can be accessed through the NMFS Office of Protected Resource's Web site at: *http://www.nmfs.noaa.gov/pr.sars/.* Additional information can also be found on the National Observer Program Web site at: *http://www.st.nmfs.gov/st4/nop/.*

Comment 2: The CBD noted that the proposed 2009 LOF lists over 40 fisheries that are known to interact with ESA-listed marine mammals. Only one fishery, the Category I ''CA/OR thresher shark/swordfish drift gillnet fishery,'' has authorization to take ESA-listed marine mammals. Each of these other fisheries is therefore operating in violation of both the ESA and MMPA. NMFS must either issue permits for these fisheries authorizing take under these statutes, or take appropriate enforcement action, including, as necessary, closure of the fisheries, to ensure such illegal take does not continue to occur.

Response: CBD's comment refers to how NMFS authorizes takes of ESA-listed marine mammals incidental to commercial fishing. The MMPA requires fishers to obtain a permit granted under section 101(a)(5)(E) of the MMPA if they participate in a fishery that takes ESA-listed marine mammals. A 101(a)(5)(E) permit does not authorize the operation of a fishery. Instead, a 101(a)(5)(E) permit authorizes the incidental take of ESA-listed marine mammals in commercial fisheries, if certain provisions are met. Any incidental take of an ESA-listed species in an otherwise legally-operating fishery, without a 101(a)(5)(E) permit, is not authorized. If an ESA-listed species is taken by a fisher in a fishery that has not been granted a MMPA 101(a)(5)(E) permit, then the fisher may be subject to enforcement proceedings.

NMFS acknowledges that the LOF includes fisheries in which ESA-listed species are listed as incidentally killed/injured, but for which NMFS has not issued a permit under section 101(a)(5)(E) of the MMPA. To issue a permit under section 101(a)(5)(E) of the MMPA, NMFS must determine that (1) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stocks; (2) a recovery plan has been developed or is being developed for such species or stock pursuant to the ESA; and (3) where required under section 118 of the MMPA, a monitoring program is established, vessels engaged in such fisheries are registered, and a take reduction plan has been developed or is being developed for such species or stock. NMFS is in the process of making these determinations in various fisheries on the LOF.

Comment 3: The CBD noted that the proposed 2009 LOF includes a table of fisheries subject to take reduction teams (TRT). This is very useful. However, numerous Category I and II fisheries not yet subject to TRTs also meet the statutory criteria for convening such teams. All Category I and II fisheries not yet subject to TRTs which interact with strategic stocks must have TRTs promptly convened. The Hawaii pelagic longline fishery should be the highest priority for such a team as take continues to exceed PBR for false killer whales.

Response: Please see comment/response 6 in the final 2008 LOF (72 FR 66048, November 27, 2007). At this time, NMFS' resources for TRTs are fully utilized and new TRTs will be initiated when additional resources become available. When NMFS lacks sufficient funding to convene a TRT for all stocks that interact with Category I and II fisheries, NMFS will give highest priority for developing and implementing new take reduction plans to species or stocks whose level of incidental mortality and serious injury exceeds PBR, those with a small population size, and those which are declining most rapidly, pursuant to MMPA section 118(f)(3).

Comment 4: The CBD stated concerns regarding groups of ''fisheries'' that NMFS has excluded from the LOF. In the final rule implementing section 118 of the MMPA (60 FR 45086, August 20,

1995), NMFS concluded that tribal fisheries were exempt from the permitting requirements the MMPA. In light of the subsequent holding of the Ninth Circuit in *Anderson* v. *Evans,* 371 F.3d 475 (9th Cir. 2002) finding that the MMPA applies to the Makah application to the gray whale hunt, the CBD believes that NMFS' 1995 conclusion exempting tribal fisheries from the LOF and the Section 118 authorization process is no longer valid. The 2009 LOF should be amended to include tribal fisheries.

Response: NMFS will consider this comment during the development of future proposed LOFs.

Comment 5: The CBD does not believe aquaculture facilities are properly considered commercial fishing operations eligible for the take authorization contained in MMPA section 118. These facilities and activities, to the degree they interact with marine mammals, should be subject to the take prohibitions and permitting regimes contained in MMPA section 101.

Response: Eight aquaculture fisheries are listed on the MMPA LOF, all as Category III fisheries. NMFS' regulations implementing section 118 of the MMPA (50 CFR 229) specifically include aquaculture as a commercial fishing operation. The regulations in 50 CFR 229.2 define ''commercial fishing operation'' as ''the catching, taking, or harvesting of fish from the marine environment * * * The term includes * * * aquaculture activities.'' Further, ''fishing or to fish'' is defined as ''any commercial fishing operation.''

Comment 6: The WPFMC continues to be concerned that no recreational fishing activities are assessed under the LOF, although recreational fisheries may have a much greater impact on marine mammal stocks than their commercial counterparts. This seems a rather arbitrary application of the MMPA to marine fisheries.

Response: NMFS agrees there are documented cases of incidental injury or death of marine mammals in recreational fishing gear. However, MMPA section 118 governs the ''Taking of Marine Mammals Incidental to Commercial Fishing Operations.'' Specifically, section 118(c)(1)(A) directs NMFS to ''publish * * * list of commercial fisheries'' that interact with marine mammals.

Comments on High Seas Fisheries

Comment 7: The CBD supported NMFS' decision to include high seas fisheries on the LOF, but they have concerns with how NMFS is implementing the process. NMFS treats fisheries that have both a high seas and within-EEZ component as two separate fisheries for LOF purposes. CBD believes this raises the risk that the total marine mammal take from such a fishery may be inappropriately apportioned into two separate fisheries (the high seas and non-high seas components), therefore resulting in an underestimation of the true environmental effect, and LOF classification of what is more properly considered the same fishery. For example, if the total take from a fishery operating both in and outside the EEZ is 60 percent of PBR, the fishery should be a Category I. However, if the fishery is split into two components and take is evenly apportioned, the total take from each fishery is only 30 percent of PBR, and therefore a Category II. NMFS must clarify how it will apportion take so as to not create this problem.

Response: Although the high seas components of fisheries that operate both within U.S. waters and on the high seas are listed in a separate table in the LOF, they are not considered separate fisheries from their associated components operating in U.S. waters. Instead, NMFS considers these fisheries as the same fishery that has extended beyond the 200 nmi boundary of the EEZ. Because of the organization and format of Tables 1 and 2 in the LOF, and because high seas fisheries have additional management (permit) requirements, it is necessary to list them on a separate table on the LOF (Table 3). NMFS clarifies which fisheries in Table 3 are extensions of fisheries operating in U.S. waters by placing a ''*'' after the fishery name. NMFS will not apportion any incidental serious injury or mortality in these fisheries separately for purposes of categorization. Takes on either side of the EEZ boundary are included as takes in one fishery. As stated in the preamble of this rule, NMFS does not calculate PBR estimates for marine mammals stocks on the high seas. Therefore, at this time, the high seas fisheries that are extensions of fisheries operating within U.S. waters, are categorized the same as the component operating within U.S. waters.

Comment 8: The Marine Mammal Commission concurred with NMFS' decision to describe and evaluate high seas fisheries and include them on LOF. Doing so makes the LOF more nearly complete and more consistent with the scope of the MMPA. The descriptions and evaluations of high seas fisheries highlight the lack of data on both the status and the incidental take of marine mammals outside the U.S. EEZ, and information on status and incidental take of marine mammals in foreign and international fisheries often is not available. To address this need, the Commission recommends that NMFS develop and implement research and monitoring programs needed to manage high seas fisheries in a manner consistent with the requirements of the MMPA. Such approaches likely will require novel stock assessment techniques and development of international partnerships. This task may be difficult, but also will provide many ancillary benefits, including the development of useful tools for managing transboundary stocks.

Response: NMFS acknowledges this comment. The development of a research and monitoring plan to manage high seas fisheries in a manner consistent with the requirements of the MMPA will require novel stock assessment techniques and the development, and/or continuation, of international partnerships. NMFS will consider such stock assessment techniques and components of a research and monitoring program while continuing to include high seas fisheries on future LOFs.

Comment 9: The CBD noted that NMFS proposed to categorize all high seas fisheries operating in the CCAMLR region as Category II. However, NMFS also states that because there are no currently valid HSFCA permits for CCAMLR fisheries, none of these fisheries will actually be listed in the LOF. Given such fisheries are authorized under existing CCAMLR regulations, NMFS should either list these fisheries on the LOF, or clearly indicate that NMFS will not issue any authorizations for these fisheries during the duration of the time in which the 2009 LOF is operative. If NMFS does include CCAMLR fisheries on the LOF, the trawl fishery for krill should be listed as a Category I based on observer data from three CCAMLR vessels, including a U.S. flagged vessel, indicated that 95 fur seals were caught in 2004/2005 season and 156 fur seals were caught in the 2003/2004 season (71 FR 39642; July 13, 2006). Also, the Final Programmatic EIS for CCAMLR fisheries noted that a U.S.-flagged krill vessel killed 138 Antarctic fur seals in five weeks in 2004. This fishery is clearly not operating as at ''zero mortality and serious injury rate'' and must be listed as a Category I.

Response: NMFS did propose to add CCAMLR fisheries to the LOF as Category II fisheries, but because there were no current valid HSFCA permits NMFS stated that, ''CCAMLR fisheries do not appear in Table 3'' of the proposed 2009 LOF (72 FR at 33770). After considering this comment, NMFS

views the addition of the CCAMLR fisheries to the LOF without representing them in Table 3 as confusing. Therefore, NMFS has added the trawl and longline CCAMLR fisheries (the fisheries in which U.S. vessels have participated in the recent past) to Table 3 with a ''0'' indicating the number of HSFCA permits for each fishery. If/when a permit is issued for a U.S. vessel to operate in a CCAMLR fishery in the future, the number of HSFCA permits listed in Table 3 of the LOF will be updated accordingly.

The CCAMLR trawl fishery for krill does not qualify as a Category I fishery. To be considered Category I, a fishery must have a serious injury or mortality rate of marine mammals at greater than 50 percent of a stock's PBR level. While NMFS does not have sufficient information to calculate PBR level for marine mammal stocks found outside of the U.S. waters, there is available information on the abundance of Antarctic fur seals. The relative abundance of Antarctic fur seals was estimated as 1.5 million in 1990 and is thought to have since increased to over 4 million (CCAMLR Final Programmatic EIS, October 2006). Further, at the 2006 Antarctic Treaty Consultative Meeting, the Antarctic Treaty Parties delisted the Antarctic fur seal from its listed of Specially Protected Species. The delisting reflected the much-increased abundance of fur seals. Ninety-five fur seals were reported caught during fishing operations in 2005/2006, during which time no U.S. krill trawl vessel was operating. In 2003/2004, a total of 158 Antarctic fur seals were observed taken by the single U.S.-permitted trawl krill fishing vessel in the CCAMLR region, 142 of which were mortalities. As a result, a permit provision was added requiring the use of a seal excluder device and any other gear modifications or fishing practice that reduces or eliminates Antarctic fur seal bycatch. In the 2004/2005 fishing season the U.S. vessel used the required seal excluder device; and, as a result, 24 Antarctic fur seals were incidentally taken, 16 of which were mortalities (2005 Report of the CCAMLR Scientific Committee). This modification would be a requirement of any CCAMLR fishing permit NMFS would issue to the vessel. Given the large estimated abundance of Antarctic fur seals, the current low rate of incidental serious injury and mortality would likely be well below 50 percent of PBR if NMFS were to calculate a PBR for this stock. Therefore, the fishery does not qualify as a Category I fishery.

Comment 10: The WPFMC agreed that, from a ''best science'' perspective, it is logical to include high seas fishing activity by U.S. vessels on the LOF because the EEZ boundaries are an artificial construct which have no meaning biologically or ecologically. However, it seems excessive to categorize the majority of high seas fisheries as Category II in the absence of reliable data, even if this is done with the objective of collecting information through the use of observers. Further, it is one-sided, since in the absence of stock assessments, the only information that would be collected would be interactions. The numbers of interactions, even if substantial, will be meaningless without stock assessments against which to assess interactions. Moreover, the HI pelagic longline vessels already carry observers and report marine mammal interactions. Indeed, the observer coverage rates in HI's longline fishery are very high (shallow set-100 percent; deep set-20 percent), and the American Samoa longline fishery has a 7–8 percent average coverage rate.

Response: At this time, NMFS has little information with which to base a Category I or III categorization for many high seas fisheries that are not extensions of fisheries operating within U.S. waters. It is for this reason that NMFS categorizes the majority of high seas fisheries as Category II, the appropriate category for new fisheries for which NMFS does not have adequate information to accurately categorize (as stated in the final rule implementing section 118 of the MMPA 60 FR 45086; August 30, 1995). Because interactions information alone, without the associated marine mammal abundance data, is of limited use in accurately categorizing a fishery on the LOF, NMFS would consider all available abundance data along with interactions data when determining whether the reclassification of a given fishery is warranted. Observer coverage in the HI longline fisheries is high, and the American Samoa longline fishery also has adequate observer coverage. The addition of the high seas components of these fisheries will not impact observer coverage levels or the categorization of these fisheries at this time.

Comment 11: The HLA stated that NMFS should use fishery- and marine mammal-specific information to classify high seas fisheries according to their interactions and, where such information is not available, should designate high seas fisheries as Category II regardless of the classification of their U.S. EEZ components. As a general rule, it may be appropriate to assume that high seas fisheries using the same gear and operational strategies will have similar interaction rates if marine mammals occur in equal numbers on the high seas fishing grounds. However, where equal numbers are not expected or where fishing techniques and gear vary from within-EEZ practices, NMFS should assume that the high seas fishery is a Category II until specific information is available warranting a different classification. In particular, recent reports call into question the assumption that the HI deep-set (tuna target) fishery interacts with non-coastal marine mammals to the same extent as the U.S. waters fishery. First, several species listed in Table 3, including sperm whales and several species of dolphin, have not interacted with the high seas fishery for at least the past five years. Second, a 2007 Southwest Fisheries Science Center Report indicates that false killer whale density and abundance are greater on the high seas south of HI and even greater in the EEZ around Palmyra Atoll, showing that they may be sufficiently abundant on the high seas that already low deep-set fishery interaction rates may warrant something less than a Category I classification for the high seas component.

Response: As stated in the response to comment 7 above, although the high seas components of fisheries that operate both within U.S. waters and on the high seas are listed in a separate table in the LOF, they are not considered a separate fishery from their associated component operating in U.S. waters. Instead, these high seas fisheries, indicated by a ''*'' in Table 3, are the same fisheries that extend into the high seas, not a separate fishery.

As stated in the preamble of this rule, a fishery is categorized based on the stock(s) incidentally seriously injured or killed at the highest levels relative to the stock-specific PBR level (i.e., driving stocks identified by a ''1'' in Tables 1 or 2). Since the high seas ''Western Pacific pelagic deep-set longline fishery'' is an extension of the ''HI deep-set (tuna target) fishery'' operating in U.S. waters, and not a separate fishery, it is categorized in the same manner as the component in U.S. waters (i.e., based on the serious injury and mortality of false killer whales (HI stock), the stock driving the categorization of this fishery). Also, as noted in the preamble of this rule, a fishery is categorized on the LOF at its highest level of classification (e.g., a fishery qualifying for Category II for one marine mammal stock and a Category I for another stock, will be listed as Category I). If NMFS received information indicating that the high seas component of a fishery operates significantly different than the

component operating within U.S. waters, NMFS would consider splitting that fishery into two fisheries at that time. Fisheries that operate solely on the high seas will remain categorized as Category II until additional information on marine mammal abundance and/or fishery interaction data becomes available to warrant a recategorization.

Also, the calculations of PBR levels are reported in the SARs. NMFS uses the PBR levels reported in the SARs in the fishery categorization process under the LOF. PBR and interaction levels are not calculated through the LOF rulemaking process. Therefore, NMFS recommends that the commenter present this comment regarding greater false killer whale abundance on the high seas south of HI and around Palmyra and Johnston Atolls during the comment period for the SARs.

Comments on Fisheries in the Pacific Ocean

Comment 12: The HLA requested that NMFS clarify in the final LOF whether longline fishing in U.S. waters around Palmyra Atoll, Johnston Atoll, and other U.S. Possessions in the Pacific is considered part of the Western Pacific Pelagic deep-set fishery or a separate longline fishery. NMFS should clarify this particularly because false killer whale stock estimates exist for Palmyra Atoll and Johnston Atoll and could be used to derive a PBR that could be measured against observer data for longline fishing in those waters.

Response: NMFS considers U.S. vessels deep-set longline fishing in U.S. waters around Palmyra Atoll, Johnston Atoll, and other U.S. Territories in the Pacific Ocean as operating in the same fishery, the ''HI deep-set (tuna target) fishery'' (and/or its high seas component, the ''Western Pacific pelagic deep-set longline''). NMFS recognizes that the HI stock of false killer whales is distinct from the stock of false killer whales that resides around Palmyra and Johnston Atolls and that a PBR does not currently exist for these animals. However, since this is the same fishery throughout its operating range, calculating a PBR for the false killer whales residing around Palmyra and Johnston Atolls would not impact the classification of the fishery. As noted in the preamble of this rule and in the response to Comment 11 above, a fishery is categorized on the LOF at its highest level of classification (e.g., a fishery qualifying for Category II for one marine mammal stock and a Category I for another stock, will be listed as Category I). Therefore, the fishery would remain in Category I based on the level of incidental mortality and serious injury exceeding PBR of the HI stock of false killer whales (i.e., the stock driving the classification of this fishery).

As stated in the response to Comment 11 above, PBR levels are reported in the SARs. NMFS uses the PBR levels reported in the SARs in the fishery categorization process under the LOF. PBR and interaction levels are not calculated through the LOF rulemaking process. Therefore, NMFS recommends that the commenter present this comment that a PBR could be derived for false killer whales residing around Palmyra and Johnston Atolls during the comment period for the next draft SAR.

Comment 13: The CBD stated that various Hawaiian fisheries are known or suspected of interacting with Hawaiian monk seals. Given the critically endangered status of the monk seal, any interaction is significant. Yet all Hawaiian fisheries known or suspected of interactions and entanglements with this species are listed as Category III. These fisheries should all be reclassified as Category I or II.

Response: The LOF lists the Hawaiian monk seal on the list of species killed/injured in the Category III ''HI lobster trap,'' ''HI Main Hawaiian Islands, Northwestern Hawaiian Islands deep sea bottomfish,'' and the ''HI tuna handline'' fisheries. The information on Hawaiian monk seal interactions with these fisheries is outlined below.

(1) ''HI lobster trap fishery'': There have not been any reported interactions since the mid-1980s, when one seal died in a trap.

(2) ''HI Main Hawaiian Islands, Northwestern Hawaiian Islands deep sea bottomfish fishery'': There were no interactions during the bottomfish observer program in 2004–2005, and the fishery has not been observed since. While fishing in the Northwestern Hawaiian Islands will be phased out in the coming years, in previous years when more bottomfish boats were fishing in this area, NMFS received one self-reported incident (a hooking in 1994) and bottomfish hooks were observed in two seals at the French Frigate Shoals (one in 1982 and one in 1993). NMFS also had reports from the mid 1990's of seals stealing catch, seals being fed bait or non-target species by fishers to discourage seals from taking catch, and some seals becoming hooked and cut free.

(3) ''HI Tuna handline fishery'': NMFS has never received a report of interactions between Hawaiian monk seals and tuna handline gear.

While there have been no observed or reported interactions between monk seals and the ''HI lobster trap'' and ''HI Main Hawaiian Islands, Northwestern Hawaiian Islands deep sea bottomfish'' fisheries in recent years, NMFS has retained Hawaiian monk seals as a species/stock incidentally killed/injured in these fisheries because monk seals in the Main Hawaiian Islands are hooked and entangled at a rate that has not been reliably assessed. The 2007 SAR states that without a purpose-designed observation effort, the true interactions rate between these fisheries and monk seals cannot be estimated. Also, the PBR level for monk seals is currently ''undetermined'' (Final 2007 SAR). Due to the fact that the PBR level for monk seals is undetermined and the hooking and entanglement rate cannot be reliably assessed, NMFS will retain the ''HI lobster trap'' and ''HI Main Hawaiian Islands, Northwestern Hawaiian Islands deep sea bottomfish'' fisheries as Category III fisheries on the LOF until more information becomes available to determine whether reclassification is warranted.

NMFS is removing the Hawaiian monk seal from the list of species/stocks killed/injured in the ''HI tuna handline fishery,'' under which the stock has been listed since the 1996 LOF. As stated above, NMFS has never received a report of interactions between monk seals and tuna handline gear. In a thorough review of all of the past and current Hawaiian monk seal SARs, NMFS was unable to determine the reason for this stock's inclusion on the list of species/stocks killed/injured in this fishery. Therefore, NMFS removes the stock from the list of species/stocks killed/injured in the ''HI tuna handline fishery.''

Comment 14: The CBD stated that observer data from the American Samoa longline fishery shows high levels of take of false killer whales. This fishery should be listed as Category I rather than Category III.

Response: NMFS analyzes observer data and applies observed takes against calculated PBR levels during the process of updating and publishing the annual SARs. The LOF then categorizes fisheries based on the most recent SARs (including observer documented interactions, stranding data, and other data reported in the SARs). NMFS recommends that the commenter present this concern during the public comment period for the SARs.

Also, NMFS notes that 10 trips, with 410 sets, were observed in this fishery in 2007 with no observed marine mammal interactions. NMFS will reexamine the classification of this fishery on a future LOF if the analysis of the 2008 observer data reported in the SARs indicated that a change in categorization is warranted.

Comment 15: The CBD stated that the proposal to split the HI longline fishery into separate deep-set and shallow-set components appears appropriate. However, they believe that both components should be classified as Category I. Observer data from 2008 shows take of false killer whales and humpback whales from the shallow-set component of the fishery, indicating that it too meets the Category I criteria.

Response: As noted in the response to comment 14, NMFS analyzes observer data and applies observed takes against calculated PBR levels during the process of updating and publishing the annual SARs. NMFS then classifies fisheries on the LOF based on the most recent SARs (including observer documented interactions, stranding data, and other data reported in the SARs). The data presented in the annual SARs have an average of a two-year time delay because of the time needed to properly analyze the data and complete the peer-review process. Observer data from 2008 has not yet been analyzed and included in the current SARs or included in the level of annual mortality and serious injury for false killer whales or humpback whales. NMFS recommends that the commenter present this concern during the public comment period for the next draft SAR. NMFS will reexamine the categorization of this fishery on a future LOF if the analysis of the 2008 observer data reported in the SARs indicates that a change in categorization is warranted.

Comment 16: The HLA supported NMFS proposal to separately categorize the deep-set and shallow-set HI-based longline fisheries. As explained by NMFS in the proposed rule, based on the factors listed in the proposed rule (and as HLA has previously commented). Recognizing the well-documented distinctions between these fisheries, NMFS brings the LOF into harmony with the purpose of the annual LOF, to provide meaningful public identification of fisheries by the extent to which they interact with marine mammals.

Response: NMFS acknowledges the comment. The split is warranted based on the several factors listed in the proposed rule.

Comment 17: The WPFMC and HLA stated that the shallow-set component of the HI longline fishery must be based on the best available population data, and may be more appropriately classified as a Category III fishery. NMFS bases the Category II designation on a single interaction from 2006 with a humpback whale, thought to be from the Central North Pacific stock, which has a PBR level of 12.9 whales. However, NMFS recognized in the draft 2008 SAR (73 FR 40299, July 14, 2008) that this information is outdated because it is based on abundance estimates that are more than eight years old. NMFS has new, reliable population abundance data from the Structure of Populations, Levels of Abundance, and Status of Humpbacks (SPLASH) project, which reports a marked increase in North Pacific humpback whale populations. In a May 2008 press release, NMFS announced that the overall population of humpbacks in the North Pacific Ocean ''has rebounded to approximately 18,000 to 20,000 animals.'' The HLA added that the MMPA requires that NMFS use the best available scientific information in determining the minimum population estimate used and to classify fisheries on the LOF; which is true regardless of whether the information has been published yet. Further, the WPFMC believes that there should be a transparent peer reviewed process for the designation of strategic stocks.

Response: This comment refers to a recalculation of the PBR for humpback whales. Changes to population estimates, trends, and PBR levels are reported in the SARs, and NMFS then categorizes fisheries on the LOF based on the information presented in the SARs. The most recent SARs have not yet incorporated the published data from the SPLASH project to calculate a new and/or different PBR for humpback whales. NMFS recommends that the commenter present this concern during the public comment period for the next draft SAR. NMFS will reexamine the categorization of this fishery on a future LOF if future SARs report a change to the current PBR for this stock of humpback whales.

The process for designating strategic stocks is both transparent and peer-reviewed. The designation of a strategic stock is first listed in the proposed annual SARs, which are both peer-reviewed by the Scientific Review Groups and released for public review and comment before becoming final.

Comment 18: The Marine Mammal Commission concurred with NMFS' proposal to split the HI longline fishery into the Category II shallow-set and Category I deep-set fisheries based on the reasons provided in the proposed rule. The reclassification of the shallow-set fishery is warranted based on the lack of information regarding population structure and abundance of marine mammals that the fishery interacts with outside the U.S. EEZ. NMFS based the proposed Category II classification on observed interactions rates that do not exceed 50 percent of PBR for stocks within the U.S. EEZ. However, the PBR level is unknown for stocks that occur outside the U.S. EEZ and are taken incidentally by this fishery. As stated in the proposed LOF, Category II is the appropriate category for new fisheries for which NMFS does not have adequate information to accurately categorize the fishery.

Response: NMFS acknowledges the comment and will continue to conduct and support research regarding the population structure and abundance of the marine mammals that are interacting with these fisheries.

Comment 19: The WPFMC continues to be concerned about the categorization of all hookings on the exterior of the head and in the jaw in cetaceans as being likely to result in mortality. The Council does not believe that there is sufficient scientific information to justify a 100 percent mortality rate for these injuries, and suggests instead that some realistic probability scale be developed similar to that for longline hooked turtles. For turtles, an external hooking is given a 5 to 20 percent probability of causing a post-release mortality, while internal hookings range from 10 to 60 percent probability, based on various factors. It seems inconsistent of NMFS to develop a precise defensible system of categorization for turtle hookings and a blanket 100 percent mortality rate for cetaceans based on any hooking to the head and internally. Clearly, these are very different taxa, but there must be sufficient scientific observations available on cetaceans with which to construct better evaluation criteria for hookings. As such, the interactions with cetaceans are always going to be positively biased, with excessive mortalities being ascribed to fisheries.

Response: This comment is related to the determination of a serious injury, which NMFS scientists and/or the authors of the SARs make and report in the annual SARs. The SARs estimate annual human-caused mortality and serious injury caused by interactions with commercial fisheries and other human activities. NMFS does not make serious injury determinations through the LOF rulemaking process. NMFS classifies fisheries on the LOF based on the level of serious injury (and mortality) presented in the SARs. NMFS recommends that WPFMC submit this comment during the public comment period on the next draft SAR.

Comment 20: The WPFMC stated that the proposed list of marine mammals with which HI's deep set longline fishery interacts includes the Bryde's whale, pantropical spotted dolphin, and sperm whale. A search of the observer

data from 2003–2007 shows no records of these three species interacting with the fishery. If they are to be listed in Table 1, there should be a footnote to the effect that these cetaceans were not seen within the past five years, which the Council understands is the criteria used when evaluating the fisheries for the LOF.

Response: There are no records of recent serious injuries or mortalities of Bryde's whales, sperm whales, or pantropical spotted dolphins in the ''HI deep-set (tuna target) longline/set line fishery.'' The recorded interactions with these species were in the shallow-set component of the HI longline fishery. These species were inadvertently retained under the list of species/stocks killed/injured in this fishery when NMFS split the HI longline fishery into the separate deep-set and shallow-set components on the proposed 2009 LOF (73 FR 33760, June 13, 2008).

NMFS has corrected this error and removed Byrde's whale, sperm whale, and pantropical spotted dolphin from the list of species/stocks killed/injured in the ''HI deep-set (tuna target) longline/set line fishery'' in the final 2009 LOF, and included the species on the list for the shallow-set longline fishery.

Comment 21: The WPFMC believes that the evidence for categorizing the HI deep-set tuna longline fishery as a Category I is inadequate. The Council does not dispute the existence of an isolated, small false killer whale stock around Hawaii. However, the current longline exclusion zone around Hawaii extends from 50–75 nmi and creates a separation between these individuals and the fishery. Available genetic data suggests that the deep-set fishery interacts primarily with a larger Eastern Pacific false killer whale population.

Response: Based on the PBR and the average annual serious injury and mortality rate reported in the recent SARs, the ''HI deep-set (tuna target) longline/set line fishery'' qualifies as a Category I fishery on the LOF (serious injury and mortality exceeds 50 percent of PBR for the HI stock of false killer whales). NMFS calculates PBR levels and determine the status of marine mammal stocks during the annual process of developing a SAR; then NMFS classifies fisheries on the LOF based on data reported in the annual SARs. NMFS recommends the commenter submit this comment, and any other comments regarding the stock's PBR or strategic status, during the public comment period for the next draft SAR.

Comment 22: The CBD stated that the ''Gulf of AK sablefish longline fishery'' is listed as a Category III. Due to frequent interactions with sperm and killer whales, this fishery should be listed as a Category I or II.

Response: Fisheries are categorized in the LOF based on the level of serious injuries and mortalities relative to the PBR levels for specific species, not the frequency of ''interactions.'' At the time the proposed 2009 LOF was developed, the best available information was that no marine mammals were seriously injured or killed incidental to this fishery between 2001 and 2005, the most current data available in the SARs, so the fishery is appropriately retained in Category III. New information on serious injuries and mortalities has been included in the recent draft SARs which indicates that 3 serious injuries of sperm whales were observed in 2006, which would extrapolate to an estimated 10 serious injuries or mortalities of sperm whales incidental to this fishery, or 2 sperm whales per year for the 5-year period from 2002–2006. This information is still under review and will be considered when the next LOF (the proposed 2010 LOF) is developed.

Comment 23: The CBD noted inconsistencies in the classification of AK purse seine fisheries. Three salmon purse seine fisheries are listed as Category II, yet the description of the Category III ''AK salmon purse seine (except Southeast AK, which is in Category II) fishery'' only excludes one of these Category II fisheries from its description. This should be corrected, and the estimated number of vessels altered as necessary for consistency.

Response: The Category III fishery identified as ''AK salmon purse seine (except Southeast AK, which is in Category II) fishery'' was included in the LOF when it was created under the section 118 of the MMPA (i.e., under the 1994 MMPA Amendments). The ''AK salmon purse seine (except Southeast AK, which is in Category II) fishery'' was created to include all of the numerous purse seine fisheries around the state of AK, other than the Category II ''Southeast AK purse seine fishery.'' Information on marine mammal interactions with any of these purse seine fisheries included in the ''AK salmon purse seine (except Southeast AK, which is in Category II) fishery,'' particularly serious injury and mortality, was not available to NMFS when the LOF was created at that time. Since 1994, information on serious injury and mortality to humpback whales in the Cook Inlet and Kodiak purse seine fisheries has been obtained. Therefore, NMFS identified the ''Cook Inlet salmon purse seine fishery'' and the ''Kodiak salmon purse seine fishery'' separately on the 2007 LOF (72 FR 14466, March 28, 2007) as Category II fisheries based on the results from the analysis of the respective serious injury and mortality levels of humpback whales in these fisheries. To clarify that the Category III AK salmon purse seine fishery includes all AK salmon purse seine fisheries other than those listed as Category II on the LOF, NMFS has renamed the Category III ''AK salmon purse seine (except Southeast AK, which is in Category II) fishery'' as the ''AK salmon purse seine (excluding salmon purse seine fisheries listed as Category II).'' If additional information on marine mammal serious injury and mortality incidental to other discrete AK salmon purse seine fisheries becomes available in the future, and meets the criteria for elevation to Category II, those individual fisheries will be removed from the broader ''AK salmon purse seine (excluding salmon purse seine fisheries listed as Category II)'' and elevated to Category II under appropriate, specific fishery-identifying nomenclature.

Comment 24: The CBD noted that high levels of entanglement-related scarring have been documented for humpback whales in AK. While some gillnet and purse seine fisheries are listed as Category II due to humpback interactions, the ''AK Bering Sea sablefish pot fishery'' is the only pot, ring net or trap fishery so categorized. All other AK pot fisheries should also be classified as Category II rather than Category III.

Response: NMFS uses very careful criteria in assigning marine mammal serious injuries and mortalities to specific fisheries for the purpose of categorizing them in the LOF. In the Alaska Region, these criteria include, but are not limited to: Clear identification of attached gear, eyewitness accounts, or other credible information. When those criteria have been met, the individual serious injury or mortality is included in the data set used in the standard annual analysis conducted to assign fisheries in the LOF.

Current information on humpback scarring in Alaska is not detailed enough to allow NMFS to be able to identify and link specific scars or scarred animals to an individual fishery or even a specific fishing gear type, except under the rarest of circumstances. Further, humpback whales travel long distances and obtain scars from gear originally set great distances from the geographic location where the scar was noted. Finally, the analysis conducted for the annual LOF uses a rolling five-year average. This

allows for changes to fishing methods or natural fluctuations in animal distribution or behavior. Scars persist for varying lengths of time and scarring information would need to be much better understood than it is currently to be able to be used effectively in the annual LOF analysis. Information regarding serious injury or mortality incidental to the ''Gulf of Alaska sablefish pot fishery'' clearly indicates the take of the humpback whale was associated with that fishery, leading to the Category II classification for that fishery.

Without more detailed evidence, NMFS cannot assume that all humpback whale scars result from interactions with specific commercial fisheries. Further, NMFS cannot make assumptions at this time as to what proportion of entanglements that result in scarring lead to serious injury or mortality, the driving criteria for classifying fisheries on the LOF.

Comment 25: If the ''OR Dungeness crab pot fishery'' is elevated to a Category II on the final 2009 LOF, the ODFW requested NMFS advice and assistance to fulfill, in the most efficient manner possible, those requirements under the ESA that would apply to the fishery's interactions with listed humpback whales.

Response: This final rule classifies the ''OR Dungeness crab pot fishery'' as a Category II fishery. NMFS will work with the State of Oregon relative to changes on the LOF that affect state-managed fisheries.

Comment 26: If the ''OR Dungeness crab pot fishery'' is elevated to a Category II on the final 2009 LOF, fishing vessel owners will be required to register with NMFS and obtain a marine mammal authorization certificate by January 1, 2009. This would occur during the height of effort in this fishery and most participants will be actively fishing when the new rule would take effect. The ODFW requests that NMFS strive to minimize any disruptions to fishing activities in order to implement any new requirements. ODFW and NMFS regional staff have discussed potential implementation issues, particularly for the first year, and ODFW staff remains available to work with NMFS on these issues.

Response: NMFS will work with the state fishery managers to integrate fisher registration for the MMAP program with state licensing processes, to the extent possible. NMFS will request fisher registration information from the state licensing office in order to issue authorization certificates to fishers in a timely and cost efficient manner.

Comment 27: ODFW supports the addition of a separate Category II ''OR Dungeness crab pot fishery.'' ODFW is concerned about fishery interactions with marine mammals and has implemented several on-going management measures for the OR Dungeness crab pot fishery that will reduce the risk of interactions in the future. Fishing effort has been reduced from an estimated high of 200,000 pots in 2006, when the observed humpback whale entanglement occurred, to a maximum of 150,000 pots per season. Logbook information including date, location, and amount of gear fished is now required for all crab vessels. This information will be useful in the future to assess the potential for interactions and ways to reduce interactions. ODFW has also implemented management measures that restrict untended gear to no more than 14 days and several temporary rules to facilitate fishers opportunistically retrieving lost or derelict gear. ODFW has also partnered with others to charter vessels specifically to retrieve derelict and lost crab pots. ODFW anticipates working with NMFS to smoothly and efficiently implement the new requirements.

Response: NMFS acknowledges the State of Oregon's positive steps in reducing the incidental take of marine mammals in the ''OR Dungeness crab pot fishery.''

Comment 28: ODFW strongly supports the proposal to split the current ''WA/OR/CA crab pot fishery'' into three fisheries, one for each state. Each state has different management and permitting frameworks for Dungeness crab trap/pot fishing, and different amounts of gear in state waters. Also, known interactions with marine mammals differ between states, probably mainly due to differences in the timing and amount of gear fished, and differences in timing and distribution of marine mammals along the coast. The potential risk of humpback whale entanglements in Dungeness crab pot gear appears to progressively decrease from CA to WA, based on the humpback whale movement patterns, fishing intensity patterns, and observed reports of humpback whale entanglements. This differential risk from south to north justifies the proposed separation of the west coast fishery into three fisheries. Also, while there is a Tri-State agreement that addresses some aspects of the West Coast Dungeness crab fishery, the individual states have the primary role in managing their respective fishery and the management authorities and actions differ among states. The different authorities and the lack of a true regional management system provide added justification to separate the fishery among states.

Response: NMFS has classified the three fisheries by state in this final rule. The presence of humpback whales along the west coast varies seasonally and the relationship between the presence of whales and the peak periods of fishing effort likely influences the potential for entanglement. The management of the fisheries by the individual states affords added flexibility to respond to regional differences more quickly to reduce the risk of entanglement for the whales.

Comment 29: The CBD stated that, while the proposed 2009 LOF includes several West Coast pot and trap fisheries as Category II due to interactions with humpback whales, the proposed LOF improperly excluded many similar fisheries. CBD stated that NMFS acknowledges humpback whale entanglements are likely significantly underreported, yet only includes those fisheries as Category II if the fishery is known to interact with humpbacks or if there is a time/space overlap with a reported entanglement. CBD believes this method results in several fisheries being classified as Category III when Category II is the more appropriate classification. All pot or trap fisheries that occur within the range of the humpback whale should be classified as Category II until and unless observer coverage demonstrates that they do not pose a risk of entanglement to the species.

Response: As described in the final 2008 LOF (72 FR 66048, 66066, November 27, 2008), NMFS researched the commercial pot and trap fisheries to better understand which of those fisheries may interact with humpback whales along the coast of California. NMFS extended its analysis for the 2009 LOF to include pot and trap fisheries along the coasts of Washington and Oregon and worked closely with fisheries staff from the three states. NMFS developed criteria described in the proposed 2009 LOF to evaluate the pot and trap fisheries along California, Oregon, and Washington and determine which are most likely to interact with humpback whales. The first criterion was whether there is direct evidence of entanglements with a specific fishery (e.g., the identification of spot prawn gear on a humpback whale entangled in September 2005). In the absence of direct evidence on interactions, the second criterion was used, (i.e., the fishery occurs in an area and time where humpback whale entanglements have been observed and reported to NMFS). This criterion was used to refine the analysis with the limited information

available. NMFS acknowledges the uncertainties associated with this analysis. However, NMFS believes that the criteria described in the proposed 2009 LOF and used to assess the fisheries is the most reasonable means at this time of using the available information and reclassifying certain pot and trap fisheries.

The commenter suggests that all west coast pot and trap fisheries in the range of humpback whales be listed as Category II, until observers can show that the fisheries do not pose a threat to marine mammals. However, observers in pot and trap fisheries have very limited ability to detect these types of interactions. In most instances, trap/pot gear is left to soak for some time and is not actively tended by the fishing vessel for the majority of the soak period. Interactions (entanglements) between large whales and trap/pot gear are therefore unlikely to be observed from the fishing vessel except in the rare instance when the vessel is present at the time the entanglement occurs. Therefore, alternative monitoring methods are needed for trap/pot fisheries. NMFS has begun work (and will cooperate with other agencies, the scientific and fishing communities, and the general public) to find ways to monitor pot/trap fisheries and gather additional data to better understand the nature of the interactions between these fisheries and marine mammals. As noted in the 2009 LOF proposed rule, when and if additional information becomes available, NMFS would consider reclassifying pot/trap fisheries.

Comment 30: The Marine Mammal Commission recommended that NMFS reclassify all currently recognized west coast pot and trap fisheries as Category II until additional information is available to categorize a given fishery as a Category I or III. Although the Commission appreciates NMFS' efforts to evaluate information on observed humpback whale entanglements and attribute those entanglements to specific trap/pot fisheries, the Commission believes that the analysis and resulting proposed reclassifications do not account appropriately for the substantial uncertainty in the number and location of entanglements. The Commission acknowledged that NMFS has shown that humpback whales do become entangled in trap/pot gear, and that there is no evidence to suggest that whales are more or less likely to become entangled in gear from any specific trap/pot fishery. NMFS noted in the proposed 2009 LOF that ''other pot and trap fisheries may overlap in space and time with humpback whales feeding or migrating along the West coast, but in the absence of evidence of interactions, NMFS cannot justify placing these fisheries in Category II at this time.'' The Commission believes that this statement misplaces the burden of proof and removes the incentive for collecting important information on entanglement rates. The vast majority (90 to 97 percent) of humpback whale entanglements are not observed (Robbins and Matilla, 2001, 2004) and, by implication, at least some entanglements of endangered baleen whales are not observed and reported. Given that the majority of entanglements are not observed, it is reasonable to classify all west coast trap/pot fisheries as Category II based on their similarity to those trap/pot fisheries that are known to have incidentally entangled whales. Also, NMFS acknowledges in the proposed rule that ''Category II is also the appropriate category for fisheries for which reliable information on the frequency of marine mammal serious injury or mortalities is lacking.''

Response: Please see the response to Comment 29 above. NMFS acknowledges that there are likely interactions with marine mammals that are not observed or reported. However, NMFS reviewed all of the records of entanglements, the distribution of humpback whales and the spatial and temporal characteristics of the pot and trap fisheries on the U.S. west coast and developed criteria to reclassify fisheries based upon the best available information. NMFS is also working on ways to increase the amount of information available on interactions between marine mammals and pot and trap fisheries on the U.S. west coast. The commenter suggests that other species of endangered baleen whales may be entangled in pot and trap gear, but not observed. At this time, NMFS is focused on interactions with humpback whales and gray whales since these are the only species observed entangled in pot and trap gear on the U.S. west coast. Also, other pot and trap fisheries in the Pacific (including Hawaii and Alaska fisheries) have not been observed to interact with baleen whale species other than humpback whales.

NMFS notes that there was a typographical error in the proposed 2009 LOF on page 33772. The text should have stated that Category II is appropriate for *new* fisheries for which NMFS does not have adequate information. This is consistent with the text throughout the proposed rule related to the addition of high seas fisheries, and as stated in the final rule implementing the section 118 regulations (60 FR 45086, August 30, 1995, at 45090) and the final 2006 LOF (71 FR 48802, August 22, 2006; Comment/Response 4). As noted on page 33763, 33768, 33769, and 33770 of the proposed 2009 LOF, ''Category II is the appropriate category for new fisheries for which NMFS does not have adequate information to accurately categorize.'' Fisheries previously included on the LOF as a Category I or III are reclassified as Category II after evaluating the information in the SARs, the type of gear being used, stranding records, and the distribution of marine mammals in the area. All west coast pot and trap fisheries have been previously included in the LOF as Category III fisheries; therefore, NMFS conducted this type of analysis on the west coast pot and trap fisheries and detailed the process in the proposed rule. As stated in the proposed 2009 LOF, NMFS will continue to review information related to humpback and gray whale entanglement events in pot and trap gear and consider reclassifying other west coast pot and trap fisheries if additional information becomes available.

Comment 31: The CA Wetfish Producers Association requested NMFS remove short-finned pilot whales from the list of species killed/injured in the Category II ''CA squid purse seine fishery'' because the most recent scientific information available does not justify including this species for interactions with this fishery. The fishery is being monitored and was observed during the expansion period. The 2007 SAR indicates that 193 sets were observed from 2004–2006. The commenter examined the NMFS SWR CA Coastal Pelagic Purse Seine Observer Program database, which indicated that 95 sets were observed through March 2007, with an additional 80 sets observed from July 2007–December 2007. Based on these data, there is not evidence that short-finned pilot whales were taken in this fishery during this recent span of years.

Response: NMFS received a similar comment on the proposed 2008 LOF (72 FR 66048, November 27, 2008; comment/response 18). As noted in the response to comment 18 in the 2008 LOF, there have been no observed takes of short-finned pilot whales in this fishery during the three years it was monitored (2004–2006); however, annual observer coverage was very low (the estimated coverage was only 1.1 percent in 2005, and less than 2 percent in the other years). The low level of observer coverage over three years may not reliably indicate the frequency of incidental mortality or serious injury of marine mammals in this fishery. In

considering whether a fishery should be listed as Category II, NMFS must evaluate a variety of factors including the fishing technique used, the seasons and areas fished, stranding reports, and the distribution of marine mammals in the area. NMFS feels that based upon the most recently available information, including stranding reports over the past few years, that a thorough evaluation of the ''CA squid purse seine fishery,'' as well as the ''CA anchovy, mackerel, sardine purse seine fishery'' and the ''CA tuna purse seine fishery,'' is warranted. NMFS will thoroughly evaluate the available information on the three above referenced California purse seine fisheries and will include the results in the proposed 2010 LOF. At that time, NMFS will determine whether reclassifying some of the CA purse seine fisheries, including the ''CA squid purse seine fishery,'' is appropriate.

Comment 32: The CA Wetfish Producers Association requested NMFS remove common dolphin, stock unknown, from the list of species killed/injured in the Category II ''CA squid purse seine fishery'' based on the most recent scientific information available. The NMFS SWR CA Coastal Pelagic Purse Seine Observer Program data contain one single observed interaction off Santa Barbara on January 3, 2005, resulting in one dead unidentified common dolphin. The most recent and relevant scientific information indicates there have been zero interactions with either long- or short-beaked common dolphins. There were more than 193 trips observed by federal observed during 2004–2006, and 80 sets observed in mid- to late-2007, with zero interactions (except for the single 2005 incident). Clearly, this fishery represents no current threat to either stock of common dolphins.

Response: A similar comment was made on the 2008 LOF. As described in NMFS' response to this comment in the final 2008 LOF (72 FR 66048, November 27, 2007; Comment/Response 19), there is insufficient information available to identify the species of common dolphin observed taken in the squid purse seine fishery. Both species, long-beaked common dolphins and short-beaked common dolphins, utilize much of the same habitat and overlap in areas with the squid purse seine fishery; therefore, it is possible that either species could have been taken. Further, the draft 2008 SARs includes an account in 2006 of eight unidentified dolphins entangled in a squid purse seine net. Seven of the animals were released unharmed, and one was seriously injured. The area in which these interactions occurred is an area where long-beaked common dolphins are known to occur. Given the paucity of information on the interaction, NMFS cannot eliminate the possibility that a long-beaked common dolphin was seriously injured during this event.

To make the list of marine mammal species and stocks incidentally killed/injured in the ''CA squid purse seine fishery'' more clear, NMFS is changing the stock from ''common dolphin, unknown'' to ''short-beaked common dolphin, CA/OR/WA'' and ''long-beaked common dolphin, CA'' to account for the uncertainty of the species observed seriously injured or killed in this fishery. This is consistent with how NMFS lists marine mammal stocks on the LOF that are difficult to distinguish from one another in the field and/or for which additional genetic data is not available for a given interaction (i.e., resident and transient killer whales in Alaska fisheries, and long-finned and short-finned pilot whales in Atlantic fisheries).

Comment 33: The CA Wetfish Producers Association requested NMFS recategorize the Category II ''CA squid purse seine fishery'' to a Category III based on existing observer data from 2004–2007, the paucity of marine mammal interactions with this fishery, and because the number of participants has reduced from 71 to 64 active vessels. Recategorization of this fishery to a Category III is justifiable and consistent with the best scientific information available. Also, a recategorization would provide the industry with validation that NMFS actually utilizes observer data to adjust the LOF annually to reflect current circumstances in commercial fisheries. Furthermore, the commenter requested the LOF be updated to reflect the reduction in the number of participants to 64, consistent with CA Department of Fish and Game records indication that 64 purse seine vessels landed squid in 2007.

Response: NMFS recognizes that the squid purse seine fishery warrants further evaluation based upon all available information, including observer records. Please see response to Comment 31 above for more information. NMFS appreciates the information on the number of active vessels in this fishery and has updated the number of active vessels to 64 in the final 2009 LOF.

Comment 34: The Marine Mammal Commission concurred with NMFS' proposal to reclassify the ''CA halibut/white seabass set net fishery'' from Category I to II based on the information provided in the proposed rule.

Response: NMFS acknowledges and appreciates the comment.

Comment 35: The CDFG supported reclassifying the ''CA Dungeness crab pot fishery'' to a Category II fishery given the relatively high likelihood of humpback whale interactions. However, as with the sablefish pot fishery, CDFG believes that this fishery should have a coastwide designation as the ''(WA/OR/CA) Dungeness crab pot fishery'' because it is difficult to determine the precise location of the original entanglement or other incident, and humpback whale migratory patterns are such that an entangled whale might be encountered and reported far from the site of the incident. Also, there is no evidence that primary fishing areas in California, which are north of Point Arena, differ from Oregon and coastal Washington with respect to the likelihood of these interactions.

Response: As explained in the proposed 2009 LOF, NMFS believes that because of the differences in management of the Dungeness crab pot fishery by each state, it is appropriate to split the fishery into three separate fisheries by state. Also, unlike the sablefish fishery, fishermen targeting Dungeness crab are limited to fishing the waters off the state for which they hold a permit. For example, a fisherman with a Washington permit may only set Dungeness crab pot gear off Washington, while a fisherman with a California permit may only set gear off California. The sablefish fishery permit does not have this same restriction. A fisherman possessing a sablefish fishery permit (open access) may set gear in the waters off any of the three states.

As noted in the proposed 2009 LOF, NMFS acknowledged some level of uncertainty associated with the assumption that the area in which an entangled animal is observed is the area where the entanglement occurred. However, this assumption was considered necessary in order to utilize the available information and is supported by the available data on entanglements. For example, spot prawn gear was identified on a humpback during a time and in an area during high levels of effort in the spot prawn trap fishery (73 FR 33799, June 13, 2008). NMFS believes that effort in the fisheries is likely to affect the likelihood of an interaction with a humpback whale, since each fishery occurs at slightly different times of the year off the coasts of California, Oregon, and Washington. For example, the effort in the southern half of California in the ''CA Dungeness crab pot fishery'' may begin in mid-November, overlapping with the time that humpback whales are

likely to be migrating through the waters. However, in Oregon and Washington the peak of the fishery is December through February, at which time most humpback whales have migrated out of the area on their way to winter breeding areas off Mexico. As described in NMFS' pot and trap fishery characterization referenced in the proposed 2009 LOF, Dungeness crab pots may be fished through the spring, in waters off each of the three states' coasts, thus affecting the likelihood of interactions with humpback whales (i.e., Dungeness crab pot gear fished off Oregon in May, is believed to be responsible for the entanglement of a humpback whale that stranded dead on the Oregon coast). However, given the typical fishery patterns and the migratory behavior of humpbacks in California waters, it is likely that gear off California is more likely to entangle humpbacks during their migration.

Comment 36: The CDFG supported the evaluation of the ''WA/OR/CA sablefish pot fishery'' to a Category II fishery and supported the continuation of the tri-state, coastwide designation of the sablefish pot fishery. The limited information available regarding humpback whale interactions makes it difficult to determine the precise location of the original entanglement or other incident, and humpback whale migratory patterns are such that an entangled whale might be encountered and reported far from the site of the incident.

Response: As described in the proposed 2009 LOF and in the response to comment 35 above, the existing sablefish fishery regulations allow fishers from one state to fish sablefish pot gear off another state. Therefore, it is most appropriate to list the sablefish pot fishery on the LOF as one fishery that includes effort in waters in all three states.

Comment 37: The CDFG supported the removal of Eastern North Pacific humpback whales and CA sea otters from the list of species and stocks incidentally killed/injured in the Category III ''CA spiny lobster, coonstripe shrimp, finfish, rock crab, tanner crab pot or trap fishery,'' based on the 2008 analysis of humpback and gray whale interactions, and the lack of any known interactions with sea otters since 1987.

Response: NMFS acknowledges this comment.

Comment 38: The CDFG proposed that NMFS remove finfish from the Category III ''CA spiny lobster, coonstripe shrimp, finfish, rock crab, tanner crab pot or trap fishery,'' and that the fishery be renamed to reflect this change, because the finfish trap fishery is a separate and distinct fishery from the various crustacean fisheries. Additionally, finfish are included in the Category III ''CA finfish and shellfish live trap/hook-and-line fishery.'' Furthermore, finfish cannot be taken in the lobster and rock crab trap fisheries (Fish and Game Code Section 8250.5 and Title 14, CCR, Section 125.1). However, if the reference to finfish in this fishery is meant for hagfish, then it should be specified as such. Finally, the gray whale interaction listed in the LOF table comes from an observation of a gray whale with a lobster trap buoy line attached, and not from a finfish trap.

Response: NMFS appreciates CDFG's clarification on these fisheries and has removed finfish from the existing fishery description and name. The name of the fishery in the final 2009 LOF has been renamed to the ''CA spiny lobster, coonstripe shrimp, rock crab, tanner crab pot or trap fishery.'' Finfish in this fishery did not refer to hagfish, as the hagfish pot/trap fishery is currently listed separately on the LOF as the Category III ''OR/CA hagfish fishery.'' NMFS acknowledges and appreciates the clarification on the gray whale take in the lobster trap fishery and will continue to list gray whale as one of the species incidentally killed or injured in this fishery, as it is listed in the proposed 2009 LOF.

Comment 39: The CDFG supported the proposal to separate the spot prawn trap fishery from the other crustacean trap/pot fisheries and place it in Category II. CDFG understands that the change is being proposed so that the other fisheries can remain in Category III.

Response: NMFS acknowledges the comment.

Comment 40: The CDFG proposed removing shellfish from the ''CA finfish and shellfish live trap/hook-and-line fishery'' and renaming it the ''CA nearshore finfish live trap/hook-and-line fishery,'' maintaining the Category III status because there are no documented instances of marine mammal interactions. Shellfish are already covered in the proposed ''CA spiny lobster, coonstripe shrimp, finfish, rock crab, tanner crab pot or trap fishery.'' Also, while these shellfish species are taken live they are not taken with hook-and-line gear. The majority of nearshore finfish are landed in the live condition. Nearshore finfish traps are set in very shallow waters (two to eight fathoms) in kelp beds and over rock habitat off southern and central CA. Traps are usually set and pulled multiple times a day.

Response: The proposal to rename this fishery is appropriate for the reasons stated by the commenter. NMFS has renamed the Category III ''CA finfish and shellfish live trap/hook-and-line fishery'' as the ''CA nearshore finfish live trap/hook-and-line fishery'' in the final 2009 LOF.

Comments on Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

Comment 41: The MAFMC supported the proposal to eliminate *Loligo, Illex*, and butterfish from the list of species targeted by the Category II ''Mid-Atlantic Mid-Water trawl fishery.'' In addition, the MAFMC supports the addition of these three species to the list of species targeted by the Category II ''Mid-Atlantic bottom trawl fishery.'' The MAFMC notes that it was not possible to determine what other species were added to the species list for this fishery given the information provided in the proposed rule.

Response: After removing *Illex* squid, *Loligo* squid, and butterfish from the species targeted by the ''Mid-Atlantic mid-water trawl fishery,'' NMFS added ''chub mackerel and miscellaneous other pelagic species'' (73 FR 33775, June 13, 2008) to the description of species targeted by the Mid-Atlantic mid-water trawl fishery based on information provided in Appendix III of the 2007 final SAR.

Comment 42: The MAFMC, the NCDMF, and the Garden State Seafood Association (reiterating a request made as a comment on the 2007 LOF and in a letter sent directly to NMFS in November 2006) each requested that NMFS conduct a Tier Analysis of the bluefish gillnet and croaker gillnet fisheries, currently included under the Category I ''Mid-Atlantic gillnet fishery.'' The commenters requested the Tier Analysis to determine whether the data support downgrading these fisheries from Category I to Category II or III (thereby also separating the bluefish and croaker components from the ''Mid-Atlantic gillnet fishery''). Available observer data indicate that from 2000–2005 there were 109 Atlantic croaker gillnet trips and 70 bluefish gillnet trips observed with no documented marine mammal interactions. Should these fisheries be downgraded to a Category II or III, the NCDMF recommends that observer coverage be increased in other Category I Mid-Atlantic gillnet fisheries.

Response: In 1998, NMFS determined regulatory measures should be based on the characteristics of the gillnet fisheries that relate to marine mammal bycatch, rather than to base the regulations on target fisheries. NMFS determined that

the nature of the gear and how the gear is deployed determines whether marine mammals become entangled. Additionally, because the intended target species is not always the actual species landed, regulations based on sub-fisheries would become very difficult to enforce (See Harbor Porpoise Take Reduction Plan Final Environmental Assessment and Final Regulatory Flexibility Analysis, NMFS, 1998). Since the characteristics of gillnet gear targeting bluefish and croaker cannot be differentiated from the ''Mid-Atlantic gillnet'' fishery gear definition, NMFS has determined that the bluefish and croaker fisheries cannot be separated out for a separate tier analysis. Therefore, NMFS retains the current inclusion of the bluefish and croaker gillnet fisheries in the ''Mid-Atlantic gillnet fishery'' (Category I) and does not find the suggested sub-division to be warranted.

Comment 43: NMFS proposes to add trotline gear as a new Category III fishery. The proposed rule describes trotline gear as a series of baited hooks attached to a horizontal line targeting blue crab, catfish, and other finfish species throughout the coastal Atlantic and Gulf of Mexico. The MAFMC states that in the Mid-Atlantic region, primarily in the Chesapeake Bay, trotlines are fished for blue crab without the use of hooks and asks if this fishery should be included under the newly proposed trotline category. If so, then the LOF should recognize a separate category for trotlines that do not use hooks, or consider excluding this fishery from the list because no hooks are deployed in this fishery. Similarly, the NCDMF did not support the inclusion of the blue crab trotline fishery in the proposed Category III ''U.S. Atlantic Ocean, Gulf of Mexico trotline fishery,'' and recommended that blue crab trotlines not be listed under this fishery. Blue crab trotlines used in North Carolina do not use hooks for retention of bait. Instead, the bait is tied to the trotline using small diameter twine.

Response: At this time, the current definition only includes trotlines with hooks. However, in the future, NMFS intends to evaluate all Category III ''longline/hook and line fisheries'' definitions for clarification purposes. NMFS will investigate if the expansion of the ''U.S. Atlantic, Gulf of Mexico trotline fishery'' warrants including gear without hooks or if non-hook trotline gear is more specific, therefore requiring a unique fishery definition.

Comment 44: The MAFMC supported the addition of the North Carolina striped bass beach haul seine fishery to the list of fisheries included in the Mid-Atlantic haul/beach seine fishery.

Response: NMFS has added the North Carolina striped bass beach haul seine fishery to the list of fisheries included in the Category II ''Mid-Atlantic haul/beach seine fishery'' based on current gear practices and thus enabling more effective conservation measures and management.

Comment 45: The NCDMF supported the proposed revisions to the description of the Category II ''Mid-Atlantic haul/beach seine fishery.'' The revised description will complement NCDMF Proclamation FF–51–2008, effective December 2008, which requires seines used in the Atlantic Ocean striped bass beach seine fishery to be constructed of multifilament or multi-fiber webbing. NCDMF intends to maintain the multifilament or multi-fiber webbing requirements throughout the Atlantic Ocean beach seine season.

Response: NMFS will continue to work collaboratively with NCDMF to ensure descriptions and classifications in the list of fisheries of beach-based fisheries in North Carolina complement NCDMF's efforts.

Comment 46: The CBD and the Marine Mammal Commission reiterated previous years' comments expressing concerns about marine mammal interactions with Gulf of Mexico fisheries. The Commission recommended that NMFS expedite its investigation of bottlenose dolphin stock structure, and both CBD and the Commission recommended NMFS reevaluate the classification of Gulf of Mexico fisheries. The CBD believes that the ''Gulf of Mexico blue crab trap/pot fishery'' should be classified as at least a Category II, and the ''Gulf of Mexico menhaden purse seine'' and the ''Gulf of Mexico gillnet'' fisheries should be classified as Category I based on known or likely impacts to bottlenose dolphin stocks.

Response: NMFS does not believe elevating the ''Gulf of Mexico blue crab trap/pot fishery,'' ''Gulf of Mexico menhaden purse seine fishery,'' or ''Gulf of Mexico gillnet fishery'' is supported by available information. There is no observer program for these fisheries. NMFS relies on stranding data and fisher self-reports to document fishery interactions with marine mammals. While these sources show only a low level of interactions, NMFS recognizes that they are unreliable and likely to be biased low. However, NMFS will continue monitoring using self-reports and stranding data. Observer coverage for these fisheries also remains a priority if resources become available. In addition, PBR is unknown for these stocks because of insufficient information on stock structure and abundance.

In the ''Gulf of Mexico blue crab trap/pot fishery,'' stranding data indicate there were two confirmed bottlenose dolphin interactions with crab pot fishing gear between 2002–2006, one of which was released alive. In the same period, four dead bottlenose dolphins stranded with rope or rope marks that may have been from trap/pot gear, but cause of death could not be determined.

The ''Gulf of Mexico menhaden purse seine fishery'' was observed by researchers from Louisiana State University in 1992, 1994, and 1995. The observers documented nine bottlenose dolphin captures, three of which were mortalities. Using observed and total fishery effort data, the number of takes was linearly extrapolated to an estimate of 68 animals. On the basis of this information, the fishery was elevated from Category III to Category II on the 1999 LOF (64 FR 9067, February 24, 1999). Since that time, there has been no observer coverage in this fishery. Fishers' self-reports through the Marine Mammal Authorization Program (MMAP) reveal five bottlenose dolphin mortalities from 2002–2006, with two mortalities in 2002, one in 2004, and two in 2005. However, information gathered under the MMAP cannot be verified, so it is not possible to extrapolate these numbers to obtain an estimate of total takes in this fishery.

No marine mammal mortalities associated with gillnet fisheries in the Gulf of Mexico have been reported through the MMAP. Stranding data suggest that marine mammal interactions with gillnets do occur, causing mortality and serious injury. NMFS acknowledges that stranding data likely underestimate the extent of fishery-related mortality and serious injury. Interpreting the data is difficult due to varying ability among the stranding network to detect and respond to strandings in all areas and accurately document human interactions and the condition of the carcass when stranded.

It is important to further investigate stock structure and abundance of bottlenose dolphins in the Gulf of Mexico. There is currently no PBR calculated for coastal stocks or bay, sound, and estuarine stocks, preventing NMFS from assessing the population-level impacts of serious injuries and mortalities. To address this, NMFS is working toward updating estimates of bottlenose dolphin abundance and refining bottlenose dolphin stock structure in the Gulf of Mexico. Specifically, in July and August 2007, NMFS completed a ship-based survey of

the Gulf of Mexico continental shelf and completed winter and summer aerial line-transect abundance surveys of coastal bottlenose dolphin stocks. To help characterize stock structure and abundance in bays, sounds, and estuaries, NMFS conducted a photo-ID mark-recapture study and biopsy sampling in Choctawhatchee Bay, FL, in July and August 2007 and biopsy sampling in Mississippi Sound in 2005 and 2006. Data collected during these surveys are currently being analyzed, and updated information on population abundance and stock structure will appear in the 2008 SARs. Once this information is available and PBR is calculated for each stock, NMFS will be better able to assess the impacts of mortality and serious injury of marine mammals associated with commercial fisheries in the Gulf.

Comment 47: The Marine Mammal Commission recommended that NMFS expand its efforts to collect reliable information on serious injury and mortality rates of marine mammals incidental to Gulf of Mexico fisheries, with priority being given to instituting an observer program for the menhaden purse seine fishery and expanding efforts to evaluate bottlenose dolphin entanglements in blue crab trap/pot gear. The CBD also recommended that NMFS make it a high priority to place observer coverage in the ''Gulf of Mexico menhaden purse seine fishery'' and further recommended that NMFS convene a TRT to address bottlenose dolphin take in the Gulf from this and other fisheries.

Response: Collecting reliable information on serious injury and mortality of marine mammals in the Gulf of Mexico is essential. However, there are currently no resources to fund observer programs in these fisheries. Therefore, NMFS is focusing on building volunteer stranding network capacity in the Gulf and increasing the level and quality of stranding response. NMFS held training workshops for the stranding network in Texas, Louisiana, and Mississippi in May 2008 to train responders how to recognize and document human interaction and conduct necropsies. NMFS expects these efforts to increase the effectiveness of the stranding networks and better inform management decisions in the future.

Observer coverage for the ''Gulf of Mexico menhaden purse seine fishery'' and evaluating bottlenose dolphin entanglements in the blue crab/trap pot gear are priorities if resources become available. Because population size and PBR are unknown for the three coastal and all the bay, sound, and estuary stocks, NMFS is unable to assess the population level impacts of serious injuries and mortalities from fisheries to determine whether annual mortality is greater than or equal to 50 percent of PBR. Thus, NMFS does not believe a TRT is supported by currently available information. As stated in the response comment 46, NMFS is working to collect and analyze additional data. Once this information is available and a PBR is calculated for each stock, NMFS will be better able to assess the impacts of mortality and serious injury of marine mammals associated with commercial fisheries in the Gulf of Mexico.

Summary of Changes to the LOF for 2009

The following summarizes changes to the LOF for 2009 in fishery classification, fisheries listed in the LOF, the number of participants in a particular fishery, and the species/stocks that are incidentally killed or injured in a particular fishery. The classifications and definitions of U.S. commercial fisheries for 2009 are identical to those provided in the LOF for 2008 with the changes outlined below.

Commercial Fisheries on the High Seas

Addition of Fisheries to the LOF

High Seas Atlantic Highly Migratory Species Fisheries

The high seas Atlantic HMS fisheries are added to the LOF. All gear types targeting Atlantic HMS on the high seas are categorized as Category II on the LOF, with the exception of longline and purse seine gear. The longline component of this fishery is classified as Category I because it is an extension of the Category I ''Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline fishery'' operating within U.S. waters; and the purse seine component of this fishery is classified as Category III because it is an extension of the Category III ''U.S. Atlantic tuna purse seine fishery'' operating within U.S. waters. There are 88 valid HSFCA permits for fishers targeting Atlantic HMS on the high seas with all gear types. As noted in the preamble, the number of valid permits may not accurately account for annual fishing effort on the high seas.

Observer information is available on which marine mammal stocks are incidentally killed or injured on the high seas by the Atlantic HMS longline fishery; therefore, NMFS lists the marine mammal species that have been documented killed or injured in the Category I high seas longline component of Atlantic HMS fisheries in Table 3. Similar observer data are not available for the high seas Atlantic HMS purse seine fishery, which is an extension of the Category III ''Atlantic tuna purse seine fishery.'' NMFS adds all non-coastal marine mammal species/stocks killed or injured in the Category III ''Atlantic tuna purse seine fishery'' as injured or killed in the high seas purse seine component of the Atlantic HMS fisheries.

There is little information on interactions between marine mammals and fishing gear used to target Atlantic HMS on the high seas, other than that listed in the previous paragraphs. Given the lack of data on marine mammal abundance and interactions with high seas Atlantic HMS fisheries using gear other than longline and purse seine, NMFS lists the marine mammal species killed or injured in these fisheries as ''undetermined'' in Table 3.

High Seas Pacific Highly Migratory Species Fisheries

The high seas Pacific HMS fisheries are added to the LOF. All gear types targeting Pacific HMS on the high seas are listed as Category II, with the exception of drift gillnet and troll gear. The drift gillnet component of this fishery is listed as a Category I because it is an extension of the Category I ''CA/OR thresher shark/swordfish drift gillnet (≥14 in. mesh) fishery'' operating within U.S. waters; and the troll component of this fishery is listed as a Category III because it is an extension of the Category III ''AK North Pacific halibut, AK bottom fish, WA/OR/CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries'' operating within U.S. waters. There are 344 valid HSFCA permits for fishers targeting Pacific HMS on the high seas using all gear types. As noted in the preamble, the number of valid permits may not accurately account for annual fishing effort on the high seas.

Observer information is available for which species/stocks are incidentally killed or injured in the high seas longline component of this fishery; therefore, NMFS lists the marine mammal species that have been documented killed or injured in the high seas longline component of Atlantic HMS fisheries in Table 3. This list of species/stocks is identical to those listed as taken in the Category II ''CA pelagic longline fishery'' operating in U.S. waters. This is because the fishery is currently prohibited within U.S. waters, but remains listed on Table 1 because catch is landed on the U.S. West coast. Therefore, the marine mammal species listed as killed or

injured in this fishery were observed taken on the high seas.

For those fisheries where no interaction data (observer or other data) exist on the high seas, NMFS lists all the non-coastal marine mammal species/stocks killed or injured in the portion of the fishery that operates in U.S. waters as injured or killed in the same fishery operating on the high seas in Table 3. NMFS adds all non-coastal marine mammal species killed or injured in the Category I ''CA/OR thresher shark/swordfish drift gillnet (≥14 in. mesh) fishery'' as injured or killed in the high seas drift gillnet component of Pacific HMS fisheries. NMFS adds all non-coastal marine mammal species killed or injured in the Category II ''CA tuna purse seine fishery'' as injured or killed in the high seas purse seine component of the Pacific HMS fisheries.

There is little information on interactions between marine mammals and fishing gear used to target Pacific HMS on the high seas, other than that listed in the previous paragraphs. Given the lack of data on marine mammal abundance and interactions with high seas Pacific HMS fisheries using gear other than longline, drift gillnet, and purse seine, NMFS lists the marine mammal species killed or injured in these fisheries as ''undetermined'' in Table 3.

High Seas Western Pacific Pelagic Fisheries

The high seas Western Pacific pelagic fisheries are added to the LOF. All gear targeting Western Pacific pelagic species are listed as Category II, with the exception of deep-set longline gear. The deep-set longline component of this fishery is listed as a Category I because it is an extension of the Category I ''HI deep-set (tuna target) longline/set line fishery'' operating in U.S. waters. There are 219 valid HSFCA permits for fishers targeting Western Pacific pelagic species with all gear types on the high seas. As noted in the preamble, the number of valid permits may not accurately account for annual fishing effort on the high seas.

NMFS adds all non-coastal marine mammal species/stocks killed or injured in the Category I ''HI deep-set (tuna target) longline/set line fishery'' as injured or killed in the deep-set longline component operating on the high seas. NMFS adds all non-coastal marine mammal species killed or injured in the Category II ''HI shallow-set (swordfish target) longline/set line fishery'' as injured or killed in the shallow-set longline component operating on the high seas.

There is little information on interactions between marine mammals and fishing gear used to target Western Pacific pelagic species on the high seas, other than that listed in the previous paragraph. Given the lack of data on marine mammal abundance and interactions with high seas Western Pacific pelagic fisheries using gear other than longline, NMFS lists the marine mammal species killed or injured in these fisheries as ''undetermined'' in Table 3.

High Seas South Pacific Albacore Troll Fisheries

The high seas South Pacific albacore troll fisheries are added to the LOF, with all gear types listed as Category II. There are 83 valid HSFCA permits for vessels participating in the South Pacific albacore troll fisheries on the high seas with all gear types. As noted in the preamble, the number of valid permits may not accurately account for annual fishing effort on the high seas.

There are no records of incidental mortality or serious injury of marine mammals in the South Pacific albacore troll fisheries. While there is little indication of marine mammal interactions with South Pacific albacore troll fishing, NMFS listed the marine mammal species killed or injured in these fisheries as ''undetermined'' in Table 3 due to the lack of an observer program covering these fisheries.

High Seas South Pacific Tuna Fisheries

The high seas South Pacific tuna fisheries (as authorized under the SPTT) are added to the LOF. All gear types are listed as Category II because, while a formal observer program exists for fishing in the Treaty area, information on marine mammal stock abundance in the area is scarce and observer reports of fishery interactions are not yet specific enough to determine the level of marine mammal serious injury and mortality. There are 26 valid HSFCA permits for vessels participating in the South Pacific tuna fishery. This number accurately reflects the effort by U.S. vessels in the SPTT area because it closely matches the number of U.S. vessels with a valid SPTT license.

While available observer data document interactions with marine mammals, the data only currently identify the animals as unidentified whales, marine mammals, or dolphin/porpoise. For this reason, Table 3 lists the marine mammal species killed/injured in these fisheries as ''undetermined.''

High Seas Antarctic Living Marine Resources Fisheries

The high seas Antarctic Living Marine Resources (or CCAMLR) fisheries are added to the LOF. All gear types are listed as Category II because, while a formal observer program exists for fishing under CCAMLR, specific information on marine mammal abundance and fishery interactions levels has not been calculated in the manner necessary to categorize the fisheries based on a marine mammal stock's PBR. There are no valid HSFCA permits for vessels participating in the CCAMLR fisheries for the 2008 fishing season, which accurately reflects effort by U.S. vessels in the CCAMLR area. NMFS has included the trawl and gillnet components of the CCAMLR fisheries (the gear types used by U.S. vessels in the recent past) on Table 3 with a zero indicating the number of HSFCA permits for these fishery components.

Observer information is available for which species are incidentally killed or injured in CCAMLR fisheries. Based on observer data of interactions with trawl gear, NMFS adds Antarctic fur seals as incidentally killed or injured in the trawl component of the fishery. There are no documented injuries or mortalities of other marine mammal species and U.S. vessels when using other gear types in the CCAMLR region; therefore, Table 3 lists the marine mammal species killed/injured in longline gear as ''none documented.''

Commercial Fisheries in the Pacific Ocean

Fishery Classification

HI Swordfish, Tuna, Billfish, Mahi mahi, Wahoo, Oceanic Sharks Longline/Set Line Fishery

The Category I ''HI swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line fishery'' is split into two separately managed commercial fisheries: (1) The ''HI deep-set (tuna target) longline/set line fishery''; and (2) the ''HI shallow-set (swordfish target) longline/set line fishery.'' The ''HI deep-set (tuna target) longline/set line fishery'' is classified as a Category I fishery, and the ''HI shallow-set (swordfish target) longline/set line fishery'' is classified as a Category II fishery.

CA Halibut/White Seabass and Other Species Set Gillnet (>3.5 in. mesh) Fishery

The ''CA halibut/white seabass and other species set gillnet (>3.5 in. mesh)

fishery'' is recategorized from a Category I to a Category II fishery.

West Coast Trap/Pot Fisheries

NMFS reclassifies multiple West Coast trap and pot fisheries from Category III to Category II based on interactions with humpback whales (CA/OR/WA stock).

The ''CA spot prawn pot fishery'' is split from the Category III ''CA lobster, prawn, shrimp, rock crab, fish pot'' (renamed the ''CA spiny lobster, coonstrip shrimp, rock crab, tanner crab pot or trap'' in this final rule) and listed on the LOF as a Category II fishery. The estimated number of vessels or participants in this fishery is 29. In addition to humpback whales, gray whales remain listed as injured or killed in this fishery because gray whales have been listed as injured or killed in this fishery on past LOFs.

The ''WA/OR/CA sablefish pot fishery'' is elevated from Category III to a Category II fishery. The estimated number of vessels or participants in this fishery is 155, including both limited and open access permits (there are 32 limited access permits).

The ''OR Dungeness crab pot fishery'' is split from the Category III ''WA/OR/CA crab pot fishery'' and elevated to Category II. The estimated number of vessels or participants in this fishery is 433 (433 permits exist, 364 landings were made in 2006). In addition to humpback whales, gray whales remain listed as injured or killed in this fishery because gray whales have been listed as injured or killed in this fishery on past LOFs.

The ''CA Dungeness crab pot fishery'' is split from the Category III ''WA/OR/CA crab pot fishery'' and elevated to Category II. The estimated number of vessels or participants in this fishery is 625 (625 permits exist, 435 landings were made in 2006). In addition to humpback whales, gray whales remain listed as injured or killed in this fishery because gray whales have been listed as injured or killed in this fishery on past LOFs.

The ''WA Dungeness crab pot fishery'' is split from the Category III ''WA/OR/CA crab pot fishery'' and remains a Category III fishery. In addition to humpback whales, gray whales remain listed as injured or killed in this fishery because gray whales have been listed as injured or killed in this fishery on past LOFs.

Addition of Fisheries to the LOF

The ''HI deep-set (tuna target) longline/set line fishery'' is added to the LOF as a Category I fishery.

The ''HI shallow-set (swordfish target) longline/set line fishery'' is added to the LOF as a Category II fishery.

The ''CA spot prawn trap fishery'' is added to the LOF as a Category II fishery.

The ''CA Dungeness crab pot fishery'' is added to the LOF as a Category II fishery.

The ''OR Dungeness crab pot fishery'' is added to the LOF as a Category II fishery.

The ''WA Dungeness crab pot fishery'' is added to the LOF as a Category III fishery.

The ''AK statewide miscellaneous finfish pot fishery'' is added to the LOF as a Category III fishery.

The ''AK shrimp pot, except Southeast fishery'' is added to the LOF as a Category III fishery.

Removal of Fisheries From the LOF

The Category II ''AK Metlakatla/Annette Island salmon drift gillnet fishery'' is removed from the LOF.

Fishery Name and Organizational Changes and Clarifications

The Category II ''CA angel shark/halibut and other species set gillnet (>3.5 mesh size) fishery'' is renamed the ''CA halibut/white seabass and other species set gillnet (>3.5 in. mesh) fishery.''

The prawn portion of the Category III ''CA lobster, prawn, shrimp, rock crab, and fish pot fishery'' is split into a separate fishery, the Category II ''CA spot prawn fishery,'' and the remaining portion of the Category III fishery is renamed the ''CA spiny lobster, coonstripe shrimp, rock crab, tanner crab pot or trap fishery.''

The Category III ''WA/OR/CA crab pot fishery'' is split into three fisheries, the Category II ''CA Dungeness crab pot'' and ''OR Dungeness crab pot'' fisheries, and the Category III ''WA Dungeness crab pot fishery.''

The Category III ''CA finfish and shellfish live trap/hook-and-line fishery'' is renamed the ''CA nearshore finfish live trap/hook-and-line fishery.''

The Category III ''AK state-managed waters groundfish longline/set line (including sablefish, rockfish, and miscellaneous finfish'' is renamed the ''AK state-managed waters longline/set line (including sablefish, rockfish, lingcod, and miscellaneous finfish.''

The Category III ''AK North Pacific halibut handline and mechanical jig fishery'' is renamed the ''AK North Pacific halibut handline/hand troll and mechanical jig fishery.''

The Category III ''AK miscellaneous finfish handline and mechanical jig fishery'' is renamed the ''AK miscellaneous finfish handline/hand troll and mechanical jig fishery.''

The Category III ''AK salmon purse seine (except Southeast AK, which is in Category II) fishery'' is renamed the ''AK salmon purse seine (excluding salmon purse seine fisheries listed as Category II).

The superscript ''1'' following Steller sea lion (Western U.S.) is removed under the Category II ''AK Bristol Bay salmon drift gillnet fishery'' in Table 1. The superscript ''2'' remains after the fishery's name in Table 1.

Number of Vessels/Persons

The estimated number of vessels or persons in the Category II ''CA squid purse seine fishery'' is updated to 64.

The estimated number of vessels or persons in the Category III ''CA spiny lobster, coonstripe shrimp, rock crab, tanner crab pot or trap fishery'' is updated to 530.

The estimated number of vessels or persons in the Category III ''OR/CA hagfish pot or trap fishery'' is updated to 54.

The estimated number of vessels or persons in the majority of the AK Category II fisheries are updated: AK Southeast salmon drift gillnet fishery to 476; AK Yakutat salmon set gillnet to 166; AK Prince William Sound salmon drift gillnet to 537; AK Cook Inlet salmon drift gillnet to 571; AK Cook Inlet salmon set gillnet to 738; AK Peninsula/Aleutian Islands salmon drift gillnet to 162; AK Peninsula/Aleutian Islands salmon set gillnet to 115; AK Bristol Bay salmon drift gillnet to 1,862; AK Bristol Bay salmon set gillnet to 983; AK Southeast salmon purse seine fishery to 415; AK Bering Sea, Aleutian Islands pollock trawl to 95; AK Bering Sea, Aleutian Islands Pacific cod trawl to 54; AK Bering Sea, Aleutian Islands finfish trawl to 34.

The estimated number of vessels or persons in the majority of the AK Category III fisheries are updated: AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet to 1,824; AK roe herring and food/bait herring gillnet to 986; AK miscellaneous finfish set gillnet to 0; AK salmon purse seine (except Southeast AK, which is Category II) to 936; AK salmon beach seine to 31; AK roe herring and food/bait herring purse seine to 361; AK roe herring and food/bait herring beach seine to 4; AK octopus/squid purse seine to 0; AK salmon troll to 2,045; AK North Pacific halibut/bottom fish troll to 1,302 (102 AK); AK state-managed waters groundfish longline/set line (including sablefish, rockfish, and miscellaneous finfish) to 1,448; AK Gulf of Alaska rockfish longline to 0; AK Gulf of Alaska

sablefish longline to 291; AK Bering Sea, Aleutian Islands Greenland turbot longline to 29; AK Bering Sea, Aleutian Islands rockfish longline to 0; AK Bering Sea, Aleutian Islands sablefish longline to 28; AK halibut longline/set line (State and Federal waters) to 2,521; AK octopus/squid longline to 2; AK shrimp otter and beam trawl (statewide and Cook Inlet) to 32; AK Gulf of Alaska flatfish trawl to 41; AK Gulf of Alaska Pacific cod trawl to 62; AK Gulf of Alaska pollock trawl to 62; AK Gulf of Alaska rockfish trawl to 34; AK Bering Sea, Aleutian Islands Atka mackerel trawl to 9; AK Bering Sea, Aleutian Islands Pacific cod trawl to 93; AK Bering Sea, Aleutian Islands rockfish trawl to 10; AK miscellaneous finfish otter or beam trawl to 317; AK food/bait herring trawl to 4; AK Bering Sea, Aleutian Islands Pacific cod pot to 68; AK Bering Sea, Aleutian Islands crab pot to 297; AK Gulf of Alaska crab pot to 300; AK Southeast Alaska crab pot to 433; AK Southeast Alaska shrimp pot to 283; AK octopus/squid pot to 27; AK snail pot to 1; AK North Pacific halibut handline/hand troll and mechanical jig to 228; AK miscellaneous finfish handline/hand troll and mechanical jig to 445; AK octopus/squid handline to 0; AK Southeast herring roe/food/bait pound net to 6; AK dungeness crab (hand pick/dive) to 2; AK herring spawn on kelp (hand pick/dive) to 266; AK urchin and other fish/shellfish (hand pick/dive) to 570; AK commercial passenger fishing vessel from to >7,000 (2,702 AK).

List of Species That Are Incidentally Killed or Injured

Harbor porpoise (central CA) are removed from the list of marine mammal species/stock incidentally killed/injured in the Category II ''CA halibut/white seabass and other species set gillnet (>3.5 mesh size) fishery.''

The following marine mammals species/stocks are removed from the list of species/stocks incidentally killed/injured in the Category I ''CA/OR thresher shark/swordfish drift gillnet (≥14 in. mesh) fishery'': Dall's porpoise (CA/OR/WA), fin whale (CA/OR/WA), gray whale (Eastern North Pacific), humpback whale (CA/OR/WA), and sperm whale (CA/OR/WA).

Humpback whales (CA/OR/WA) are removed from the list of species/stocks incidentally killed/injured in the Category II ''WA Dungeness pot fishery.''

Humpback whales (CA/OR/WA) and sea otters (CA) are removed from the list of species/stocks incidentally killed/injured in the Category III ''CA spiny lobster, coonstripe shrimp, rock crab, tanner crab pot or trap fishery.''

The stock name of humpback whales (Eastern North Pacific) is changed to humpback whales (CA/OR/WA) for all fisheries in Table 1 in which this stock is listed as incidentally killed or injured to match the stock name in the most current SARs.

The stock of common dolphin listed as incidentally killed or injured in the Category II ''CA squid purse seine fishery'' is changed from ''common dolphin, unknown'' to ''short-beaked common dolphin, CA/OR/WA'' and ''long-beaked common dolphin, CA'' to account for the uncertainty of the species observed seriously injured or killed in this fishery.

Bryde's whale, sperm whale, and pantropical spotted dolphin are removed from the list of species/stocks killed/injured in the Category I ''HI deep-set (tuna target) longline/set line fishery,'' and added to the list of species/stocks killed/injured in the Category II ''HI shallow-set (swordfish target) longline/set line fishery,'' to correct a typographical error in the proposed 2009 LOF.

Hawaiian monk seal is removed from the list of species/stocks killed/injured in the Category III ''HI tuna handline fishery.'' NMFS has never received a report of interactions between monk seals with tuna handline.

Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

Addition of Fisheries to the LOF

The ''U.S. Atlantic, Gulf of Mexico trotline fishery'' is added to the LOF as a Category III fishery.

Fishery Name and Organizational Changes and Clarifications

Gulf of Mexico Menhaden Purse Seine Fishery

NMFS corrects a typographical error that has persisted since the 2006 LOF (71 FR 48802; August 22, 2006) and was not proposed in the proposed 2009 LOF (73 FR 33760, June 13, 2008). A superscript ''1'' following bottlenose dolphin (Western Gulf of Mexico coastal) is added under the Category II ''Gulf of Mexico menhaden purse seine fishery'' in Table 2, indicating that this stock is driving the categorization of this fishery. The 2006 LOF included a superscript ''1'' following bottlenose dolphin (Northern Gulf of Mexico coastal); however, a superscript ''1'' should have been included for both the Northern and the Western Gulf of Mexico coastal stocks.

Northeast Bottom Trawl Fishery

NMFS corrects a typographical error that has persisted since the 2005 LOF (71 FR 247; January 4, 2006). In the proposed 2005 LOF (70 FR 70094; December 2, 2004), NMFS proposed to add harbor porpoise (Gulf of Maine/Bay of Fundy) to the list of species/stocks incidentally taken in the Category II ''Northeast bottom trawl fishery.'' However, NMFS decided not to include this stock on the list based on a public comment stating that the animal taken in that fishery was badly decomposed and the trawl duration was only five hours (see comment/response 33 in the final 2005 LOF). While this stock has never been considered incidentally killed/injured in this fishery, it inadvertently remained listed in Table 2 of the LOF. NMFS corrects that error at this time by removing harbor porpoise (Gulf of Maine/Bay of Fundy) from Table 2 following the ''Northeast bottom trawl fishery.''

Northeast Sink Gillnet Fishery

The definition of the Category I ''Northeast sink gillnet fishery'' is amended to clarify and correct the boundary description by replacing ''excluding Long Island Sound or other waters where gillnet fisheries are listed as Category III. At this time, these Category II and II fisheries include * * *'' with ''* * * excluding Long Island Sound and other waters where gillnet fisheries are listed as Category II and III. At this time, these Category II and III fisheries include * * *''.

Northeast Anchored Float Gillnet Fishery

The definition of the Category II ''Northeast anchored float gillnet fishery'' is amended to clarify and correct the boundary description by replacing '' * * * from the U.S.-Canada border to Long Island, NY, at 72°30″ W. long south to 36°33.03″ N. lat. and east to the eastern edge of the EEZ * * *'' with '' * * * from the U.S.-Canada border to Long Island, NY, at 72°30″ W. long south to 36°33.03″ N. lat. (corresponding with the VA/NC border) and east to the eastern edge of the EEZ * * *''.

Northeast Drift Gillnet Fishery

The definition of the Category II ''Northeast drift gillnet fishery'' is amended to clarify and correct the boundary description by replacing ''* * * at any depth in the water column from the U.S.-Canada border to Long Island, NY, at 72°30″ W. long. south to 36°33.03″ N. lat. and east to the eastern edge of the EEZ * * *'' with '' * * * at any depth in the water column

from the U.S.-Canada border to Long Island, NY, at 72°30″ W. long. south to 36°33.03″ N. lat. (corresponding with the VA/NC border) and east to the eastern edge of the EEZ * * *''.

Mid-Atlantic Mid-water Trawl Fishery

The fishery description for the Category II ''Mid-Atlantic mid-water trawl fishery'' is replaced with the following description, ''The 'Mid-Atlantic mid-water trawl fishery' primarily targets Atlantic mackerel, chub mackerel, and miscellaneous other pelagic species. This fishery consists of both single and pair trawls, which are designed, capable, or used to fish for pelagic species with no portion of the gear designed to be operated in contact with the bottom. The fishery for Atlantic mackerel occurs primarily from southern New England through the mid-Atlantic from January to March and in the Gulf of Maine during the summer and fall (May to December). This fishery is managed under the Federal Atlantic Mackerel, Squid, and Butterfish FMP using an annual quota system.''

Mid-Atlantic Bottom Trawl Fishery

The fishery description for the Category II ''Mid-Atlantic bottom trawl fishery'' is replaced with the following description: ''The Category II 'Mid-Atlantic bottom trawl fishery' uses bottom trawl gear to target species including but not limited to: bluefish, croaker, monkfish, summer flounder (fluke), winter flounder, silver hake (whiting), spiny dogfish, smooth dogfish, scup, black sea bass, Atlantic cod, haddock, pollock, yellowtail flounder, witch flounder, windowpane flounder, summer flounder, American plaice, Atlantic halibut, redfish, red hake, white hake, ocean pout, skate spp, Atlantic mackerel, *Loligo* squid, *Illex* squid, and Atlantic butterfish. These fisheries occur year round from Cape Cod, MA, to Cape Hatteras, NC, in waters west of 72°30″ W. long. and north of a line extending due east from the NC/SC border. While the gear characteristics for the mixed groundfish bottom trawl gear have not yet been determined, the *Illex* and *Loligo* squid fisheries are dominated by small-mesh otter trawls. The *Loligo* fishery occurs mostly offshore near the edge of the continental shelf during fall and winter months (October to March) and inshore during spring and summer (April–September) though landings of *Loligo* are also taken by inshore pound nets and fish traps in the spring and summer. The fishery for *Illex* occurs offshore, mainly in continental shelf and slope waters during summer months (June–September). The *Illex* and *Loligo* fisheries are managed by moratorium permits, gear and area restrictions, quotas, and trip limits. Atlantic butterfish are mainly caught as bycatch in the directed squid and mackerel fisheries and observer data has suggested that there is a significant amount of butterfish discarding that occurs at sea.''

Mid-Atlantic Haul/Beach Seine Fishery

The fishery description for the Category II ''Mid-Atlantic haul/beach seine fishery'' is replaced with the following description: ''The NC component of this fishery operates primarily along the Outer Banks using small and large mesh nets. Small mesh nets are generally used in the spring and fall to target gray trout (weakfish), speckled trout, spot, kingfish (sea mullet), bluefish, and harvest fish (star butters). Large mesh nets are used to target Atlantic striped bass during the winter and are regulated via NC Marine Fisheries Commission rules and NCDMF proclamations. Construction and characteristics of the large and small mesh nets differ, but they generally both gill fish, rather than haul fish to shore in the manner of a traditional beach seine. Small mesh nets are generally constructed with a combination of multifilament and monofilament webbing or all monofilament webbing material. If a combination of materials is used, the construction design often consists of monofilament for the inshore (wash) and offshore (wing) portions of the net, while the middle (bunt) is constructed of twisted nylon. Conversely, large mesh nets are constructed of all monofilament material. Despite the difference in construction, they are set and hauled similarly. Nets are deployed out of the stern of surf dories and set perpendicular to the shoreline. A truck is generally used to haul the net ashore by attaching one end of the net to the truck and pulling it ashore while the other end remains fixed until the end of the haul.

North Carolina fishers previously referred to this type of gear as a beach seine because of the way the gear was set and hauled. Because of the manner in which both large and small mesh nets are constructed (i.e., inclusion of monofilament material) and fished, they operate as gillnets rather than beach seines, and NMFS considers them a component of the Category I, ''Mid-Atlantic gillnet fishery.'' Once NCDMF's regulation is effective, the Atlantic Ocean striped bass beach seine fishery will be the only fishery included under the ''Mid-Atlantic haul/beach seine fishery'' for North Carolina. Therefore, small and large mesh nets constructed of monofilament and multifilament material will be considered part of the Category I ''Mid-Atlantic gillnet fishery.'' NMFS is not currently regulating this component of the ''Mid-Atlantic gillnet fishery'' (i.e., nets that are anchored to the beach and subsequently hauled onto the beach to retrieve the catch). NMFS will discuss the appropriate management measures for this fishery component with the Atlantic Large Whale Take Reduction Team in the future.

In addition to the North Carolina component as described above, the ''Mid-Atlantic haul/beach seine fishery'' also includes haul seining in other areas of the mid-Atlantic, including VA, MD, and NJ. Because the net materials and fishing practices of the Atlantic Ocean striped bass beach seine fishery in North Carolina are different from haul seining in other areas, NMFS may consider splitting this fishery in the future.''

List of Species That Are Incidentally Killed or Injured

White-side dolphins (Western North Atlantic [WNA]) are added to the list of marine mammal species/stocks incidentally injured or killed in the Category II ''Mid-Atlantic bottom trawl fishery.''

Harbor seals (WNA) are added to the list of marine mammal species/stocks incidentally injured or killed in the Category II ''Northeast bottom trawl fishery.''

Bottlenose dolphins (WNA coastal) are added to the list of marine mammal species/ stocks incidentally injured or killed in the Category III ''FL spiny lobster trap/pot fishery.''

Bottlenose dolphins (WNA coastal) are added to the list of marine mammal species/stocks incidentally injured or killed in the Category III ''Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot fishery.''

List of Fisheries

The following tables set forth the final list of U.S. commercial fisheries according to their classification under section 118 of the MMPA. In Tables 1 and 2, the estimated number of vessels/ participants in fisheries operating within U.S. waters is expressed in terms of the number of active participants in the fishery, when possible. If this information is not available, the estimated number of vessels or persons licensed for a particular fishery is provided. If no recent information is available on the number of participants in a fishery, the number from the most recent LOF is used. For high seas fisheries, Table 3 lists the number of

currently valid HSFCA permits held by fishers. Although this likely overestimates the number of active participants in many of these fisheries, the number of valid HSFCA permits is the most reliable data at this time.

Tables 1, 2, and 3 also list the marine mammal species and stocks incidentally killed or injured in each fishery based on observer data, logbook data, stranding reports, and fisher reports. This list includes all species or stocks known to be injured or killed in a given fishery, but also includes species or stocks for which there are anecdotal records of an injury or mortality. Additionally, species identified by logbook entries may not be verified. NMFS has designated those stocks driving a fishery's classification (i.e., the fishery is classified based on serious injuries and mortalities of a marine mammal stock greater than 50 percent [Category I], or greater than 1 percent and less than 50 percent [Category II], of a stock's PBR) by a ''[1]'' after the stock's name.

In Tables 1 and 2, there are several fisheries classified in Category II that have no recent documented injuries or mortalities of marine mammals, or that did not result in a serious injury or mortality rate greater than 1 percent of a stock's PBR level. NMFS has classified these fisheries by analogy to other gear types that are known to cause mortality or serious injury of marine mammals, as discussed in the final LOF for 1996 (60 FR 67063, December 28, 1995), and according to factors listed in the definition of a ''Category II fishery'' in 50 CFR 229.2. NMFS has designated those fisheries originally listed by analogy in Tables 1 and 2 by a ''[2]'' after the fishery's name.

There are several fisheries in Tables 1, 2, and 3 in which a portion of the fishing vessels cross the EEZ boundary, and therefore operate within U.S. waters and on the high seas. NMFS has designated those fisheries in each Table by an ''*'' after the fishery's name.

Table 1 lists commercial fisheries in the Pacific Ocean (including Alaska); Table 2 lists commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean; Table 3 lists commercial fisheries on the High Seas; Table 4 lists fisheries affected by Take Reduction Teams or Plans.

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Table 1 - List of Fisheries Commercial Fisheries in the Pacific Ocean

Fishery Description	Estimated # of vessels/ persons	Marine mammal species and stocks incidentally killed/injured
CATEGORY I		
GILLNET FISHERIES:		
CA/OR thresher shark/swordfish drift gillnet (≥14 in mesh) *	85	California sea lion, U.S. Long-beaked common dolphin, CA Northern elephant seal, CA breeding Northern right-whale dolphin, CA/OR/WA Pacific white-sided dolphin, CA/OR/WA Risso's dolphin, CA/OR/WA Short-beaked common dolphin, CA/OR/WA Short-finned pilot whale, CA/OR/WA[1]
LONGLINE/SET LINE FISHERIES:		
HI deep-set (tuna target) longline/set line *	129	Blainville's beaked whale, HI Bottlenose dolphin, HI False killer whale, HI[1] Humpback whale, Central North Pacific Risso's dolphin, HI Short-finned pilot whale, HI Spinner dolphin, HI Striped dolphin, HI
CATEGORY II		
GILLNET FISHERIES:		
CA halibut/white seabass and other species set gillnet (>3.5 in mesh)	58	California sea lion, U.S.[1] Harbor seal, CA[1] Long-beaked common dolphin, CA Northern elephant seal, CA breeding Sea otter, CA Short-beaked common dolphin, CA/OR/WA
AK Bristol Bay salmon drift gillnet[2]	1,862	Beluga whale, Bristol Bay Gray whale, Eastern North Pacific Harbor seal, Bering Sea Northern fur seal, Eastern Pacific Pacific white-sided dolphin, North Pacific Spotted seal, AK Steller sea lion, Western U.S.
AK Bristol Bay salmon set gillnet[2]	983	Beluga whale, Bristol Bay Gray whale, Eastern North Pacific Harbor seal, Bering Sea Northern fur seal, Eastern Pacific Spotted seal, AK

AK Cook Inlet salmon set gillnet	738	Beluga whale, Cook Inlet Dall's porpoise, AK Harbor porpoise, GOA Harbor seal, GOA Humpback whale, Central North Pacific[1] Steller sea lion, Western U.S.
AK Cook Inlet salmon drift gillnet	571	Beluga whale, Cook Inlet Dall's porpoise, AK Harbor porpoise, GOA[1] Harbor seal, GOA Steller sea lion, Western U.S.
AK Kodiak salmon set gillnet	188	Harbor porpoise, GOA[1] Harbor seal, GOA Sea otter, Southwest AK Steller sea lion, Western U.S.
AK Peninsula/Aleutian Islands salmon drift gillnet[2]	162	Dall's porpoise, AK Harbor porpoise, GOA Harbor seal, GOA Northern fur seal, Eastern Pacific
AK Peninsula/Aleutian Islands salmon set gillnet[2]	115	Harbor porpoise, Bering Sea Steller sea lion, Western U.S.
AK Prince William Sound salmon drift gillnet	537	Dall's porpoise, AK Harbor porpoise, GOA[1] Harbor seal, GOA Northern fur seal, Eastern Pacific Pacific white-sided dolphin, North Pacific Sea Otter, South Central AK Steller sea lion, Western U.S.[1]
AK Southeast salmon drift gillnet	476	Dall's porpoise, AK Harbor porpoise, Southeast AK Harbor seal, Southeast AK Humpback whale, Central North Pacific[1] Pacific white-sided dolphin, North Pacific Steller sea lion, Eastern U.S.
AK Yakutat salmon set gillnet[2]	166	Gray whale, Eastern North Pacific Harbor seal, Southeast AK Humpback whale, Central North Pacific (Southeast AK)
CA yellowtail, barracuda, and white seabass drift gillnet fishery (mesh size ≥3.5 in and <14 in)	24	California sea lion, U.S. Long-beaked common dolphin, CA[1] Short-beaked common dolphin, CA/OR/WA
WA Puget Sound Region salmon drift gillnet (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line-Treaty Indian fishing is excluded)	210	Dall's porpoise, CA/OR/WA Harbor porpoise, inland WA[1] Harbor seal, WA inland
PURSE SEINE FISHERIES:		
AK Southeast salmon purse seine	415	Humpback whale, Central North Pacific[1]

AK Cook Inlet salmon purse seine	82	Humpback whale, Central North Pacific[1]
AK Kodiak salmon purse seine	370	Humpback whale, Central North Pacific[1]
CA anchovy, mackerel, sardine purse seine	63	Bottlenose dolphin, CA/OR/WA offshore[1] California sea lion, U.S. Harbor seal, CA
CA squid purse seine	64	Long-beaked common dolphin, CA Short-beaked common dolphin, CA/OR/WA Short-finned pilot whale, CA/OR/WA[1]
CA tuna purse seine[2] *	10	None documented
TRAWL FISHERIES:		
AK Bering Sea, Aleutian Islands flatfish trawl	34	Bearded seal, AK Harbor porpoise, Bering Sea Harbor seal, Bering Sea Killer whale, AK resident[1] Northern fur seal, Eastern North Pacific Spotted seal, AK Steller sea lion, Western U.S.[1] Walrus, AK
AK Bering Sea, Aleutian Islands pollock trawl	95	Dall's porpoise, AK Harbor seal, AK Humpback whale, Central North Pacific[1] Humpback whale, Western North Pacific[1] Killer whale, Eastern North Pacific, GOA, Aleutian Islands, and Bering Sea transient[1] Minke whale, AK Ribbon seal, AK Spotted seal, AK Steller sea lion, Western U.S.[1]
LONGLINE/SET LINE FISHERIES:		
HI shallow-set (swordfish target) longline/ set line *	28	Bottlenose dolphin, stock unknown Bryde's whale, stock unknown Humpback whale, Central North Pacific[1] Pantropical spotted dolphin, stock unknown Risso's dolphin, stock unknown Sperm whale, stock unknown
AK Bering Sea, Aleutian Islands Pacific cod longline	54	Killer whale, AK resident[1] Ribbon seal, AK Steller sea lion, Western U.S.
CA pelagic longline[2] *	6	California sea lion, U.S. Risso's dolphin, CA/OR/WA
POT, RING NET, AND TRAP FISHERIES:		
AK Bering Sea sablefish pot	6	Humpback whale, Central North Pacific[1] Humpback whale, Western North Pacific[1]
CA spot prawn pot	29	Gray whale, Eastern North Pacific Humpback whale, CA/OR/WA[1]

CA Dungeness crab pot[2]	625	Gray whale, Eastern North Pacific Humpback whale, CA/OR/WA
OR Dungeness crab pot	433	Gray whale, Eastern North Pacific Humpback whale, CA/OR/WA[1]
WA/OR/CA sablefish pot	155	Humpback whale, CA/OR/WA[1]
CATEGORY III		
GILLNET FISHERIES:		
AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet	824	Harbor porpoise, Bering Sea
AK miscellaneous finfish set gillnet	3	Steller sea lion, Western U.S.
AK Prince William Sound salmon set gillnet	30	Harbor seal, GOA Steller sea lion, Western U.S.
AK roe herring and food/bait herring gillnet	986	None documented
CA set gillnet (mesh size <3.5 in)	304	None documented
HI inshore gillnet	5	Bottlenose dolphin, HI Spinner dolphin, HI
WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing)	24	Harbor seal, OR/WA coast
WA/OR herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet	913	None documented
WA/OR lower Columbia River (includes tributaries) drift gillnet	110	California sea lion, U.S. Harbor seal, OR/WA coast
WA Willapa Bay drift gillnet	82	Harbor seal, OR/WA coast Northern elephant seal, CA breeding
PURSE SEINE, BEACH SEINE, ROUND HAUL AND THROW NET FISHERIES:		
AK Metlakatla salmon purse seine	10	None documented
AK miscellaneous finfish beach seine	1	None documented
AK miscellaneous finfish purse seine	0	None documented
AK octopus/squid purse seine	0	None documented
AK roe herring and food/bait herring beach seine	4	None documented
AK roe herring and food/bait herring purse seine	361	None documented
AK salmon beach seine	31	None documented

AK salmon purse seine (excluding salmon purse seine fisheries listed as Category II)	936	Harbor seal, GOA
WA/OR sardine purse seine	42	None documented
HI Kona crab loop net	42	None documented
HI opelu/akule net	12	None documented
HI inshore purse seine	23	None documented
HI throw net, cast net	14	None documented
WA (all species) beach seine or drag seine	235	None documented
WA/OR herring, smelt, squid purse seine or lampara	130	None documented
WA salmon purse seine	440	None documented
WA salmon reef net	53	None documented
DIP NET FISHERIES:		
CA squid dip net	115	None documented
WA/OR smelt, herring dip net	119	None documented
MARINE AQUACULTURE FISHERIES:		
CA marine shellfish aquaculture	unknown	None documented
CA salmon enhancement rearing pen	>1	None documented
CA white seabass enhancement net pens	13	California sea lion, U.S.
HI offshore pen culture	2	None documented
OR salmon ranch	1	None documented
WA/OR salmon net pens	14	California sea lion, U.S. Harbor seal, WA inland waters
TROLL FISHERIES:		
AK North Pacific halibut, AK bottom fish, WA/OR/CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries *	1,302 (102 AK)	None documented
AK salmon troll	2,045	Steller sea lion, Eastern U.S. Steller sea lion, Western U.S.
American Samoa tuna troll	<50	None documented
CA/OR/WA salmon troll	4,300	None documented
Commonwealth of the Northern Mariana Islands tuna troll	88	None documented

Guam tuna troll	401	None documented
HI trolling, rod and reel	1,321	None documented
LONGLINE/SET LINE FISHERIES:		
AK Bering Sea, Aleutian Islands Greenland turbot longline	29	Killer whale, AK resident
AK Bering Sea, Aleutian Islands rockfish longline	0	None documented
AK Bering Sea, Aleutian Islands sablefish longline	28	None documented
AK Gulf of Alaska halibut longline	1,302	None documented
AK Gulf of Alaska Pacific cod longline	440	None documented
AK Gulf of Alaska rockfish longline	0	None documented
AK Gulf of Alaska sablefish longline	291	Sperm whale, North Pacific Steller sea lion, Eastern U.S.
AK halibut longline/set line (State and Federal waters)	2,521	Steller sea lion, Western U.S.
AK octopus/squid longline	2	None documented
AK State-managed waters longline/setline (including sablefish, rockfish, lingcod, and miscellaneous finfish)	1,448	None documented
American Samoa longline	60	None documented
WA/OR/CA groundfish, bottomfish longline/set line	367	None documented
WA/OR North Pacific halibut longline/set line	350	None documented
TRAWL FISHERIES:		
AK Bering Sea, Aleutian Islands Atka mackerel trawl	9	Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands Pacific cod trawl	93	Harbor seal, Bering Sea Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands rockfish trawl	10	None documented
AK Gulf of Alaska flatfish trawl	41	None documented
AK Gulf of Alaska Pacific cod trawl	62	Steller sea lion, Western U.S.
AK Gulf of Alaska pollock trawl	62	Fin whale, Northeast Pacific Northern elephant seal, North Pacific Steller sea lion, Western U.S.

AK Gulf of Alaska rockfish trawl	34	None documented
AK food/bait herring trawl	4	None documented
AK miscellaneous finfish otter or beam trawl	317	None documented
AK shrimp otter trawl and beam trawl (statewide and Cook Inlet)	32	None documented
AK State-managed waters of Cook Inlet, Kachemak Bay, Prince William Sound, Southeast AK groundfish trawl	2	None documented
CA halibut bottom trawl	53	None documented
WA/OR/CA groundfish trawl	160-180	California sea lion, U.S. Dall's porpoise, CA/OR/WA Harbor seal, OR/WA coast Northern fur seal, Eastern Pacific Pacific white-sided dolphin, CA/OR/WA Steller sea lion, Eastern U.S.
WA/OR/CA shrimp trawl	300	None documented
POT, RING NET, AND TRAP FISHERIES:		
AK statewide miscellaneous finfish pot	293	None documented
AK Aleutian Islands sablefish pot	8	None documented
AK Bering Sea, Aleutian Islands Pacific cod pot	68	None documented
AK Bering Sea, Aleutian Islands crab pot	297	None documented
AK Gulf of Alaska crab pot	300	None documented
AK Gulf of Alaska Pacific cod pot	154	Harbor seal, GOA
AK Southeast Alaska crab pot	433	Humpback whale, Central North Pacific (Southeast AK)
AK Southeast Alaska shrimp pot	283	Humpback whale, Central North Pacific (Southeast AK)
AK shrimp pot, except Southeast	15	None documented
AK octopus/squid pot	27	None documented
AK snail pot	1	None documented
CA spiny lobster, coonstripe shrimp, rock crab, tanner crab pot or trap	530	Gray whale, Eastern North Pacific Harbor seal, CA
OR/CA hagfish pot or trap	54	None documented
WA Dungeness crab pot	288	Gray whale, Eastern North Pacific

WA/OR shrimp pot/trap	254	None documented
HI crab trap	22	None documented
HI fish trap	19	None documented
HI lobster trap	0	Hawaiian monk seal
HI shrimp trap	5	None documented
HANDLINE AND JIG FISHERIES:		
AK miscellaneous finfish handline/hand troll and mechanical jig	445	None documented
AK North Pacific halibut handline/hand troll and mechanical jig	228	None documented
AK octopus/squid handline	0	None documented
American Samoa bottomfish	<50	None documented
Commonwealth of the Northern Mariana Islands bottomfish	<50	None documented
Guam bottomfish	200	None documented
HI aku boat, pole and line	4	None documented
HI Main Hawaiian Islands, Northwestern Hawaiian Islands deep sea bottomfish	300	Hawaiian monk seal
HI inshore handline	307	None documented
HI tuna handline	298	None documented
WA groundfish, bottomfish jig	679	None documented
Western Pacific squid jig	6	None documented
HARPOON FISHERIES:		
CA swordfish harpoon	30	None documented
POUND NET/WEIR FISHERIES:		
AK herring spawn on kelp pound net	415	None documented
AK Southeast herring roe/food/bait pound net	6	None documented
WA herring brush weir	1	None documented
BAIT PENS:		
WA/OR/CA bait pens	13	California sea lion, U.S.
DREDGE FISHERIES:		

Coastwide scallop dredge	108 (12 AK)	None documented
DIVE, HAND/MECHANICAL COLLECTION FISHERIES:		
AK abalone	0	None documented
AK clam	156	None documented
WA herring spawn on kelp	4	None documented
AK dungeness crab	2	None documented
AK herring spawn on kelp	266	None documented
AK urchin and other fish/shellfish	570	None documented
CA abalone	0	None documented
CA sea urchin	583	None documented
HI black coral diving	1	None documented
HI fish pond	N/A	None documented
HI handpick	37	None documented
HI lobster diving	19	None documented
HI squiding, spear	91	None documented
WA/CA kelp	4	None documented
WA/OR sea urchin, other clam, octopus, oyster, sea cucumber, scallop, ghost shrimp hand, dive, or mechanical collection	637	None documented
WA shellfish aquaculture	684	None documented
COMMERCIAL PASSENGER FISHING VESSEL (CHARTER BOAT) FISHERIES:		
AK/WA/OR/CA commercial passenger fishing vessel	>7,000 (2,702 AK)	Killer whale, stock unknown Steller sea lion, Eastern U.S. Steller sea lion, Western U.S.
HI charter vessel	114	None documented
LIVE FINFISH/SHELLFISH FISHERIES:		
CA nearshore finfish live trap/hook-and-line	93	None documented

List of Abbreviations and Symbols Used in Table 1: AK - Alaska; CA - California; GOA - Gulf of Alaska; HI - Hawaii; OR - Oregon; WA - Washington; [1] Fishery classified based on serious injuries and mortalities of this stock, which are greater than 50 percent (Category I) or greater than 1 percent and less than 50 percent (Category II) of the stock's PBR; [2] Fishery classified by analogy; * Fishery has an associated high seas component listed in Table 3.

Table 2 - List of Fisheries Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

Fishery Description	Estimated # of vessels/ persons	Marine mammal species and stocks incidentally killed/injured
CATEGORY I		
GILLNET FISHERIES:		
Mid-Atlantic gillnet	>670	Bottlenose dolphin, WNA coastal[1] Bottlenose dolphin, WNA offshore Common dolphin, WNA Gray seal, WNA Harbor porpoise, GME/BF[1] Harbor seal, WNA Harp seal, WNA Humpback whale, Gulf of Maine[1] Long-finned pilot whale, WNA Minke whale, Canadian east coast Short-finned pilot whale, WNA White-sided dolphin, WNA
Northeast sink gillnet	341	Bottlenose dolphin, WNA offshore Common dolphin, WNA Fin whale, WNA Gray seal, WNA Harbor porpoise, GME/BF[1] Harbor seal, WNA Harp seal, WNA Hooded seal, WNA Humpback whale, Gulf of Maine[1] Minke whale, Canadian east coast[1] North Atlantic right whale, WNA[1] Risso's dolphin, WNA White-sided dolphin, WNA
LONGLINE FISHERIES:		

Fishery Description	Estimated # of vessels/ persons	Marine mammal species and stocks incidentally killed/injured
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline *	94	Atlantic spotted dolphin, Northern GMX Atlantic spotted dolphin, WNA Bottlenose dolphin, Northern GMX oceanic Bottlenose dolphin, Northern GMX continental shelf Bottlenose dolphin, WNA offshore Common dolphin, WNA Cuvier's beaked whale, WNA Long-finned pilot whale, WNA[1] Mesoplodon beaked whale, WNA Northern bottlenose whale, WNA Pantropical spotted dolphin, Northern GMX Pantropical spotted dolphin, WNA Pygmy sperm whale, WNA[1] Risso's dolphin, Northern GMX Risso's dolphin, WNA Short-finned pilot whale, Northern GMX Short-finned pilot whale, WNA[1]
TRAP/POT FISHERIES:		
Northeast/Mid-Atlantic American lobster trap/pot	13,000	Fin whale, WNA Harbor seal, WNA Humpback whale, Gulf of Maine[1] Minke whale, Canadian east coast[1] North Atlantic right whale, WNA[1]
CATEGORY II		
GILLNET FISHERIES:		
Chesapeake Bay inshore gillnet[2]	45	None documented
Gulf of Mexico gillnet[2]	724	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, GMX bay, sound, and estuarine Bottlenose dolphin, Northern GMX coastal Bottlenose dolphin, Western GMX coastal
NC inshore gillnet	94	Bottlenose dolphin, WNA coastal[1]
Northeast anchored float gillnet[2]	133	Harbor seal, WNA Humpback whale, Gulf of Maine White-sided dolphin, WNA
Northeast drift gillnet[2]	unknown	None documented
Southeast Atlantic gillnet[2]	779	Bottlenose dolphin, WNA coastal
Southeastern U.S. Atlantic shark gillnet	30	Atlantic spotted dolphin, WNA Bottlenose dolphin, WNA coastal[1] North Atlantic right whale, WNA
TRAWL FISHERIES:		

Fishery Description	Estimated # of vessels/ persons	Marine mammal species and stocks incidentally killed/injured
Mid-Atlantic mid-water trawl (including pair trawl)	620	Bottlenose dolphin, WNA offshore Common dolphin, WNA Long-finned pilot whale, WNA Risso's dolphin, WNA Short-finned pilot whale, WNA White-sided dolphin, WNA[1]
Mid-Atlantic bottom trawl	>1,000	Common dolphin, WNA[1] Long-finned pilot whale, WNA[1] Short-finned pilot whale, WNA[1] White-sided dolphin, WNA
Mid-Atlantic flynet[2]	21	None documented
Northeast mid-water trawl (including pair trawl)	17	Harbor seal, WNA Long-finned pilot whale, WNA[1] Short-finned pilot whale, WNA[1] White-sided dolphin, WNA
Northeast bottom trawl	1,052	Common dolphin, WNA Harbor seal, WNA Harp seal, WNA Long-finned pilot whale, WNA Short-finned pilot whale, WNA White-sided dolphin, WNA[1]
TRAP/POT FISHERIES:		
Atlantic blue crab trap/pot	>16,000	Bottlenose dolphin, WNA coastal[1] West Indian manatee, FL[1]
Atlantic mixed species trap/pot[2]	unknown	Fin whale, WNA Humpback whale, Gulf of Maine
PURSE SEINE FISHERIES:		
Gulf of Mexico menhaden purse seine	40-42	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, GMX bay, sound, estuarine Bottlenose dolphin, Northern GMX coastal[1] Bottlenose dolphin, Western GMX coastal[1]
Mid-Atlantic menhaden purse seine[2]	22	Bottlenose dolphin, WNA coastal
HAUL/BEACH SEINE FISHERIES:		
Mid-Atlantic haul/beach seine	25	Bottlenose dolphin, WNA coastal[1]
NC long haul seine	33	Bottlenose dolphin, WNA coastal[1]
STOP NET FISHERIES:		
NC roe mullet stop net	13	Bottlenose dolphin, WNA coastal[1]
POUND NET FISHERIES:		

VA pound net	187	Bottlenose dolphin, WNA coastal[1]
CATEGORY III		
GILLNET FISHERIES:		
Caribbean gillnet	>991	Dwarf sperm whale, WNA West Indian manatee, Antillean
DE River inshore gillnet	60	None documented
Long Island Sound inshore gillnet	20	None documented
RI, southern MA (to Monomoy Island), and NY Bight (Raritan and Lower NY Bays) inshore gillnet	32	None documented
Southeast Atlantic inshore gillnet	unknown	None documented
TRAWL FISHERIES:		
Atlantic shellfish bottom trawl	972	None documented
Gulf of Mexico butterfish trawl	2	Bottlenose dolphin, Northern GMX oceanic Bottlenose dolphin, Northern GMX continental shelf
Gulf of Mexico mixed species trawl	20	None documented
GA cannonball jellyfish trawl	1	None documented
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	>18,000	Bottlenose dolphin, WNA coastal Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, Western GMX coastal Bottlenose dolphin, GMX bay, sound, estuarine West Indian Manatee, FL
MARINE AQUACULTURE FISHERIES:		
Finfish aquaculture	48	Harbor seal, WNA
Shellfish aquaculture	unknown	None documented
PURSE SEINE FISHERIES:		
Gulf of Maine Atlantic herring purse seine	30	Harbor seal, WNA Gray seal, WNA
Gulf of Maine menhaden purse seine	50	None documented
FL West Coast sardine purse seine	10	Bottlenose dolphin, Eastern GMX coastal

U.S. Atlantic tuna purse seine *	5	Long-finned pilot whale, WNA Short-finned pilot whale, WNA
LONGLINE/HOOK-AND-LINE FISHERIES:		
Northeast/Mid-Atlantic bottom longline/hook-and-line	46	None documented
Gulf of Maine, U.S. Mid-Atlantic tuna, shark swordfish hook-and-line/harpoon	26,223	Humpback whale, Gulf of Maine
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean snapper-grouper and other reef fish bottom longline/hook-and-line	>5,000	None documented
Southeastern U.S. Atlantic, Gulf of Mexico shark bottom longline/hook-and-line	<125	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, Northern GMX continental shelf
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean pelagic hook-and-line/harpoon	1,446	None documented
U.S. Atlantic, Gulf of Mexico trotline	unknown	None documented
TRAP/POT FISHERIES		
Caribbean mixed species trap/pot	>501	None documented
Caribbean spiny lobster trap/pot	>197	None documented
FL spiny lobster trap/pot	2,145	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, WNA coastal
Gulf of Mexico blue crab trap/pot	4,113	Bottlenose dolphin, Western GMX coastal Bottlenose dolphin, Northern GMX coastal Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, GMX Bay, Sound, & Estuarine West Indian manatee, FL
Gulf of Mexico mixed species trap/pot	unknown	None documented
Southeastern U.S. Atlantic, Gulf of Mexico golden crab trap/pot	10	None documented
Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot	4,453	Bottlenose dolphin, WNA coastal
U.S. Mid-Atlantic eel trap/pot	>700	None documented
STOP SEINE/WEIR/POUND NET FISHERIES:		

Gulf of Maine herring and Atlantic mackerel stop seine/weir	50	Gray seal, Northwest North Atlantic Harbor porpoise, GME/BF Harbor seal, WNA Minke whale, Canadian East Coast White-sided dolphin, WNA
U.S. Mid-Atlantic crab stop seine/weir	2,600	None documented
U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net)	751	None documented
DREDGE FISHERIES:		
Gulf of Maine mussel	>50	None documented
Gulf of Maine, U.S. Mid-Atlantic sea scallop dredge	233	None documented
U.S. Mid-Atlantic/Gulf of Mexico oyster	7,000	None documented
U.S. Mid-Atlantic offshore surf clam and quahog dredge	100	None documented
HAUL/BEACH SEINE FISHERIES:		
Caribbean haul/beach seine	15	West Indian manatee, Antillean
Gulf of Mexico haul/beach seine	unknown	None documented
Southeastern U.S. Atlantic haul/beach seine	25	None documented
DIVE, HAND/MECHANICAL COLLECTION FISHERIES:		
Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection	20,000	None documented
Gulf of Maine urchin dive, hand/mechanical collection	>50	None documented
Gulf of Mexico, Southeast Atlantic, Mid-Atlantic, and Caribbean cast net	unknown	None documented
COMMERCIAL PASSENGER FISHING VESSEL (CHARTER BOAT) FISHERIES:		
Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel	4,000	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, Northern GMX coastal Bottlenose dolphin, Western GMX coastal Bottlenose dolphin, WNA coastal

List of Abbreviations and Symbols Used in Table 2: DE - Delaware; FL - Florida; GA - Georgia; GME/BF - Gulf of Maine/Bay of Fundy; GMX - Gulf of Mexico; MA - Massachusetts; NC - North Carolina; VA - Virginia; WNA - Western North Atlantic; [1] Fishery classified based on serious injuries and mortalities of this stock, which are greater than 50 percent (Category I) or greater than 1 percent and less than 50 percent (Category II) of the stock's PBR; [2] Fishery classified by analogy; * Fishery has an associated high seas component listed in Table 3.

Table 3 - List of Fisheries Commercial Fisheries on the High Seas

Fishery Description	# of HSFCA permits	Marine mammal species and stocks incidentally killed/injured
Category I		
DRIFT GILLNET FISHERIES:		
Pacific Highly Migratory Species * ^	5	Long-beaked common dolphin, CA Northern right-whale dolphin, CA/OR/WA Pacific white-sided dolphin, CA/OR/WA Risso's dolphin, CA/OR/WA Short-beaked common dolphin, CA/OR/WA Short-finned pilot whale, CA/OR/WA
LONGLINE FISHERIES:		
Atlantic Highly Migratory Species * +	75	Atlantic spotted dolphin, WNA Bottlenose dolphin, Northern GMX oceanic Bottlenose dolphin, WNA offshore Common dolphin, WNA Cuvier's beaked whale, WNA Long-finned pilot whale, WNA Mesoplodon beaked whale, WNA Pygmy sperm whale, WNA Risso's dolphin, WNA Short-finned pilot whale, WNA
Western Pacific Pelagic (Deep-set component) * ^	129	Blainville's beaked whale, HI Bottlenose dolphin, HI False killer whale, HI Humpback whale, Central North Pacific Risso's dolphin, HI Short-finned pilot whale, HI Spinner dolphin, HI Striped dolphin, HI
Category II		
DRIFT GILLNET FISHERIES:		
Atlantic Highly Migratory Species	1	Undetermined
Unspecified	1	Undetermined
GILLNET NEI FISHERIES:		
Pacific Highly Migratory Species	1	Undetermined
TRAWL FISHERIES:		
Atlantic Highly Migratory Species **	3	Undetermined

Pacific Highly Migratory Species **	14	Undetermined
CCAMLR	0	Antarctic fur seal
South Pacific Albacore Troll	5	Undetermined
Western Pacific Pelagic	11	Undetermined
Unspecified	22	Undetermined
PURSE SEINE FISHERIES:		
Pacific Highly Migratory Species * ^	5	None documented
South Pacific Albacore Troll	1	Undetermined
South Pacific Tuna Fisheries	23	Undetermined
Western Pacific Pelagic	4	Undetermined
POT VESSEL FISHERIES:		
Pacific Highly Migratory Species **	8	Undetermined
South Pacific Albacore Troll	5	Undetermined
Western Pacific Pelagic	8	Undetermined
LONGLINE FISHERIES:		
CCAMLR	0	None documented
Pacific Highly Migratory Species * +	56	Risso's dolphin, CA/OR/WA
South Pacific Albacore Troll	12	Undetermined
South Pacific Tuna Fisheries **	2	Undetermined
Western Pacific Pelagic (Shallow-set component) * ^	28	Bottlenose dolphin, stock unknown Bryde's whale, stock unknown Humpback whale, Central North Pacific Pantropical spotted dolphin, stock unknown Risso's dolphin, stock unknown Sperm whale, stock unknown
Unspecified	4	Undetermined
HANDLINE/POLE AND LINE FISHERIES:		
Atlantic Highly Migratory Species	2	Undetermined
Pacific Highly Migratory Species	18	Undetermined
South Pacific Albacore Troll	7	Undetermined
Western Pacific Pelagic	8	Undetermined
SEINE-HANDLINE FISHERIES:		

Pacific Highly Migratory Species	1	Undetermined
TROLL FISHERIES:		
Atlantic Highly Migratory Species	5	Undetermined
South Pacific Albacore Troll	45	Undetermined
South Pacific Tuna Fisheries **	1	Undetermined
Western Pacific Pelagic	44	Undetermined
Unspecified	9	Undetermined
LINERS NEI FISHERIES:		
Pacific Highly Migratory Species **	3	Undetermined
South Pacific Albacore Troll	1	Undetermined
Western Pacific Pelagic	2	Undetermined
DREDGE FISHERIES:		
Unspecified	2	Undetermined
FACTORY MOTHERSHIP FISHERIES:		
Western Pacific Pelagic	1	Undetermined
MULTIPURPOSE VESSELS NEI FISHERIES:		
Atlantic Highly Migratory Species	1	Undetermined
Pacific Highly Migratory Species **	9	Undetermined
South Pacific Albacore Troll	6	Undetermined
Western Pacific Pelagic	7	Undetermined
FISHING VESSELS NEI FISHERIES:		
Pacific Highly Migratory Species **	2	Undetermined
South Pacific Albacore Troll	1	Undetermined
Western Pacific Pelagic	2	Undetermined
Category III		
TROLL FISHERIES:		
Pacific Highly Migratory Species *	222	None documented
PURSE SEINE FISHERIES:		

Atlantic Highly Migratory Species * ^	1	Long-finned pilot whales, WNA Short finned pilot whales, WNA

List of Terms, Abbreviations, and Symbols Used in Table 3:
GMX- Gulf of Mexico.
NEI - Not Elsewhere Identified.
Unspecified - Identifies the number of valid high seas permits for a fishery that, as of 2004, is no longer authorized under the HSFCA - High Seas Fishery Compliance Act. Once these permits expire (valid for 5 years), fishers will be required to obtain a permit for one of the seven currently authorized HSFCA fisheries to continue fishing on the high seas.
WNA - Western North Atlantic.
* Fishery is an extension/component of an existing fishery operating within U.S. waters listed in Table 1 or 2. The number of permits listed in Table 3 represents only the number of permits for the high seas component of the fishery.
** These gear types are not authorized under the Pacific HMS FMP (2004), the Atlantic HMS FMP (2006), or without a South Pacific Tuna Treaty license (in the case of the South Pacific Tuna fisheries). Because HSFCA permits are valid for five years, permits obtained in past years exist in the HSFCA permit database for gear types that are now unauthorized. Therefore, while HSFCA permits exist for these gear types, it does not represent effort. In order to land fish species, fishers must be using an authorized gear type. Once these permits for unauthorized gear types expire, the permit-holder will be required to obtain a permit for an authorized gear type.
+ The marine mammal species or stock listed as killed/injured in this fishery has been observed taken by this fishery on the high seas.
^ The list of marine mammal species killed/injured in this fishery is identical to the list of marine mammal species killed/injured in U.S. waters component of the fishery, minus coastal stocks, because the marine mammal species are also found on the high seas and the fishery remains the same on both sides of the EEZ boundary. Therefore, the high seas components of these fisheries pose the same risk to marine mammals as the fisheries operating in U.S. waters.

Table 4 - Fisheries Affected by Take Reduction Teams and Plans

Take Reduction Plans	Affected Fisheries
Atlantic Large Whale Take Reduction Plan (ALWTRP) - 50 CFR 229.32	Category I Mid-Atlantic gillnet Northeast/Mid-Atlantic American lobster trap/pot Northeast sink gillnet Category II Atlantic blue crab trap/pot Atlantic mixed species trap/pot Northeast anchored float gillnet Northeast drift gillnet Southeast Atlantic gillnet Southeastern U.S. Atlantic shark gillnet*
Bottlenose Dolphin Take Reduction Plan (BDTRP) - 50 CFR 229.35	Category I Mid-Atlantic gillnet Category II Atlantic blue crab trap/pot Mid-Atlantic haul/beach seine NC inshore gillnet NC long haul seine NC roe mullet stop net Southeast Atlantic gillnet Southeastern U.S. Atlantic shark gillnet VA pound net
Harbor Porpoise Take Reduction Plan (HPTRP) - 50 CFR 229.33 and 229.34	Category I Mid-Atlantic gillnet Northeast sink gillnet
Pacific Offshore Cetacean Take Reduction Plan (POCTRP) - 50 CFR 229.31	Category I CA/OR thresher shark/swordfish drift gillnet (≥14 in mesh)
Take Reduction Teams	Affected Fisheries
Pelagic Longline Take Reduction Team (PLTRT)	Category I Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline
Atlantic Trawl Gear Take Reduction Team (ATGTRT)	Category II Mid-Atlantic Bottom Trawl Mid-Atlantic Mid-Water Trawl (Including Pair Trawl) Northeast Bottom Trawl Northeast Mid-Water Trawl (Including Pair Trawl)

* Only applicable to portion of fishery in U.S. waters.

For a description of each Take Reduction Team and copies of Take Reduction Plans, access: http://www.nmfs.noaa.gov/pr/interactions/trt/

Classification

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis leading to the certification is set forth below.

Under existing regulations, all fishers participating in Category I or II fisheries must register under the MMPA and obtain an Authorization Certificate. The Authorization Certificate authorizes the taking of marine mammals incidental to commercial fishing operations. Additionally, fishers may be subject to a Take Reduction Plan (TRP) and requested to carry an observer. NMFS has estimated that approximately 44,200 fishing vessels, most of which are small entities, operate in Category I or II fisheries, and therefore, are required to register with NMFS. The MMPA registration process is integrated with existing state and Federal licensing, permitting, and registration programs. Therefore, fishers who have a federal or state fishery permit or landing license, or who are authorized through another related federal or state fishery registration program, are currently not required to register separately under the MMPA or pay the $25 registration fee under the MMPA. Therefore, there are

no direct costs to small entities under this final rule.

If a vessel is requested to carry an observer, fishers will not incur any direct economic costs associated with carrying that observer. Potential indirect costs to individual fishers required to take observers may include: lost space on deck for catch, lost bunk space, and lost fishing time due to time needed to process bycatch data. For effective monitoring, however, observers will rotate among a limited number of vessels in a fishery at any given time and each vessel within an observed fishery has an equal probability of being requested to accommodate an observer. Therefore, the potential indirect costs to individual fishers are expected to be minimal because observer coverage would only be required for a small percentage of an individual's total annual fishing time. In addition, section 118 of the MMPA states that an observer will not be placed on a vessel if the facilities for quartering an observer or performing observer functions are inadequate or unsafe, thereby exempting vessels too small to accommodate an observer from this requirement. As a result of this certification, an initial regulatory flexibility analysis is not required and was not prepared. In the event that reclassification of a fishery to Category I or II results in a TRP, economic analyses of the effects of that plan will be summarized in subsequent rulemaking actions.

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act. The collection of information for the registration of fishers under the MMPA has been approved by the Office of Management and Budget (OMB) under OMB control number 0648–0293 (0.15 hours per report for new registrants and 0.09 hours per report for renewals). The requirement for reporting marine mammal injuries or mortalities has been approved by OMB under OMB control number 0648–0292 (0.15 hours per report). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these reporting burden estimates or any other aspect of the collections of information, including suggestions for reducing burden, to NMFS and OMB (see **ADDRESSES** and **SUPPLEMENTARY INFORMATION**).

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

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

An environmental assessment (EA) was prepared under the National Environmental Policy Act (NEPA) for regulations to implement section 118 of the MMPA in June 1995. NMFS revised that EA relative to classifying U.S. commercial fisheries on the LOF in December 2005. Both the 1995 EA and the 2005 EA concluded that implementation of MMPA section 118 regulations would not have a significant impact on the human environment. This final rule would not make any significant change in the management of reclassified fisheries, and therefore, this final rule is not expected to change the analysis or conclusion of the 2005 EA. If NMFS takes a management action, for example, through the development of a TRP, NMFS will first prepare an environmental document, as required under NEPA, specific to that action.

This final rule will not affect species listed as threatened or endangered under the Endangered Species Act (ESA) or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this final rule will not affect the conclusions of those opinions. The classification of fisheries on the LOF is not considered to be a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, through the development of a TRP, NMFS would conduct consultation under ESA section 7 for that action.

This final rule will have no adverse impacts on marine mammals and may have a positive impact on marine mammals by improving knowledge of marine mammals and the fisheries interacting with marine mammals through information collected from observer programs, stranding and sighting data, or take reduction teams.

This final rule will not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

Dated: November 24, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. E8–28378 Filed 11–28–08; 8:45 am]

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Monday,
December 1, 2008

Part VI

Department of Transportation

Federal Railroad Administration

49 CFR Part 213

Track Safety Standards; Continuous Welded Rail (CWR); Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 213

[Docket No. FRA–2008–0036]

RIN 2130–AB90

Track Safety Standards; Continuous Welded Rail (CWR)

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to amend the Federal Track Safety Standards to promote the safety of railroad operations over continuous welded rail (CWR). In particular, FRA is proposing specific requirements for the qualification of persons designated to inspect CWR track, or supervise the installation, adjustment, or maintenance of CWR track. FRA is also proposing to clarify the procedures associated with the submission of CWR plans to FRA by track owners. FRA proposes that these plans focus on inspecting CWR for pull-apart prone conditions, and focus more specifically on CWR joint installation and maintenance procedures. This proposed rule would also make other changes to the requirements governing CWR.

DATES: (1) Written comments must be received by January 15, 2009. Comments received after that date will be considered to the extent possible without incurring additional delay or expense.

(2) FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However if FRA receives a specific request for a public, oral hearing prior to December 31, 2008 one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to this Docket No. FRA–2008–0036 may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.Regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Please note that all comments received will be posted without change to *www.Regulations.gov,* including any personal information provided. Please see the discussion under the Privacy Act heading in the Supplementary Information section of this document.

Docket: For access to the docket to read background documents or comments received, go to *www.Regulations.gov* at any time or visit the Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kenneth Rusk, Staff Director, Office of Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: (202) 493–6236); Daniel Alpert, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (telephone: (202) 493–6026); or Sarah Grimmer Yurasko, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (telephone: (202) 493–6390).

SUPPLEMENTARY INFORMATION:

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Background

I. Continuous Welded Rail (CWR)

A. General

CWR refers to the way in which rail is joined together to form track. In CWR, rails are welded together to form one continuous rail that may be several miles long. Although CWR is normally one continuous rail, there can be joints [1] in it for one or more reasons: The need for insulated joints that electrically separate track segments for signaling purposes, the need to terminate CWR installations at a segment of jointed rail, or the need to remove and replace a section of defective rail.

B. Statutory and Regulatory History for CWR

FRA issued the first Federal Track Safety Standards in 1971. *See* 36 FR 20336 (October 20, 1971). At that time, FRA addressed CWR in a rather general manner, stating, in 49 CFR 213.119, that railroads must install CWR at a rail temperature that prevents lateral displacement of track or pull-aparts of rail ends and that CWR should not be disturbed at rail temperatures higher than the installation or adjusted installation temperature.

In 1982, FRA removed § 213.119 because FRA believed it was so general in nature that it provided little guidance to railroads and it was difficult to enforce. *See* 47 FR 7275 (February 18, 1982) and 47 FR 39398 (September 7, 1982). FRA stated: ''While the importance of controlling thermal stresses within continuous welded rail has long been recognized, research has not advanced to the point where specific safety requirements can be established.'' 47 FR 7279. FRA explained that continuing research might produce reliable data in this area in the future.

Congressional interest in CWR developed. With passage of the Rail Safety Enforcement and Review Act of 1992 (Pub. L. 102–365, September 3, 1992), Congress required the Secretary

[1] Rail joints commonly consist of two joint bars that are bolted to the sides of two abutting ends of rail and contact the rail at the bottom surface of the rail head and the top surface of the rail base.

of Transportation to evaluate procedures for installing and maintaining CWR and its attendant structure. In 1994, Congress further directed the Secretary to specifically evaluate cold weather installation procedures for CWR with passage of the Federal Railroad Safety Reauthorization Act of 1994 (Pub. L. 103–440, November 2, 1994), codified at 49 U.S.C. 20142 As delegated by the Secretary, *see* 49 CFR 1.49(m), FRA evaluated those procedures in connection with information gathered from the industry and FRA's own research and development activities. FRA then addressed CWR procedures by adding § 213.119 during its 1998 revision of the Track Safety Standards (49 CFR part 213). *See* 63 FR 33992 (June 22, 1998).

Section 213.119, as added in 1998, requires railroads to develop and submit to the Federal Railroad Administration, written CWR plans containing procedures that, at a minimum, provide for the installation, adjustment, maintenance, and inspection of CWR, as well as a training program and minimal recordkeeping requirements. Section 213.119 does not dictate which procedures a railroad must use in its CWR plan; however, it states that each track owner with track constructed of CWR shall have in effect and comply with a plan that contains written procedures which address the installation, adjustment, maintenance, and inspection of CWR, the inspection of CWR joints, and a training program for the application of those procedures. It allows each railroad to develop and implement its individual CWR plan based on procedures which have proven effective for it over the years. The operative assumption was that geophysical conditions vary so widely among U.S. railroads that, in light what was then known about CWR, CWR plans should vary to take account of them. Accordingly, procedures can vary from railroad to railroad.

On August 10, 2005, President Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59). Section 9005(a) of SAFETEA–LU amended 49 U.S.C. 20142 by adding a new subsection (e). This new subsection required that within 90 days after its enactment, FRA require (1) each track owner using CWR track to include procedures (in its procedures filed with FRA pursuant to § 213.119) to improve the identification of cracks in rail joint bars; (2) instruct FRA track inspectors to obtain copies of the most recent CWR programs of each railroad within the inspectors' areas of responsibility and require that inspectors use those programs when conducting track inspections; and (3) establish a program to review CWR joint bar inspection data from railroads and FRA track inspectors periodically. This new subsection also provided that whenever FRA determines that it is necessary or appropriate, FRA may require railroads to increase the frequency of inspection, or improve the methods of inspection, of joint bars in CWR.

Pursuant to this mandate, on November 2, 2005, FRA revised the Track Safety Standards by publishing an Interim Final Rule (IFR), 70 FR 66288, which addresses the inspection of rail joints in CWR. FRA requested comment on the IFR and provided the Railroad Safety Advisory Committee (RSAC) with an opportunity to review the comments on the IFR. To facilitate this review, on February 22, 2006, RSAC established the Track Safety Standards Working Group (Working Group). The Working Group was given two tasks: (1) To resolve the comments on the IFR, and (2) to make recommendations regarding FRA's role in oversight of CWR programs, including analyzing the data to determine effective management of CWR safety by the railroads. The first task, referred to as ''Phase I'' of the CWR review, included analyzing the IFR on the inspection of joint bars in CWR territory, reviewing the comments on the IFR, and developing recommendations for the final rule. With guidance from the Working Group, FRA published a final rule on October 11, 2006, 71 FR 59677, which addressed the comments on the IFR, adopted a portion of the IFR, and made changes to other portions. The final rule became effective October 31, 2006, and is codified at 49 CFR part 213. The Working Group then turned to the second task, referred to as ''Phase II'' of RSAC's referral, which involves an examination of all the requirements of § 213.119 concerning CWR-not focused only on those concerning joints in CWR. As discussed below, the Working Group reported its findings and recommendations to RSAC at its February 20, 2008 meeting. RSAC approved the recommended consensus regulatory text proposed by the Working Group, which accounts for the majority of this NPRM.

II. Railroad Safety Advisory Committee (RSAC) Overview

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The RSAC includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

American Association of Private Railroad Car Owners (AARPCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Chemistry Council;
American Petrochemical Institute;
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);
Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employees Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Chlorine Institute;
Federal Transit Administration (FTA)*;
Fertilizer Institute;
High Speed Ground Transportation Association (HSGTA);
Institute of Makers of Explosives;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA)*;
League of Railway Industry Women*;
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women*;
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association;
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB)*;
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte*;
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada*;
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC);
Transportation Security Administration (TSA); and

United Transportation Union (UTU).

* Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation.

However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

III. RSAC Track Safety Standards Working Group

As noted above, RSAC established the Track Safety Standards Working Group on February 22, 2006. To address Phase I of RSAC's referral, the Working Group convened on April 3–4, 2006; April 26–28, 2006; May 24–25, 2006; and July 19–20, 2006. The results of the Working Group's efforts were incorporated into the final rule that was published on October 11, 2006. To address Phase II of RSAC's referral, the Working Group convened on January 30–31, 2007; April 10–11, 2007; June 27–28, 2007; August 15–16, 2007; October 23–24, 2007; and January 8–9, 2008. The Working Group's finding and recommendations were then presented to the full RSAC on February 20, 2008, as noted above.

The members of the Working Group, in addition to FRA, include the following:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSX), Kansas City Southern Railway Company (KCS), Norfolk Southern Railway Company (NS), and Union Pacific Railroad Company (UP);

Amtrak;

APTA, including members from Port Authority Trans-Hudson Corporation (PATH), LTK Engineering Services, Northeast Illinois Regional Commuter Railroad Corporation (Metra), and Peninsula Corridor Joint Powers Board (Caltrain);

ASLRRA (representing Class III/smaller railroads);

ASRSM (represented by staff from the California Public Utilities Commission (CPUC));

BLET;

BMWED;

BRS;

Kandrew, Inc.;

Transportation Technology Center, Inc. (TTCI); and

UTU.

Staff from DOT's John A. Volpe National Transportation Systems Center (Volpe Center) attended all of the meetings and contributed to the technical discussions. In addition, NSTB staff attended all of the meetings and contributed to the discussions as well.

FRA has worked closely with the RSAC in developing its recommendations and believes that the RSAC has effectively addressed concerns with regard to FRA's management of CWR and rail carriers' effective implementation of their CWR plans. FRA has greatly benefitted from the open, informed exchange of information during the meetings. There is a general consensus among the railroads, rail labor organizations, State safety managers, and FRA concerning the primary principles FRA sets forth in this NPRM. The Working Group has also benefitted in particular from participation of NTSB staff. FRA believes that the expertise possessed by the RSAC representatives enhances the value of the recommendations, and FRA has made every effort to incorporate them in this proposed rule.

The Working Group was unable to reach consensus on one item that FRA has elected to include in this NPRM. The Working Group did not reach consensus with regard to the proposed change to 49 CFR 213.119(c), which describes the joint installation and maintenance procedures that track owners must include in their CWR plans. The FRA representatives to the Working Group felt strongly that the text is necessary to include in the NPRM, as the failure of CWR joints was the principal basis for the 2006 final rule. The FRA members believed that the integrity of CWR joints could not be definitively maintained without requiring that the specific installation and maintenance procedures delineated in proposed § 213.119(c) be included in the track owner's CWR plan. On the other hand, the rail carrier representatives maintained that such specific requirements would interfere with their freedom to modify installation and maintenance procedures as they saw fit. Nevertheless, it is FRA's position that the text is necessary to prevent the failure of CWR joints and has included this singular, non-consensus item into the rule text of this NPRM.

IV. FRA's Approach to CWR in This NPRM

As opposed to the more narrow approach taken by FRA when publishing the final rule on inspections of joints in CWR (Oct. 11, 2006; 71 FR 59677), FRA broadly reviewed all of § 213.119 for purposes of this NPRM. In collaboration with the Working Group, FRA examined compliance with § 213.119 in general and concerns brought forward by the industry. At the end of the first Working Group meeting, FRA decided to focus the review on the following issues: The training/re-training of individuals qualified to maintain and inspect CWR; the submission of CWR plans to FRA; the availability of a carrier's plan at CWR work sites; special inspections of CWR; the definition of CWR; ballast; and anchoring requirements.

A. Qualifications and Training of Individuals on CWR

During the rulemaking on inspections of joints in CWR, the BMWED suggested that there should be annual re-training of track inspectors on joint bar inspections in CWR. FRA understood this comment as pertaining to CWR training in general and resolved to address this concern as part of the Phase II task of broadly reviewing § 213.119. In carrying out this task, and because of the concern raised by the BMWED, the Working Group decided that it would be beneficial to review accident data from

Class I and shortline railroads to determine whether accidents on CWR could be attributed to training deficiencies of track inspectors. The Working Group established the Accident Review Task Force (AR Task Force) to facilitate this review and analysis, and it was comprised of FRA and the following Working Group members:

AAR, including BNSF, CSX, CP, NS, UP;
Amtrak;
APTA, including Metra;
ASLRRA;
BMWED; and
BRS.

Staff from the Volpe Center and NTSB also participated in this effort, which focused on researching and analyzing accident data from the years 2000 to 2007 for major causal factors of accidents on CWR. The AR Task Force initially reviewed over 1100 accident/incident report forms from January 2000 to August 2007. After taking into consideration the location of the most severe accidents/incidents, the AR Task Force narrowed its review to exclude accidents/incidents on Class 1 and excepted track, as defined in 49 CFR part 213. The final review included over 200 reports that met the objectives and criteria for study.

The AR Task Force determined that a high volume of accidents was due to misalignment of track, caused by sunkinks or buckling of the track. The AR Task Force also discovered that each incident studied occurred after track work had been performed recently, and, surprisingly, that the carriers' CWR engineering standards were not being followed in conducting various types of track-work. In particular, the research disclosed failure to adequately de-stress the track following a previous derailment; failure to maintain the neutral temperature of the rail and to record the amount of rail added or removed during installation; failure to adjust or replace deficient anchors; and failure to place the proper speed restrictions and/or maintain a sufficient length of time and/or tonnage on disturbed track. Moreover, upon review of the railroads' CWR program plans, FRA noted that the railroads were not providing comprehensive guidelines for the training/retraining of their employees in the application of CWR procedures.

Given the concerns raised, the Working Group decided that it was necessary to ensure that individuals are properly qualified and trained to install, adjust, maintain, and inspect CWR track. Section § 213.7 currently delineates how a railroad must designate (1) qualified persons to supervise restorations and renewals of track, (2) qualified persons to inspect track, and (3) persons who may pass trains over broken rails and pull aparts. However, the section contains no explicit provision for individuals to supervise restorations and renewals of track, or for individuals to inspect track, specific to CWR. In order to address qualification and training concerns specific to individuals qualified on CWR, the Working Group recommend adding a new paragraph (c) to § 213.7. See the Section-by-Section Analysis, below, for further discussion of the proposed changes to this section.

B. Submission of CWR Plans to FRA

The second issue that was raised at the Working Group discussions involved the submission of CWR plans to FRA. FRA representatives raised the concern that rail carriers were presenting plans to FRA's Office of Safety that were not the current plans, were unenforceable because of their vagueness, and did not contain all of the procedures in a single, comprehensive document. The Working Group therefore discussed: (1) The need to develop a mechanism for updating and submitting CWR program procedures in a timely manner to FRA's Office of Safety; (2) notification and re-submission criteria for any and all modifications to program plans; (3) the need for CWR procedures to be contained in a single document; and (4) the desirability of track owners submitting changes to CWR procedures to FRA prior to implementation, as immediate implementation can cause problems with enforcement activities and information being available to FRA personnel in the field.

The Working Group determined that there was a need to establish procedures for the submission and implementation of modified CWR plans to maintain consistency with the continued growth of the industry through developments in engineering and technology. Initially, rail carrier representatives did not agree with FRA's position on the need for changes to their CWR procedures to be sent to FRA prior to their implementation. They contended that changes in CWR procedures should be effective immediately, without having to submit the changes to FRA in advance. For example, the rail carrier representatives stated that the ability to change their plans as they wished would help them to more expeditiously incorporate recent developments based upon engineering and accident review findings. However, since FRA enforces the plan that the track owner has on file with FRA, if track owners change their plans without first notifying FRA, the agency can not properly enforce their plans. The rail carrier representatives acknowledged this issue and agreed to FRA's proposal that any change to a CWR plan be submitted to FRA 30 days prior to its implementation. Nevertheless, FRA makes clear that a track owner is allowed to immediately implement more restrictive measures than provided for in the plan on-file with FRA. The track owner can, of course, do more than the minimum measures provided for in its plan, such as to address an immediate safety concern. However, the track owner would not be able to do less than the minimum measures provided for in its plan without first following the proposed procedures for changing the plan.

The rail carrier representatives stated that they would like to know when FRA has received a submitted CWR plan. FRA agreed that this request was reasonable, and agreed to include a provision in the regulation stating that FRA will issue a written statement acknowledging receipt of the plan to the track owner. The Working Group also discussed that the current regulatory text was vague as to what FRA did with a plan once it was received. FRA has determined that the best course of action is to allow for the agency to review a plan and, if it is disapproved, to state the reasons for the disapproval. This is intended to allow the track owner to better understand and remedy the deficiencies that FRA identifies with its plan. The proposed regulatory text also provides a process by which the track owner could appeal an initial rejection of its CWR plan by FRA. This process is further discussed in the Section-by-Section Analysis, below.

C. Availability of CWR Written Procedures at CWR Work Sites

With the passage of SAFETEA–LU in 2005, Congress mandated that FRA instruct its track inspectors to obtain the most recent copies of rail carriers' CWR plans and to use these plans when conducting track inspections. In response, FRA posted the CWR plans received by the Office of Safety on FRA's Intranet site, where they are available to all Federal and State inspectors, and has instructed all of its inspectors to use these plans when conducting track inspections.

The Working Group discussed the desirability of having copies of the carrier's written CWR procedures at every work site. FRA and labor representatives maintained that updated revisions and modifications to the CWR

plans should be made available to the carrier personnel responsible for the installation, adjustment, maintenance, and inspection of CWR; railroads should maintain/retain these procedures and guidelines within their engineering manuals. FRA proposed to the Working Group that the railroads provide a copy of their CWR program plans to be maintained on-site during the performance of duties either with the employee in charge or the qualified employee conducting the work. This type of practice would ensure that personnel understand the track owner's CWR policies and procedures.

The Working Group reached consensus that the track owner should make available, in one comprehensive manual, a copy of the track owner's CWR plan, including all revisions, appendices, updates, and referenced materials, at every job site where personnel are assigned to install, inspect, and maintain CWR.

D. Special Inspections

During Phase I of the Working Group's assignment, it was determined that the issue of special inspections of CWR be tabled until Phase II. During preliminary Phase II discussions, the Working Group recognized that this issue would be better resolved by enlisting additional resources for further technical engineering research and analysis. The Working Group therefore formed the Technical Issues Task Force (TI Task Force), which was principally comprised of members from the Volpe Center and Kandrew, Inc., an independent engineering contractor engaged to represent the interests of the AAR. Technical concerns discussed by the TI Task Force included: speed restrictions for track work following mechanized stabilization (*i.e.*, how slow orders are lifted); maintaining the desired rail installation temperature range; inspecting for curve movement; the relationship between ambient and rail temperature; special inspections (severe weather effects on rail); and rail anchoring requirements. The TI Task Force reported to the Working Group that all of these issues should be handled either individually or jointly in special CWR inspections. These issues are further discussed, below, in the section on Specific Technical Issues Addressed by the Working Group.

E. Definition of CWR

CWR refers to the way in which rail is joined together to form track. In CWR, rails are welded together to form one continuous rail that may be several miles long. Although CWR is nominally one continuous rail, rail joints may exist for many different reasons. CWR is currently defined as rail that has been welded together into lengths exceeding 400 feet. Labor representatives questioned whether the railroads would consider CWR into which a joint has been installed (to repair a rail break or remove a detected defect, for example) to be jointed rail and no longer subject to the railroad's CWR maintenance policy. FRA's position is that rail designated as CWR when installed should remain CWR irrespective of whether it contains a joint or joints.

F. Ballast

In its ongoing review of CWR plans, FRA noted that some track owners included a definition of what constitutes ''sufficient ballast'' in their plans. Some plans cited specific measurements prescribing the amount of ballast appropriate for various track locations. During the Working Group meetings, labor representatives proposed that FRA adopt a definition of minimum sufficient ballast. The labor representatives also requested additional information from the Volpe Center to address concerns about how track ballast affects track strength. The ensuing discussion highlighted the fact that the track owners' CWR plans (which are submitted to FRA) are supplemented in practice by additional railroad-specific policies and procedures (''best practices'') which are often more restrictive. Rail carrier representatives were reluctant to have explicit ballast requirements in their CWR plans, due to the concern that ballast conditions may not always be maintained to the presumably more stringent internal standards.

The Track Safety Standards currently define ballast in § 213.103 as material which will transmit and distribute the load of the track and railroad rolling equipment to the subgrade; restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails; provide adequate drainage for the track; and maintain proper track crosslevel, surface, and alinement. It is FRA's position that § 213.103 appropriately defines the term ''ballast'' for use by the regulated industry.

G. Anchoring

The Working Group discussed rail anchoring specifically in terms of controlling longitudinal force near joints installed at the end of CWR strings and near joints within CWR strings. A CWR string is understood to be a length of CWR rail set aside by the railroad for installation in the track. Of concern is the relative effectiveness of anchoring patterns—every tie versus every other tie in conventional, wood tie construction. Railroads typically do not change anchoring patterns when installing joints within CWR strings, and generally have policies to remove the joint when practical. At the end of CWR strings some railroads under certain circumstances box-anchor every tie for a prescribed distance to help control the longitudinal forces at the transition. This is not a universally accepted practice. The primary effect of this practice is to reduce the longitudinal force carried by the joint when the rail is in tension. As the force carried by the joint increases, the predicted life of the joint shortens.

The Group also focused on when the joint would be removed, and proposed time limits for certain actions based on the performance of the joint in practice. One of the concerns is that as the joint fails the existing stress-free temperature of the rail may significantly be reduced, and, hence, require subsequent adjustment. Although the technical aspects of this issue were agreed upon by the Working Group, consensus was not reached on including specific requirements in the regulatory text. Please see the Section-by-Section Analysis for further discussion on this issue.

V. Specific Technical Issues Addressed by the Working Group

In addition to technical issues already discussed above, the Working Group also addressed a number of other technical issues. Many of these issues arose out of the Working Group's review of a proposed, generic plan for the installation and maintenance of CWR, which was based on the AAR's submission of CWR plans for Class I railroads which were very similar in form and content. The Working Group analyzed each aspect of the generic plan to determine if it fulfilled all of the safety requirements of § 213.119. After discussion and analysis of the technical issues raised, as further discussed below, the Working Group revised the generic plan. In collaboration with the Working Group, FRA further revised and redacted the plan, and posted it on the FRA public Web site found at *http://safetydata.fra.dot.gov/officeofsafety/*. The plan reflects the labors of the Working Group as well as FRA's analysis, and it is not intended to be the definitive guide for a CWR plan; FRA understands that each railroad has its own specific needs and circumstances that should be taken into account in formulating its CWR plans.

The generic plan incorporates technical issues addressed by the Working Group which include: Maintaining the desired rail installation temperature range; inspecting for curve movement as a result of disturbed track; speed restrictions for maintenance/rehabilitation work on disturbed ballast; ambient temperature vs. rail temperature; anchoring; and cold weather inspections. The following describes the Working Group consensus on these topics.

A. Maintaining Desired Rail Installation Temperature

The Working Group developed the concept of the rail neutral temperature (RNT) ''safe range.'' The lower limit of this safe range is defined as 20° F below the designated rail laying temperature (RLT) for a particular territory. Rail that has pulled apart, broken, or been cut for defect removal must be readjusted such that its neutral temperature is within the safe range. If the rail has not been so readjusted before the rail temperature exceeds a prescribed value, the railroad would either: (1) Apply a speed restriction of 25 mph, or (2) apply a speed restriction of 40 mph in conjunction with a daily inspection of the rail made during the heat of the day. The track owner must not, however, raise the speed of track in this situation to 40 mph if the track was in operation at a lower speed. Locations at which the rail neutral temperature is known to have not been adjusted to within the safe range (20 °F below designated RLT) would ultimately be adjusted in 365 days. Each railroad would document its inspection procedures for slow orders and special inspections due to heat. When rail separations occur in CWR, the rail gap and rail temperature should be recorded to facilitate the estimation of the rail neutral temperature at the location of the separation.

B. Inspecting for Curve Movement Resulting From Disturbed Track

The Working Group analyzed best industry practices for inspecting for curve movement as a result of disturbed track. The Group came to the consensus that, when surfacing disturbed track with a 3° (or higher degree) curve, the curve must be staked and the curve movement monitored when the rail temperature is substantially (50 degrees) below the designated RLT. If more than 3″ of curve movement occurs, then slow orders must be placed if the curve is not lined out before the rail temperature reaches the desired RLT.

C. Speed Restrictions for Maintenance/Rehabilitation Work on Disturbed Ballast

Certain track maintenance procedures result in disturbance of the ballast which can reduce its capacity to restrain the track from unwanted lateral movement. The passage of train traffic over the track or the use of ballast stabilizers can restore this capacity by consolidating the ballast. Railroads typically apply speed restrictions following such track work until sufficient consolidation has occurred and the restraining capacity of the ballast is restored. The Working Group agreed that the equivalent of 0.1 million gross tons (''MGT'') of traffic would be sufficient to allow resumption of normal speeds over the track. This degree of consolidation may be achieved through the use of properly tuned ballast stabilizers. The Working Group also agreed that the passage of 16 passenger trains or 8 freight trains (or a proportional combination thereof) would be equivalent to 0.1 MGT of traffic to allow resumption of normal speeds.

D. Ambient Temperature Versus Rail Temperature

The Working Group agreed that all references to temperature should refer to rail temperature. In hot weather, the rail temperature is generally greater than the ambient (air) temperature. For the purposes of planning or scheduling track work in the short term in hot weather, the Working Group believes it appropriate for a railroad to use the predicted ambient temperature plus 30 °F to estimate the rail temperature. In cold weather, the rail temperature is essentially equal to the ambient temperature, and no such adjustment is necessary.

E. Cold Weather Inspections

The Working Group agreed that cold weather inspections would be triggered at a minimum when the rail temperature is forecast to be 100° or more below the designated RLT. Cold weather inspections are necessary in order to safely detect pulled apart rail before a train passes over damaged rail.

Again, FRA notes that these agreements on technical issues regarding the management of CWR track were intended to describe one set of CWR procedures that could be recognized as providing suitable assurance of safety. FRA intends to use the technical agreements, as reflected in the generic CWR plan, as a benchmark document for reference as actual railroad plans are received and reviewed. Railroads remain free to deviate from this benchmark approach, but FRA would expect to receive supporting analysis explaining how the relevant safety objectives are met by the alternative means. FRA is not specifically requesting comment on these technical issues, which are discussed here as useful background information.

VI. Section-by-Section Analysis

Section 213.7 Designation of qualified persons to supervise certain renewals and inspect track.

FRA is proposing to revise § 213.7 principally by adding a new paragraph (c), which would create a new requirement for the track owner to specifically designate individuals who are qualified to inspect CWR track or supervise the installation, adjustment, and maintenance of CWR track in accordance with the track owner's written procedures. The new paragraph would require that the designated individual have: (1) Current qualifications under either paragraphs (a) or (b) of this section; (2) successfully completed a comprehensive training course specifically developed for the application of written CWR procedures issued by the track owner; (3) demonstrated to the track owner that he/she knows and understands the requirements of the written CWR procedures, can detect deviations from those requirements, and can prescribe appropriate remedial action(s) to correct or safely compensate for those deviations; and (4) written authorization from the track owner to prescribe remedial action(s) to correct or safely compensate for deviations from the requirements in the CWR procedures and successfully completed a recorded examination on the procedures as part of the qualification process to be made available to FRA.

FRA has determined that, as CWR track has characteristics inherently different than those of traditional jointed rail, track owners should be required to designate which individuals are specifically qualified to inspect, or supervise the installation, adjustment, and maintenance of CWR. In addition to the qualifications that an individual must have under paragraph (a) to perform track maintenance work, or the qualifications under paragraph (b) to inspect track, an individual designated under paragraph (c) would have to be well-versed in the maintenance of CWR track as detailed in the track owner's CWR plan.

For guidance, FRA originally looked to § 213.305(c), which regulates the requirements of an individual qualified

to inspect CWR track or supervise the installation, adjustment, and maintenance of CWR in accordance with the track owner's written procedures for train operations at track classes 6 and higher. The Working Group discussed the merits of the requirement in § 213.305(c)(2), which states that an individual must have ''successfully completed a training course of at least eight hours duration specifically developed for the application of written CWR procedures issued by the track owner.'' Carrier representatives maintained that the requirement to have an eight-hour course would interfere with current training methods. As the FRA representatives agreed that the comprehensive nature of the training course is more important than its duration, the Working Group reached consensus that the individual would have to successfully complete a comprehensive training course pursuant to proposed paragraph (c)(2), which does not specify the duration of the training.

The Working Group also discussed the merits of requiring the individual to successfully complete an examination on the track owner's CWR procedures. In § 213.305(c)(4), individuals qualified on CWR for train operations at track classes 6 and higher must successfully complete a recorded examination on the track owner's CWR procedures. The paragraph states that this examination may be written, or it may be a computer file with the results of an interactive training course. Working Group members were concerned with the proposal that the examination be in a written context. It was argued that, quite often, a supervisor can better test someone's knowledge through practical application in the field as opposed to a written test. In order to accommodate this option for testing, FRA agreed to define the required examination in proposed paragraph (c)(4) as ''recorded'' instead of written; therefore, track owners would have the flexibility to test an individual's knowledge how they best see fit. However, it should be noted that the results of this examination would have to be recorded so that FRA may inspect the basis for the qualification of an individual under paragraph (c).

In proposing to add new paragraph (c) to this section, FRA is proposing to redesignate current paragraphs (c) and (d) as paragraphs (d) and (e), respectively. FRA is also proposing to make conforming changes to these paragraphs to cross-reference the new paragraph (c), in the same way that the current paragraphs of this section are cross-referenced. Although FRA is setting out the entire text of these paragraphs for clarity, the changes to the proposed, redesignated paragraphs would involve only adding the cross-reference to the introductory text of the paragraphs, and removing the superfluous reference ''of this part'' in redesignated paragraph (d)(4).

Section 213.119 Continuous welded rail (CWR); general.

FRA is proposing to amend § 213.119 by adding new provisions and revising existing provisions, as discussed below. In part because of the proposed addition of new paragraphs and the consequent need to redesignate existing paragraphs, FRA is setting out § 213.119 in its entirety to enable the regulated industry to more readily understand and follow its requirements, given the length of this section and the number of changes proposed.

Introductory text. During Working Group discussions, FRA representatives expressed concern that this section's current introductory text does not explicitly address certain procedural issues associated with CWR plans. The text does not explain how a track owner would revise a CWR plan that has already been submitted to FRA, or what the process would be for FRA to require a revision to a plan, including the process to appeal a revision requirement. FRA is therefore proposing to make clear that a track owner must file its CWR plan with the FRA Associate Administrator for Safety not less than 30 days before it implements its CWR plan, including submitting revisions to an existing CWR plan in order for the changes to take effect under the regulation. FRA would send a written statement to the track owner acknowledging receipt of the plan. Also, the proposed regulation provides more guidance to the track owner regarding FRA's process of reviewing submitted plans. FRA's resources do not permit it to review each plan prior to its implementation, however, FRA will review plans subsequent to implementation as circumstances require or resources permit. If the review indicates that revisions to the plan are needed to bring the plan into compliance with the requirements of the rule, FRA would give notice of the revision requirement in writing to the track owner, including the basis of the revision requirement. The track owner would have 30 days either to implement FRA's required plan revisions, or to respond and provide evidence in support of the original plan. FRA would then render a final decision with regard to the plan, and the track owner would have 30 days from receipt of FRA's final decision to amend the plan and resubmit it in accordance with FRA's decision. The amended plan would become effective upon its submission to FRA.

Paragraphs (a) and (b). Paragraphs (a) and (b) would be republished in their entirety with no changes.

Paragraph (c). FRA is proposing to redesignate current paragraph (c) as paragraph (d), and add a new paragraph (c) in its place. New paragraph (c) would revise the requirements for CWR joint installation and maintenance procedures to be included in a track owner's CWR plan. The new paragraph proposes to require that rail joints be installed per the requirement in § 213.121(e), which states, ''In the case of continuous welded rail track, each rail shall be bolted with at least two bolts at each joint.'' The proposed paragraph further states that, in the case of a bolted joint installed during CWR installation after the publication date of the final rule, within 60 days the track owner must either: (1) Weld the joint; (2) install a joint with six bolts [2]; or (3) anchor every tie 195 feet in both directions of the joint. Finally, the proposed paragraph states that, in the case of a bolted joint in CWR experiencing service failure or a failed bar with a rail gap present, the track owner must either: (1) Weld the joint; (2) remediate joint conditions, replace the broken bolts, and weld the joint within 30 days; (3) replace the broken bar, replace the broken bolts, install two additional bolts, and adjust the anchors; (4) replace the broken bar, replace the broken bolts, and anchor every tie 195 feet in both directions from the CWR joint; or (5) add rail with provisions for later adjustment pursuant to (d)(2) of this section.

FRA noted during Working Group discussions that this section currently lacks an explicit reference to how a rail joint in CWR shall be bolted. As this requirement appears in § 213.121(e), FRA decided that it would be prudent to also state this requirement in § 213.119 so as to include all requirements for CWR in one section. This requirement would be stated in § 213.119(c) and would serve as a reminder to track owners that they cannot create their own joint bolt requirements in their CWR plans that are less restrictive than those specified in the regulation.

As previously mentioned, the Working Group was not able to reach

[2] *See* 49 CFR § 213.121(e), stating that, in the case of CWR, each rail shall be bolted with at least two bolts at each joint. This is a total of four bolts required at each joint.

consensus on this proposed paragraph (c). However, virtually identical text was included and discussed in the generic CWR plan generated by the rail carrier representatives, as discussed above. The rail carrier representatives were not in favor of including this paragraph, contending that its inclusion would constitute ''regulatory creep.'' These representatives did not believe it was necessary to incorporate the text into the rule if FRA knew that they had already proposed to add the text to their individual CWR plans. Nevertheless, FRA strongly feels that inclusion of the paragraph is necessary. With the history of high-profile derailments on CWR due to joint bar failure, as discussed in the October 11, 2006 final rule (71 FR 59677), FRA stresses the importance for CWR track owners to follow the installation and maintenance procedures proposed in this paragraph. FRA also notes that the maintenance procedures proposed were analyzed and discussed at length by the Working Group and found to represent sound industry guidance to avoid a derailment on CWR track due to poor joint installation or maintenance.

Paragraph (d). FRA is proposing to redesignate current paragraph (c) as paragraph (d). No substantive change to this paragraph's requirements is intended.

Paragraph (e). FRA is proposing to redesignate current paragraph (d) as paragraph (e). No substantive change to this paragraph's requirements is intended.

Paragraph (f). FRA is proposing to redesignate current paragraph (e) as paragraph (f). FRA is also proposing to revise paragraph (f)'s format to more clearly identify its requirements and add a new paragraph (f)(1)(ii) which would require the track owner to have procedures in the CWR plan that govern train speed when the difference between the average rail temperature and the rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location. ''Rail temperature'' is currently defined as ''the temperature of the rail, measured with a rail thermometer,'' and, as discussed in proposed, redesignated paragraph (l), below, FRA is proposing to add a definition for ''rail neutral temperature'' (RNT) as ''the temperature at which the rail is neither in compression nor in tension.'' When maintaining the integrity of CWR track, the track owner needs to be concerned not only with the actual rail temperature, but also with the rail neutral temperature. FRA notes that the track owner would also have the responsibility to quantify the rail neutral temperature at a specific location.

As previously stated, FRA notes that there has been a significant number of derailments caused by buckled track. Because of this safety concern, FRA is proposing to require track owners to reduce train speed over areas where there is an increased possibility of track buckling. By reducing the train speed, FRA anticipates that track owners will be able to reduce the probability of a catastrophic derailment caused by track buckling.

Paragraph (g). FRA is proposing to redesignate current paragraph (f) as paragraph (g). FRA is also proposing to revise the requirements of this paragraph by specifying that track owners must have in their CWR plans procedures which prescribe when physical track inspections are to be performed to detect not only buckling-prone conditions, but also pull-apart prone conditions.

This paragraph currently is focused only on when physical track inspections are required to identify buckling-prone conditions in CWR track. The requirements for these inspections to detect buckling-prone conditions would not be changed. In paragraph (g)(1)(i), track owners would still be required to have procedures in their CWR plans that address inspecting track to identify buckling-prone conditions in CWR, which include: (A) Locations where tight or kinky rail conditions are likely to occur, and (B) locations where track work of the nature described in redesignated paragraph (f)(1)(i) of this section have recently been performed. As discussed above, redesignated paragraph (f)(1)(i) would describe maintenance work, track rehabilitation, track construction, or any other event which disturbs the roadbed or ballast section and reduces the lateral or longitudinal resistance of the track. The track owner would also continue to specify the timing of the inspection as well as the appropriate remedial actions to be taken when buckling-prone conditions are found, as provided in paragraph (g)(2), discussed further below.

Pull-apart prone conditions would be addressed with the addition of paragraph (g)(1)(ii), which would require the track owner to include procedures in its CWR plan that prescribe when physical track inspections are to be performed to identify pull-apart prone conditions in CWR track. The procedures must include locations where pull-apart or stripped-joint rail conditions are likely to occur. As provided in paragraph (g)(2), the track owner must also specify the timing of the inspection and the appropriate remedial actions to be taken when pull-apart prone conditions are found. Paragraph (g)(2) is based on the current text of paragraph (f)(2), which addresses buckling-prone conditions, expanding it to address pull-apart prone conditions as well.

The Working Group discussed that changes in temperature can greatly affect the integrity of CWR. Typically, significant increases in rail temperature can cause buckling-prone conditions, and significant decreases in rail temperature can cause pull-apart prone conditions. FRA has chosen not to quantify the specific temperatures that would cause a buckling-prone condition or a pull-apart prone condition. The Working Group discussed that, given the varied geographical composition of each railroad entity, specifying these temperatures would be best left to the track engineering program of each track owner. Therefore, FRA has declined to specify at what temperatures a physical track inspection under paragraph (g)(1) would be required, choosing instead to propose requiring that the track owner identify the conditions and situations when a physical track inspection would need to occur due to a buckling-prone or pull-apart prone condition.

Paragraph (h). FRA is proposing to redesignate paragraph (g) as paragraph (h). FRA is not proposing any substantive change to the requirements of this paragraph. FRA is only proposing to make conforming amendments to cross-references in this paragraph to reflect the proposed redesignation of the paragraphs in the section.

Paragraph (i). FRA is proposing to redesignate paragraph (h) as paragraph (i). FRA is also proposing to revise this paragraph by requiring the track owner to have in effect a comprehensive training program for the application of its written CWR procedures with provisions for annual re-training for individuals designated under § 213.7(c) to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. Additionally, FRA is proposing that the track owner make the training program available for review by FRA upon request.

This paragraph currently requires that the track owner's training program have provisions for ''periodic'' re-training of qualified individuals. The Working Group discussed this requirement and advised that the term ''periodic'' was undesirably vague. A brief, informal survey at one of the Working Group meetings revealed that some rail carriers re-trained individuals every year, while others re-trained individuals every two

or three years. FRA identified that a leading cause of carrier non-compliance with § 213.119 is a lack of training among individuals qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. The AR Task Force's study showed that a significant number of accidents/incidents could be attributed to the failure to comply with the track owner's CWR policy. In order to address this serious safety concern, FRA determined that it was necessary to more specifically state when qualified individuals must be re-trained.

Within the Working Group, FRA representatives proposed to revise this paragraph by specifying the months or days that should pass between the re-training of qualified individuals. Rail carrier representatives stated that this would not give them the flexibility to train individuals at pre-determined training classes and would add to operational costs. In order to address the concerns of the rail carrier representatives, FRA agreed that it would be sufficient to require annual re-training of individuals. FRA notes that, for purposes of this paragraph, ''annual'' means ''calendar year,'' as opposed to a 365-day period.

As FRA is proposing to amend § 213.7 to include a new paragraph (c) that explicitly addresses how a track owner designates an individual as qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track, FRA decided that it was necessary to include a reference to proposed § 213.7(c) in the proposed revision to this § 213.119(i).

In paragraph (i), FRA is also proposing to require that the track owner make the training program available for review by FRA upon request. Due to the unique and individual nature of training programs, FRA determined that it would not be cost-effective for the agency to examine the training program of each track owner in addition to its CWR plan any time a change is made to the plan. However, particularly in the event of non-compliance with the CWR regulations, FRA believes that it should have the option of examining how qualified individuals are trained to apply the track owner's written CWR procedures.

During the Working Group's meetings, Class I railroad representatives agreed to voluntarily make an initial submission of their CWR training programs to FRA. FRA also agreed that, in its Track Safety Standards Compliance Manual, track inspectors would be instructed not to request the training program of a specific track owner unless under the specific direction of FRA management. Rather, FRA's headquarters staff would undertake the responsibility of obtaining and disseminating this information, as needed, to both FRA inspectors and inspectors from States participating in rail safety enforcement activities under 49 CFR part 212.

Paragraph (j). FRA is proposing to redesignate current paragraph (i) as paragraph (j). FRA is not proposing any substantive changes to the requirements of this paragraph, however. FRA is proposing only to make a conforming change to the cross-reference to another paragraph in this section, due to the proposed redesignation of the paragraphs in this section, and to correct the cross-reference so that it references ''this section''-not ''this part.''

Paragraph (k). FRA is proposing to add a new paragraph (k) that would require the track owner to make readily available, at every job site where personnel are assigned to install, inspect or maintain CWR, a copy of the track owner's CWR procedures and all revisions, appendices, updates, and referenced materials related thereto prior to their effective date. Additionally, such CWR procedures would be required to be issued and maintained in one comprehensive engineering standards and procedures manual.

Since the implementation of the CWR regulations, FRA has noted that a number of rail carriers maintain two different sets of CWR procedures; rail carriers have been discovered to maintain the set of CWR procedures submitted to FRA pursuant to this § 213.119, as well as maintain a separate set of CWR procedures to be used by personnel in the field. While FRA takes no issue with a rail carrier instructing its personnel to maintain more restrictive CWR procedures in the field than what is on-file with FRA, FRA stresses that rail carriers are required to train their personnel on the plan on-file with FRA. While FRA would continue to enforce the CWR plan on-file with its Office of Safety, having the procedures required to be at every job site where personnel are assigned to install, inspect or maintain CWR would ensure that personnel in the field understand which set of procedures FRA will hold them responsible for compliance with pursuant to the Federal regulations.

Paragraph (l). FRA is proposing to redesignate current paragraph (j) as paragraph (l). This paragraph contains definitions to be used in connection with this section. FRA is proposing to revise two existing definitions, remove a definition, add a new definition, and make non-substantive changes to correct the capitalization of the definitions. Specifically, FRA is proposing to change the definition of ''Continuous Welded Rail (CWR)'' to mean ''rail that has been welded together into lengths exceeding 400 feet. Rail installed as CWR remains CWR, regardless of whether a joint or plug is installed into the rail at a later time.'' As a consequence of this proposed change, FRA is also proposing to change the definition of ''CWR joint'' to mean ''any joint directly connected to CWR.'' (''CWR joint'' is currently defined as ''(a) any joint directly connected to CWR, and (b) any joint(s) in a segment of rail between CWR strings that are less than 195 feet apart, except joints located on jointed sections on bridges.'')

The Working Group discussed that the current definition of CWR, which does not include a reference to a joint or plug, does not fully address the reality of CWR in the industry. When the current definition of CWR is read with the current definition of CWR joint, one could wrongly conclude that, by adding a joint or plug into a section of CWR track, the track would no longer be defined as CWR track. Indeed, it was agreed upon by the members of the Working Group that CWR track generally maintains its CWR properties whether or a not a joint or plug is added to the track at a later date. Therefore, the Working Group recommended that the definition be revised to specify that rail installed as CWR remains as CWR, regardless of whether a joint or plug is installed into the rail at a later date.

Due to the decision to revise the definition of CWR, the Working Group determined that the definition of CWR joint should also be revised. As the new definition of CWR would explain that CWR track remains as CWR, regardless of whether a joint or plug is installed into the rail at a later date, the definition of CWR joint would no longer need to specify that a CWR joint is a joint in a segment of rail between CWR strings that are less than 195 feet apart. Since rail installed as CWR remains as CWR with the new definition, FRA is revising the definition of CWR joint to simply be a ''any joint connected to CWR.''

FRA is proposing to remove the definition ''Action items,'' because the term is not expressly used in this section. Currently, ''Actions items'' are defined as ''the rail joint conditions that track owners identify in their CWR plans pursuant to paragraph (g)(3) which require the application of a corrective correction.'' Paragraph (g)(3) itself provides that, in formulating procedures which prescribe the scheduling and conduct of inspections

to detect cracks and other indications of potential failures in CWR joints, the track owner specify the conditions of actual or potential joint failure for which personnel must inspect. Current paragraph (g)(3) further provides that these conditions include, at a minimum, the following items: (i) Loose, bent, or missing joint bolts; (ii) rail end batter or mismatch that contributes to instability of the joint; and (iii) evidence of excessive longitudinal rail movement in or near the joint, including, but not limited to, wide rail gap, defective joint bolts, disturbed ballast, surface deviations, gap between tie plates and rail, or displaced rail anchors. The term ''action items'' is not used in this paragraph, however. FRA is proposing to redesignate paragraph (g)(3) as paragraph (h)(3), for formatting purposes only due to the proposed addition of new paragraphs in this section. FRA makes clear that it does not intend to make any change to the substance of this paragraph, and that removing the definition of ''action items'' is not intended to have any effect on what items are considered defects under the provisions of the rule.

At the same time, FRA is proposing to add the new definition of ''Rail neutral temperature'' to mean ''the temperature at which the rail is neither in compression nor tension.'' This definition is necessary because FRA is proposing to add new paragraph (f)(1)(ii), which would introduce for the first time in this section the term ''rail neutral temperature.'' In proposed paragraph (f)(1)(ii), FRA would require track owners to have procedures that govern train speed when the difference between the average rail temperature and the rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location. When maintaining the integrity of CWR track, the track owner has to be concerned with not only the actual rail temperature of the rail, but the rail neutral temperature as well. FRA decided that it was necessary to include in the regulation a definition of rail neutral temperature to clarify what temperature the track owner should be concerned with when preventing rail buckling. While FRA has provided a definition of ''rail neutral temperature,'' it is the responsibility of the track owner to quantify the rail neutral temperature at specific locations.

Appendix B to Part 213—Schedule of Civil Penalties

Appendix B to part 213 contains a schedule of civil penalties for use in connection with this part. FRA intends to revise the schedule of civil penalties in issuing the final rule to reflect revisions made to § 213.119. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to submit suggestions to FRA describing the types of actions or omissions for each proposed regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative seriousness of each type of violation.

VII. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 128566 and DOT policies and procedures. *See* 44 FR 11034; February 26, 1979. As part of the regulatory impact analysis, FRA has assessed a quantitative measurement of costs and benefits expected from the implementation of this NPRM. FRA has determined that none of the provisions would have a major impact. If FRA's main assumptions are correct, the sum of the net benefit of all provisions would be $390,000 per year. The cost per year is estimated at $300,000 for the first year, and $150,000 per year for subsequent years. The total net benefit would then be $90,000 for the first year and $240,000 per year for subsequent years. The analysis has a range of assumptions to check sensitivity. Under the least favorable assumptions the rule would develop net societal costs, but those are apparently extreme assumptions. Under the most favorable assumptions the net benefits would be up to $1,140,000 per year. In no event would the net benefits or costs be more than a very small portion of the total railroad expenditures on CWR rail maintenance.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (the Act) (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities. The U.S. Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a railroad business firm that is ''for-profit'' may be, and still be classified as a ''small entity,'' is 1,500 employees for ''Line-Haul Operating Railroads,'' and 500 employees for ''Switching and Terminal Establishments.'' ''Small entity'' is defined in the Act as a small business that is not independently owned and operated, and is not dominant in its field of operation. SBA's ''Size Standards'' may be altered by Federal agencies after consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final policy that formally establishes ''small entities'' as railroads which meet the line haulage revenue requirements of a Class III railroad. The revenue requirements are currently $20 million or less in annual operating revenue. The $20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) is based on the Surface Transportation Board's (STB) threshold for a Class III railroad carrier. FRA uses the same revenue dollar limit to determine whether a railroad or shipper or contractor is a small entity.

Approximately 200 small railroads have CWR and may be affected by the final rule resulting from this NPRM. Relatively few Class III railroads have CWR. For the minority of Class III railroads that have CWR, the portion of each such railroad made up of CWR is more likely to be small. To the extent these railroads have CWR, Class III railroads would be subject to most of the provisions proposed in this NPRM. Small railroads were consulted during the RSAC Working Group deliberations and their interests have been taken into consideration in this NPRM. FRA believes that there will be no significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that would contain the new information collection requirements are noted, and the estimated times to fulfill each of the requirements are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
213.4 Excepted Track:				
—Designation of track as excepted	200 railroads	20 orders	15 minutes	5 hours.
—Notification to FRA about removal of excepted track.	200 railroads	15 notifications	10 minutes	3 hours.
213.5—Responsibility of track owners	718 railroads	10 notifications	8 hours	80 hours.
213.7 Designation of qualified persons to supervise certain renewals and inspect track:				
—Designations	718 railroads	1,500 names	10 minutes	250 hours.
—Employees Trained in CWR Procedures (New).	31 railroads	80,000 tr. employ 80,000 auth. +	90 minutes	120,000 hours.
—Written Authorizations and Recorded Exams (New).	31 railroads	80,000 exams	10 min. + 60 min	93,333 hours.
—Designations (partially qualified) under paragraph (c) of this section.	31 railroads	250 names	10 minutes	42 hours.
213.17 Waivers	718 railroads	6 petitions	24 hours	144 hours.
213.57 Curves, elevation and speed limitations:				
—Request to FRA for approval	718 railroads	2 requests	40 hours	80 hours.
—Notification to FRA with written consent of other affected track owners.	718 railroads	2 notifications	45 minutes	2 hours.
—Test Plans for Higher Curving Speeds	1 railroad	2 test plans	16 hours	32 hours.
213.110—Gage Restraint Measurement Systems (GRMS):				
—Implementing GRMS—Notices & Reports.	718 railroads	5 notifications + 1 tech rpt.	45 min./4 hours	8 hours.
—GRMS Vehicle Output Reports	718 railroads	50 reports	5 minutes	4 hours.
—GRMS Vehicle Exception Reports	718 railroads	50 reports	5 minutes	4 hours.
—GRMS/PTLF—Procedures for Data Integrity.	718 railroads	4 proc. docs.	2 hours	8 hours.
—GRMS Training Programs/Sessions	718 railroads	2 prog. + 5 sessions	16 hours	112 hours.
—GRMS Inspection Records	718 railroads	50 records	2 hours	100 hours.
213.119 Continuous welded rail (CWR), general:				
—Plans with written procedures for CWR (Amended).	718 railroads	718 plans	4 hours	2,872 hours.
—Written submissions after plan disapproval (New).	718 railroads	20 submissions	2 hours	40 hours.
—Final FRA disapproval and Plan Amendment (New).	718 railroads	20 amended plans	1 hour	20 hours.
—Fracture Report for Each Broken CWR Joint Bar.	239 railroads/ASLRRA	12,000 reports	10 minutes	2,000 hours.
—Petition for technical conference on Fracture Rpts.	1 RR association	1 petition	15 minutes	.25 hour.
—Training Programs re CWR Procedures (Amended).	239 railroads/ASLRRA	240 am. programs	1 hour	240 hours.
—Annual CWR Training of Employees (New).	31 railroads	80,000 tr. employ	30 minutes	40,000 hours.
—Recordkeeping	239 railroads	2,000 records	10 minutes	333 hours.
—Recordkeeping for CWR Rail Joints	239 railroads	360,000 records	2 minutes	12,000 hours.
—Periodic Records For CWR Rail Joints	239 railroads	480,000 records	1 minute	8,000 hours.
—Copy of Track Owner's CWR Procedures (New).	718 railroads	239 manuals	10 minutes	40 hours.
213.233 Track inspections:				
—Notations	718 railroads	12,500 notations	1 minute	208 hours.
213.241 Inspection records	718 railroads	1,542,089 records	Varies	1,672,941 hours.
213.303 Responsibility for Compliance	2 railroads	1 petition	8 hours	8 hours.
213.305 Designation of qualified individuals; general qualifications.	2 railroads	150 designations	10 minutes	25 hours.
—Designations (Partially qualified)	2 railroads	20 designations	10 minutes	3 hours.
213.317—Waivers	2 railroads	1 petition	80 hours	80 hours.
213.329 Curves, elevation and speed limitations:				
—FRA approval of qualified equipment and higher curving speeds.	2 railroads	3 notifications	40 hours	120 hours.
—Written notification to FRA with written consent of other affected track owners.	2 railroads	3 notifications	45 minutes	2 hours.
213.333 Automated Vehicle Inspection System:				
—Track Geometry Measurement System—Reports.	3 railroads	18 reports	20 hours	360 hours.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Track/Vehicle Performance Measurement System: Copies of most recent exception printouts.	2 railroads	13 printouts	20 hours	260 hours.
213.341 Initial inspection of new rail and welds:				
—Mill inspection—Copy of Manufacturer's Report.	2 railroads	2 reports	16 hours	32 hours.
—Welding plan inspection report	2 railroads	2 reports	16 hours	32 hours.
—Inspection of field welds	2 railroads	125 records	20 minutes	42 hours.
213.343 Continuous welded rail (CWR):				
—Recordkeeping	2 railroads	150 records	10 minutes	25 hours.
213.345 Vehicle qualification testing:				
—Report of Test Procedures and Results.	1 railroad	2 reports	560 hours	1,120 hours.
213.347 Automotive or Railroad Crossings at Grade:				
—Protection Plans 213.369 Inspection Records.	1 railroad	2 plans	8 hours	16 hours.
—Record of inspection of track	2 railroads	500 records	1 minute	8 hours.
—Internal defect inspections and remedial action taken.	2 railroads	50 records	5 minutes	4 hours.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at (202) 493–6292, or Ms. Nakia Jackson at (202) 493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Nakia Jackson, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Jackson at the following address: *robert.brogan@dot.gov; nakia.jackson@dot.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Environmental Impact

FRA has evaluated this NPRM in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this NPRM that might trigger the need for a more detailed environmental review. As a result, FRA finds that this NPRM is not a major Federal action significantly affecting the quality of the human environment.

E. Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM is intended to result in a final rule that has preemptive effect. Subject to a limited exception for essentially local safety or security

hazards, the requirements of the final rule would be intended to establish a uniform Federal safety standard that must be met, and State requirements covering the same subject would be displaced, whether those standards are in the form of State statutes, regulations, local ordinances, or other forms of State law, including common law. Section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce. This is consistent with past practice at FRA, and within the Department of Transportation.

FRA has analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132. This NPRM will not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among various levels of government. This NPRM will not have federalism implications that impose any direct compliance costs on State and local governments.

FRA notes that RSAC, which endorsed and recommended the majority of this NPRM, has as permanent members two organizations representing State and local interests: AASHTO and ASRSM. Both of these State organizations concurred with the RSAC recommendation endorsing this proposed rule. RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the federalism implications of this rulemaking from these representatives or from any other representatives of State government. Consequently, FRA concludes that this NPRM has no federalism implications.

F. Unfunded Mandate Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) [currently $141,100,000] in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. This NPRM will not result in the expenditure, in the aggregate, of $141,100,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' *See* 66 FR 28355 (May 22, 2001). Under the Executive Order a ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a ''significant energy action'' within the meaning of the Executive Order.

H. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc). You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

List of Subjects in 49 CFR Part 213

Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 213 of chapter II, subtitle B of Title 49, Code of Federal Regulations, as follows:

PART 213—[AMENDED]

1. The authority citation for part 213 continues to read as follows:

Authority: 49 U.S.C. 20102–20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

2. Section 213.7 is amended by redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively; adding new paragraph (c); and revising newly redesignated paragraphs (d) and (e) to read as follows:

§ 213.7 Designation of qualified persons to supervise certain renewals and inspect track.

* * * * *

(c) Individuals designated under paragraphs (a) or (b) of this section that inspect continuous welded rail (CWR) track or supervise the installation, adjustment, and maintenance of CWR track in accordance with the written procedures of the track owner shall have:

(1) Current qualifications under either paragraph (a) or (b) of this section;

(2) Successfully completed a comprehensive training course specifically developed for the application of written CWR procedures issued by the track owner;

(3) Demonstrated to the track owner that the individual:

(i) Knows and understands the requirements of those written CWR procedures;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(4) Written authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements in those procedures and successfully completed a recorded examination on those procedures as part of the qualification process.

(d) Persons not fully qualified to supervise certain renewals and inspect track as required in paragraphs (a) through (c) of this section, but with at least one year of maintenance-of-way or signal experience, may pass trains over broken rails and pull aparts provided that—

(1) The track owner determines the person to be qualified and, as part of doing so, trains, examines, and re-examines the person periodically within two years after each prior examination on the following topics as they relate to the safe passage of trains over broken rails or pull aparts: rail defect identification, crosstie condition, track surface and alignment, gage restraint, rail end mismatch, joint bars, and maximum distance between rail ends over which trains may be allowed to pass. The sole purpose of the examination is to ascertain the person's ability to effectively apply these requirements and the examination may not be used to disqualify the person from other duties. A minimum of four hours training is required for initial training;

(2) The person deems it safe and train speeds are limited to a maximum of 10 m.p.h. over the broken rail or pull apart;

(3) The person shall watch all movements over the broken rail or pull apart and be prepared to stop the train if necessary; and

(4) Person(s) fully qualified under § 213.7 are notified and dispatched to the location promptly for the purpose of authorizing movements and effecting temporary or permanent repairs.

(e) With respect to designations under paragraphs (a) through (d) of this section, each track owner shall maintain written records of—

(1) Each designation in effect;

(2) The basis for each designation; and

(3) Track inspections made by each designated qualified person as required by § 213.241. These records shall be kept available for inspection or copying by the Federal Railroad Administration during regular business hours.

3. Section 213.119 is revised to read as follows:

§ 213.119 Continuous welded rail (CWR); general.

Each track owner with track constructed of CWR shall have in effect and comply with a plan that contains written procedures which address: the installation, adjustment, maintenance, and inspection of CWR; inspection of CWR joints; and a training program for the application of those procedures. The track owner shall file its CWR plan with the FRA Associate Administrator for Safety. The CWR plan must contain an implementation date, provided that such date shall not be less than 30 days after its submission. FRA will send a written statement to the track owner acknowledging receipt of the plan. FRA shall, at any time subsequent to filing, review a railroad's plan for conformity with this subpart. FRA, for cause stated, may require revisions to the plan to bring the plan into conformity with this subpart. Notice of a revision requirement shall be made in writing and specify the basis of FRA's requirement. The track owner may, within 30 days of the revision requirement, respond and provide written submissions in support of the original plan. FRA renders a final decision in writing. Not more than 30 days following any final decision requiring revisions to a CWR plan, the track owner shall amend the plan in accordance with FRA's decision and resubmit the conforming plan. The conforming plan becomes effective upon its submission to FRA. FRA reviews each plan for compliance with the following required contents—

(a) Procedures for the installation and adjustment of CWR which include—

(1) Designation of a desired rail installation temperature range for the geographic area in which the CWR is located; and

(2) De-stressing procedures/methods which address proper attainment of the desired rail installation temperature range when adjusting CWR.

(b) Rail anchoring or fastening requirements that will provide sufficient restraint to limit longitudinal rail and crosstie movement to the extent practical, and specifically addressing CWR rail anchoring or fastening patterns on bridges, bridge approaches, and at other locations where possible longitudinal rail and crosstie movement associated with normally expected train-induced forces, is restricted.

(c) CWR joint installation and maintenance procedures which require that—

(1) Each rail shall be bolted with at least two bolts at each CWR joint;

(2) In the case of a bolted joint installed during CWR installation after (insert publication date of final rule), the track owner shall, within 60 days—

(i) Weld the joint;

(ii) Install a joint with six bolts; or

(iii) Anchor every tie 195 feet in both directions of the joint; and

(3) In the case of a bolted joint in CWR experiencing service failure or a failed bar with a rail gap present, the track owner shall—

(i) Weld the joint;

(ii) Remediate joint conditions, replace the broken bolts, and weld the joint within 30 days;

(iii) Replace the broken bar, replace the broken bolts, install two additional bolts, and adjust anchors;

(iv) Replace the broken bar, replace the broken bolts, and anchor every tie 195 feet in both directions from the CWR joint; or

(v) Add rail with provisions for later adjustment pursuant to paragraph (d)(2) of this section.

(d) Procedures which specifically address maintaining a desired rail installation temperature range when cutting CWR, including rail repairs, in-track welding, and in conjunction with adjustments made in the area of tight track, a track buckle, or a pull-apart. Rail repair practices shall take into consideration existing rail temperature so that—

(1) When rail is removed, the length installed shall be determined by taking into consideration the existing rail temperature and the desired rail installation temperature range; and

(2) Under no circumstances should rail be added when the rail temperature is below that designated by paragraph (a)(1) of this section, without provisions for later adjustment.

(e) Procedures which address the monitoring of CWR in curved track for inward shifts of alinement toward the center of the curve as a result of disturbed track.

(f)(1) Procedures which govern train speed on CWR track when—

(i) Maintenance work, track rehabilitation, track construction, or any other event occurs which disturbs the roadbed or ballast section and reduces the lateral or longitudinal resistance of the track; and

(ii) The difference between the average rail temperature and the average rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location; and

(2) In formulating the procedures under paragraph (f)(1) of this section, the track owner shall—

(i) Determine the speed required, and the duration and subsequent removal of any speed restriction based on the restoration of the ballast, along with sufficient ballast re-consolidation to stabilize the track to a level that can accommodate expected train-induced forces. Ballast re-consolidation can be achieved through either the passage of train tonnage or mechanical stabilization procedures, or both; and

(ii) Take into consideration the type of crossties used.

(g) Procedures which prescribe when physical track inspections are to be performed.

(1) At a minimum, these procedures shall address inspecting track to identify—

(i) Buckling-prone conditions in CWR track, including—

(A) Locations where tight or kinky rail conditions are likely to occur; and

(B) Locations where track work of the nature described in paragraph (f)(1)(i) of

this section has recently been performed; and

(ii) Pull-apart prone conditions in CWR track, including locations where pull-apart or stripped-joint rail conditions are likely to occur; and

(2) In formulating the procedures under paragraph (g)(1) of this section, the track owner shall—

(i) Specify the inspection interval; and

(ii) Specify the appropriate remedial actions to be taken when either buckling-prone or pull-apart prone conditions are found.

(h) Procedures which prescribe the scheduling and conduct of inspections to detect cracks and other indications of potential failures in CWR joints. In formulating the procedures under this paragraph (h), the track owner shall—

(1) Address the inspection of joints and the track structure at joints, including, at a minimum, periodic on-foot inspections;

(2) Identify joint bars with visible or otherwise detectable cracks and conduct remedial action pursuant to § 213.121;

(3) Specify the conditions of actual or potential joint failure for which personnel must inspect, including, at a minimum, the following items:

(i) Loose, bent, or missing joint bolts;

(ii) Rail end batter or mismatch that contributes to instability of the joint; and

(iii) Evidence of excessive longitudinal rail movement in or near the joint, including, but not limited to; wide rail gap, defective joint bolts, disturbed ballast, surface deviations, gap between tie plates and rail, or displaced rail anchors;

(4) Specify the procedures for the inspection of CWR joints that are imbedded in highway-rail crossings or in other structures that prevent a complete inspection of the joint, including procedures for the removal from the joint of loose material or other temporary material;

(5) Specify the appropriate corrective actions to be taken when personnel find conditions of actual or potential joint failure, including on-foot follow-up inspections to monitor conditions of potential joint failure in any period prior to completion of repairs.

(6) Specify the timing of periodic inspections, which shall be based on the configuration and condition of the joint:

(i) Except as provided in paragraphs (h)(6)(ii) through (iv) of this section, track owners must specify that all CWR joints are inspected, at a minimum, in accordance with the intervals identified in the following table—

MINIMUM NUMBER OF INSPECTIONS PER CALENDAR YEAR [1]

	Freight trains operating over	Passenger trains	Less than 40 mgt	40 to 60 mgt	Greater than 60 mgt Less
Class 5 & above	2	[2] 3	[2] 4	[2] 3	[2] 3
Class 4	2	[2] 3	[2] 4	2	[2] 3
Class 3	1	2	2	2	2
Class 2	0	0	0	1	1
Class 1	0	0	0	0	0
Excepted Track	0	0	0	[3]	[3]

4 = Four times per calendar year, with one inspection in each of the following periods: January to March, April to June, July to September, and October to December; and with consecutive inspections separated by at least 60 calendar days.

3 = Three times per calendar year, with one inspection in each of the following periods: January to April, May to August, and September to December; and with consecutive inspections separated by at least 90 calendar days.

2 = Twice per calendar year, with one inspection in each of the following periods: January to June and July to December; and with consecutive inspections separated by at least 120 calendar days.

1 = Once per calendar year, with consecutive inspections separated by at least 180 calendar days.

[1] Where a track owner operates both freight and passenger trains over a given segment of track, and there are two different possible inspection interval requirements, the more frequent inspection interval applies.

[2] When extreme weather conditions prevent a track owner from conducting an inspection of a particular territory within the required interval, the track owner may extend the interval by up to 30 calendar days from the last day that the extreme weather condition prevented the required inspection.

[3] n/a.

(ii) Consistent with any limitations applied by the track owner, a passenger train conducting an unscheduled detour operation may proceed over track not normally used for passenger operations at a speed not to exceed the maximum authorized speed otherwise allowed, even though CWR joints have not been inspected in accordance with the frequency identified in paragraph (h)(6)(i) of this section, provided that:

(A) All CWR joints have been inspected consistent with requirements for freight service; and

(B) The unscheduled detour operation lasts no more than 14 consecutive calendar days. In order to continue operations beyond the 14-day period, the track owner must inspect the CWR joints in accordance with the requirements of paragraph (h)(6)(i) of this section.

(iii) Tourist, scenic, historic, or excursion operations, if limited to the maximum authorized speed for passenger trains over the next lower class of track, need not be considered in determining the frequency of inspections under paragraph (h)(6)(i) of this section.

(iv) All CWR joints that are located in switches, turnouts, track crossings, lift rail assemblies or other transition devices on moveable bridges must be inspected on foot at least monthly, consistent with the requirements in § 213.235; and all records of those inspections must be kept in accordance with the requirements in § 213.241. A track owner may include in its § 213.235 inspections, in lieu of the joint inspections required by paragraph (h)(6)(i) of this section, CWR joints that are located in track structure that is adjacent to switches and turnouts, provided that the track owner precisely defines the parameters of that arrangement in the CWR plans.

(7) Specify the recordkeeping requirements related to joint bars in CWR, including the following:

(i) The track owner shall keep a record of each periodic and follow-up inspection required to be performed by the track owner's CWR plan, except for those inspections conducted pursuant to § 213.235 for which track owners must maintain records pursuant to § 213.241. The record shall be prepared on the day the inspection is made and signed by

the person making the inspection. The record shall include, at a minimum, the following items: the boundaries of the territory inspected; the nature and location of any deviations at the joint from the requirements of this part or of the track owner's CWR plan, with the location identified with sufficient precision that personnel could return to the joint and identify it without ambiguity; the date of the inspection; the remedial action, corrective action, or both, that has been taken or will be taken; and the name or identification number of the person who made the inspection.

(ii) The track owner shall generate a Fracture Report for every cracked or broken CWR joint bar that the track owner discovers during the course of an inspection conducted pursuant to §§ 213.119(g), 213.233, or 213.235 on track that is required under § 213.119(h)(6)(i) to be inspected.

(A) The Fracture Report shall be prepared on the day the cracked or broken joint bar is discovered. The Report shall include, at a minimum: the railroad name; the location of the joint bar as identified by milepost and subdivision; the class of track; annual million gross tons for the previous calendar year; the date of discovery of the crack or break; the rail section; the type of bar (standard, insulated, or compromise); the number of holes in the joint bar; a general description of the location of the crack or break in bar; the visible length of the crack in inches; the gap measurement between rail ends; the amount and length of rail end batter or ramp on each rail end; the amount of tread mismatch; the vertical movement of joint; and in curves or spirals, the amount of gage mismatch and the lateral movement of the joint.

(B) The track owner shall submit the information contained in the Fracture Reports to the FRA Associate Administrator for Safety (Associate Administrator) twice annually, by July 31 for the preceding six-month period from January 1 through June 30 and by January 31 for the preceding six-month period from July 1 through December 31.

(C) After February 1, 2010, any track owner may petition FRA to conduct a technical conference to review the Fracture Report data submitted through December of 2009 and assess whether there is a continued need for the collection of Fracture Report data. The track owner shall submit a written request to the Associate Administrator, requesting the technical conference and explaining the reasons for proposing to discontinue the collection of the data.

(8) In lieu of the requirements for the inspection of rail joints contained in paragraphs (h)(1) through (h)(7) of this section, a track owner may seek approval from FRA to use alternate procedures.

(i) The track owner shall submit the proposed alternate procedures and a supporting statement of justification to the Associate Administrator.

(ii) If the Associate Administrator finds that the proposed alternate procedures provide an equivalent or higher level of safety than the requirements in paragraphs (h)(1) through (h)(7) of this section, the Associate Administrator will approve the alternate procedures by notifying the track owner in writing. The Associate Administrator will specify in the written notification the date on which the procedures will become effective, and after that date, the track owner shall comply with the procedures. If the Associate Administrator determines that the alternate procedures do not provide an equivalent level of safety, the Associate Administrator will disapprove the alternate procedures in writing, and the track owner shall continue to comply with the requirements in paragraphs (h)(1) through (h)(7) of this section.

(iii) While a determination is pending with the Associate Administrator on a request submitted pursuant to paragraph (h)(8) of this section, the track owner shall continue to comply with the requirements contained in paragraphs (h)(1) through (h)(7) of this section.

(i) The track owner shall have in effect a comprehensive training program for the application of these written CWR procedures, with provisions for annual re-training, for those individuals designated under § 213.7(c) as qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. The track owner shall make the training program available for review by FRA upon request.

(j) The track owner shall prescribe and comply with recordkeeping requirements necessary to provide an adequate history of track constructed with CWR. At a minimum, these records must include:

(1) Rail temperature, location, and date of CWR installations. Each record shall be retained for at least one year;

(2) A record of any CWR installation or maintenance work that does not conform with the written procedures. Such record shall include the location of the rail and be maintained until the CWR is brought into conformance with such procedures; and

(3) Information on inspection of rail joints as specified in paragraph (h)(7) of this section.

(k) The track owner shall make readily available, at every job site where personnel are assigned to install, inspect or maintain CWR, a copy of the track owner's CWR procedures and all revisions, appendices, updates, and referenced materials related thereto prior to their effective date. Such CWR procedures shall be issued and maintained in one engineering standards and procedures manual.

(l) As used in this section—

Adjusting/de-stressing means the procedure by which a rail's temperature is re-adjusted to the desired value. It typically consists of cutting the rail and removing rail anchoring devices, which provides for the necessary expansion and contraction, and then re-assembling the track.

Buckling incident means the formation of a lateral misalignment sufficient in magnitude to constitute a deviation from the Class 1 requirements specified in § 213.55. These normally occur when rail temperatures are relatively high and are caused by high longitudinal compressive forces.

Continuous Welded Rail (CWR) means rail that has been welded together into lengths exceeding 400 feet. Rail installed as CWR remains CWR, regardless of whether a joint or plug is installed into the rail at a later time.

Corrective actions mean those actions which track owners specify in their CWR plans to address conditions of actual or potential joint failure, including, as applicable, repair, restrictions on operations, and additional on-foot inspections.

CWR joint means any joint directly connected to CWR.

Desired rail installation temperature range means the rail temperature range, within a specific geographical area, at which forces in CWR should not cause a buckling incident in extreme heat, or a pull-apart during extreme cold weather.

Disturbed track means the disturbance of the roadbed or ballast section, as a result of track maintenance or any other event, which reduces the lateral or longitudinal resistance of the track, or both.

Mechanical stabilization means a type of procedure used to restore track resistance to disturbed track following certain maintenance operations. This procedure may incorporate dynamic track stabilizers or ballast consolidators, which are units of work equipment that are used as a substitute for the stabilization action provided by the passage of tonnage trains.

Rail anchors means those devices which are attached to the rail and bear against the side of the crosstie to control longitudinal rail movement. Certain types of rail fasteners also act as rail anchors and control longitudinal rail movement by exerting a downward clamping force on the upper surface of the rail base.

Rail neutral temperature is the temperature at which the rail is neither in compression nor tension.

Rail temperature means the temperature of the rail, measured with a rail thermometer.

Remedial actions mean those actions which track owners are required to take as a result of requirements of this part to address a non-compliant condition.

Tight/kinky rail means CWR which exhibits minute alignment irregularities which indicate that the rail is in a considerable amount of compression.

Tourist, scenic, historic, or excursion operations mean railroad operations that carry passengers with the conveyance of the passengers to a particular destination not being the principal purpose.

Track lateral resistance means the resistance provided by the rail/crosstie structure against lateral displacement.

Track longitudinal resistance means the resistance provided by the rail anchors/rail fasteners and the ballast section to the rail/crosstie structure against longitudinal displacement.

Train-induced forces means the vertical, longitudinal, and lateral dynamic forces which are generated during train movement and which can contribute to the buckling potential of the rail.

Unscheduled detour operation means a short-term, unscheduled operation where a track owner has no more than 14 calendar days' notice that the operation is going to occur.

Issued in Washington, DC, on November 24, 2008.

Joseph H. Boardman,

Federal Railroad Administrator.

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Part VII

Department of Transportation

Federal Motor Carrier and Safety Administration

49 CFR Parts 383, 384, 390, et al.

Medical Certification Requirements as Part of the CDL; National Registry of Certified Medical Examiners; Final Rule and Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 383, 384, 390, and 391

[Docket No. FMCSA–1997–2210]

RIN 2126–AA10

Medical Certification Requirements as Part of the CDL

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), USDOT.

ACTION: Final rule.

SUMMARY: FMCSA amends the Federal Motor Carrier Safety Regulations (FMCSRs) to require interstate commercial driver's license (CDL) holders subject to the physical qualification requirements of the FMCSRs to provide a current original or copy of their medical examiner's certificates to their State Driver Licensing Agency (SDLA). The Agency also requires the SDLA to record on the Commercial Driver License Information System (CDLIS) driver record the self-certification the driver made regarding the applicability of the Federal driver qualification rules and, for drivers subject to those requirements, the medical certification status information specified in this final rule. Other conforming requirements are also implemented. This action is required by section 215 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA).

DATES: This rule is effective January 30, 2009. The incorporation by reference of the September 2007 version of the publication listed in this rule is approved by the Director of the Office of the **Federal Register** as of December 1, 2008. State compliance is required by January 30, 2012. All CDL holders must comply with the requirement to submit to the SDLA their self-certification on whether they are subject to the physical qualification rules by January 30, 2014.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, FMCSA, Room W64–224, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Telephone: (202) 366–4001. E-mail: FMCSAMedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

A. Legal Basis

Section 215 of the MCSIA (Pub. L. 106–159, 113 Stat. 1767 (Dec. 9, 1999)) (set out as a note to 49 U.S.C. 31305) provides that: ''The Secretary shall initiate a rulemaking to provide for a Federal medical qualification certificate to be made a part of commercial driver's licenses.'' The population of drivers required to obtain a commercial driver's license (CDL) is different from the population of drivers required to obtain a medical certificate. For that reason, in order to implement this congressional mandate, the rule reconciles the differences between the scope of the Agency's authority to regulate the physical qualifications of drivers of commercial motor vehicles (CMVs) and its authority to establish requirements for CDLs.

The rule places the medical certification documentation requirements on only those drivers required to obtain a CDL from a State who are also required to obtain a certificate from a medical examiner indicating that they are physically qualified to operate a commercial motor vehicle in interstate commerce. The rule also establishes requirements to be implemented by States that issue CDLs to such drivers. These requirements will ensure that accurate and up-to-date information about the CDL holder's medical examiner's certificate will be contained in the electronic CDLIS driver record that is maintained by States in compliance with the CDL regulations. Finally, the rule requires States to take certain actions against CDL holders if they do not provide the required and up-to-date medical certification status information in a timely manner.

1. Authority Over Drivers Affected

a. *Drivers Required to Obtain a Medical Certificate.* The FMCSA is required by statute to establish standards for the physical qualifications of drivers who operate CMVs in interstate commerce (49 U.S.C. 31136(a)(3) and 31502(b)). For this purpose, CMVs are defined in 49 U.S.C. 31132(1) and 49 CFR 390.5. There are four basic categories of vehicles covered by this definition:

- Those with a gross vehicle weight rating (GVWR) or gross combination weight rating (GCWR), or gross vehicle weight (GVW) or gross combination weight (GCW), whichever is greater, of at least 10,001 pounds;
- Those designed or used to transport for compensation more than 8 passengers, including the driver;
- Those designed or used to transport not for compensation more than 15 passengers, including the driver; or
- Those used to transport hazardous materials that require a placard on the vehicle under 49 CFR subtitle B, chapter I, subchapter C.

In addition, the vehicles in these categories must be ''used on the highways in interstate commerce to transport passengers or property.'' (Id.). Interstate commerce, for purposes of this provision, is based on the definitional provisions of 49 U.S.C. 31132(4) and 31502(a) and long-standing administrative and judicial interpretations of those sections (and their predecessors), and defined in 49 CFR 390.5, as follows:

> Interstate commerce means trade, traffic, or transportation in the United States—
> (1) Between a place in a State and a place outside of such State (including a place outside of the United States);
> (2) Between two places in a State through another State or a place outside of the United States; or
> (3) Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.

Subject to certain limited exceptions,[1] FMCSA has fulfilled the statutory mandate of 49 U.S.C. 31136(a)(3) by establishing physical qualification standards for all drivers covered by these provisions (49 CFR 391.11(b)(4)). Such drivers must obtain from a medical examiner a certificate indicating that the driver is physically qualified to drive a CMV (49 CFR 391.41(a), 391.43(g) and (h)). This final rule does not make any change in the standards for obtaining a medical certificate; however, on the basis of the Agency's CDL program authority, this rule requires the CDL drivers who are also subject to the medical examiner's certificate requirement to furnish the original or a copy of the certificate to the licensing State. As explained in the Summary Cost Benefit Analysis provided in this preamble, the rule should improve compliance by CMV operators with the physical qualification standards set forth in the FMCSRs. By doing so, the rule would aid the Agency in ensuring that the physical condition of CMV operators is sufficient to enable them to operate safely and that such operation does not have a deleterious effect on their health, as required by section 31136(a)(3) and (4). The other minimum requirements of section 31136, set out in subsections (a)(1) and (2), are not applicable to this rule because it does not involve either the safety of CMV equipment or the operational activities of the operators.

b. *Drivers Required to Obtain a CDL.* The authority for FMCSA to require an operator of a CMV to obtain a CDL rests on different statutory provisions than those authorizing the promulgation of

[1] *See* 49 CFR 390.3(f) and 391.2.

physical qualifications for such operators; that authority to hold a valid driver's license is found in 49 U.S.C. 31302. The requirement to obtain a CDL is applicable to drivers of specified CMV categories that are different from the categories specified in 49 U.S.C. 31132(1) and the implementing regulations, as discussed in the preceding section. The four categories of CMVs for which an operator is required to have a CDL, as defined in 49 U.S.C. 31301(4) and specified in 49 CFR 383.5, are the following:

- Those with a GVWR or GCW, of at least 26,001 pounds, including towed units with GVWR or GCW of more than 10,000 pounds;
- Those with a GVWR or GCW of at least 26,001 pounds;
- Those designed to transport at least 16 passengers, including the driver; or
- Those of any size used to transport either hazardous materials that require a placard on the vehicle under 49 CFR part 172, subpart F, or any quantity of a material listed as a select agent or toxin under 42 CFR part 73.

In addition, the vehicles involved must be used ''in commerce to transport passengers or property'' (49 U.S.C. 31301(4)). The term ''commerce'' is defined for the purpose of the CDL statutes and regulations as follows:

> Trade, traffic, and transportation—
> (A) In the jurisdiction of the United States between a place in a State and a place outside that State (including a place outside the United States); or
> (B) In the United States that affects trade, traffic, and transportation described in subclause (A) of this clause.

(49 U.S.C. 31301(2); *see also* 49 CFR 383.5.).

However, the statutory provisions governing CDLs also contain a limitation on the scope of the authority granted to FMCSA. The provision at 49 U.S.C. 31305(a)(7) states that:

> The Secretary of Transportation [Secretary] shall prescribe regulations on minimum standards for testing and ensuring the fitness of an individual operating a commercial motor vehicle. The regulations—
> * * *
> (7) Shall ensure that an individual taking the tests is qualified to operate a commercial motor vehicle under regulations prescribed by the Secretary and contained in title 49, Code of Federal Regulations, *to the extent the regulations apply to the individual;* [Emphasis added].

The current CDL provisions require each CDL driver to either certify that he or she meets the qualification requirements contained in 49 CFR part 391 or that he or she is not subject to part 391 (49 CFR 383.71(a)(1)). If the driver expects to operate entirely in intrastate commerce and is not subject to part 391, then the driver is subject to State driver qualification requirements.

Therefore, reading all of these statutory provisions as a whole, FMCSA interprets section 215 of MCSIA to be applicable only to CDL holders or applicants operating or intending to operate in non-excepted, interstate commerce, as defined in 49 CFR 390.5. This rule requires all CDL holders to continue to furnish a self-certification for the type of driving they will perform. Those CDL holders and applicants operating in non-excepted, interstate commerce must furnish an original or copy of their medical examiner's certificate to the State issuing the CDL.

2. Authority to Regulate State CDL Programs

FMCSA, in accordance with 49 U.S.C. 31311 and 31314, has authority to prescribe procedures and requirements for the States to observe in order to issue CDLs (*see, generally,* 49 CFR part 384). In particular, under section 31314, in order to avoid loss of funds apportioned from the Highway Trust Fund, each State shall comply with the following requirement:

> (1) The State shall adopt and carry out a program for testing and ensuring the fitness of individuals to operate commercial motor vehicles consistent with the minimum standards prescribed by [FMCSA] under section 31305(a) of [Title 49 U.S.C.]. (49 U.S.C. 31311(a)(1); *see also* 49 CFR 384.201).

On the basis of this authority, the rule requires States issuing CDLs to drivers operating or intending to operate in non-excepted, interstate commerce, to obtain specified information on the required medical examiner's certificate for posting into the CDLIS driver record. The rule also requires States to take certain specified actions to downgrade the CDL if required information is not provided by the CDL applicant or holder.

B. Background

1. Notice of Proposed Rulemaking

On November 16, 2006, FMCSA published a notice of proposed rulemaking (NPRM) (71 FR 66723) titled, ''Medical Certification Requirements as Part of the CDL.'' The Agency proposed to add a requirement for CDL holders subject to part 391 of title 49, Code of Federal Regulations, to provide an original or copy (at the option of the SDLA) of the federally mandated medical examiner's certificate to the SDLA. The SDLA would record medical certificate status information on the CDLIS driver record. Each State would be provided the flexibility of establishing its own processes for receiving this information from drivers. SDLAs would also be required to update the medical certification status of a driver to ''not-certified'' within 2 days of the expiration of the certificate, and subsequently downgrade the CDL within 60 days, if the SDLA did not receive a new medical certificate for that driver.

2. Summary of the Final Rule

After considering the public comments to the NPRM, FMCSA adopts a final rule consistent with the NPRM.[2]

a. *SDLAs.* This rule requires the States to modify their CDL procedures to: (1) Record a CDL driver's self-certification regarding type of driving (*e.g.*, interstate (non-excepted or excepted) and intrastate (non-excepted or excepted) on the CDLIS driver record); (2) require submission of the medical examiner's certificates (or a copy) from those drivers operating in non-excepted, interstate commence who are required by part 391 to be medically certified; (3) date stamp the medical examiner's certificate (or a copy); (4) provide the stamped medical examiner's certificate or a copy as a receipt to the driver; (5) retain the certificate or a copy for 3 years from the date of issuance; (6) post the required information from the certificate or a copy onto the CDLIS driver record within 10 days; and (7) update the medical certification status of the CDLIS driver record to show the driver as ''not-certified'' if the certification expires; and then downgrade the CDL within 60 days of the expiration of the driver certification.

If the driver certifies that he or she expects to drive in interstate commerce and is not driving exclusively for one of the industries excepted from the requirements of part 391, this rule requires the State to post on the CDLIS driver record the following information from that driver's medical examiner's certificate: (1) Medical examiner's (ME) name; (2) ME's license or certificate number and the State that issued it; (3) expiration date of ME's certificate; (4) ME's telephone number; (5) date of physical examination/issuance of the

[2] In this final rule, the Agency will refer to several terms for reports of driver history information that the SDLA provides to the driver or motor carrier employer from the State's official CDLIS driver record. The terms are as follows: (1) ''CDLIS driver record'' for CDL drivers and ''driver record'' for non-CDL drivers, to refer to the electronic record stored by the SDLA and containing a CDL driver's status and history located in the database of the driver's State-of Record; and (2) ''CDLIS motor vehicle record (CDLIS MVR)'' for CDL drivers and ''motor vehicle record (MVR)'' for non-CDL drivers, to describe the driver history information provided by the SDLA from the CDLIS driver record to the driver or employer.

ME's certificate to the driver; (6) National Registry [3] identification number, if required by future rules; (7) medical certification status determination (i.e., ''certified'' or ''not-certified''); (8) information from FMCSA if a medical variance was issued to the driver; (9) any driver restrictions; and (10) the date the information is entered on the CDLIS driver record.

In addition to the recordkeeping functions, the SDLA must make the driver's medical certification status information electronically accessible to authorized State and Federal enforcement officials via CDLIS and the National Law Enforcement Telecommunication System (NLETS), and to drivers and employers via the CDLIS motor vehicle records (MVRs).

b. *Motor carriers.* Under this rule, motor carriers who employ a CDL driver to operate in non-excepted, interstate commerce must place his or her current CDLIS MVR documenting the driver's medical certification status in the driver's qualification (DQ) file before allowing the driver to operate a CMV. The receipt issued the driver when the certificate is presented to the SDLA may be used for this purpose for up to 15 days from the date of the receipt or date stamp. The motor carrier must obtain the CDLIS MVR to verify: (1) The driver's self-certification to operate in non-excepted, interstate commerce; (2) that a non-excepted, interstate driver has a medical certification status of ''certified;'' and/or (3) whether the driver was issued a medical variance by FMCSA.

Motor carriers may no longer use a copy of the medical examiner's certificate to document physical qualification in the DQ file, except for up to 15 days from the date stamp on the receipt given to the driver by the SDLA. After the 15th day, the carrier must have obtained a copy of the CDLIS MVR as documentation that the driver is medically ''certified'' and placed it in the DQ file.

c. *Drivers.* Currently, interstate CDL drivers subject to part 391 are responsible for providing a copy of the medical examiner's certificate to the motor carrier and for carrying a copy of the certificate when operating. Under this final rule, drivers must provide the medical examiner's certificate to the SDLA. A driver's date-stamped medical examiner's certificate (or a copy) serves as a receipt from the SDLA and may be used as proof of medical certification for 15 days. Except for using the receipt for the first 15 days, the driver is no longer allowed to use the medical examiner's certificate as proof of his or her certification to enforcement personnel or employers. Such drivers no longer have to carry the actual medical examiner's certificate, but must continue to carry any skill performance evaluation (SPE) certificate or medical exemption document while on duty.

3. Safety Need for the Rule

This rulemaking action will help to prevent medically unqualified drivers from operating on the Nation's highways by providing State licensing agencies a means of identifying interstate CDL holders who are unable to obtain a medical certificate and taking action to downgrade their CDLs accordingly. The final rule will also serve as a deterrent to drivers submitting falsified medical certificates because FMCSA and State enforcement personnel will now have access, via CDLIS, to information about the medical certificate and the identity of the medical examiner who performed the examination. Electronic access will enable FMCSA and the States to detect certain patterns or anomalies concerning the source of medical certificates through queries of the licensing databases at any time rather than being limited to checking for such issues during roadside inspections and compliance reviews.

While there are no studies to provide data on the number of medically unqualified drivers that may be currently operating CMVs in interstate commerce, roadside inspection and compliance review data for calendar year 2007 indicate there remains a need to improve oversight of the medical certification process for CMV drivers. For calendar year 2007, FMCSA and its State partners conducted more than 3.4 million roadside inspections. There were 145,219 violations cited for drivers failing to have a medical examination certificate in their possession while operating a CMV, 42,171 violations cited for drivers operating with an expired medical examination certificate, 4,387 violations for drivers in possession of an improper medical examination certificate, and 6,105 violations for physically unqualified drivers.

During calendar year 2007 FMCSA and its State partners conducted 17,453 compliance reviews of motor carriers. A compliance review is an on-site examination of a motor carrier's operations, such as drivers' hours of service, maintenance and inspection, driver qualifications, CDL requirements, financial responsibility, crash involvement, hazardous materials, and other safety and transportation records to determine whether the carrier meets FMCSA's safety fitness standard under 49 CFR part 385. There were 43 acute violations cited for motor carriers using a physically unqualified driver. Acute regulations are those identified as such where noncompliance is so severe as to require immediate corrective action by a motor carrier regardless of the overall safety posture of the carrier.

With regard to crash data, FMCSA estimates that based on the results of its Large Truck Crash Causation Study (see ''Report to Congress on the Large Truck Crash Causation Study,'' March 2006) that there are 3,000 trucks per year involved in crashes where there was either a fatality or serious injury, and the ''critical reason'' for the crash was the truck driver having a heart attach or other physical impairment. The critical reason is the immediate reason for the critical event, which is the action or event which put the vehicle(s) on a course that made the crash unavoidable, given reasonable driving skills and vehicle handling.

While the enforcement data does not provide any insights into crash causation and the LTCCS estimates have certain limitations, that information is nonetheless disconcerting and suggests the need for action to improve the oversight of the documentation of the medical examination.

C. Discussion of Public Comments

The FMCSA received 83 comments in response to the NPRM. The commenters included: 24 State agencies and the American Association of Motor Vehicle Administrators (AAMVA); 22 individuals, many of whom identified themselves as drivers; 18 motor carriers, including owner-operators; 8 trucking industry consultants and associations, including the American Trucking Associations (ATA) and the Owner-Operator Independent Driver Association (OOIDA); 4 commercial passenger carrier industry representatives; 2 safety advocacy groups and the National Transportation Safety Board (NTSB); 4 insurance and medical community representatives; and the Commercial Vehicle Safety Alliance (CVSA).

Ten commenters, including three State agencies, expressed support for the concept of linking medical certification status to obtaining and maintaining a

[3] Although FMCSA plans to issue a separate rule establishing the National Registry of Medical Examiners in the future (see 49 U.S.C. 31149 as added by section 4116(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (Pub. L. 109–59, 119 Stat 114 , August 10, 2005)) (SAFETEA–LU), to minimize the number of times States have to upgrade their licensing systems, States may want to make provisions in the CDLIS driver record to accept this information, should it be required.

CDL; however eight of these commenters expressed concerns regarding the specifics of how FMCSA proposed to accomplish this.

Twenty-six commenters, 12 of whom were individuals, opposed the proposed amendments to the FMCSRs. Among other things, they believed the regulations would lead to increased costs and paperwork burdens on motor carriers, drivers, and States. They further maintained that this regulation does nothing to address driver fraud and abuse of the medical certification process. While the remaining 47 commenters did not explicitly support or oppose the NPRM, they offered specific comments about the proposal. The following sections provide details regarding the comments submitted to this docket.

1. Information on the CDLIS Driver Record

a. *Medical Examiner Information.* Both the Oregon DOT and Maryland State Highway Administration commented on inclusion of various elements of information from the medical examiner's certificate into an SDLA's CDLIS driver record. Oregon agreed on the importance of entering the driver certification information and medical certification status, but did not understand why the State has to enter information identifying the medical examiner as well. Oregon suggests that FMCSA only add the expiration date of the medical examiner's certificate, medical certification status, a ''W'' restriction code to indicate that the driver is not medically qualified to operate CMVs in Canada because of a medical variance (e.g., an exemption or SPE certificate to enable drivers who do not meet certain physical qualifications requirements to operate CMVs), and a record of any restrictions to the CDLIS driver record.

FMCSA Response: The Agency chose to require the SDLA to post on the CDLIS driver record the contact information for the ME who conducts the examination. This will help deter driver fraud by enabling FMCSA and the SDLA to contact the ME directly to verify the identity of the ME and details of the ME's certificate if the Agency or the SDLA suspects there is a problem, or to obtain a copy of the supporting Medical Examination Report.

b. *Medical Variance Indicator.* In the NPRM, the FMCSA proposed adding a new restriction code to § 383.95 indicating a medical variance. The Agency recommended using a code of ''W'' to be placed both on the CDLIS driver record and on the CDL document to identify CDL holders subject to part 391 who have obtained an ME's certificate only because they previously obtained a medical variance in order to operate CMVs in the U.S. The Kentucky Division of Driver Licensing stated that the ''W'' restriction should be displayed on the CDLIS driver record, but not on the CDL document. Nebraska DMV recommended that a different code should be selected.

FMCSA Response: Displaying a restriction code (not necessarily a ''W'') on the CDL document, as well as on the CDLIS driver record, will enable U.S. enforcement personnel to identify drivers who are required to carry documentation of an SPE certificate or medical exemption when they are on-duty. It will also enable Canadian authorities to identify U.S. CDL holders who are prohibited by reciprocal agreement with Canada from operating a CMV in Canada. Implementation of a similar restriction code on Canadian licenses will enable U.S. enforcement personnel to identify Canadian drivers who do not meet U.S. physical qualification standards.

The FMCSA has selected the letter ''V'' as the code for identifying drivers with a medical variance because the letter ''W'' is currently used by a number of States for other purposes. To reduce the burden on the States, FMCSA selects a code (the letter ''V'') that could be adopted without redefining existing letter designations. The Agency will work with AAMVA to include the ''V'' code in the CDLIS State Procedures Manual. Section 383.95(b) is revised to require that the code published in that manual must be put on the CDL document and the CDLIS driver record.

c. *Medical Variances.* CVSA agreed that it is important that any medical variance granted to a driver should be part of the driver's record, including any SPE or exemption. If FMCSA grants an SPE certificate to a driver, the Maryland State Highway Administration believes that the Agency should be required to submit evidence of this to the SDLA. Maryland also questions FMCSA's logic for continuing the requirement that motor carriers maintain evidence of the SPE certificate in their driver files. They believe including the CDLIS MVR in the file should satisfy the requirement.

FMCSA Response: The final rule requires that the SDLA post on the CDLIS driver record whether a variance is noted on the medical certificate. The Agency continues the requirement for motor carriers to maintain evidence of the SPE certificate in driver qualification files because the driver licensing information system will not include details about the specific variance. The FMCSA will continue to notify States about drivers who no longer meet the applicable criteria for a variance to enable States to identify drivers that should no longer be considered medically qualified based on the loss of the variance.

Because FMCSA's knowledge of the SDLA contacts is essential to the information flow from FMCSA to the SDLAs, it is important to establish a requirement that States maintain accurate contact information with FMCSA. Therefore, FMCSA adds a new requirement at § 383.73(j)(5) designating the FMCSA Medical Program as the contact with whom the SDLAs are responsible for maintaining their up-to-date State contact information for receiving medical variance information from FMCSA.

The final rule at § 383.73(j)(3) increases the time allowed for the SDLA to record the medical variance information from the proposed 2 days to 10 days, which makes this rule consistent with the posting requirements in § 384.225(c).

The terms of a medical variance are spelled out on either the SPE certificate or on the medical exemption document, which is issued to the driver by FMCSA. In order for an enforcement officer to verify whether the driver is in compliance with the medical variance document, the driver must maintain a copy with him or her when on-duty.

Currently, section 391.49(j)(1) requires drivers (both CDL and non-CDL) who are granted an SPE to carry the SPE certificate while on-duty, in addition to the medical examiner's certificate. It also requires motor carriers to maintain a copy of the SPE certificate in the DQ file. There is a similar provision on the medical examiner's certificate requiring a driver with an exemption to have a copy of the applicable exemption in his or her possession when on-duty. The medical examiner's certificate by itself has never been valid unless the driver also presents the exemption document or SPE certificate with the medical examiner's certificate. This final rule adds clarifying statements of this existing requirement at §§ 391.23(m)(1), 391.41(a)(1)(ii) and (a)(2)(ii).

2. Definitions and Clarification of Terms

a. *New Definitions.* The FMCSRs have used several different terms when referring to the electronic record containing a CDL driver's status and full history maintained by the driver's State-

of-Record.[4] In the NPRM, the Agency proposed specific definitions for each of these terms.

(1). *''CDLIS driver record,'' ''CDLIS MVR,'' and ''MVR.''* First Advantage believes that attempting to define the terms ''CDLIS driver record'' (§ 383.5), ''CDLIS MVR'' (§ 384.105), and ''MVR'' (§ 390.5) may create confusion within the States that have adopted the FMCSRs. It suggests that the States should be made cognizant of this change in terminology when developing their SDLA computer systems. The Minnesota Department of Public Safety suggests using the term ''CDLIS Driver History'' to replace CDLIS MVR.

FMCSA Response: FMCSA retains the proposed definitions it set forth in the NPRM. The Agency points out that the definition for ''motor vehicle record'' was established by the Driver Privacy Protection Act (DPPA) of 1994 (18 U.S.C. 2721 *et seq.*) that, as amended, adopted the term ''Motor Vehicle Record'' for the report generated from the driver record and provided by SDLAs to various parties. The DPPA established what information SDLAs can and cannot include on the MVR and to whom they may provide it. Therefore, FMCSA's use of the term ''CDLIS MVR'' in part 384 is intended to be consistent with the 1994 statute, and provides a complete driver history for CDL holders.

(2). *The Terms ''Certified'' and ''Not-Certified.''* Some commenters were concerned that linking medical certification information to the CDL raises issues concerning the privacy of driver information. For example, several drivers and other individuals opposed linking personal medical information to the CDL because they believed that such information should not be available without the driver's permission.

FMCSA Response: These comments made it clear that the proposed term of ''not-qualified'' is confusing to some readers. Some commenters equate it with indicating that a driver is medically ''unqualified.'' For example, the driver could be physically qualified, but because the driver failed to obtain a current medical certification he or she is ''not-certified.'' Therefore, to eliminate confusion, the final rule uses the terms ''certified'' and ''not-certified'' to make the point that the status indicator on the CDL is not an indicator of any particular medical information about the driver.

A medical certification status of ''not-certified'' should not be construed as an adverse action taken against a CDL holder's driving privileges. The term ''not-certified'' is intended to specifically avoid any implication of an adverse licensing action against the driver. For example, the driver may not meet the requirements to hold a non-excepted, interstate CDL, but not because of any adverse actions taken against the driver or because the driver is medically unqualified to drive a CMV in interstate commerce.

3. Medical Examiner's Certificate and Form Issues

a. *Proof of Submission to the SDLA.* A number of commenters were concerned about the reliability of the medical certificate SDLA submission process. OOIDA, Schneider National, Gabbard Consulting, and the Oregon DOT believe there is a need to establish a mechanism by which drivers could demonstrate proof of submission of the medical examiner's certificate so that the driver will be protected if the SDLA later claims that it did not receive it in a timely manner. The International Brotherhood of Teamsters (Teamsters) and the National Propane Gas Association suggest that the SDLA should be required to provide the driver with a receipt and an acknowledgement that the CDLIS driver record has been updated. Schneider National points out that some States, such as California and Indiana, currently provide a receipt to the driver.

UniGroup, Inc. states that the rule should provide the driver with an ''electronic'' means of submission (*i.e.*, fax or email). ACOEM states that a mechanism is needed for drivers to present a copy of their medical certification to the SDLA if the ME delays submitting the medical examiner's certificate.

Commenters also want to know how enforcement officials will handle drivers who provide their new medical examiner's certificate to the SDLA at the last moment and continue to drive CMVs prior to the SDLA updating the CDLIS driver record. An electronic check of the medical certification status could indicate the driver is not-certified. The California Highway Patrol and Oregon DOT recommend adding an exception that would allow a driver to obtain and carry a written medical examiner's certificate for cases when providing the certificate to the home State cannot be practically accomplished while the driver is on the road.

FMCSA Response: FMCSA emphasizes that it is the driver's responsibility to ensure the timely submission of the medical examiner's certificate to the SDLA and the State's responsibility to enter the information from the certificate to the CDLIS driver record in a timely manner after it has been received. This rule does not impose on the State a requirement to establish a mechanism to accommodate last-minute submissions of medical certificates. Therefore, drivers should ensure the submission of their new medical certificates far enough in advance of the expiration date to provide the SDLA with sufficient time to process the information. FMCSA agrees that it is important, in order to standardize this process, to require SDLAs to provide a receipt to a driver when the driver submits the required medical examiner's certificate to the State.

FMCSA revised § 383.73(a)(5) and § 383.73(j) to require all SDLAs to provide drivers with a date stamped original (or copy) of the submitted medical examiner's certificate as the driver's receipt. For 15 days, the receipt can provide proof for law enforcement officials and a motor carrier that a driver has submitted a current medical examiner's certificate to the SDLA, bridging a possible gap between submission and the posting of the information on the CDLIS driver record. The availability of the receipt also lowers employers' costs because they will not need to pay additional funds to obtain a copy of a driver's MVR during this 15-day period. Because of this receipt requirement, SDLAs are allowed additional time to post the medical certification status information to CDLIS driver record, which will lower the costs for all States.

b. *Notice of Pending Expiration of the Medical Certificate.* The Texas Department of Public Safety believes that some drivers might be charged or cited for operating a CMV without a CDL if they do not receive timely notification of the pending expiration of their medical certification from the State. Two States (Wisconsin DOT and New York DMV), UniGroup, an individual ME, AMSA, Advocates for Highway and Auto Safety (Advocates), and the Commercial Vehicle Safety Alliance believe that drivers should be notified by SDLAs in advance that their ME's certifications are due to expire. The Teamsters emphasize the importance of notifying drivers well in advance of any punitive actions being implemented by the SDLA.

J.B. Hunt states that motor carriers should be notified when a medical certification is going to expire so that drivers can be contacted more

[4] The ''State of Record'' is the jurisdiction that maintains the CDLIS driver record for every CDL driver licensed by that jurisdiction. See 49 CFR 384.109 and the AAMVA's ''Commercial Driver License Information System (DCLIS) State Procedures Manual.''

expeditiously. Gabbard Consulting notes that a problem exists in carriers not notifying their drivers within a reasonable time frame prior to the driver's medical certification expiration date.

FMCSA Response: The FMCSA emphasizes that it is a driver's responsibility to maintain a current medical certification and to renew it before it expires. The final rule does not require the SDLA to notify the driver of a pending expiration of his/her medical certification. However, the final rule requires the SDLA to notify the driver of a pending ''downgrade'' of the CDL.

The medical certification status on the CDLIS driver record includes the expiration date of the medical examiner's certificate; thus, the carrier and driver will continue to have access, via the CDLIS MVR, to any pending expiration date of the driver's medical examiner's certificate. An additional clarification is added to § 391.51(b)(7) setting forth the details on how motor carriers must maintain a driver's medical certification during the 2-year transition following the States' implementation of the requirements, which will occur no later than 3 years after the effective date of this final rule.

c. *Retention of Medical Forms by MEs.* In the NPRM, the FMCSA proposed that MEs should retain the medical examiner's certificate (Short Form) for the duration of the certification period. The NTSB and ACOEM voiced concern that the NPRM did not explicitly require MEs to retain the Medical Examination Report. ACOEM notes that because there is no requirement in the existing rule that specifies the length of time that the ME should retain the Medical Examination Report, the ME should retain the report for at least 10 years in the event there is ever a need to review previous certifications and medical history.

FMCSA Response: In order to provide clear direction to MEs, FMCSA revises its original proposal in § 391.43(g)(2) so that medical examiners must retain the medical examiner's certificate for at least 3 years after the certificate was issued; and adds a comparable recommendation for the retention period for the Medical Examination Report for at least 3 years after the examination. The existing 3-year minimum retention period for the medical examiner's certificate that applies to employing motor carriers found at § 391.51(d)(4) is the basis for this provision.

d. *Retention of Medical Examiner's Certificate Documentation by SDLAs.* In the NPRM, the Agency proposed that States would be required to keep for 6 months either the original or copy, including the date stamp, of the medical examiner's certificate. The majority of commenters who addressed this issue (13 of 18), including the Minnesota Department of Public Safety, stated that the retention period for SDLAs to keep the medical examiner's certificate should be longer than 6 months. CVSA believes that States should retain both a hard copy and an electronic image of the medical examiner's certificate for as long as the certificate is valid.

Most of the other commenters who addressed the proposed retention period of 6 months (UniGroup; North Dakota DOT, an individual ME, J.B. Hunt, Schneider National, ATA, New York DMV) recommend that the retention period should be at least as long as the period of validity of the certification or the potentially longer ''licensing cycle'' of the current CDL document. This would allow any error to be corrected quickly and would allow carriers access to information about the medical certifications of their drivers. The Delaware DOT recommends a retention period of 5 years in case there are challenges in court. The NTSB recommends that the certificate should be retained indefinitely because it may be the only historical record available to verify a driver's medical status. Although the Wisconsin DOT believes that retention of the ME's certificate should be for the duration of the certification period, it contends that the employer or driver should have the responsibility to retain it, not the SDLA.

The Michigan Department of State and AAMVA point out that individual States might currently have different requirements. They recommend that the rule should not set a specific standard but should provide flexibility. The Pennsylvania DOT believes that a retention period of 6 months for the SDLAs to keep the certificate would be acceptable. AMSA did not think that SDLAs should be required to retain the certificate at all. It believes that the driver or ME should be responsible for retaining the certificate. The State of Vermont said it had no comment on this issue, but notes that it makes electronic images of all documents presented at the time of issuance.

FMCSA Response: FMCSA agrees with the commenters that there is a need to retain the medical examiner's certificate of all CDL holders subject to part 391, whether the original or a copy, for a sufficient amount of time in order to enforce the fraud penalty specified at § 383.73(g). In the interest of minimizing any possible additional burden on States that this increased retention requirement might impose, and to be consistent with other retention criteria FMCSA has already established for medical examiner's certificates, this final rule adopts a three-year period for SDLAs to retain the medical certificate.

e. Data Quality Control. A number of commenters expressed concern about the accuracy of the medical certification status data that will be posted and updated on CDLIS driver records. Based on its experience, Trailways National Bus System (Trailways) claims that there are chronic problems with medical certifications and errors on the ME forms. Trailways expressed concerns about obtaining corrections to information posted on the CDLIS driver record. The Teamsters, ATA, the New York DMV, CVSA, and the National Propane Gas Association favor an expedited process to correct errors and omissions, such as an on-line system that drivers or employers could access.

Trailways also expressed concern about the impact of data errors, particularly those that would cause delays to the driver, and questioned what remedy would be available to the driver. The Minnesota Trucking Association recommends developing a mechanism for rapid processing to correct errors that would be available continuously at all hours.

CVSA suggests that such a data correction capability could be implemented into their proposed Employer Notification System or into existing State systems. The Wisconsin DOT believes the Federal government should have the responsibility to develop a program to enable employers to access the CDLIS driver record for their employees.

The Delaware DOT suggests that MEs could be electronically linked to the SDLAs, which would provide a way to quickly correct data errors.

FMCSA Response: FMCSA emphasizes that this rulemaking does not affect the duties and responsibilities of MEs to accurately complete the medical examination form and accompanying medical certificate. There is no reason to believe that MEs will be more prone to incorrectly certify drivers than is currently the case. SDLAs are responsible for accurately posting information from the ME's certificate submitted to them by the driver. If a data entry error is made, it is SDLAs that are responsible for making prompt corrections, not the Federal government. If the information on the certificate is illegible or incomplete, the SDLA may refuse to accept the certificate.

4. Privacy of Information

a. *Data on the CDLIS Driver Record.* Some commenters believe the proposed

rule raises issues concerning the privacy of driver information. Other commenters, including the Teamsters, Minnesota Department of Public Safety, New York DMV, OOIDA, and the Delaware DOT, contend that using the medical examiner's certification alone does not raise privacy concerns.

The Delaware DOT notes that drivers might be subject to hiring discrimination from employers because certain types of medical information displayed on CDLIS MVRs might affect an employer's insurance costs. Delaware was concerned that providing medical variance information above and beyond the basic medical certification status information (i.e., valid or not valid) could create privacy problems. It suggests that ME offices could add information to the SDLA system electronically to help maintain privacy. The Minnesota Department of Public Safety warns that the possible applicability of privacy laws might force drivers to appear at an SDLA office in person.

The California DMV and National Propane Gas Association warn of the possibility of computer hackers or of a lost or stolen computer. The National Propane Gas Association expresses concerns over the security of the proposed information stored on the CDLIS driver record and requests that FMCSA take the necessary precautions to safeguard the information.

OOIDA comments that States should not be allowed to require the Medical Examination Reports and that MEs should be prohibited from providing the Medical Examination Reports to motor carriers. It also believes that safety auditors (investigators) performing a carrier compliance review (CR) should not ask motor carriers for the driver's Medical Examination Report. OOIDA further comments that FMCSA must instruct its authorized safety auditors not to compel motor carriers to provide more information than motor carriers are required to retain under the rules.

FMCSA Response: The final rule requires SDLAs to post on the CDLIS driver record only that information that is found on the current medical certificate. This is the same information that is available on drivers subject to the physical qualification standards and that drivers are currently required to provide to motor carrier employers prior to their drivers operating CMVs in interstate commerce. Therefore, this rulemaking will not result in the mandatory disclosure of sensitive medical information to current employers or prospective future employers.

OOIDA's recommendation that employers be prohibited from obtaining the Medical Examination Report is not necessary to prevent infringing upon the employee's privacy rights. Employers may, as a condition of employment, require drivers to provide the medical examination report. Additionally, FMCSA has the authority to investigate whether or not a driver is medically qualified to operate a commercial motor vehicle in interstate commerce. If the Medical Examination Report is included in the DQ file, safety investigators may ask the motor carrier for a copy of it as part of a motor carrier CR.

In response to OOIDA's recommendation that States should not be allowed to require the Medical Examination Reports, States may impose physical qualification requirements that are more stringent than those provided in this final rule. The provisions of 49 CFR parts 383 and 384 are considered minimum standards (49 U.S.C. 31305(a)).

b. *Health Insurance Portability and Accountability Act of 1996 (HIPAA).*[5] One individual and the AAMVA request that FMCSA evaluate the security standards under HIPAA (42 U.S.C. 1320d–6) as they may pertain to availability of medical information on the CDLIS driver record. AAMVA is concerned that SDLAs would have to comply with HIPAA regulations.

FMCSA Response: This rulemaking concerns the posting to the CDLIS driver record by SDLAs of information from the medical certificate which is limited to whether the driver is medically certified, and whether the driver needs a medical variance. With the exception of the SPE certificates, FMCSA may only grant medical variances through a notice-and-comment proceeding in the **Federal Register**. Therefore, the information about such variances is already publicly available and the States should not consider HIPAA as a legal barrier to implementing this rule.

c. *Applicability of the Privacy Act.* The Pennsylvania DOT contends that the effect of the 1974 Privacy Act (5 U.S.C. 552a) is unclear to them, particularly with respect to whether States must provide a copy of the submitted medical information to the driver. The Pennsylvania DOT argues that this rule seems to require the provision of a copy. However, their existing State law prohibits release of medical information provided by others for the purpose of evaluating the medical condition of the driver. They suggest that the issue regarding applicability of the Privacy Act to States should be resolved before a final rule is issued.

OOIDA said that FMCSA should institute a Federal System of Records for CDLIS, which they believe is required by the Privacy Act.

FMCSA Response: The Privacy Act of 1974 (5 U.S.C. 552a), was created in response to concerns about how the creation and use of computerized databases might impact individuals' privacy rights. It safeguards privacy through creating four procedural and substantive rights in personal data. First, it requires government agencies to show an individual any records kept on him or her. Second, it requires agencies to follow certain principles, called ''fair information practices,'' when gathering and handling personal data. Third, it places restrictions on how agencies can share an individual's data with other people and agencies. Fourth and finally, it lets individuals sue the government for violating its provisions. There are, however, several exceptions to the Privacy Act. In particular, the Privacy Act applies to Federal systems of records. The Office of Management and Budget (OMB) has determined that CDLIS is not a Federal System of Records subject to the Privacy Act. Because CDLIS is not a Federal system of records, the Privacy Act does not apply to this database containing driver history and status information.

5. Authorized Users and Information Access Issues

a. *Authorized Users.* Under 49 CFR 384.225, access to CDLIS driver records is limited to ''the following users or their authorized agents:'' States, the Secretary of Transportation, the affected driver, and the employing motor carrier or prospective employing motor carrier. The Maryland State Highway Administration notes that § 384.225(e) failed to include enforcement agencies as an authorized agent to access CDLIS information.

Three commenters, including an anonymous person, Advocates, and the Maryland State Highway Administration, raise questions regarding who will be authorized to access the driver medical certification status information on the CDLIS driver record. Advocates request that FMCSA provide a comprehensive list of the users who will be permitted to access CDLIS for a driver's MVR.

[5] Since the passage of the HIPPA in 1996, health care providers must be able to provide assurances that the integrity and confidentiality of the electronic protected health information that they collect, maintain, use or transmit is protected—and not just against the risk of improper access, but also against the risk of interception during electronic transmission.

FMCSA Response: In response to concerns about CDLIS access, each group of authorized users has access to certain defined information on CDLIS, as set out in § 384.225(e). States and the Secretary can obtain all information on all driver records. However, drivers can only obtain their own CDLIS driver record. Employers can only obtain records for drivers employed or being evaluated for employment who have therefore given their permission to the motor carrier to obtain/access the record. Drivers and motor carriers must obtain the CDLIS MVR from the SDLA; they are not permitted electronic access to CDLIS nor is the CDLIS MVR available via a CDLIS query.

b. *Motor Carrier Must Obtain CDLIS MVR.* Before allowing a driver to operate a CMV in non-excepted, interstate commerce, this rule requires a motor carrier to obtain the driver's CDLIS MVR to verify a driver's or prospective driver's medical certification status. However, for up to 15 days from the date on the SDLA's date stamped receipt, the motor carrier is allowed to instead use the receipt as proof that the driver is ''certified'' to operate a CMV in interstate commerce. The current rule requiring employers to check the driving record of new employees gives the motor carrier 30 days to obtain the CDLIS MVR. Advocates strongly support the change to require the MVR sooner, because Advocates thinks that a driver who is required to be medically certified, but is not, should not be allowed to operate a CMV for up to 30 days. ATA was unsure what the effect of the proposed change would be on smaller motor carriers and believes that FMCSA should conduct an additional evaluation. The National Propane Gas Association opposed the change and urged FMCSA to retain the 30-day period. The Minnesota Department of Public Safety believes that small business concerns were sufficiently covered by the analysis presented. The American Bus Association/Bus Industry Safety Council (ABA/BISC) and OOIDA believe that this provision for carriers to obtain the CDLIS MVR would have adverse impacts on small business truckers and bus companies.

An individual ME suggests that the rule should require States to make the proposed CDLIS MVR information available more readily, so that the carrier can make timely hiring decisions. Schneider National suggests that the rule should assure carrier access to the CDLIS MVR data through third parties.

FMCSA Response: The current motor carrier requirements for documenting driver medical certification, found at § 391.41(a) and § 391.51(a)(7), are that the medical examiner's certificate must be placed in the DQ file before the driver is allowed to operate a CMV in interstate commerce. Thus, only the method of documentation for this requirement is modified by this rule. The basic requirements remain the same—the employer may not allow a driver to operate a CMV without proof that he or she is physically qualified to do so.

It is FMCSA's opinion that allowing 30 days to obtain a CDLIS MVR is a remnant of the time when requests for, and provisions of, MVRs were processed by paper. Electronic access, however, is now common-place, so the carrier should receive the MVR sooner than 30 days from the SDLA's receipt of the driver's medical certification. On average, FMCSA estimates that it now takes approximately 4 days to obtain those results. FMCSA concludes that it is possible to obtain a CDLIS MVR within that same 4-day period, so our implementation of a 30-day time frame to meet this requirement should be sufficient.

There are various third party commercial services available to motor carriers that obtain MVRs electronically from the SDLAs. For small carriers that make the business decision not to use one of these commercial services, it is possible that it may be more difficult to obtain a CDLIS MVR from an out-of-state SDLA within 4 days. However, it is likely the majority of drivers hired by such small motor carriers are going to be licensed in-State, so this requirement is unlikely to be a major impediment to the normal operations of these small entities.

6. Impacts

a. *Impacts on the States.* As set forth in the NPRM, FMCSA originally estimated that the requirements of the rule would cost the States $18.3 million over the first 3 years of implementation and $4.0 million per year every year thereafter. Several commenters expressed concern about the financial burden the rule would impose on the States. Individual State driver licensing agencies, including Virginia, Pennsylvania, Wisconsin, New York, California, and Delaware, provided a range of estimates for associated costs pertaining to this rule.

The Alabama Department of Public Safety, Missouri Department of Revenue, Nebraska DMV, Kentucky Division of Driver Licensing, Texas Department of Public Safety, and the National Propane Gas Association did not provide specific estimates; rather they described the types of costs that States would incur, including hiring and training additional staff for reviewing submissions, entering data into the CDLIS driver record, obtaining office space and equipment, mailing multiple notifications, retaining certifications, and making CDLIS changes. These commenters agree that these expenses would constitute a large ongoing operational burden. The Alabama Department of Public Safety, Virginia DMV, Nebraska DMV, Oregon DOT, Michigan Department of State, Texas Department of Public Safety, and CVSA all believe the Federal government should bear the cost of this rule, including the ongoing operations costs. The Indiana Department of Revenue believes, however, that it would have no difficulties implementing the proposed changes, as their system exceeds what is proposed by the FMCSA.

Some commenters specifically request that FMCSA revisit its cost estimates based on the comments to the docket, including the Oregon DOT, which states the actual implementation costs will be significantly higher than the amounts estimated by FMCSA. Delaware recommends sending out surveys to ascertain the expected cost impact for staff and resources. Schneider National similarly asked for the cost analysis to be revisited.

The California DMV, Minnesota Department of Public Safety, Oregon DOT, National Propane Gas Association, and Virginia DMV point out that estimates are difficult to develop because the exact requirements of the proposal have not been finalized. They believe FMCSA's calculation was especially low regarding its estimate of new ongoing operating costs, for which the Agency will not be able to provide any financial assistance to the States.

The Delaware DOT comments that applicants who physically drop off their certifications would put an undue strain on State staff and resources. The Alabama Department of Public Safety said the additional burden of a paper-based system is cost prohibitive and labor intensive. The Minnesota Department of Public Safety said that the State comments on impacts contained in the FMCSA report [6] on concept models accurately expressed the impacts that States would have to address.

FMCSA Response: In response to these State comments, FMCSA conducted a survey among several

[6] ''Medical Certification Requirements as Part of the CDL,'' October 2007, prepared for FMCSA by the North American Driver Safety Foundation.

States in an effort to re-evaluate the costs of its original proposal to determine if the Agency's calculation was especially low (73 FR 36489; June 27, 2008). The explanation of the methodology used for gathering data from the States and its analysis are in the docket. Based on its new analysis, FMCSA agrees that the Agency underestimated the costs to the States. The revised estimates for State costs are explained in the Regulatory Analysis section contained later in the preamble to this final rule. A complete final regulatory analysis is located in the docket.

b. *Impact on Licensing Renewal Procedures.* The Alabama Department of Public Safety notes that the only CDL holders who return to the SDLA for renewals are those CDL holders who carry a Hazardous Material (HM) endorsement; all other CDL drivers renew their CDLs at the Office of the Probate Judge. Alabama subsequently asked which organization would be responsible for checking the validity of the medical certification status upon renewal.

FMCSA Response: In the final rule, the State must verify that the medical certification status is ''certified'' on the CDLIS driver record before renewing the CDL. It does not matter whether the SDLA or another designated agency or agent (e.g., Office of the Probate Judge) performs the renewal, the CDL compliance requirements remain the same. In the regulatory text of this rule, FMCSA will use the more generic term ''State,'' rather than SDLA, to encompass all State entities and/or State licensing agencies that are responsible for the CDL issuance, renewal, transfer or update.

c. *Impacts on Drivers.* In the NPRM, the FMCSA estimated that the medical and CDL rulemaking requirements would cost drivers a total of $3.22 million per year once the rule is implemented. A number of commenters believe the rule has additional impacts on drivers that have been underestimated by FMCSA. Several individuals, employers, and others, including the Virginia DMV, Texas Department of Public Safety, and the National Propane Gas Association, express their concern about the burden for drivers to travel to the SDLA and the extra costs for drivers to obtain new CDLs or medical certifications. The National Propane Gas Association believes that there will be an increased burden on drivers who must correspond with the SDLA more frequently than in the past. The Teamsters allege that drivers will have to take time off work and will be charged fees to obtain a copy of their CDLIS MVR. Therefore, at a minimum, the Teamsters contend that a copy of the driver's updated CDLIS driver record should be provided at no cost to the driver.

One individual driver points out that the proposed rule did not consider the fact that many drivers often take time off from driving as a CDL driver. They will now be forced to maintain medical certificates to keep their CDL active, even when they are not driving CMVs for a living. Gabbard Consulting believes that some drivers do not obtain physical examinations for reasons other than those involving some unqualifying condition.

The National Propane Gas Association claims that SDLAs are likely to add a new fee to pay for receiving and posting the medical certification information, on top of the fee drivers already have to pay to obtain an HM background check. The Association believes the rule would also contribute to further delays for their drivers who are being approved to operate CMVs with an HM endorsement. Such delays, they contend, are particularly troublesome during the winter months. The Minnesota Trucking Association questions whether drivers would have to pay renewal fees each time the medical certification is updated.

FMCSA Response: The final rule does not increase the frequency with which drivers must renew their medical certificates or place restrictions on the States that would preclude the use of mail, fax, or electronic submission of medical certificates. Therefore, drivers would only be forced to go to the SDLA office if the State requires the medical certificate to be hand-carried to the licensing agency. Furthermore, the rule does not prevent drivers from requesting a copy of their medical certificates from the ME at the time of the exam and prior to submission of the certificate to the SDLA.

With regard to fees that the SDLAs may charge drivers for processing the medical certificates, FMCSA does not require or prohibit the States from passing the costs of implementing this rule on to interstate CDL holders. Each State has discretion to determine the most appropriate means of obtaining funds to cover the implementation costs of this rule, based upon its particular circumstances. FMCSA does not expect that any additional fee charged drivers as part of providing their medical examiner's certificate would be large or likely to significantly impact the availability of drivers on our nation's highways.

The requirement for non-excepted, interstate drivers to maintain their medical certification if they have a CDL is not new. For interstate driving, the current provisions of § 383.71(a)(1) state that an applicant: ''* * * shall certify that he/she meets the qualification requirements contained in part 391 of this title. A person who operates or expects to operate entirely in intrastate commerce * * * is subject to State driver qualification requirements. * * *'' Thus, drivers who self-certify to driving in non-excepted, interstate commerce and, for whatever reason, fail to maintain a current medical certificate on file with the SDLA, are not eligible to hold an interstate CDL.

Also, a non-excepted, interstate CDL holder is currently required to maintain his or her medical certification. This is a requirement whether or not the individual is working as a driver requiring a CDL. This rulemaking is merely putting into place recordkeeping procedures so that licensing and enforcement personnel can detect drivers who are operating CMV in interstate commerce without the proper medical certification; and, who are required to have it.

The background check for drivers seeking an HM endorsement takes up to 60 days. Posting the medical examiner's certificate information should easily be accomplished during the time the background clearance for an HM endorsement is being processed and would not cause any delay in issuance of the HM endorsement or the CDL.

d. *Cost Impacts on Carriers.* Greyhound, ABA/BISC, and Peter Pan Bus Lines point out that, although employers currently receive medical certificates from MEs without charge, under the new rule, employers would have to request the certification status from the State and would be charged for this service. ABA/BISC adds that the carrier would now need to query the SDLA for these drivers' records. Under the current standard, the driver is required to provide the ME certificate to the motor carrier, which incurs no additional cost. The commenters contend that the additional costs across the entire driver population could be well above those estimated by FMCSA in the NPRM; therefore they must be factored into any final cost/benefit analysis. The Minnesota Trucking Association believes that license fees and transportation taxes would increase the burden on consumers.

Motor carriers also note that FMCSA's cost estimates did not include the implications of liability and insurer rate changes based on a changing operating climate, where carriers have less management oversight and control.

FMCSA Response: Motor carriers are currently required to obtain the CDLIS MVR for all interstate drivers as part of the hiring process and annually thereafter. Motor carriers could continue to use their existing processes for keeping track of their drivers' medical certificate expiration dates. FMCSA does not believe motor carriers would rely solely on periodic driver record checks to determine when individual drivers' medical certificates expire. Such an approach would be no more efficient or effective than manually reviewing individual driver qualification files to locate such information, which would leave open the possibility that the employer may not be aware of a soon-to-be expired medical certificate until it is too late to prevent a violation of the safety regulations. The revision to § 391.23 requires motor carriers either to perform the existing initial check with the SDLA and receive the CDLIS MVR, or have the driver obtain a new medical examiner's certificate, provide it to the SDLA, and receive a date-stamped receipt that is good for a 15-day period of documentation of certification, before allowing the driver to operate a CMV.

If a motor carrier uses the driver's receipt to fulfill the DQ file requirement during the 15 days allowed, a small possibility exists that the motor carrier might have to obtain a second MVR. This would happen if the SDLA had not yet posted the medical status information when the carrier obtained the first one. However, motor carriers could simply delay obtaining the CDLIS MVR until close to the 15-day maximum. Therefore, only a very small percentage of carriers would actually have to obtain a second CDLIS MVR. FMCSA has added this small increase in motor carrier cost to its evaluation.

If the certificate expires during the year, between required annual checks, and the employer is not participating in a subscription service that provides driver record update information for that driver, then the employing motor carrier would have to make an additional request for a CDLIS MVR and pay for it to document in the DQ file that the medical certification status was renewed. This circumstance results in an increased cost and FMCSA has added it to its regulatory evaluation.

FMCSA points out that § 390.3(d) makes clear that motor carriers continue to have the same authority to require and enforce more stringent conditions of employment on potential CDL drivers. The medical certification status information on the CDLIS MVR does not prevent the motor carrier from applying a more strict standard regarding whether that employee is allowed to operate a CMV for that motor carrier. Therefore, this rule should not change the liability of the motor carrier or result in increased insurance rates.

e. *Medical Examiner Provides Certificate to Carriers; and Employer Oversight.* A significant issue for motor carrier commenters' was their objection to the removal of the regulatory language that allows the medical examiner to provide to the motor carrier a copy of the medical examiner's certificate. Advocates contend that deleting this regulatory text will create a hiatus of widely varying length between the time a medical certificate is issued and the time when an employing motor carrier receives the CDLIS information indicating whether the driver in question is certified.

Trailways, the NTSB, J.B. Hunt, Lancer Insurance, AMSA, and ATA were concerned that the rule would shift responsibility for documentation of driver medical eligibility from the motor carrier to the SDLAs. They believe that motor carriers need to have the continued capability of ensuring that their drivers have valid medical examiner's certifications. Peter Pan Bus Lines was also concerned over their perception that the NPRM would require motor carriers to entrust a major component of their driver safety programs to the States.

Greyhound Lines, Inc. states that the proposed rule should not be a substitute for employer control. It claims that removing the recommendation for MEs to provide certificates to employers will inevitably weaken the employer's and the State's ability to keep unqualified drivers off the road.

Trailways claims that administration of the ME certifications requirement by the motor carrier would be far more likely to assure safe, qualified drivers than administration by a State agency. Trailways urged that carriers should be able to continue to provide oversight of driver qualifications.

The ABA/BISC requests that FMCSA make it clear that motor carriers are allowed to continue to manage their drivers' medical qualification programs and obtain ME certification documents from the medical provider. An individual ME stated that motor carriers should continue to be involved in the review of the ME's certificates to monitor for errors.

FMCSA Response: In response to the comments, and for purposes of clarity, the final rule revises the proposed rule and reinstates § 391.43(g)(1), which explicitly allows the medical examiner to provide to the motor carrier a copy of the certificate, upon request. Any agreement between the ME and the employing motor carrier to provide medical certification data to the employer is based strictly on a business arrangement between the two parties and may continue under this rule.

If the motor carrier obtains medical examiner's certificates from MEs, the motor carrier can compare the certificate received from the ME with the date stamped receipt the driver obtained from the SDLA. In this manner, the carrier can verify that the receipts obtained from their drivers are not fraudulent.

The final rule does not relieve motor carriers of their responsibility for ensuring that their drivers are medically certified. The FMCSRs continue to require that a motor carrier must ensure each driver subject to part 391 is medically certified. The integration of medical certification status as part of the CDL application process is intended to ensure that individuals cannot obtain or renew a CDL for non-excepted, interstate operations unless the State has been provided with proof of the driver's medical certification.

f. *Appearance of the FMCSA Proposal.* The Minnesota Trucking Association, UniGroup, Greyhound, J.B. Hunt, Peter Pan Bus Lines, and Landstar Systems were concerned that the rule would give SDLAs new authority; and that it would cause carriers to incur liability for accidents caused by drivers who are not medically certified, even if the State had not yet downgraded the CDL.

FMCSA Response: Today's final rule does not alter carriers' liability for crashes involving their drivers—it only changes the procedures for obtaining the required documentation to ensure current medical certification of non-excepted, interstate CDL holders. The rule at 49 CFR 391.51(b)(7) continues to require the motor carrier to obtain and place medical certification information in the DQ file before allowing the driver to operate a CMV in interstate commerce. Except for the first 15 days, when a motor carrier may use the driver's date-stamped receipt, under this rule, the documentation needed is the already required CDLIS MVR placed in the DQ file.

7. Posting, Updating, and Downgrading Information

a. *SDLA Posting of the Medical Certificate.* When the SDLA receives the medical examiner's certificate, the State will date stamp the certificate and post the required information onto the CDLIS driver record. Many State agencies—including the Alabama Department of Public Safety (DPS), California DMV,

Missouri Department of Revenue, North Dakota DOT, Minnesota DPS, Pennsylvania DOT, Missouri DOT, Wisconsin DOT, Oregon DOT, New York DMV, Texas DPS, Vermont DMV, and Delaware DOT; plus AAMVA; an individual ME; and CVSA—argued that the proposed period of 2 business days is insufficient due to the time needed to sort and route the mail, review the information submitted, and obtain additional information if the certificate were incomplete or illegible. These commenters believe that up to 10 days is needed and that funding should be provided for State staffing and programming.

On the other hand, several commenters, such as the Teamsters, note that the number of days for posting the information should be kept to a minimum, but that States should have adequate time to ensure that the data are accurate. OOIDA believes that 2 business days should not be a problem if States are diligent to post the information. First Advantage argues that no more than 2 business days should be allowed for posting because drivers should not be penalized for administrative delays.

FMCSA Response: Under item 3a, Proof of Submission to SDLA, above, the Agency describes its decision to require the SDLA to give the driver a date stamped receipt as proof of his or her submission of the medical examiner's certificate to the State. FMCSA believes that the receipt serves as the interim method for verifying the driver's medical certification status information that is available to users, such as, enforcement personnel and employers, during the time the information is being posted to the CDLIS driver record. In view of the Agency's decision to allow the receipt to serve for 15 days as verification of the driver's medical certification, including the concerns expressed by commenters of possible administrative delays, FMCSA will increase the time period for SDLAs to post this information on the CDLIS driver record. Therefore, FMCSA is extending the maximum time allowed for the SDLA to post the medical certification status data on the CDLIS driver record from 2 business days to 10 business days to allow States sufficient time to make the CDLIS MVR available to users.

b. *Updating the Driver Record to ''Not-Certified.''* If the medical certification expires, the States will be required within 2 business days to update the certification status on the CDLIS driver record to show the driver as ''not-certified.'' Five State agencies (Minnesota Department of Public Safety, Virginia DMV, Pennsylvania DOT, Michigan Department of State, and Vermont DMV) and AAMVA commented that 2 business days is an unreasonably short period for updating the status. Some of them recommended a longer period, up to 10 days.

AMSA was concerned that 2 business days might be insufficient time for a carrier to contact a driver about an expired medical certificate to determine whether new medical information had been submitted but not reflected in the State's system. UniGroup and an individual ME, however, believe that a 2-day period for SDLAs to update a driver's status to ''not certified'' is acceptable.

FMCSA Response: FMCSA is aware that some SDLAs still use scheduled runs of batch programs to periodically process their entire driver database. The batch program periodically performs the maintenance function to detect and update expired medical certifications to a status of ''not-certified.'' After considering these comments to the docket, and taking notice of a comparable updating provision found at 49 CFR 384.225(c) for recording conviction information within 10 days, FMCSA increases the time for accomplishing the update of expired medical certification to a status of ''not-certified'' to the CDLIS driver record from 2 business days to 10 business days.

c. *Downgrading the CDL by the SDLA.* Upon expiration of a driver's medical certification, if the driver's self-certification of driving type remains non-excepted, interstate, the State must initiate a downgrade of the CDL to be completed within 60 days of the driver becoming and remaining ''not-certified.'' Six State agencies (North Dakota DOT, Minnesota Department of Public Safety, Virginia DMV, Oregon DOT, Vermont DMV, and Delaware DOT) agree that 60 days is a reasonable period of time to downgrade the CDL. The Missouri Department of Revenue does not think that drivers should be downgraded automatically, because they might be downgraded prior to receiving notification. The Delaware DOT warned, however, that 60 days might not be sufficient if the driver challenges the action. Other commenters, including the Alabama Department of Public Safety, UniGroup, an individual ME, ACOEM, the NTSB, Advocates, Schneider National, the New York DMV, and First Advantage, argue that 60 days is too long a period to allow CDL holders to drive if they are not medically certified. Instead, an individual ME, Advocates, and First Advantage suggest a shorter 30-day period to downgrade the CDL.

The Missouri Department of Revenue suggests a timeframe, such as 15 or 30 days following the expiration of the medical certification, to notify the driver of a pending downgrade of status. ATA believes that a disqualification [downgrade] provision ''should only be implemented if there is a way to remind drivers and carriers in advance of the driver becoming'' not-certified. The Louisiana Department of Public Safety (DPS), ATA, and the Texas DPS said that SDLAs should be responsible for immediately notifying drivers of any change in their status to ''not-certified'' based on their medical examiner's certificate expiring, as well as adequate and timely notification to drivers ''out on the road.''

The Delaware DOT is concerned about suspending a driver's non-commercial license privilege for failure to have a valid medical certificate, since the license is a necessity in today's society. The Maryland State Highway Administration notes that FMCSA's ''Diagram 2: Proposed System,'' as contained in the NPRM, fails to accurately reflect the flow of the processes involved—CDLIS does not know if the driver has applied for a CDL, nor does it issue a CDL. The Maryland State Highway Administration requests that FMCSA develop a procedure for downgrading a CDL and posting the updated status on the State's CDLIS driver record.

FMCSA Response: The FMCSA continues to believe that giving the SDLA a period of up to 60 days for downgrading allows time for whatever State processes are required to meet this requirement, including time for the driver to obtain a new certificate if he or she desires to do so. To make the process easier for both SDLAs and drivers, and given the requirements set forth in this final rule, FMCSA revises the definition for downgrade under section 383.5. The CDL privilege must now be removed due to the driver's failure to update his or her medical certification, not because the driver has been disqualified for traffic convictions.

States will need to develop procedures both to update the CDLIS driver record to reflect that the driver is ''not-certified'' within 10 days and downgrade the license within 60 days.

In response to Missouri's concerns, this rule does not create a requirement for an *automatic* downgrade for CDL drivers. The 60-day period for the State to downgrade a CDL is implemented to allow the State to use whatever process it prefers to accomplish the downgrade.

Delaware's concern about this rule requiring suspension of a non-commercial license is unwarranted. This rule does not apply to non-CDL driving privileges.

In the NPRM, the Agency did not propose that SDLAs notify drivers about the pending expiration of medical examiners' certificates. The rule only requires notification for a pending downgrade of the driver's CDL.

8. Driver Penalty for Presenting a Fraudulent Certificate

The Missouri Department of Revenue and Texas Department of Public Safety note that the NPRM does not define penalties for the driver presenting a fraudulent certification.

FMCSA Response: Section 383.73(g) currently provides a minimum penalty for drivers for submitting a fraudulent medical examiner's certificate. If at any time a State determines the driver has falsified information required under § 383.71(a), the State must suspend, cancel, revoke or otherwise disqualify the driver's CDL for at least 60 days. Knowingly presenting a fraudulent certificate would be falsification of physical qualification. This is why the State is required to keep a copy of the certificate for 3 years after its issuance as proof of the driver's medical certification to enforce imposing such a penalty.

9. Intrastate CDL Drivers

Some commenters believe that the medical certification information requirements for the CDLIS driver record being established by this rule for non-excepted, interstate CDL holders should also apply to CDL holders operating in intrastate commerce. Because some crashes involve State-certified CDL holders who operate solely in intrastate commerce, the Minnesota Trucking Association contends that the final rule should apply to CDL holders conducting intrastate operations.

Maryland commented that FMCSA has failed to capture all of the drivers subject to its jurisdiction. It argues that 49 CFR 390.3(b) is applicable to all individuals operating a CMV in interstate or intrastate commerce. Maryland further believes that use of the term ''downgrade'' and its application in the NPRM indicate that FMCSA is only concerned with interstate CDL drivers and is failing to address intrastate CDL drivers. It points to the use in the NPRM of the term ''tolerance guidelines'' found at § 350.341, relative to Motor Carrier Safety Assistance Program (MCSAP) funding, as adding more uncertainty to the issue of intrastate drivers' physical qualification requirements. Maryland requests that FMCSA clarify its position in this matter.

FMCSA Response: In the legal basis section of the NPRM and this final rule, the Agency explained that the medical certification requirements found in part 391 may only be applied to CDL holders who both: (1) Operate CMVs as defined in 49 CFR 383.5, and (2) are subject to the physical qualification requirements under 49 CFR part 391. The Agency further stated that FMCSA's statutory authority to require medical certification documentation that the driver is physically qualified only extends to non-excepted, interstate drivers. Therefore, only if a CDL driver is required under part 391 to obtain a medical certificate does FMCSA have the authority to require that driver to provide the medical certificate to the SDLA as documentation of his or her physical qualifications.

With regard to Maryland's comment that the NPRM did not fully explain the State's obligations under the MCSAP grant program, the FMCSA takes this opportunity to clarify that issue.

Currently, all 50 States and the District of Columbia participate in MCSAP and receive Federal grants to support the adoption and enforcement of compatible motor carrier safety regulations.[7] As a condition of receiving the Federal grants, States must adopt and enforce compatible State regulations applicable to certain intrastate drivers (see 49 U.S.C. 31102(a) and 49 CFR part 350). Section 350.339 concerning tolerance guidelines allows limited deviations for such State regulations to be considered compatible. Essentially, the State regulations must be identical to, or have the same effect as, the FMCSRs. Additionally, variances are allowed for the physical qualification standards, as specified at § 350.341(h). Section 350.201(a) indicates that the requirement for compatibility includes the provisions in parts 390 through 397. Therefore, States will be expected, as a condition of receiving MCSAP grant funds, to revise their medical certification rules applicable to their intrastate CDL drivers to be compatible with FMCSA changes made to those provisions by this rule. There is no requirement under MCSAP for States to similarly adopt State laws or regulations for intrastate drivers compatible with parts 383 and 384. FMCSA does not have the authority to require that intrastate medical certification status information required by States be placed on the CDLIS driver record. However, the States are certainly free to do so.

10. Excepted Drivers

A number of commenters were concerned that the NPRM did not adequately address how the State enforcement officials would identify ''excepted'' drivers. Some commenters suggest that the information be available on the driver's record. The Alabama Department of Public Safety and the Minnesota Trucking Association express concern that the NPRM did not explicitly and clearly address documentation requirements for these excepted drivers. For example, Alabama asked how law enforcement would know if a driver (who self-certified to operating in excepted commerce) got a CDL, and then drove for a private carrier (who is not in an excepted industry) without obtaining required medical certification. For excepted drivers, as well as for those drivers who self-certify they operate only intrastate, the Missouri Department of Revenue suggests that the rule be modified to include specific procedures for SDLAs to determine and record the driver self-certification. Missouri further asks whether such drivers are completely free to self-certify that they are excepted, or whether the SDLAs must retain some type of verification of the exception.

To aid law enforcement, the Missouri DOT believes that the driver's SDLA should include the medical certification status information ''excepted'' as part of each CDL driver's record. CVSA suggests that the driver's self-certification of exception should be made part of both the license document and the CDLIS MVR.

CVSA states that it is critical that all SDLAs, as well as law enforcement agents, be made fully knowledgeable about the applicability provisions and industry exceptions that are part of the FMCSRs and have the capacity to accurately evaluate them. ATA expressed concern that SDLAs would take many years to come into compliance with this proposed ''national standard.'' It doubts that there would be a uniform and high degree of licensing and enforcement conformance to the part 391 applicability requirements.

FMCSA Response: FMCSA emphasizes that this rulemaking does not change the application of the medical standards. Nothing in this rulemaking would increase the burden

[7] While all 50 States and the District of Columbia participate in MCSAP, 2 States get only 50 percent of their grant funds because they have not adopted nor enforce State rules that are completely compatible with FMCSA regulations and allow variances for intrastate commerce.

on enforcement officials to determine the applicable rules during an inspection. Regardless of what type of operation the driver may have claimed at the time the CDL was issued, enforcement personnel would make a determination based on what the driver is actually doing at the time of inspection.

However, the FMCSA acknowledges the commenters' concerns and revises proposed § 383.71(a) to add additional categories, intrastate drivers (both excepted and non-excepted), listing all four self-certification possibilities:

- Interstate and subject to 49 CFR part 391;
- Interstate, but operating exclusively in transportation or operations excepted from part 391 under 49 CFR 390.3(f), 391.2, 391.68, or 398.3;
- Intrastate and subject to State driver qualification requirements; or,
- Intrastate, but operating exclusively in transportation or operations excepted from all or part of the State driver qualification requirements.

As noted above in the Legal Basis section of the preamble, this rule only applies to non-excepted, interstate CDL drivers who operate CMVs in interstate commerce. The self-certification that drivers make at the State level, either when applying for, renewing, transferring or upgrading their CDL, or as otherwise required by this final rule, will determine whether they are required to comply with the medical certification provisions set forth in this rule.

11. CDL Advisory Committee (Task Force)

Section 4135 of Safe, Accountable, Flexible, Efficient Transportation Equity Act A Legacy for Users (SAFETEA–LU) mandates that FMCSA convene a Task Force to review the CDL program and provide recommendations for its improvement. The Task Force examined many aspects of the CDL program. The members discussed this rule in their meetings, and made certain recommendations on the Agency's proposal.

Initially, some members of the Task Force thought the National Registry for Certified Medical Examiners (NRCME) (see 49 U.S.C. 31149(d)) should be implemented before this rule becomes final. However, based on advice from the designated Federal official for the Task Force that the medical program is outside the charter of the Task Force, they confined their recommendations on this rule to an alternative approach within the CDL program for dealing with the requirements of section 215 of MCSIA.

Task Force members recommended that, as part of CDLIS Modernization, FMCSA should implement a central Web-based application for electronically receiving, screening, and forwarding medical examination reports to the licensing State. This application would be used by MEs who choose to be included on an FMCSA-established List of Medical Examiners (List). The only requirements for an ME to be added to the List would be that the ME must: (1) Document that he or she meets the definition of medical examiner found at § 390.5; (2) agree to abide by the requirements of the List, including the requirement that the ME may be removed from the List by FMCSA (e.g., for consistently submitting faulty medical examination reports); and (3) submit electronic reports of all medical examinations (pass and fail) to the CDLIS Web application. The CDLIS application would then electronically send the medical certification status information to the licensing State as a CDLIS transaction. Such an electronic system would help achieve more uniform compliance among the States, and would reduce State operating costs by virtually eliminating the staffing impact on States. It would address the driver fraud problem by removing the opportunity for drivers to commit fraud by creating false ME certificates. Additionally, such an approach could capture information about failed physical examinations that occur before the expiration date of the current certification and highlight ''medical examiner shopping,'' when multiple electronic certificate reports for a driver are received from different medical examiners. Establishment of the authorized list of MEs, Task Force members believe, together with the CDLIS Web application for ME submission of medical examination reports, would help prevent virtually all driver fraud and abuse, including fraudulently creating and submitting ME certificates, shopping for a favorable ME, and identifying MEs with patterns of problem certifications. The Task Force members also believe that the FMCSA list should be a precursor, or perhaps Phase I, of the SAFETEA–LU required NRCME. The medical program requirement regarding the qualification of medical examiners would be left to the forthcoming NRCME required by 49 U.S.C. 31149(d).

FMCSA Response: Both policy recommendations—that the Agency develop a CDLIS Web application for MEs to electronically submit medical examination reports as part of CDLIS modernization and that FMCSA establish a list of MEs—are outside the scope of this rulemaking. However, these concepts recommended by the Task Force may be considered within other rulemaking initiatives.

b. *Access to Electronic Communication in the Field.* Several commenters express their concern that all enforcement officers do not have access to the necessary equipment to make electronic inquiries to verify a driver's medical certification status. Pennsylvania DOT states that it is improbable that all levels of enforcement are capable of performing electronic verifications in the field. Because of the cost and time involved, Pennsylvania DOT believes it is not feasible to provide all enforcement personnel with the necessary equipment and telecommunications capabilities required to make electronic inquiries. The Alabama Department of Public Safety states that a large number of field officers do not have access to CDLIS or NLETS. Similarly, an individual ME observed that electronic verification might be unrealistic for local, regional, and municipal officers who do not have access to the equipment due to budget constraints. Additionally, the ME urged that training should be provided to those individuals authorized to access the driver medical information from CDLIS.

FMCSA Response: All States are required to certify, as part of MCSAP, that they are checking CDLs. Generally, CMV enforcement is not performed by all enforcement personnel. The vast majority of CMV enforcement efforts—even at the regional, local, and municipal levels—are performed by persons on designated, trained teams. FMCSA believes it is fairly common that members of such teams have access to electronic communications, through either NLETS or some version of FMCSA's CDLIS-Access software provided to MCSAP enforcement personnel.

With FMCSA's October 26, 2006, MCSAP policy memorandum encouraging traffic enforcement without a vehicle inspection, some CDL checks via NLETS will be made via radio connection to a dispatcher, rather than via a terminal in the patrol car. Despite this, FMCSA is aware that enforcement personnel who do not have certain specific equipment can still make a CDL check using their police radio dispatcher services.

c. *Out-of-Service Violation.* J.B. Hunt and ATA generally believe that for non-excepted, interstate drivers, some type of penalty for driving without a current medical certification is necessary and should be severe enough to discourage

unsafe behavior. CVSA expressed concern that a driver might attempt to circumvent providing a medical examiner's certificate by self-certifying to operate only in excepted or intrastate commerce. It then asks how enforcement personnel will know what actions to take. CVSA argues that such drivers could circumvent the medical certification requirement and continue to operate CMVs without meeting the qualifications standards of the FMCSRs.

At a minimum, CVSA recommends that CDL drivers found operating in non-excepted, interstate commerce with a medical certification status of ''not-certified'' should be placed out-of-service. J.B. Hunt also advocates that operating a CMV with a ''not-certified'' status should be made an out-of-service violation, noting that placing a driver out-of-service creates a significant incentive for the motor carrier not to allow the driver to operate a CMV when not medically certified. It comments further that making a medical certification status of ''not-certified'' an out-of-service violation would positively influence safety, since carriers have a vested interest in reducing out-of-service violations. J.B. Hunt points out that management's time is consumed by performing an investigation and corrective action—when a load is delivered late, the carrier's profitability is affected.

FMCSA Response: FMCSA agrees with CVSA and J.B. Hunt that CDL drivers and motor carriers need some type of deterrent from attempting to circumvent either the medical certification requirement for non-excepted, interstate drivers, or the restrictions of excepted and intrastate self-certification. In response to the comments to the docket, including those from CVSA and J.B. Hunt, FMCSA notes that the final rule adds explicit requirements at § 391.41(a)(3)(i) and (ii), specifying the medical certification requirements for non-excepted, interstate CDL drivers. There are already civil and criminal sanctions applicable to a driver operating a CMV without a required medical certificate. *See* 49 CFR 390.37. Where there is a substantial likelihood of serious injury or death, such a driver can be ordered out-of-service as an imminent hazard. *See also* 49 CFR 386.72(b).

d. *Disqualification Offense.* Many commenters on the issue of drivers operating without the required medical certification favored implementing a disqualifying offense under § 383.51. The California DMV, Maryland State Highway Administration, Minnesota Department of Public Safety, Wisconsin DOT, Oregon DOT, Advocates, New York DMV, First Advantage, CVSA, Vermont DMV, and an individual medical examiner agree that this offense should included under the disqualification rules. Other commenters, such as J.B. Hunt and ATA, believe that there should be a penalty severe enough to discourage unsafe behavior, but do not specifically suggest making the offense a disqualification violation in the FMCSRs. The Teamsters, the Michigan Department of State, Delaware DOT, and Landstar Systems do not support adding a new disqualifying offense under 49 CFR 383.51.

FMCSA Response: FMCSA agrees with ATA, J.B. Hunt, and Maryland that the enforcement action against an uncertified driver should be sufficiently severe to discourage the behavior. The Agency also agrees with the commenters that such driver behavior exists. However, upon careful legal review, the FMCSA determined it does not have the statutory authority to include such conduct as a new serious traffic offense in § 383.51(c).

e. *Intrastate and Excepted Service Restrictions.* The New York DMV suggests that the final rule should require a restriction for drivers who are claiming the ''excepted'' status for any reason and who are not limited to intrastate operation. Because the Agency proposed in the NPRM that drivers could self-certify to operating CMVs only in intrastate commerce, the Oregon DOT recommends using a ''K'' restriction to identify drivers licensed for ''intrastate'' driving only.

FMCSA Response: FMCSA does not agree with New York and Oregon's proposal that drivers who, in accordance with § 383.71(a)(1), self-certify to operate only in either excepted or intrastate commerce should be restricted. The regulations are clear about the type of operations that drivers may perform; thus the recommended restriction will not be imposed. There is no requirement for the SDLA to verify the driver's self-certification. The driver's self-certification required by § 383.71(a)(1) establishes procedures that enable enforcement personnel to detect whether the driver correctly self-certified and to cite the driver for corrective enforcement action, if necessary. If a driver who self-certified to operate only in ''excepted'' commerce is stopped at the roadside and determined to be operating in other than excepted commerce, the driver could be cited and placed out-of-service.

13. Implementation Schedule

A number of State agencies and organizations commented on the timing of the compliance date of this rule and CDLIS modernization efforts required by SAFETEA–LU.

a. *Compliance Date Sooner than 3 years.* Advocates suggest implementing a shorter time frame for compliance with these requirements than the Agency proposed in the NPRM. They describe a need for reforms and improvements in CDLIS and note that uncorrected problems adversely impact the benefits of the proposal. Nevertheless, Advocates believe that the proposed integration should not be delayed until CDLIS is upgraded via CDLIS modernization because some part of the safety benefits could be achieved if the Agency acts quickly to issue a final rule.

FMCSA Response: It is FMCSA's established practice to allow States 3 years to come into compliance with new regulatory requirements in both the CDL and MCSAP programs. Generally, that time period allows for any needed legislative changes, CDLIS software changes, and training of State employees for new procedures.

After States are in compliance with the technical requirements of the rule and are ready to begin receiving the medical examiner's certificates from the drivers, they will need all CDL drivers to provide their self-certification of driving type, and will need to collect and post the medical certificates drivers are required to provide them. This rule establishes a timeframe for CDL drivers to make the self-certification of driving type no later than two additional years after the State comes into compliance with the rule. These compliance dates are intended to provide States sufficient time to incrementally add all CDL drivers' required status information. To fully implement the rule any faster would create a significant burden on SDLAs, enforcement personnel, and drivers.

b. *Compliance Date Later than 3 Years.* State agencies in Minnesota and Wisconsin do not believe legislation would be required to implement these requirements and think that the 3-year period would be sufficient, particularly if adequate funding is received from FMCSA. Vermont also thought the 3-year implementation window for States to achieve compliance would be acceptable.

State agencies in California, Delaware, Louisiana, Michigan, Nebraska, New York, Oregon, Pennsylvania, Texas, Vermont, and Virginia indicate that new legislation might be required for them to implement the new requirements. Delaware, Michigan, Oregon, Texas, and Virginia think that the 3-year implementation timeframe would be

difficult to meet, in part because of other Federal program requirements that will soon be imposed on them (e.g., CDLIS modernization and the REAL ID Act of 2005, (Pub. L. 109–13, Div. B. Title II, sections 201–207, 119 Stat. 311–316 (May 11, 2005) (set out as a note to 49 U.S.C. 30301))).

The Minnesota Department of Public Safety, Wisconsin DOT, Maryland State Highway Administration, Vermont DMV, and AAMVA either support having the compliance dates coincide or think that it is essential for the CDLIS modernization to be completed first. The California DMV suggests FMCSA should not start the clock for the States' 3-year compliance from the effective date of the rule, but instead from the time that the final CDLIS technical specifications are released by AAMVA as part of CDLIS modernization. The Pennsylvania DOT notes that it is essential that all detailed technical specifications be provided at least 2 years prior to when the State must be in compliance to allow sufficient time for technical programming. Based on the experience implementing the MCSIA requirements in CDLIS, AAMVA urged FMCSA to allow States a compliance period longer than 3 years.

FMCSA Response: FMCSA acknowledges States' concerns about implementing the other Federal program requirements for CDLIS modernization and the Real ID Act at the same time as the requirements of this rule. The Agency will monitor the progress of State implementation of this rulemaking and how it will impact States' implementation of these two other Federal programs.

California and Pennsylvania's point is well taken regarding the time required for AAMVA to develop the CDLIS modernization technical specifications and release them to the States. Section 4123 of SAFETEA–LU requires the development of the CDLIS design specifications necessary for implementing this rule to be part of developing the specifications for CDLIS Modernization. FMCSA consulted with AAMVA on when they projected they could issue the necessary CDLIS technical specifications for implementation of this rule. Their estimate is close to the expected date the rule will be published. Therefore, the Agency retained the 3-year provision to implement the section 215 of MCSIA requirement to merge the medical requirements with the CDL.

c. *No Cut-Off Date for Driver Submission.* The Michigan Department of State comments that there is no need for the cut-off (mandatory downgrade) at 5 years for drivers who have not provided the SDLA with a current medical examiner's certificate, as the driver's license renewal cycles would eventually address this need.

FMCSA Response: The average national CDL licensing cycle is approximately 5 years, with some States having longer cycles. If FMCSA were to provide States the opportunity to implement fully the rule within a period that exceeds 5 years, an unknown number of drivers would not have to self-certify their driving type or provide a medical examiner's certificate for, at least, an average of 3 additional years. This period for drivers to self-certify and provide a medical examiner's certificate would be longer in States with CDL renewal cycles longer than 5 years.

14. Outreach

a. *Quality and Timeliness of NLETS Data.* A number of commenters express concern about the ability of enforcement personnel to: (1) Always obtain an electronic response during nights and weekends, through either CDLIS access software or NLETS; and (2) obtain CDLIS quality responses via NLETS.

FMCSA Response: FMCSA is aware of both these issues. The Agency is continuously studying these issues to identify the cost that would be incurred if the existing level of NLETS CDL inquires are submitted to CDLIS. The Agency is considering demonstration projects to gather information on what it would cost to have electronic responses at night and on the weekends from States that have not yet implemented such capabilities.

1. *Nights and Weekends.* The ability to get an electronic response during the night and on the weekends is predominantly an hours-of-operation issue (i.e., for the responding computer). Historically, this was a common issue for SDLA computers with restricted hours of operation. Nonetheless, online access by SDLAs at all times continues to expand. FMCSA continues to investigate options to further improve the availability of electronic driver license information during nights and weekends, and plans to analyze the cost implications of solving this issue.

2. *CDLIS Quality Responses via NLETS.* In States that use a copy of the CDLIS driver records to respond to NLETS inquiries, depending on how frequently that copy is updated, it is possible that the NLETS responses could be out-of-date and show the driver as not-certified when CDLIS has been updated to show the driver is certified.

b. *Notification of Rule Requirements.* A number of commenters express concern that, depending on when a State begins notifying drivers of this new requirement, it is possible that a driver might not receive notification that he or she must provide the SDLA with an updated driving type self-certification, and for those operating in non-excepted, interstate commerce, a copy of the medical examiner's certificate. As a result, the SDLA might initiate a downgrade of the driver's CDL. Schneider National states that it is troubled by the lack of performance standards and uniformity among the States for handling the submission of the medical examiner's certificate. The Wisconsin DOT estimates that they would have to notify over 185,000 drivers.

FMCSA Response: In the NPRM, the Agency proposed that States must be in compliance with these provisions 3 years after the effective date of a rule. It also proposed two additional years for all drivers to provide their SDLAs with the driving type status concerning whether they are subject to Federal or State driver qualifications rules. In the final rule, FMCSA retains the State compliance date of 3 years after the effective date, and the driver compliance date of 5 years after the effective date.

FMCSA encourages SDLAs to begin including information about this new CDL requirement as soon as is practical. Except for those few States with license renewal cycles of six or more years, it is possible for all CDL drivers to be notified as part of their normal CDL renewal notice from their SDLA.

It is important to note that FMCSA is currently working with various partners in developing a package of materials to be made available to SDLAs, driver and carrier organizations, and trade publications as outreach initiatives for the industry.

15. Comments Outside the Scope of This Rulemaking

A number of respondents submitted comments on topics that were either outside the scope of what was proposed in the NPRM or were based on a misunderstanding of what the Agency proposed in that rulemaking. Many of these issues concern the rulemaking for the NRCME, how FMCSA could regulate MEs or establish specific medical examination requirements, or discuss alternative approaches to the Agency's initial rulemaking proposal to specifically deal with issues of driver fraud.

FMCSA Response: FMCSA acknowledges the policy concerns of the commenters. However, as stated in the NPRM, the policy direction of this

rulemaking is limited to the creation of a method for CDLIS capability to ensure current and accurate driver medical certification status for use in CDL driver licensing and enforcement decisions. FMCSA continues to believe this rulemaking represents a step in improving the oversight capabilities of medical certification status information for non-excepted, interstate CDL drivers.

Neither this rule nor the forthcoming NRCME rulemaking proposal are intended to address fraud perpetuated by drivers regarding their medical certification. While we acknowledge that driver fraud is an important issue, these comments are outside the scope of this notice.

Although FMCSA could eventually require MEs to transmit data to SDLAs, this rule did not propose to include such provisions because the Agency does not have the statutory authority to regulate MEs. Rather, this rule establishes a system for drivers to provide medical certification status information to the licensing SDLA by using the medical examiner's certificates. It also requires the SDLA to post that medical certification status information into the CDLIS driver record for licensing, enforcement, and employment decisions. This rule complements the medical examiner qualification issues that will be addressed later by the NRCME rulemaking.

D. Section-by-Section Explanation of Changes From NPRM

Conforming amendments. Throughout parts 383, 384, 390, and 391, the terms used by the Agency to refer to a driver record or driver history have been revised for uniformity. The term ''CDLIS driver record'' refers to the electronic record of a CDL driver's license status and history stored by the State-of-Record as part of CDLIS. The term ''driver record'' refers to the electronic record of a non-CDL driver's license status and history that is stored by the SDLA. The Agency's use of the term ''motor vehicle record (MVR)'' refers to the information provided to a driver or employer about the status and history of a non-CDL CMV driver. The term ''CDLIS MVR'' refers to the information provided to a driver or employer about the status and history of a driver that holds a CDL. In the NPRM, the Agency proposed adding a new term of ''medical certification status information'' with values of either ''qualified'' or ''not-qualified.'' The final rule changes the status values to ''certified'' or ''not-certified.''

Part 383

Section 383.5. In the NPRM, the Agency proposed to add a definition for the term ''CDLIS driver record.'' FMCSA also proposed to add a definition for the term ''CDL downgrade'' that included the following two options: (1) restrict an otherwise unrestricted CDL to intrastate transportation, or interstate transportation excepted from part 391 as provided in 49 CFR 390.3(f) or 391.2; or (2) have the State remove the CDL privilege entirely from the driver license.

The final rule adopts the definition for CDLIS driver record as proposed. The final rule modifies the definition of ''CDL downgrade'' found at § 383.5. It simplifies the required State action to notify the driver that the SDLA will remove the CDL privilege from the license, unless the driver elects to change his or her self-certification and restrict driving to either transportation excepted from the requirements of part 391, intrastate commerce and subject to State driver qualification requirements, or intrastate excepted if allowed by the State. A State can also remove the CDL privilege from the driver's license if the driver has not complied with the FMCSRs.

Section 383.71(a). FMCSA proposed to revise the self-certification requirement in the CDL application process to clarify how applicants should self-certify if they operate in interstate commerce, but are excepted from part 391, and now includes such clarification for other self-certification categories as well. In the final rule, FMCSA revises the paragraph to provide four categories for the self certification:

- Interstate and subject to 49 CFR part 391;
- Interstate, but operating exclusively in transportation or operations excepted under 49 CFR 390.3(f), 391.2, 391.68, or 398.3;
- Intrastate and subject to State driver qualification requirements; or,
- Intrastate, but operating exclusively in transportation or operations excepted from all or part of the State driver qualification requirements.

Section 383.71(g) and (h). In the NPRM, FMCSA proposed a new requirement that, beginning on the SDLA's compliance date of 3 years after the effective date of the new rule, applicants for any CDL licensing action who are operating in non-excepted, interstate commerce must provide their SDLA with an original or a copy (at the State's option) of a current medical examiner's certificate. In the final rule, paragraph (g) clarifies that all CDL holders must provide SDLAs the self-certification in 383.71(a)(1)(ii) between years 3 and 5 (the two-year phase-in period) after the effective date of this rule. Paragraph (h) of the final rule requires new and existing non-excepted, interstate CDL holders to provide the SDLA with a current medical examiner's certificate between years 3 and 5, respectively, after the effective date of this rule. States must post the medical certification status and medical examination certification information in the CDLIS driver record.

Section 383.73(a)(3)(v). The final rule adds a new requirement that for non-excepted, interstate CDL drivers, the SDLA must verify that the medical certification status of the driver is ''certified'' before taking any licensing action to issue, renew, transfer, or upgrade the CDL.

Section 383.73(a)(5). FMCSA proposed that the SDLA enter on the CDLIS driver record the type of driving self-certification made by the driver according to § 383.71(a)(1). For all non-excepted, interstate CDL drivers, the SDLA must record the information from the physical qualification documentation (medical examiner's certificate) on the CDLIS driver record. In the final rule, FMCSA will also require all SDLAs to provide drivers with a date-stamped original or copy of the submitted medical examiner's certificate as their receipt.

Section 383.73(b)(6). When a driver applies for a CDL transfer from another State, FMCSA proposed to add a requirement for the SDLA to ask the driver to self-certify whether the driver will operate in non-excepted, interstate commerce, and, if so, verify whether the medical certification status on the CDLIS driver record is ''qualified'' before taking any licensing action.

The final rule requires the SDLA to conduct a check on non-excepted, interstate CDL drivers to verify whether the medical certification status is designated as ''certified.'' If the driver self-certifies that he or she will operate solely in excepted, interstate commerce, no verification of medical certification status is required.

To accommodate drivers and SDLA's during the transition period for implementing the requirements set forth in this rule, drivers who need to transfer their CDL are not required to obtain an early medical examination during the 2-year phase-in period of time between the State compliance date (3 years after the effective date) and the date all drivers are required to have submitted medical certification information to the SDLA (5 years after the effective date). During the 2-year phase-in period, all CDL drivers must self-certify to the

SDLA as to the type of operation in which they will engage. There will be instances where non-excepted, interstate drivers will provide SDLAs with their medical examiner's certificate as documentation of current medical certification during this 2-year phase-in period, but only if, and when, it replaces a prior certificate.

Section 383.73(c)(5). FMCSA adds the same requirement as § 383.73(b)(6) for the license renewal process.

Section 383.73(d)(3). FMCSA adds the same requirement as § 383.73(b)(6) to the license upgrade process.

Section 383.73(j). FMCSA proposed to add a new CDLIS recordkeeping requirement for medical certification status information. A number of items displayed on the medical examiner's certificate would be recorded on the CDLIS driver record, including a recommendation for States to upgrade their licensing systems to make provisions in the CDLIS driver record to accept National Registry information (see 49 U.S.C. 31149(d) as added by section 4116(a) of SAFETEA–LU), should it be required. The medical certification status information would need to be posted by the SDLA within 2 business days of receiving a new medical examiner's certificate from a driver. Similarly the medical certification status of the driver would need to be updated within 2 business days of a current certification expiring. Additionally, if a driver's medical certification expires, the SDLA was to initiate a downgrade of the CDL. The SDLA would then need to accept and record within 2 business days on the CDLIS driver record any medical variance issued by FMCSA to a driver.

In the final rule, FMCSA subdivides the different actions included in § 383.73(j)(2) of the NPRM into three more easily referenced paragraphs, (j)(2), (3), and (4). It extends the time allowed for the SDLA to post medical certification or medical variance status data or update the information from 2 business days to 10 business days. The SDLA also must provide drivers with a date stamped original or copy of the submitted medical examiner's certificate as their receipt. The time during which the SDLA must retain the certificate is extended from 6 months to 3 years from the issuance date. The downgrade provision is simplified to require the removal of the CDL privilege unless the driver changes his or her self-certification to either excepted or intrastate, if allowed by the State. A new paragraph is added as (j)(5) designating FMCSA Medical Programs as the keeper of the official list of State contacts for receiving medical variance information from FMCSA, and States are responsible for ensuring their medical variance contact information is up-to-date with FMCSA Medical Programs.

Section 383.95. FMCSA proposed to add a medical variance restriction to the existing air brake restriction provision and rename the section. The Agency indicated that the new medical variance restriction would require an indicator on both the CDL and the CDLIS driver record if the driver has received a medical variance. FMCSA has selected the letter ''V'' as the code for identifying drivers with a medical variance. The Agency will work with AAMVA to include that code in the CDLIS State Procedures and other appropriate CDLIS technical documentation.

Part 384

Section 384.105. FMCSA proposed to add a definition for CDLIS Motor Vehicle Record. The final rule adopts the proposed language.

Section 384.107. The Agency proposed to revise paragraph (b) to incorporate by reference the then most recent version of the CDLIS State Procedures Manual. The final rule revises the reference to the most recent version of the AAMVA's CDLIS State Procedures Manual, the September 2007 edition.

Section 384.206(a). FMCSA proposed conforming amendments to its rules concerning State record checks. The final rule adopts the proposed changes based on the application procedures in this final rule.

Section 384.206(b)(3). The Agency proposed revising § 384.206(b) to require States to verify the driver's medical certification status. The final rule revises the paragraph to also require the State to deny the CDL and initiate a downgrade action if a driver's self-certification for driving categories is still missing 5 years after the effective date of this rule.

Section 384.208. FMCSA adopts its original proposal, with a revision of § 384.208 to include the new terms it implements in this final rule, such as, ''CDLIS driver record.''

Section 384.225. FMCSA proposed to revise paragraph (a) by dividing it into 2 paragraphs and adding paragraph (a)(2) to specify inclusion of the medical certification status information that must be posted by the SDLA. The Agency proposed to revise paragraph (e) to refer to the CDLIS driver record and to clarify in paragraphs (e)(3) and (4) that drivers and motor carriers obtain this information according to State procedures on the CDLIS MVR. The Agency also proposed to add a new paragraph (f) to require States to provide the medical certification status information on the CDLIS, CDLIS MVR and CDL NLETS status and history responses. In the NPRM, the Agency proposed to change the title of the section from ''Record of violations'' to ''CDLIS driver recordkeeping'' to more accurately describe its contents.

The final rule revises paragraph (a)(2) to specify what information must be included in the medical certification status inquiry by the State. The final rule revises paragraph (e) concerning authorized CDLIS users and agents, consistent with the proposal. The Agency modifies paragraph (f) by adding a reference to (a)(2) to show what medical certification status information must appear on the report to authorized users.

Section 384.226. In the final rule, FMCSA removes the phrase ''driver's record'' and replace it with the phrase ''CDLIS driver record.''

Section 384.231. Similar to § 384.107, the Agency proposed to update the reference to the CDLIS State Procedures Manual to be the most recent version incorporated by reference into § 384.107(b). The final rule revises the reference to cite the September 2007 version.

Section 384.234. The Agency proposed to add a new section concerning the requirement for States to maintain copies of drivers' medical certificates. The final rule adopts the proposed language and adds a reference to the provisions specified at § 383.73(a)(5) and (j).

Section 384.301. The final rule adds, as a conforming amendment to the changes in 49 CFR part 383, a new paragraph (d) specifying that the State must comply with requirements of this rule within 3 years of the effective date.

Part 390

Section 390.5. FMCSA proposed to add a new definition for the term ''medical variance'' as an inclusive term for all Federal programs dealing with physical qualification, including exemptions and skill performance evaluation certificates. This definition does not cover waivers issued under subpart B of part 381. This is because waivers are issued for short periods of time and any waivers will be addressed through program documentation and not the driver's licensing systems. FMCSA also proposed to add a new definition for ''motor vehicle record.''

The final rule adopts the proposed definitional revisions and further modifies the definition for the term ''medical variance'' by adding the word ''letter'' after the word ''exemption.'' The definition for the term ''motor

vehicle record'' is changed by adding a reference to the Driver Privacy Protection Act.

Part 391

Section 391.2. In § 391.2, FMCSA proposed to change the section title from ''General exemptions'' to ''General exceptions.'' This change establishes consistency with the term ''exception'' as used in § 390.3(f) and removes confusion with the different meaning of the word ''exemption'' as used in 49 CFR part 381, subpart C, and 49 CFR 391.62. The final rule adopts the proposed language.

Section 391.23(a)(1) and (b). The final rule revises paragraphs (a)(1) and (b) to use the terms ''State driver license agency'' and ''motor vehicle record'' to conform the language to the rule changes noted above.

Section 391.23(m). FMCSA proposed to add a new paragraph (m) that specified employers must meet the § 391.51(b)(7) requirement to place the medical certification in the DQ file as part of the hiring process. It also specified the exception for how the employer must document medical certification for CDL drivers subject to part 391 to comply with the long-existing requirement in § 391.51(b)(7), and that the employer must do this before allowing the driver to operate a CMV.

This paragraph makes it explicit that, in addition to substituting the driver's CDLIS MVR for the medical examiner's certificate, FMCSA will also change the timing of when the motor carrier must obtain and place the MVR in the DQ file as part of the hiring process. All non-CDL drivers will continue to be required to provide an original or copy of the medical examiner's certificate to their employing motor carrier.

The final rule adopts § 391.23(m)(1) as proposed. It modifies (m)(2) to clarify: (a) that the exception only applies to drivers required to have a CDL under part 383; (b) that the medical examiner's certificate receipt from the SDLA can be used by the employing carrier for up to 15 days from the date stamp on the receipt; and (c) that if the CDLIS MVR shows that the driver operates exclusively in excepted commerce, no medical certification documentation is required.

Section 391.25. The final rule adopts changes to: (1) Remove the phrase ''into the driving record'' and add in its place a phrase ''to obtain the motor vehicle record;'' (2) remove the phrase ''driving record'' and add in its place the phrase ''motor vehicle record;'' and (3) remove the phrase ''response from each State agency to the inquiry'' and add in its place the phrase ''motor vehicle record.''

Section 391.41(a). The Agency proposed to amend § 391.41(a) to delete the exception reference to § 391.67, and add an exception that CDL drivers subject to part 391 will be excluded from the requirement to carry the medical examiner's certificate because their current medical certification status information will be on the electronic CDLIS driver record, and can be verified via CDLIS or NLETS inquiries, and via the CDLIS MVR for drivers and employers. All non-CDL drivers will continue to be required to provide an original or copy of the medical examiner's certificate to their employing motor carrier who must place it in the DQ file.

In the final rule, FMCSA divides § 391.41(a)(1) into paragraphs (i) and (ii). The provision for non-CDL drivers to carry the medical examiner's certificate becomes paragraph (a)(1)(i). Paragraph (a)(1)(ii) cross-references the existing requirement on the medical examiner's certificate that drivers with an exemption letter or SPE certificate must also have in their possession the medical exemption letter or the SPE certificate while on duty. Because this rule removes the requirement for non-excepted, interstate CDL drivers to carry the medical examiner's certificate, the final rule adds clarifying language to § 391.41(a)(2)(ii) to conform with the existing requirement for such drivers to continue to be required to carry the medical exemption letter or SPE certificate while on duty. For purposes of enforcement, FMCSA establishes that the ''receipt'' (the date-stamped copy of the medical examiner's certificate) is valid documentation of medical certification as set forth in § 391.43 for 15 days from the date stamped on the receipt. Thus, if the CDLIS driver record has not yet been updated to show the new medical certification, an enforcement officer may accept the receipt as valid proof of certification for up to 15 days from the date stamped on the receipt.

Section 391.43(g). The Agency proposed to amend § 391.43(g) to remove the language that the medical examiner may provide a copy of the medical examiner's certificate to the employing motor carrier, and to add a requirement that the examiner should retain a copy of all certificates for the duration of the certificate.

In the final rule, FMCSA divided § 391.43(g) into two paragraphs. The first paragraph, (g)(1), provides a recommendation that the medical examiner should provide drivers found to be physically qualified with a medical examiner's certificate, and retains the current regulatory language permitting medical examiners to also provide a copy of the certificate to the employing motor carrier.

The second paragraph, (g)(2), retains the Agency's NPRM recommended retention period of 3 years for the medical examiner to keep the certificate, and adds a new recommendation that medical examiners should also retain the Medical Examination Report (Long Form) for at least 3 years from the date of the driver's examination.

Section 391.51. FMCSA proposed to update the requirements for what must be contained in the DQ file regarding medical certification for CDL drivers subject to part 391. For non-excepted, interstate CDL drivers, FMCSA would no longer require them to carry a medical examiner's certificate because the current status of their certification would be electronically available to enforcement personnel. Employers would fulfill the medical certificate documentation requirement by using the driver's CDLIS MVR they are already required to obtain from the SDLA and placing it in the DQ file.

All CDL drivers may continue to provide the employing motor carrier with a medical examiner's certificate until 5 years after the effective date of this rule. After that date, a driver required to be medically certified who does not have current medical certification status information on the CDLIS MVR is not certified as physically qualified under part 391. Section 391.51(b)(7) of the final rule allows employers to use the date-stamped original or copy of the medical examiner's certificate (i.e., the receipt given to the driver) up to 15 days from the date of the receipt as proof of the driver's current medical certification.

E. Summary Cost Benefit Analysis

Costs

The regulatory evaluation describes and evaluates the requirements contained in this final rule. This final rule does not change the physical qualification standards of the FMCSRs or the medical advisory criteria for determining whether a driver may be certified as physically qualified to operate a CMV in interstate commerce. A number of provisions modify the existing CDL procedures used to document the driver's current medical certification status as a condition for him or her obtaining or retaining a CDL. This documentation will also enable motor carriers and enforcement personnel to verify the driver's medical certification status.

Under the final rule, before an SDLA issues, renews, updates, or transfers a CDL for a driver who is not excepted from the part 391 physical qualification requirements, it must verify that the driver is currently medically certified. The SDLA must post the driver's self-certification and specified medical certificate information on the CDLIS driver record. The SDLA must also include the medical certification status information on all reports provided to persons authorized to access information from the CDLIS driver record. This includes those individuals using CDLIS and NLETS to make the inquiries, as well as drivers and employing motor carriers requesting a CDLIS MVR. Implementing this change will enable enforcement personnel to gain electronic access to verify whether non-excepted, interstate CDL drivers possess a medical certification status of ''certified'' during roadside inspections or traffic stops. The SDLA is also required to update the driver's medical certification status to ''not-certified'' if it expires. Finally, the SDLA must downgrade the CDL within 60 days of the expiration of the medical certification.

The changes promulgated in this final rule ensure that all CDL drivers who are not excepted from the Federal physical qualification requirements of part 391 and operate CMVs in interstate commerce will have a medical certification status of ''certified'' prior to the State issuing, renewing, upgrading, or transferring their CDL. It also allows employers to verify the current medical certification status and expiration date for covered CDL drivers they employ.

It is anticipated that States will prefer mail or electronic delivery of certifications from drivers rather than in-person delivery, because these alternatives are expected to be less costly to both States and drivers. However, nothing in this rule precludes each State from developing more advanced ways of dealing with the requirements of this rule. For example, SDLAs could establish an internet portal or other IT solution to accomplish the submission of medical certification forms. Each State is given the flexibility to develop its own method to accept medical certifications that is easiest or least expensive for that State.

The regulatory evaluation for the NPRM described and evaluated three possible alternatives to implement this rule. Alternative 1 would require current medical certification status information to be listed on the driver's license document for any driver holding a CDL who intends to operate a CMV in non-excepted, interstate commerce. Thus, the license document would have to be replaced every time a new medical examiner's certificate was issued.

Alternative 2 the preferred alternative (embodied in this rule), would require States to be responsible for receiving, posting, updating, and providing data from a medical examiner's certificate that is received from an individual before the State issues, renews, updates, or transfers a CDL for a driver who operates in non-excepted, interstate commerce. Under this alternative, the current medical certification status of ''certified'' or ''not-certified'' of the CDL driver would be maintained on the CDLIS driver record, including other information required by this rule, such as, whether a medical variance was issued to the driver.

Alternative 3 is similar to Alternative 2, except that, rather than having drivers submit the certificate to their licensing State, FMCSA would receive the medical examiner's certificate centrally through the mail or via facsimile from drivers. The FMCSA would enter the data and electronically transmit it to the licensing SDLA as a CDLIS transaction.

With regard to commenters reactions to the alternatives considered, none of the commenters favored Alternative 1.

The Illinois Secretary of State and the Michigan Department of State supported Alternative 2. Michigan supports the State's handling of data entry and the Agency's proposal that allows Michigan to retain its 4-year license renewal cycle. Indiana agreed that they could go along with this rule as proposed, but only as the first step toward requiring nationwide implementation of an electronic audit program, similar to one described in Indiana's September 2006 report to FMCSA. A copy of the report is in the docket referenced at the beginning of this notice. However, the Oregon DOT said that Alternative 2's process would result in duplication across 51 locations using 51 different methods that would add to the confusion of CMV operators. It believes that processing all reports at a single point (Alternative 3's option) would be more efficient and that FMCSA could establish an electronic means for MEs to transmit reports and a system to process and verify ME information.

Five States (Ohio Bureau of Motor Vehicles, Virginia DMV, Pennsylvania DOT, Oregon DOT, and New York DMV) supported Alternative 3. Support was largely based on the perception that Alternative 3 would have less impact on the States and result in a more uniform and efficient system.

FMCSA agrees that Alternative 3 would have less impact on the States. Efficiency might be improved by centralizing the collection of the original medical examiner's certificate or hard copy, although the Agency's analysis of processing costs for Alternative 3 indicate that it may be somewhat more costly than having the States process these forms.[8] Assuming the two alternatives were cost-neutral. The costs associated with processing the paper medical certificates would only be transferred from the States to another entity. In general, the States have systems in place to handle and process large volumes of paper for such transactions, and should, therefore, already be realizing substantial economies of scale in processing paper.

In commenting on the NPRM, several States believe the Agency had underestimated their cost of complying with this rule. Motor carriers also note that the rule entails unforeseen costs to industry, which were not dealt with in the Agency's NPRM Regulatory Evaluation. To address State comments, the Agency hired a contractor, with an intimate knowledge of State SDLA processes, to survey a sample of nine States to verify the cost impact of this rule. Results from this survey are presented below in Tables 1 and 2. Table 1 presents the one-time costs associated with development of the medical certification program. Table 2 presents the ongoing costs that States would incur in administering the program. The one-time costs are spread over the States' 3-year implementation phase of the program. Ongoing costs recur on an annual basis.

TABLE 1—ONE-TIME COSTS

	Estimated costs
Operational:	
Enabling Legislation	$326,608
Storage of medical examiner's certificates	3,883,371
Office Space and Equipment	6,607,101
Personnel Acquisition	32,266
Develop Training Materials/Conduct Initial Training	514,338
Information Technology:	
Input and Inquiry Screens	6,146,560
Expanded Database	1,563,932
Expanded Inquiries—CDLIS, NLETS, MVR	5,820,137
Expanded Reports	3,750,755
Expirations and Downgrades	5,517,259
Systems and User Acceptance Testing	1,664,850

[8] See the full regulatory evaluation, pages 21–23, for an explanation of how costs for Alternative 3 were estimated.

TABLE 1—ONE-TIME COSTS—Continued

	Estimated costs
AAMVA Testing	589,821
Total One-Time Costs	36,416,999

TABLE 2—ONGOING COSTS

	All 51 state average
Operational:	
Medical Examiner's Certificates Storage Equipment Maintenance	$1,425,739
Office Space and Equipment Maintenance	350,619
Processing and Entry of Medical Examiner's Certificates	12,901,409
Exception Handling	1,882,922
Training	1,164,836
Letter Preparation and Mailing	3,959,555
Information Technology:	
Data Storage and Computer Processing	1,111,420
Total Ongoing Costs	22,796,502

Motor carriers also identified cost issues which were not considered by the Agency in its original proposal. These costs involve the requirement that motor carriers use the CDLIS MVR to verify driver medical certification status. Motor carriers are required by current regulations to obtain medical examiners' certificates for all non-excepted, interstate drivers in their employ. Motor carriers must place this documentation of driver medical certification in the DQ file and retain it for 3 years from the date of issuance. Motor carriers may currently obtain the medical certifications directly from drivers or medical examiners.

For CDL drivers under part 391, this rule will change how motor carriers must obtain this documentation of medical certification. Now, the motor carrier must obtain the medical certification status from the SDLA on the driver's CDLIS MVR. In the NPRM, the Agency anticipated that this process would not result in an extra cost to carriers because they must already obtain an MVR for each driver they hire and annually thereafter. However, motor carriers point out that the date of expiration for a medical certification would not necessarily correspond with the date of these record checks.

For a CDL driver whose medical certification expiration date does not correspond to the date of the carrier's MVR checks, the annual MVR record check, required by § 391.25, may have to be conducted earlier. In this case, the motor carrier would incur approximately a $6 fee at an earlier point than would otherwise be the case. (The $6 fee represents a weighted national average to obtain this document; see below.) Assuming the driver must obtain either an annual or biennial medical certification, once this earlier record check is completed, the next record check would be required in 1 year.

Driver turnover would be the biggest determining factor of any extra costs to motor carriers. If the driver left the job after the additional earlier record check, but before the first anniversary of hiring the driver, the motor carrier would incur an additional fee that would have otherwise been avoided.

National Average Cost of MVR. FMCSA obtained MVR record charges for each State as of 2005. These were combined with the number of CDL pointers as of August 2007, for each of the 51 licensing jurisdictions in the U.S., to calculate a weighted, national, average State MVR charge. This weighted average is estimated at $6 per MVR. Given the volume of these additional record checks, which are required by this final rule and driver turnover, the new total cost to carriers is estimated at $3 million annually.

Table 3 below presents the revised costs associated with this medical certification program. The 10-year costs of this alternative are $154.4 million when discounted at 7 percent. These costs have also been adjusted for inflation to 2005 dollars. The row indicating industry costs includes both the cost to motor carriers, described above, and the cost to drivers associated with mailing or faxing medical certification forms to SDLAs. The State cost estimates reflect the results of FMCSA's survey mentioned previously in this document.

TABLE 3—TOTAL COST

[Thousands of dollars]

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Years 7–10	Total
State One-Time Costs	$11,411	$11,411	$11,411	$0	$0	$0	$0	$34,233
State Ongoing Costs	0	0	0	21,429	21,429	21,429	85,716	150,003
Industry Costs	0	0	0	2,500	5,000	5,000	20,000	32,500
Total Costs	11,411	11,411	11,411	23,929	26,429	26,429	105,716	216,736
Total Costs (7 percent discount rate)	11,411	10,664	9,967	19,533	20,162	18,843	63,827	154,407
Total Costs (3 percent discount rate)	11,411	11,078	10,756	21,898	23,482	22,798	84,742	186,165

Benefits

Agency research suggests that many medical conditions, if left untreated, can result in driver impairment, and as a result, increase the probability that a driver will be involved in a crash. The purpose of the medical certification requirement is to ensure that drivers who have medical conditions that may impair their ability to operate CMVs safely are prevented from working in the truck driving occupation. According to the Large Truck Crash Causation Study data, heart attack or other physical impairment of the ability to respond was cited as the critical reason for 2.2 percent of trucks involved in crashes where a fatality or serious injury occurred. This corresponds to 4 percent of involved trucks where the truck was at fault, or 3,000 crashes over the 33 month study period. This crash rate corresponds to a total of 1,090 crashes per year where a serious injury or fatality occurred. If this percentage is extrapolated to crashes with less serious injuries or where no injury occurred (property damage only), they produce an estimated 8,138 crashes per year that are due to a medical problem causing the driver to crash.

Medical certifications violations are found in between 7 and 8 percent of driver roadside inspections, making them one of the most commonly cited driver violations. Data from industry indicate that approximately 7 percent of drivers fail the medical examination. This violation is cited in approximately 6 percent of post crash inspections, and evaluation of this post-crash inspection data indicates that drivers with medical certification violations may pose an increased crash risk when compared with drivers not cited with this violation.

In the Regulatory Evaluation that accompanied the NPRM for this rule, the Agency presented one scenario under which these rule changes could result in the prevention of 0.08 percent of crashes. These benefits were expected to stem from a deterrent effect. Because the drivers will be providing their medical examiners' certificates to a State government official, rather than a motor carrier, they may be less likely to engage in forgery. In addition, having electronic access to identification information from the driver's medical examiner's certificate should facilitate any investigations of fraud in the medical certification system or process at both the State and Federal level. The medical certification requirement is more likely to assist in exposing drivers who engage in untruthful statements about their medical certification status. Thus, certain types of fraud might be deterred.

This final rule also provides safety benefits by providing drivers with a greater incentive to renew their medical certifications on time. In the past, there was limited incentive for drivers or motor carriers not to put off renewing medical certifications until well after the old ones had expired. There were only minor penalties for driving with an expired medical certification and it was probable that a driver could escape detection. This violation of the FMCSRs was only detected if the CMV was targeted for a roadside inspection or stopped for the driver's violation of traffic laws and subjected to at least a Level III driver inspection.

Because of the SDLA's automated detection of expired medical certificates, this rule will increase the possibility of a penalty for the driver's failure to renew his or her medical certification on time. As a result, it is expected that fewer drivers will let their medical certifications lapse; and it should result in more timely renewal of medical certifications. Consequently, more drivers who have medical problems will be diagnosed and treated sooner than is the case under current rules.

FMCSA expects that an increased rate of timely renewal by CDL drivers of medical certifications is likely to provide enhanced safety benefits for the entire motor carrier industry. During the 2-year renewal period between medical examinations (and, in some instances, shorter renewal periods), some percentage of drivers will develop medical conditions that make them physically unqualified to drive. For instance, a driver may experience a decline in eyesight, or develop high blood pressure, kidney problems, or heart problems. If these drivers put off obtaining a new medical examination, they would remain an increased safety risk for the public. However, if they are medically examined on schedule, the medical conditions that have developed in the interim can be discovered and treated effectively. Effective treatment of the medical conditions would reduce the potential safety risk the driver poses, and will yield safety benefits to the public in the form of fewer crashes involving physically unqualified drivers operating CMVs on our nation's highways. The Agency acknowledges that the level of the safety benefits that would accrue from the changes in this rulemaking is uncertain.

The average crash involving a truck with a Gross Vehicle Weight Rating (GVWR) of 26,000 pounds or more (the threshold weight rating for a CDL) has been estimated to have a total societal cost of $165,350 (2005 dollars). This cost reflects the average value of damaged property, medical care, injuries, and fatalities, and other costs associated with the ''average'' large truck crash. Preventing a crash thus yields $165,350 in benefits to the economy. Fatal crashes involving trucks with a GVWR of 26,000 pounds or more have been estimated to cost, on average, $7,377,417 per crash.

Given these crash values, we can calculate the number of either the average or fatal crashes that would have to be prevented for this rule to break even. In order for this rule to break even after 10 years, approximately 218 average crashes would need to be prevented in each year beginning in year 4, assuming a discount rate of 7 percent. The prevention of only 5 fatal crashes per year would also yield total net benefits after 10 years. It is estimated that approximately 320,000 crashes involving CDL drivers occur per year, and that 4,800 of these crashes are fatal crashes. The crash reduction benefits required for this rule to be cost beneficial after 10 years correspond to a crash reduction of 0.1 percent of average crashes per year and 0.2 percent of fatal crashes per year.

If the time horizon is extended to 20 years, and assuming a discount rate of 7 percent, the crash benefit break even threshold would be lower—only 191 average crashes or 5 fatal crashes would need to be prevented each year. Extending the time horizon lowers the number of crashes that would need to be prevented in later years because benefits from this final rule would not begin accruing until year 4, whereas costs accrue starting in year 1. A longer time horizon enables a longer time for the later year benefits to make up for the costs incurred in the planning and implementation phases for this rule.

The latest research the Agency has conducted on the safety risk posed by drivers operating in interstate commerce with medical certification violations indicates that these drivers have an elevated risk for a crash when compared with other drivers, and that the size of this relative risk is 1.12. Approximately 7.8 percent of drivers have medical certification violations at any one time. Evaluating costs and benefits assuming this risk ratio, and a reduction in medical certification violations of only 10 percent as a result of this rule, yields a total annual benefit of 288 crashes avoided and annual monetary benefits of $42.6 million. Over 10 years, this rule would have discounted net benefits of approximately $28.7 million. Over 20 years, net benefits would be approximately $90.4 million.

F. Rulemaking Analyses

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FMCSA determined this rulemaking is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures. The final rule is significant because of the level of congressional and public interest in the rule. The final rule has been reviewed by the Office of the Secretary and the Office of Management and Budget (OMB).

This rulemaking requires States to obtain a self-certification from the driver about which of the four (4) categories of driving the driver will engage in: interstate; interstate, but excepted from the certain Federal driver qualification requirements; intrastate; and, intrastate, but excepted from State driver qualification requirements. It further requires States to obtain documentation from all non-excepted, interstate CDL drivers regarding their physical

qualification status and to provide the driver with a date-stamped receipt for that documentation, indicating that the driver is ''certified'' before operating a CMV in interstate commerce. The States are required to enter the driver's self-certification and the medical certificate information onto the CDLIS driver record to be available to Federal and State enforcement agencies via CDLIS or NLETS inquiries and to drivers and employers via the CDLIS MVR.

To implement this final rule, the States will incur development costs. These include the cost to modify each State's information systems to enable it to record the CDL driver's: (1) Self-Certification he or she makes to the SDLA, and (2) information from the driver's medical examiner's certificate. Operational costs to States include: (1) Hiring and maintaining sufficient staff to receive these certificates from all non-excepted, interstate CDL drivers, at least every 2 years (in 31 percent of cases more often), and (2) performing data entry functions to post specified information from the paper medical examiner's certificates. State costs also include a requirement to update the medical certification status to ''not-certified'' if it expires, to notify the driver of a pending downgrade and to downgrade the driver's CDL. There are also State costs to update the programs that provide the following responses: CDLIS, CDLIS equivalent for NLETS, and CDLIS MVR status and history to users authorized in 49 CFR 384.225(e). More details about these requirements are discussed under the section titled, ''Executive Order 13132 (Federalism),'' below.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires Federal agencies to take small businesses' particular concerns into account when developing, writing, publicizing, promulgating, and enforcing regulations. To achieve this goal, the Act requires that agencies explain how they have met these concerns, by including a Regulatory Flexibility Analysis (RFA). An RFA includes the following five elements:

(1) A description of the reasons why action by the Agency is being taken.

The Agency has identified numerous instances in which drivers who are physically unqualified or have failed to be medically examined have obtained CDLs and operated CMVs in interstate commerce in violation of Federal regulations. The Agency believes, and research suggests,[9] that some physically unqualified drivers are significantly more likely to be involved in motor vehicle crashes nationwide. The continued operation of CMVs by physically unqualified drivers, therefore, poses a significant risk to the health and safety of the general public. FMCSA believes that the changes being implemented here would reduce the number of large truck crashes that occur and the losses in property, health, and lives that are associated with them.

(2) A succinct statement of the objectives of, and legal basis for, the final rule.

The objective of the final rule is to require interstate CDL holders subject to the physical qualifications requirements of the FMCSRS to provide a current original or a copy of their medical examiner's certificate to their SDLA, and to require the SDLA to record on the CDLIS driver record the driver's medical certification status. To accomplish this, it is necessary to create the systems infrastructure for States to electronically store and for Federal and State enforcement personnel to retrieve medical certification status information as part of the CDLIS driver record. This will enable the status information to become part of the process of determining whether to issue, renew, upgrade, transfer, or downgrade a CDL privilege. It will also enable roadside and traffic enforcement personnel to easily determine whether to place a driver out-of-service. This brings the CDL process into compliance with both the authorization of Commercial Motor Vehicle Safety Act (CMVSA) of 1986 and the requirements of section 215 of MCSIA, which requires FMCSA to initiate a rulemaking to provide for a Federal medical qualification certificate to be made part of the CDL.

(3) A description of and, where feasible, an estimate of the number of small entities to which the final rule applies.

The latest estimates from the Agency's Motor Carrier Management Information System (MCMIS) database (February 2006) indicate that there are a total of approximately 685,000 interstate motor carriers. However, FMCSA analysts believe the number of truly ''active'' motor carriers (i.e., those currently moving freight or passengers, operating under their own authority, and with required filings on record with FMCSA) is probably less than 500,000. Approximately 356,625 of them are considered small entities and this rule applies to all that use CDL drivers to operate CMVs in interstate commerce.

The changes being implemented here will slightly reduce the paperwork and documentation requirements on employing motor carriers. This rule change enables motor carriers to obtain the driver's self-certification for driving type, medical certification status and CDLIS MVR from the licensing SDLA with one transaction and therefore reduces the current reporting and recordkeeping requirements and burdens for all motor carriers.

However, States charge a fee for an MVR check. Although most motor carriers would not have to conduct an extra record check for the majority of drivers, in some circumstances, FMCSA agrees with them that an extra record check would be necessary. We have calculated a weighted average of State MVR check charges based on State charges as of 2005 and the total number of CDLIS records held by each State. On average, an MVR record check costs a motor carrier $6. We calculate the cost of the additional record checks that would result from this rule to be $3 million per year for the whole industry. Since smaller motor carriers employ approximately 30 percent of drivers, we estimate that 30 percent of these costs would fall on them. This amounts to approximately $930,000 per year spread over the small entities in the industry, for an average of $2.60 per small entity.

(4) A description of the reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements and the type of professional skills necessary for preparation of the report or record.

This rule changes the source from which motor carriers gather medical certification status for CDL drivers operating in commerce. Motor carriers will obtain driver medical certification status information for non-excepted, interstate CDL drivers from the driver's SDLA, as part of the driver's CDLIS MVR that the motor carrier must already collect when hiring a new driver. This rule also reduces recordkeeping requirements for those drivers who must comply with the requirements because they are no longer required to carry a copy of their medical examiner's certificate with them while driving a CMV. However, driver reporting requirements are increasing. Other than excepted drivers, all other interstate CDL drivers who are subject to part 391 will need to deliver a copy of their

[9] See for instance: Ogden, E.J.D., and Moskowitz, H., ''Effects of Alcohol and Other Drugs on Driver Performance.'' *Traffic Injury Prevention*. 5:185–198, 2004.

Terran-Santos, J., M.D., A. Jimenez-Gomez, M.D., J. Cordero-Guevara, M.D., and the Cooperative Group Burgos-Santander, 1999. ''The Association Between Sleep Apnea and the Risk of Traffic Accidents.'' *New England Journal of Medicine*. 340:11. pp. 847–851.

mandated medical certification status documentation to their SDLA each time they receive a new certificate, rather than provide their current employing motor carrier with a copy of the medical certificate.

(5) An identification, to the extent practicable, of all Federal rules that may duplicate, overlap, or conflict with the final rule.

This rule makes medical certification status information a part of the commercial driver's license process. FMCSA is not aware of any other regulations that duplicate, overlap, or conflict with the rule.

The entire Regulatory Flexibility analysis is available in the docket for this rule. FMCSA has determined that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

FMCSA analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FMCSA determined that this rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rulemaking does not involve taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This action was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (64 FR 43255, August 10, 1999). In compliance with Executive Order 13132, FMCSA provides to OMB in a separately identified section of the preamble to the rulemaking a ''Federalism Summary Impact Statement (FSIS).'' The FSIS includes: (1) A description of the extent of FMCSA's prior consultation with State and local government officials; (2) a summary of the nature of their concerns; (3) the Agency's position supporting the need to issue the regulation; and (4) a statement of the extent to which the concerns of State and local government officials have been met. Also, when FMCSA transmits a draft final rule with Federalism implications to OMB for review pursuant to Executive Order 12866, FMCSA includes a certification from the Agency's Federalism official stating that FMCSA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

Nothing in this rule directly preempts any State law or regulation. However, FMCSA believes this action has Federalism implications. For States that choose to participate in the CDL program, this rule imposes new and ongoing CDL program operational costs, beyond the development and implementation phase, for which grant funds are not likely to be available from FMCSA. The totally unfunded costs begin when States are required to be in compliance with this rule's new requirements—3 years after the effective date. The rule also limits State policymaking discretion if the State chooses to issue CDLs in compliance with the rule.

FMCSA has consulted with States and local government officials on these issues for many years, as described below. Thus, the requirements of section 6 of the Executive Order regarding consultation have been met for this rule.

Federalism Summary Impact Statement (FSIS)

Over the years, State officials have been consulted on a variety of possible approaches for addressing the issue of including the medical certification information as part of the issuance and retention of CDLs. An ANPRM on this subject was published July 15, 1994 (59 FR 36338). Comments to the ANPRM are in the docket, as is a summary of the comments prepared by FMCSA. An Advisory Committee was convened for a negotiated rulemaking. No rule resulted from those negotiations, but materials from that Committee are included in the docket which demonstrate the Agency's consultation efforts in this regard.

Alternative models for implementing the 1999 congressional mandate of section 215 of MCSIA were prepared by FMCSA and discussed with AAMVA. AAMVA sought additional feedback from some of its members regarding the models and provided their comments, which are included in the docket. FMCSA funded a grant to the State of Indiana to conduct a feasibility analysis of alternative approaches for meeting the requirement of section 215. Their report from that feasibility analysis is in the docket. FMCSA sent a letter to the States through the National Governors Association advising them that an NPRM would be published. In order to implement the proposed mandate, the States would need to make changes to their CDL process and CDLIS implementations. A copy of that letter is included in the docket for this rulemaking.

In addition to consultation, State and local officials had an opportunity to provide official comments on the NPRM, which was published on November 16, 2006 (71 FR 66723). Because States believed that FMCSA had underestimated the costs of its proposal, they requested FMCSA to conduct a survey of States to collect additional information on what costs the States would incur to implement and operate the capabilities contained in the NPRM. In keeping within OMB guidelines for information collections, FMCSA responded to the States' request by conducting an information collection from a representative sample of nine States to obtain that information. The report from that information collection is in the docket.

Summary of the Nature of State and Local Government Officials' Concerns

States have consistently expressed concern about the level of resources that would be necessary to achieve compliance with whatever alternative would be adopted as a CDL regulation. In their specific comments to the docket, they stated their belief that their ongoing operating costs for the proposed alternative are substantially higher than estimated in the NPRM.

An alternative that FMCSA discussed with the States as part of the negotiated rulemaking would require States to obtain, review, and approve the medical examination report (Long Form) as part of the CDL program. That alternative would more explicitly address whether or not a driver is physically qualified. Most State representatives in the negotiated rulemaking opposed that proposal when it was discussed.

Another alternative, examined in the Regulatory Impact Analysis for this rule, was to make the medical examiner's certificate and the CDL the same document. This alternative would require the driver to obtain a new CDL each time the driver is reexamined by a medical examiner. FMCSA determined that the costs of that approach would be very much higher than the preferred alternative, because the medical examination schedule (maximum duration of 2 years) is dramatically shorter than the current CDL renewal

cycle (on average, approximately 5 years). The approximate 5-year CDL renewal cycle would need to be shortened to require drivers to renew their CDL, on average, much more often than every 5 years.

Currently, 49 CFR 391.45 requires that all drivers not excepted from the requirements of part 391 who operate CMVs in interstate commerce must be medically examined and certified as physically qualified at least once every 2 years. Section 391.45(c) essentially requires an employer to have a driver medically reexamined at any time the employer is concerned that the driver's ability to perform his or her usual duties may be impaired. FMCSA guidance to medical examiners says that drivers should be given less than a 2-year certification if they have medical conditions that need more frequent monitoring. The medical exemptions for vision and diabetes granted by FMCSA under 49 CFR part 381 require annual reexamination and recertification. A report available from the American Trucking Research Institute documents that there is a large turnover in employment among drivers.[10] Each time a driver changes his or her employer, the new employer has the opportunity, as a condition of employment, to require a new medical examination, and a number of larger carriers do so. Because of these reasons, FMCSA estimates that at least 31 percent of the drivers granted a 2-year medical examiner's certificate are required to obtain at least one additional certificate during that 2-year period. This estimate is higher than the 20 percent used in the NPRM, making the number of drivers who must submit medical examiner's certificates to the SDLAs even larger.

During the negotiated rulemaking, the States suggested another alternative. As part of the requirement for each driver to submit documentation of his or her physical qualification status in the form of a medical examiner's certificate to the State, the State would only record specified information from the medical examiner's certificate on the CDLIS driver record, and would make no other changes to the existing licensing processes. This alternative is far less intrusive on existing CDL procedures used by the States than requiring the medical certificate and the CDL license to be combined, and is the one FMCSA will promulgate in this final rule.

This final rule requires the driver to maintain a valid medical certification status on his or her CDLIS driver record. All non-excepted, interstate CDL drivers will accomplish this requirement by providing their SDLA with a current federally required medical examiner's certificate documenting their current medical certification status, before the SDLA can issue, renew, upgrade, or transfer a CDL, and every time the certificate expires.

The SDLA must provide the driver with a date-stamped receipt for the medical examiner's certificate and post the driver's self-certification for driving type and the medical certification status information on the CDLIS driver record within 10 business days of receiving it. If the medical certification expires, the State is required to update the medical certification status to ''not-certified'' within 10 business days of expiration and downgrade the driver's CDL within 60 days. This rule also revises procedures for how employers and enforcement personnel verify a driver's current medical certification status as part of their responsibilities.

States are required to notify the driver of the impending CDL downgrade as part of the process. This notification requirement is an incremental addition to existing driver notification systems operated by all States, but will increase the number of notifications they will send out. However, because interstate CDL drivers are only a small percentage of the total number of motor vehicle drivers that SDLAs serve, the notification requirement imposed by this rule represents a relatively small increase in the volume of driver notifications required of States.

FMCSA Position Supporting Need To Issue This Regulation

This new CDL requirement is congressionally authorized by the CMVSA of 1986, and mandated by section 215 of MCSIA, which requires FMCSA to initiate rulemaking to provide for a Federal medical qualification certificate to be made a part of the commercial driver's license program. This requirement is national in scope, directing regulation of an aspect of safety for all CDL drivers who operate CMVs in non-excepted, interstate commerce. This final rule establishes a requirement for States to: (1) Obtain a medical examiner's certificate from these non-excepted, interstate CDL drivers, (2) give the driver a date stamped receipt, and (3) record specified medical certification status information from the certificate within 10 business days, documenting the driver's certification of physical qualification to drive a CMV in interstate commerce. States are also required to downgrade the CDL if the driver receives a medical certification of ''not-certified'' or fails to update his or her certification in a timely manner.

In developing this final rule, FMCSA intends for States to have the maximum discretion to adjust their administrative processes and determine how they choose to have the driver satisfy the minimum medical certification documentation and CDL regulatory requirements set forth in this rule. Through AAMVA, FMCSA works to develop and oversee the technical details necessary for CDLIS to successfully operate in compliance with the Agency's regulations. There is no preemption of State law.

To allow for development and implementation of the new CDLIS capabilities, FMCSA will begin monitoring State compliance with the new parts 383 and 384 requirements 3 years after the effective date of this rule, as part of the standard State CDL compliance review process. If a State is determined not to have implemented the minimum changes required by this rule, the normal process will apply, as specified in the CDL compliance regulations for notifying the State about potential withholding of Federal-aid highway funds (49 CFR part 384).

Similarly, States participating in MCSAP grants are already required to have intrastate physical qualification programs compatible with those specified in part 391. The ongoing State MCSAP compliance reviews will verify whether the States have implemented intrastate physical qualification programs in compliance with this rule as required by the MCSAP grants. The normal process, specified in the MCSAP compliance regulations for notifying the State about potential withholding of MCSAP funds (49 CFR part 350, subpart B), will apply.

FMCSA estimates the States will incur approximately the following costs to implement, and then operate, the new procedures and CDLIS capabilities required in this rule.

[10] ''Empty Seats and Musical Chairs: Critical Success Factors in Truck Driver Retention'', Chapter III, prepared by the Gallup Organization for the American Trucking Associations (ATA) Foundation, October 1997. A copy of this report is available online at *http://www.atri-online.org/research/safety/images/Musical__Chairs.pdf*

TABLE 4—SUMMARY STATE COSTS

Year	Total national cost	Average cost/ State
Year 1	$11,411,000	$224,000
Year 2	11,411,000	224,000
Year 3	11,411,000	224,000
Continuing Years	21,429,000	420,000

FMCSA anticipates Federal funds will be available to assist only with development and implementation of the mandated merger of the medical certification and CDL processes, i.e., to assist in paying the direct costs incurred by the States and local governments in developing and implementing capabilities to comply with the regulation by the compliance date (3 years after the effective date of this rule). No grant funds are available to assist with ongoing operations.

SAFETEA–LU provides two grant programs to assist the States in the following: (1) Improving the CDL program, and (2) modernizing CDLIS as required by 49 U.S.C. 31309(e)(1)(D). FMCSA will consult with AAMVA and the States to include the CDLIS changes required by this rule as part of the CDLIS modernization specifications. An additional possible source of limited grant funds is the State MCSAP grant funds. (see 49 U.S.C. 31102). Expenses are allowable as part of these grant programs for the implementation of these requirements to reach compliance by the required effective date of the final rule. These are 80 percent Federal grant funds, and 20 percent State matching funds that cannot come from any other FMCSA grant.

State Operating Costs After Implementation

Currently, FMCSA's CDL grant funds may not be used to support day-to-day operating expenses of State licensing agencies. Therefore, CDL grant funds are not authorized for assisting States with the ongoing operating costs they will incur to comply with the requirements set forth in this final rule. Beyond the compliance date, the Agency assumes that States would adjust either their driver fees or their authorized budgets to cover the new additional costs to remain in compliance with these medical certification and CDL requirements. Whether any such CDL State grant funds would be included in the FMCSA reauthorization is unknown.

Statement of Extent to Which FMCSA Has Addressed the Concerns of State and Local Government Officials

The Agency is required to implement regulations to merge the medical certification and CDL issuance and renewal processes in order to meet the requirement of section 215 of MCSIA. FMCSA believes, that within its funding limitations, the alternative selected for implementing the congressional mandate of section 215 of MCSIA responds to the concerns raised by State and local officials prior to and during the Agency's development of this final rule to minimize unfunded impacts on the States. During the rulemaking process, FMCSA provided all affected State and local officials with notice and an opportunity for appropriate participation in the proceedings. Based on the States' requests to revisit the costs of this rule, the Agency initiated a process to gather additional cost information from a group of selected representative States to re-evaluate the economic burdens imposed on them by the requirements. While the revised 10-year costs associated with this medical certification program are estimated at $154.4 million when discounted at 7 percent; FMCSA estimates that this rule will result in the avoidance of 0.09 percent of the crashes involving trucks with a GVWR of greater than 26,000 pounds, or approximately 288 crashes per year, for a total of approximately $42.6 million in annual undiscounted crash avoidance benefits, and a total 10 year benefit of $183 million when discounted at 7 percent. The net benefit over 10 years is estimated at $28.7 million using a 7 percent discount rate.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare analyses of rules that would result in the expenditure by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Department of Transportation guidance requires the use of a revised threshold figure of $136.1 million, which is the value of $100 million in 2008 after adjusting for inflation. FMCSA has determined that the impact of this rulemaking will not be that large in any projected year.

The estimated costs of this final rule are presented in the table below. The estimated costs to States of this rule will not exceed $22 million in any 1 year. This figure is well below the $136.1 million threshold used by the Department in making an unfunded mandate determination.[11] Total 5-year costs are estimated at $ 77 million, so costs average nearly $15.4 million per year. This final rule will not impose a Federal mandate resulting in the net expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $136.1 million or more (adjusted annually for inflation) in any 1 year (2 U.S.C. 1531, *et seq.)*.

TABLE 5—STATE COSTS OF FINAL RULE

[Thousands of dollars]

	Year 1	Year 2	Year 3	Year 4	Year 5	Total
State One-Time Costs	$11,411	$11,411	$11,411	$0	$0	$34,233
State Ongoing Costs	0	0	0	21,429	21,429	42,858
5 Year Total						77,091

[11] Memorandum titled: *Departmental Guidance:* Threshold of Significant Regulatory Actions Under the Unfunded Mandates Reform Act of 1995, From Assistant Secretary for Transportation Policy, April 5, 2004.

Executive Order 12372 (Intergovernmental Review)

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

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), a Federal Agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. FMCSA analyzed this rule and determined that its implementation will increase the currently approved information collection burdens covered by OMB Control No. 2126–0006, titled ''Medical Qualification Requirements,'' and OMB Control No. 2126–0011, titled ''Commercial Driver Licensing and Test Standards.'' Table 6 below captures the current and future paperwork burden hours associated with the two approved Medical and CDL information collections.

TABLE 6—CURRENT AND FUTURE INFORMATION COLLECTION BURDENS

OMB Approvals Number	Annual burden hours currently approved	Future change burden hours	Future annual burden hours
2126–0006	1,541,534	141,167	1,682,701
2126–0011	1,391,456	0*	1,391,456
Totals	2,932,990	141,167	3,074,157

*This future burden hour estimate for the CDL IC covers only years 1–3. Table 7 below covers the burden hour estimates for the CDL IC during years 1–3 and subsequent years.

Below is an explanation of how each of the two information collections shown above will be impacted by this rule.

2126–0006 Medical Qualification Requirement. This rulemaking will increase slightly the information collection burden associated with the medical qualification requirement. The increase noted is attributed to FMCSA's adjustment of its estimate of the total number of medical examinations and the associated burden hours from 1,541,534 to 1,682,701 hours, and the new requirement for motor carriers to maintain a copy of the vision or diabetes exemption in the driver qualification file. Currently, FMCSA manages vision and diabetes exemption programs under its authority provided at 49 U.S.C. 31136(e) and 31315. Drivers who are granted an exemption are required under the terms and conditions of the exemption programs to carry on their person a copy of the exemption when on duty. Motor carriers are also required to maintain a copy of the exemption that may be granted from the physical qualifications standards in the driver's DQ file.

FMCSA notes that the final rule revises the method by which motor carriers maintain a copy of the medical examiner's certificate in the CDL driver's DQ file by substituting use of the CDLIS MVR they already must obtain. Although the final rule increases the time the SDLA must maintain a copy of the CDL driver's medical examiner's certificate from 6 months to three years from the date of issuance, the information collection burden reductions for motor carriers are offset by the information collection burden increases for the SDLAs. The Agency will retain the requirement for a carrier to place a copy of the non-CDL driver's medical certificate in the DQ file so that portion of the information collection burden remains unchanged.

2126–0011, Commercial Driver Licensing and Test Standards. This information collection supports the DOT Strategic Goal of Safety by requiring that CDL drivers of CMVs subject to part 391 are properly licensed according to all applicable Federal requirements. The information being collected ensures that CDL drivers are qualified to hold a CDL and operate CMVs, and that States are administering their CDL programs in compliance with the Federal requirements.

For non-excepted CDL drivers, there is a new requirement that SDLAs must collect documentation and post the current medical certification information on the CDLIS driver record.

A non-excepted, interstate driver applicant, applying for a CDL for the first time, is required to provide an original or a copy of the medical examiner's certificate to the SDLA before it issues the CDL. The SDLA then posts the information from the medical examiner's certificate to the driver's CDLIS driver record for electronic access by authorized State and Federal personnel via CDLIS and NLETS; and for drivers and employing motor carriers via the CDLIS MVR. When the driver renews, updates, or transfers the CDL, the SDLA must verify the driver's self-certification for the type of driving operations he or she intends to conduct. If the driver specified non-excepted, interstate driving, then he or she must obtain a medical certification status of ''certified,'' before the SDLA can honor the driver's requested CDL licensing action.

In addition to providing the documentation of physical qualification status to the SDLA for the initial application for a CDL, whenever a non-excepted, interstate CDL driver renews his or her medical certification (because it is about to expire, or there is a change in the driver's medical condition, or because a new medical examination is requested by his or her employer) the driver must provide an original or copy of the new medical examiner's certificate to the SDLA. It is expected that the driver will mail or perhaps fax the certificate to the SDLA, if this latter option is determined to be a viable alternative by the State. The SDLA must then post the new medical examiner's certificate information to the electronic CDLIS driver record within 10 business days of receipt of the certificate.

If a non-excepted, interstate CDL driver is no longer medically certified, the SDLA will be required to notify the driver that the SDLA is initiating a downgrade proceeding. In this instance, the SDLA must update the driver's medical certification status on the CDLIS driver record within 10 business days from ''certified'' to ''not-certified.'' The SDLA will proceed with established State procedures for downgrading the CDL privilege. The process must be completed and recorded on the CDLIS driver record by the State within 60 days of the driver's medical certification expiration date.

The States must be in compliance with this rule by 3 years after the effective date. Thus, for the first 3 years after the rule takes effect there will be

no required change in the total annual burden hours due to this new medical certification/CDL program change. During these 3 years, the SDLAs will, however, incur a combined one-time estimated cost of $36,416,999 to develop legislation and make systems revisions in order to accommodate the recordkeeping requirements of this new rule. This includes development of capabilities to record information from the medical examiner's certificate onto the CDLIS driver record. It also includes updating all necessary systems to provide medical certification status information as part of the responses to inquiries by all users authorized under 49 CFR 394.225(e).

Starting in the 4th and subsequent years, there is an increase in total annual burden hours due largely to the CDL holders having to provide the State with their driver qualification certification, interstate CDL holders providing their medical examiner certificate to the State and the State recording this information on CDLIS.

The major assumptions used for calculating the information collection annual burden hours include the following: (1) Currently, approximately 10 percent of the 12.8 million (or 1.28 million) CDLIS driver records concern inactive driver records; (2) it will take 3 years for States to pass legislation and make the necessary system revisions before the first medical certificate would be posted to the CDLIS driver record; and (3) there are approximately 8.52 million interstate CDL holders.

The following table 7 summarizes the annual burden hours for current and future information collection activities for the first 3 years and the 4th and subsequent years. The currently-approved total annual burden of 1,391,456 hours for the first 3 years remains unchanged. The increase in the future total annual burden of 211,910 hours in subsequent years is due to the program changes implementing the new requirements as described above. A detailed analysis of the annual burden hour changes for each information collection activity can be found in the Supporting Statement of OMB Control Number 2126–0011.

TABLE 7—CURRENT AND FUTURE INFORMATION COLLECTION BURDENS

Current and future information collection activities for states and CDL drivers	Currently approved annual burden hours	Future annual burden hours for first 3 years (program adjustment)	Future annual burden hours for subsequent years (program change)
State to obtain and record the medical certificate information	0	0	205,333
State recording of medical certification status	0	0	3,984
State to verify the medical certification status of all interstate CDL drivers	0	0	2,593
Driver to notify employer of convictions/disqualifications	640,000	640,000	640,000
Driver to complete previous employment paperwork	403,200	403,200	403,200
States to complete compliance certification documents	1,632	1,632	1,632
State to complete compliance review documents	2,400	2,400	2,400
CDLIS recordkeeping	212,224	212,224	212,224
Drivers to complete the CDL application	48,000	48,000	46,000
CDL Tests Recordkeeping	84,000	84,000	84,000
Total Current Burden	1,391,456	1,391,456	1,603,366

National Environmental Policy Act

The Agency analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1, published March 1, 2004 (69 FR 9680), that this action is covered by a Categorical Exclusion (CE) under Appendix 2, paragraph 6(t) in the Order from further environmental documentation. The CE relates to regulations that ensure States comply with the provisions of the CMVSA of 1986 by having appropriate laws, regulations, programs, policies, procedures, and information systems concerning the qualification and licensing of persons who apply for, and are issued, a commercial driver's license. In addition, the Agency believes that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, FMCSA determines that the action does not require an environmental assessment or an environmental impact statement.

The Agency analyzed this rule under section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. This action is exempt from the CAA's general conformity requirement since it involves rulemaking and policy development and issuance. (Refer to 40 CFR 93.153(c)(2).) It will not result in any emissions increase, nor will it have any potential to result in emissions that are above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonable that the rule will not increase total CMV mileage, change the routing of CMVs, how CMVs operate, or the CMV fleet mix of motor carriers. Interstate drivers who are not operating CMVs in excepted service are currently required to obtain and maintain medical certification as proof they meet the physical qualification standards of 49 CFR part 391. This rulemaking establishes a requirement for States to record documentation of that physical qualification on the CDLIS driver record, which is accessible to FMCSA and State licensing and enforcement agencies through CDLIS, the CDLIS equivalent for NLETS, and to drivers and employers on the CDLIS MVR.

Executive Order 12898 (Environmental Justice)

FMCSA considered the environmental effects of this final rule in accordance with Executive Order 12898 and DOT Order 5610.2 on addressing Environmental Justice for Minority Populations and Low-Income Populations, published April 15, 1997 (62 FR 18377) and determined that there are no environmental justice issues associated with this rule nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on

minority or low-income populations. None of the regulatory alternatives considered in this rulemaking will result in high and adverse environmental impacts.

Executive Order 13211 (Energy Effects)

FMCSA analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency determined that implementation of this rule will not result in a ''significant energy action'' under that executive order because it will not be economically significant and will not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this final rule as required by section 522(a)(5) of division H of the Fiscal Year 2005 Omnibus Appropriations Act, Public Law 108–447, 118 Stat. 3268 (December 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the final rule on the privacy of information in an identifiable form and related matters. FMCSA determined that this initiative will not create any impacts on privacy of information associated with implementation of this rule. The entire privacy impact assessment is available in the docket for this final rule.

List of Subjects

49 CFR Part 383

Administrative practice and procedure, Highway safety, and Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Highway safety, Incorporation by reference, and Motor carriers.

49 CFR Part 390

Motor carriers, Reporting and recordkeeping requirements, Safety.

49 CFR Part 391

Motor carriers, Reporting and recordkeeping requirements, Safety.

■ In consideration of the foregoing, FMCSA amends parts 383, 384, 390 and 391 of title 49, Code of Federal Regulations, as follows:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 1. Revise the authority citation for part 383 to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.,* and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1766, 1767; sec. 1012(b) of Pub. L. 107–56; 115 Stat. 397; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1726; and 49 CFR 1.73.

■ 2. Amend § 383.5 by adding definitions for ''CDL Downgrade'' and ''CDLIS driver record'' in alphabetical order to read as follows:

§ 383.5 Definitions.

* * * * *

CDL downgrade means either:

(1) A State allows the driver to change his or her self-certification to interstate, but operating exclusively in transportation or operation excepted from part 391, as provided in § 390.3(f), 391.2, 391.68 or 398.3 of this chapter;

(2) A State allows the driver to change his or her self-certification to intrastate only, if the driver qualifies under that State's physical qualification requirements for intrastate only;

(3) A State allows the driver to change his or her certification to intrastate, but operating exclusively in transportation or operations excepted from all or part of the State driver qualification requirements, or

(4) A State removes the CDL privilege from the driver license.

CDLIS driver record means the electronic record of the individual CDL driver's status and history stored by the State-of-Record as part of the Commercial Driver's License Information System (CDLIS) established under 49 U.S.C. 31309.

* * * * *

■ 3. Amend § 383.71 by revising paragraph (a) and adding paragraphs (g) and (h) to read as follows:

§ 383.71 Driver application and certification procedures.

(a) *Initial Commercial Driver's License.* Prior to obtaining a CDL, a person must meet the following requirements:

(1)(i) Initial Commercial Driver's License Applications Submitted Prior to January 30, 2012. Any person applying for a CDL prior to January 30, 2012 must meet the requirements set forth in paragraphs (a)(2) through (a)(9) of this section, and make the following applicable certification in paragraph (a)(1)(i)(A) or (B) of this section:

(A) A person who operates or expects to operate in interstate or foreign commerce, or is otherwise subject to 49 CFR part 391, must certify that he/she meets the qualification requirements contained in part 391 of this title; or

(B) A person who operates or expects to operate entirely in intrastate commerce and is not subject to part 391, is subject to State driver qualification requirements and must certify that he/she is not subject to part 391.

(ii) *Initial Commercial Driver's License Applications Submitted On or After* January 30, 2012. Any person applying for a CDL on or after January 30, 2012 must meet the requirements set forth in paragraphs (a)(2) through (a)(9), and (h) of this section, and make one of the following applicable certifications in paragraph (a)(ii)(A) or (B) of this section:

(A) *Non-excepted interstate.* A person must certify that he or she operates or expects to operate in interstate commerce, is both subject to and meets the qualification requirements under 49 CFR part 391, and is required to obtain a medical examiner's certificate by § 391.45 of this chapter;

(B) *Excepted interstate.* A person must certify that he or she operates or expects to operate in interstate commerce, but engages exclusively in transportation or operations excepted under 49 CFR 390.3(f), 391.2, 391.68 or 398.3 from all or parts of the qualification requirements of 49 CFR part 391, and is therefore not required to obtain a medical examiner's certificate by 49 CFR 391.45 of this chapter;

(C) *Non-excepted intrastate.* A person must certify that he or she operates only in intrastate commerce and therefore is subject to State driver qualification requirements; or

(D) *Excepted intrastate.* A person must certify that he or she operates in intrastate commerce, but engages exclusively in transportation or operations excepted from all or parts of the State driver qualification requirements.

* * * * *

(g) *Existing CDL Holder's Self-Certification.* Every person who holds a CDL must provide to the State on or after January 30, 2012, but not later than January 30, 2014 the certification contained in § 383.71(a)(1)(ii).

(h) *Medical Certification Documentation Required by the State.* An applicant or CDL holder who certifies to non-excepted, interstate driving operations according to § 383.71(a)(1)(ii)(A) must comply with applicable requirements in paragraphs (h)(1) through (3) of this section:

(1) *New CDL applicants.* After January 30, 2012, a new CDL applicant who certifies that he or she will operate CMVs in non-excepted, interstate commerce must provide the State with an original or copy (as required by the State) of a medical examiner's certificate prepared by a medical examiner, as defined in § 390.5 of this chapter, and

the State will post a certification status of ''certified'' on the Commercial Driver's License Information System (CDLIS) driver record for the driver;

(2) *Existing CDL holders.* By January 30, 2014, provide the State with an original or copy (as required by the State) of a current medical examiner's certificate prepared by a medical examiner, as defined in 49 CFR 390.5, and the State will post a certification status of ''certified'' on CDLIS driver record for the driver. If the non-excepted, interstate CDL holder fails to provide the State with a current medical examiner's certificate, the State will post a certification status of ''not-certified'' in the CDLIS driver record for the driver, and initiate a CDL downgrade following State procedures in accordance with section 383.73(j)(4); and

(3) *Maintaining the medical certification status of ''certified.''* In order to maintain a medical certification status of ''certified,'' after January 30, 2012, a CDL holder who certifies that he or she will operate CMVs in non-excepted, interstate commerce must provide the State with an original or copy (as required by the State) of each subsequently issued medical examiner's certificate.

■ 5. Amend § 383.73 by:
■ a. Adding paragraph (a)(3)(v);
■ b. Redesignating existing paragraph (a)(5) as (a)(6);
■ c. Adding a new paragraph (a)(5);
■ d. Removing the ''and'' from the end of paragraph (b)(4)(ii);
■ e. Removing the period and adding ''; and'' at the end of paragraph (b)(5);
■ f. Adding paragraph (b)(6);
■ g. Removing ''and'' at the end of paragraph (c)(3);
■ h. Removing the period and adding ''; and'' at the end of paragraph (c)(4);
■ i. Adding paragraph (c)(5);
■ j. Removing ''and'' at the end of paragraph (d)(1);
■ k. Removing the period and adding ''; and'' at the end of paragraph (d)(2); and
■ l. Adding paragraphs (d)(3) and (j).

The additions read as follows:

§ 383.73 State procedures.

(a) * * *

(3) * * *

(v) Beginning January 30, 2012, a check that the medical certification status of a driver that self-certified according to § 383.71(a)(1)(ii)(A) (non-excepted interstate) is ''certified;''

* * * * *

(5) Beginning January 30, 2012, for drivers who certified their type of driving according to § 383.71(a)(1)(ii)(A) (non-excepted interstate) and, if the CDL driver submits a current medical examiner's certificate, provide the driver with a receipt, which is a date-stamped original or copy of the medical examiner's certificate, and post all required information from the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (j) of this section.

* * * * *

(b) * * *

(6)(i) Beginning January 30, 2012, verify from the CDLIS driver record that that the medical certification status of driver is ''certified'' for those who certified according to § 383.71(a)(1)(ii)(A).

(ii) *Exception.* A driver who certified according to § 383.71(a)(1)(ii)(A) that he or she plans to operate in non-excepted interstate commerce may present a current medical examiner's certificate issued prior to January 30, 2012. The medical examiner's certificate provided by the driver must be posted to the CDLIS driver record in accordance with paragraph (j) of this section.

(c) * * *

(5)(i) Beginning January 30, 2012, verify from the CDLIS driver record that the medical certification status is ''certified'' for drivers who self-certified according to § 383.71(a)(1)(ii)(A).

(ii) *Exception.* A driver who certified according to § 383.71(a)(1)(ii)(A) may present a current medical examiner's certificate issued prior to January 30, 2012. The medical examiner's certificate provided by the driver must be posted to the CDLIS driver record in accordance with paragraph (j) of this section.

(d) * * *

(3)(i) Beginning January 30, 2012, verify from the CDLIS driver record that the medical certification status is ''certified'' for drivers who self-certified according to § 383.71(a)(1)(ii)(A).

(ii) *Exception.* A driver who certified according to § 383.71(a)(1)(ii)(A) may present a current medical examiner's certificate issued prior to January 30, 2012. The medical examiner's certificate provided by the driver must be posted to the CDLIS driver record in accordance with paragraph (j) of this section.

* * * * *

(j) *Medical recordkeeping.* (1) Status of *CDL Holder.* Beginning January 30, 2012, for each operator of a commercial motor vehicle required to have a commercial driver's license, the current licensing State must:

(i) Post the driver's self-certification of type of driving under § 383.71(a)(1)(ii),

(ii) Retain the original or a copy of the medical certificate of any driver required to provide documentation of physical qualification for 3 years beyond the date the certificate was issued, and

(iii) Post the information from the medical examiner's certificate within 10 business days to the CDLIS driver record, including:

(A) Medical examiner's name;

(B) Medical examiner's telephone number;

(C) Date of medical examiner's certificate issuance;

(D) Medical examiner's license or certificate number and the State that issued it;

(E) Medical examiner's National Registry identification number (if the National Registry of Medical Examiners, mandated by 49 U.S.C. 31149(d), requires one);

(F) The indicator of medical certification status, i.e., ''certified'' or ''not-certified'';

(G) Expiration date of the medical examiner's certificate;

(H) Existence of any medical variance on the medical certificate, such as an exemption, Skill Performance Evaluation (SPE) certification, or grandfather provisions;

(I) Any restrictions (e.g., corrective lenses, hearing aid, required to have possession of an exemption letter or SPE certificate while on-duty, etc.); and

(J) Date the medical examiner's certificate information was posted to the CDLIS driver record.

(2) *Status update.* Beginning January 30, 2012, the State must, within 10 calendar days of the driver's medical certification status expiring or a medical variance expiring or being rescinded, update the medical certification status of that driver as ''not-certified.''

(3) *Variance update.* Beginning January 30, 2012, within 10 calendar days of receiving information from FMCSA regarding issuance or renewal of a medical variance for a driver, the State must update the CDLIS driver record to include the medical variance information provided by FMCSA.

(4) *Downgrade.* (i) Beginning January 30, 2012, if a driver's medical certification or medical variance expires, or FMCSA notifies the State that a medical variance was removed or rescinded, the State must:

(A) Notify the CDL holder of his or her CDL ''not-certified'' medical certification status and that the CDL privilege will be removed from the driver license unless the driver submits a current medical certificate and/or medical variance, or changes his or her self-certification to driving only in excepted or intrastate commerce (if permitted by the State);

(B) Initiate established State procedures for downgrading the license. The CDL downgrade must be completed and recorded within 60 days of the driver's medical certification status becoming ''not-certified'' to operate a CMV.

(ii) Beginning January 30, 2014, if a driver fails to provide the State with the certification contained in § 383.71(a)(1)(ii), or a current medical examiner's certificate if the driver self-certifies according to 383.71(a)(1)(ii)(A) that he or she is operating in non-excepted interstate commerce as required by § 383.71(h), the State must mark that CDLIS driver record as ''not-certified'' and initiate a CDL downgrade following State procedures in accordance with paragraph (j)(4)(i)(B) of this section.

(5) FMCSA Medical Programs is designated as the keeper of the list of State contacts for receiving medical variance information from FMCSA. Beginning January 30, 2012, States are responsible for insuring their medical variance contact information is always up-to-date with FMCSA's Medical Programs.

■ 6. Revise § 383.95 to read as follows:

§ 383.95 Restrictions.

(a) *Air Brake Restrictions.* (1) If an applicant either fails the air brake component of the knowledge test, or performs the skills test in a vehicle not equipped with air brakes, the State must indicate on the CDL, if issued, that the person is restricted from operating a CMV equipped with air brakes.

(2) For the purposes of the skills test and the restriction, air brakes shall include any braking system operating fully or partially on the air brake principle.

(b) *Medical Variance Restrictions.* If the State is notified according to § 383.73(j)(3) that the driver has been issued a medical variance, the State must indicate the existence of such a medical variance on the CDLIS driver record and the CDL document, if issued, using the restriction code ''V'' indicating there is information about a medical variance on the CDLIS driver record. NOTE: In accordance with the agreement between Canada and the United States (see footnote to § 391.41), drivers with a medical variance restriction code on their commercial driver license are restricted from operating a CMV in the other country.

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 7. Revise the authority citation for 49 CFR part 384 to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1753, 1767; and 49 CFR 1.73.

■ 8. Amend § 384.105(b) by adding in alphabetical order the definition for ''CDLIS motor vehicle record'' to read as follows:

§ 384.105 Definitions.

* * * * *

(b) * * *

CDLIS motor vehicle record (CDLIS MVR) means a report generated from the CDLIS driver record meeting the requirements for access to CDLIS information and provided by States to users authorized in § 384.225(e)(3) and (4), subject to the provisions of the Driver Privacy Protection Act, 18 U.S.C. 2721–2725.

* * * * *

■ 9. Revise § 384.107(b) and (c) to read as follows:

§ 384.107 Matter incorporated by reference.

* * * * *

(b) *Materials incorporated.* The AAMVA, Inc.'s ''Commercial Driver License Information System (CDLIS) State Procedures Manual,'' Version 4.1.0, September 2007 (''CDLIS State Procedures Manual''), IBR approved for §§ 384.225(f) and 384.231(d).

(c) *Addresses.* (1) All of the materials incorporated by reference are available for inspection at:

(i) The Department of Transportation Library, 1200 New Jersey Ave., SE., Washington, DC 20590–0001; telephone is (202) 366–0746. These documents are also available for inspection and copying as provided in 49 CFR part 7.

(ii) 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) Information and copies of all of the materials incorporated by reference may be obtained by writing to: American Association of Motor Vehicle Administrators, Inc., 4301 Wilson Blvd, Suite 400, Arlington, VA 22203; Web site is *http://www.aamva.org.*

■ 10. Amend § 384.206 by:

■ a. Removing the phrase ''driving record'' and adding in its place ''driver record'' wherever it occurs in paragraphs (a)(2)(ii) and (iii); and

■ b. Revising paragraphs (a)(1) and (b) to read follows:

§ 384.206 State record checks.

(a) *Required checks*—(1) *Issuing State's records.* Before issuing, renewing, upgrading, or transferring a CDL to any person, the driver's State of record must, within the period of time specified in § 384.232, check its own records as follows:

(i) The driver record of the person in accordance with § 383.73(a)(3)(i) of this chapter; and

(ii) For a driver who certifies that his or her type of driving is not-excepted, interstate commerce according to § 383.71(a)(1)(ii)(A) of this chapter, the medical certification status information on the person's CDLIS driver record.

* * * * *

(b) *Required action.* Based on the findings of the State record checks prescribed in this section, the State of record must do one of the following as appropriate:

(1) Issue, renew, upgrade or transfer the applicant's CDL;

(2) In the event a State obtains adverse information regarding the applicant, promptly implement the disqualifications, licensing limitations, denials, or penalties that are called for in any applicable sections of this subpart; or

(3) In the event there is no information regarding the driver's self-certification for driving type that is required by § 383.71(a)(1)(ii), or for a driver who is required by § 383.71(h) to be ''certified;'' if the medical certification status of the individual is ''not-certified,'' the State must deny the CDL action requested by the applicant and initiate a downgrade of the CDL, if required by § 383.73(j)(4) of this chapter.

§ 384.208 [Amended]

■ 11. Amend § 384.208(b) by removing the phrase ''driver's record'' and adding in its place the phrase ''CDLIS driver record''.

■ 12. Amend § 384.225 by:

■ a. Revising the heading of the section to read as set forth below;

■ b. Removing the term ''driver history'' wherever it occurs and adding in its place the term ''CDLIS driver record''; and

■ c. Revising paragraphs (a) and (e) and adding a new paragraph (f) to read as follows:

§ 384.225 CDLIS driver recordkeeping.

* * * * *

(a) *CDL holder.* Post and maintain as part of the CDLIS driver record:

(1) All convictions, disqualifications and other licensing actions for

violations of any State or local law relating to motor vehicle traffic control (other than a parking violation) committed in any type of vehicle.

(2) Medical certification status information.

(i) Driver self-certification for the type of driving operations provided in accordance with § 383.71(a)(1)(ii) of this chapter, and

(ii) Information from medical certification recordkeeping in accordance with § 383.73(j) of this chapter.

* * * * *

(e) Only the following users or their authorized agents may receive the designated information:

(1) States—All information on all CDLIS driver records.

(2) Secretary of Transportation—All information on all CDLIS driver records.

(3) Driver—All information on that driver's CDLIS driver record obtained on the CDLIS Motor Vehicle Record from the State according to its procedures.

(4) Motor Carrier or Prospective Motor Carrier—After notification to a driver, all information on that driver's, or prospective driver's, CDLIS driver record obtained on the CDLIS Motor Vehicle Record from the State according to its procedures.

(f) The content of the report provided a user authorized by paragraph (e) of this section from the CDLIS driver record, or from a copy of this record maintained for use by the National Law Enforcement Telecommunications System, must be comparable to the report that would be generated by a CDLIS State-to-State request for a CDLIS driver history, as defined in the ''CDLIS State Procedures Manual'' (incorporated by reference, see § 384.107(b)), and must include the medical certification status information of the driver in paragraph (a)(2) of this section. This does not preclude authorized users from requesting a CDLIS driver status.

§ 384.226 [Amended]

■ 13. Amend § 384.226 by removing the phrase ''driver's record'' and adding in its place the phrase ''CDLIS driver record''.

§ 384.231 [Amended]

■ 14. Amend § 384.231(d) by removing the phrase ''October 1998 edition of the AAMVAnet, Inc.'s 'Commercial Driver License Information System (CDLIS) State Procedures,' Version 2.0 (Incorporated by reference, see § 384.107)'' and adding in its place the phrase ''CDLIS State Procedures Manual (incorporated by reference in § 384.107(b)).''

■ 15. Add new § 384.234 to read as follows:

§ 384.234 Driver medical certification recordkeeping.

The State must meet the medical certification recordkeeping requirements of §§ 383.73(a)(5) and (j) of this chapter.

■ 16. Amend § 384.301 by adding a new paragraph (d) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(d) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of January 30, 2009, as soon as practical, but not later than January 30, 2012.

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 17. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31502, 31504, and sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, 229, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 18. Amend § 390.5 by adding in alphabetical order the definitions for ''medical variance'' and ''motor vehicle record'' as follows:

§ 390.5 Definitions.

* * * * *

Medical variance means a driver has received one of the following from FMCSA that allows the driver to be issued a medical certificate:

(1) An exemption letter permitting operation of a commercial motor vehicle pursuant to part 381, subpart C, of this chapter or § 391.64 of this chapter;

(2) A skill performance evaluation certificate permitting operation of a commercial motor vehicle pursuant to § 391.49 of this chapter.

* * * * *

Motor vehicle record means the report of the driving status and history of a driver generated from the driver record, provided to users, such as, drivers or employers, and subject to the provisions of the Driver Privacy Protection Act, 18 U.S.C. 2721–2725.

* * * * *

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTORS

■ 19. Revise the authority citation for part 391 to read as follows:

Authority: 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1767; and 49 CFR 1.73.

■ 20. Amend § 391.2 by revising the heading of the section to read as follows:

§ 391.2 General exceptions.

■ 21. Amend § 391.23 by:

■ a. Revising paragraphs (a)(1) and (b); and

■ b. Adding paragraph (m) to read as follows:

§ 391.23 Investigation and inquiries.

(a) * * *

(1) An inquiry to each State where the driver held or holds a motor vehicle operator's license or permit during the preceding 3 years to obtain that driver's motor vehicle record.

* * * * *

(b) A copy of the motor vehicle record(s) obtained in response to the inquiry or inquiries to each State required by paragraph (a)(1) of this section must be placed in the driver qualification file within 30 days of the date the driver's employment begins and be retained in compliance with § 391.51. If no motor vehicle record is received from the State or States required to submit this response, the motor carrier must document a good faith effort to obtain such information, and certify that no record exists for that driver in that State or States. The inquiry to the State driver licensing agency or agencies must be made in the form and manner each agency prescribes.

* * * * *

(m)(1) The motor carrier must obtain an original or copy of the medical examiner's certificate issued in accordance with § 391.43, and any medical variance on which the certification is based, and place the records in the driver qualification file, before allowing the driver to operate a CMV.

(2) *Exception.* For drivers required to have a commercial driver's license under part 383 of this chapter:

(i) Beginning January 30, 2012, using the CDLIS motor vehicle record obtained from the current licensing State, the motor carrier must verify and document in the driver qualification file the following information before allowing the driver to operate a CMV:

(A) The type of operation the driver self-certified that he or she will perform in accordance with §§ 383.71(a)(1)(ii) and 383.71(g) of this chapter, or

(B) *Exception.* If the driver has provided the motor carrier with a date-stamped receipt from the State driver licensing agency for the medical examiner's certificate given to the driver in accordance with § 383.73(a)(5) of this chapter, the motor carrier may use that receipt as proof of the driver's medical certification for up to 15 days after the date stamped on the receipt.

(ii) Until January 30, 2014, if a driver operating in non-excepted, interstate commerce has no medical certification status information on the CDLIS MVR obtained from the current State driver licensing agency, the employing motor carrier may accept a medical examiner's certificate issued to that driver prior to January 30, 2012, and place a copy of it in the driver qualification file before allowing the driver to operate a CMV in interstate commerce.

§ 391.25 [Amended]

■ 22. Amend § 391.25 by:

■ a. Removing the phrase ''into the driving record'' and adding in its place the phrase ''to obtain the motor vehicle record'' in paragraph (a);

■ b. Removing the phrase ''driving record'' and adding in its place the phrase ''motor vehicle record'' in paragraph (b) introductory text; and

■ c. Removing the phrase ''response from each State agency to the inquiry'' and adding in its place the phrase ''motor vehicle record'' in paragraph (c)(1).

■ 23. Amend § 391.41 by revising paragraph (a) to read as follows:

§ 391.41 Physical qualifications for drivers.

(a) (1) (i) A person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so, and, except as provided in paragraph (a)(2) of this section, when on-duty has on his or her person the original, or a copy, of a current medical examiner's certificate that he or she is physically qualified to drive a commercial motor vehicle. NOTE: Effective December 29, 1991, the FMCSA Administrator determined that the new Licencia Federal de Conductor issued by the United Mexican States is recognized as proof of medical fitness to drive a CMV. The United States and Canada entered into a Reciprocity Agreement, effective March 30, 1999, recognizing that a Canadian commercial driver's license is proof of medical fitness to drive a CMV. Therefore, Canadian and Mexican CMV drivers are not required to have in their possession a medical examiner's certificate if the driver has been issued, and possesses, a valid commercial driver license issued by the United Mexican States, or a Canadian Province or Territory and whose license and medical status, including any waiver or exemption, can be electronically verified. Drivers from any of the countries who have received a medical authorization that deviates from the mutually accepted compatible medical standards of the resident country are not qualified to drive a CMV in the other countries. For example, Canadian drivers who do not meet the medical fitness provisions of the Canadian National Safety Code for Motor Carriers, but are issued a waiver by one of the Canadian Provinces or Territories, are not qualified to drive a CMV in the United States. In addition, U.S. drivers who received a medical variance from FMCSA are not qualified to drive a CMV in Canada.

(ii) A person who qualifies for the medical examiner's certificate by virtue of having obtained a medical variance from FMCSA, in the form of an exemption letter or a skill performance evaluation certificate, must have on his or her person a copy of the variance documentation when on-duty.

(2) *CDL exception.* (i) Beginning January 30, 2012, a driver required to have a commercial driver's license under part 383 of this chapter, and who submitted a current medical examiner's certificate to the State in accordance with § 383.71(h) of this chapter documenting that he or she meets the physical qualification requirements of this part, no longer needs to carry on his or her person the medical examiner's certificate specified at § 391.43(h), or a copy. If there is no medical certification information on that driver's CDLIS motor vehicle record defined at 49 CFR 384.105, a current medical examiner's certificate issued prior to January 30, 2012, will be accepted until January 30, 2014. After January 30, 2014, a driver may use the date-stamped receipt (given to the driver by the State driver licensing agency) for up to 15 days after the date stamped on that receipt as proof of medical certification.

(ii) A CDL driver required by § 383.71(h) to obtain a medical examiner's certificate who obtained such by virtue of having obtained a medical variance from FMCSA must continue to have in his or her possession the original or copy of that medical variance documentation at all times when on-duty.

(3) A person is physically qualified to drive a commercial motor vehicle if:

(i) That person meets the physical qualification standards in paragraph (b) of this section and has complied with the medical examination requirements in § 391.43; or

(ii) That person obtained from FMCSA a medical variance from the physical qualification standards in paragraph (b) of this section and has complied with the medical examination requirement in § 391.43.

* * * * *

■ 24. Amend § 391.43 by revising paragraph (g) to read as follows:

§ 391.43 Medical examination; certificate of physical qualification.

* * * * *

(g)(1) If the medical examiner finds that the person examined is physically qualified to operate a commercial motor vehicle in accordance with § 391.41(b), the medical examiner should complete a certificate in the form prescribed in paragraph (h) of this section and furnish the original to the person who was examined. The examiner may provide a copy to a prospective or current employing motor carrier who requests it.

(2) For all drivers examined, the medical examiner should retain a copy of the Medical Examination Report at least 3 years from the date of the examination. If the driver was certified as physically qualified, then the medical examiner should also retain the medical certificate as well for at least 3-years from the date the certificate was issued.

* * * * *

■ 25. Amend § 391.51 by:

■ a. Removing the phrase ''response by each State agency concerning a driver's driving record'' and adding in its place the phrase ''motor vehicle record received from each State'' in paragraph (b)(2).

■ b. Removing the phrase ''response of each State agency'' and adding in its place the phrase ''motor vehicle record received from each State driver licensing agency'' in paragraph (b)(4).

■ c. Removing the phrase ''response of each State agency'' and adding in its place the phrase ''motor vehicle record received from each State driver licensing agency'' in paragraph (d)(1); and

■ d. Revising paragraphs (b)(7), (b)(8), (d)(4) and (d)(5) to read as follows:

§ 391.51 General requirements for driver qualification files.

* * * * *

(b) * * *

(7) (i) The medical examiner's certificate as required by § 391.43(g) or a legible copy of the certificate.

(ii) *Exception.* For CDL drivers beginning January 30, 2012, if the CDLIS motor vehicle record contains medical

certification status information, the motor carrier employer must meet this requirement by obtaining the CDLIS motor vehicle record defined at § 384.105 of this chapter. That record must be obtained from the current licensing State and placed in the driver qualification file. After January 30, 2014, a non-excepted, interstate CDL driver without medical certification status information on the CDLIS motor vehicle record is designated ''not-certified'' to operate a CMV in interstate commerce. For up to 15 days from the date stamped on the receipt of the medical examiner's certificate, provided to the driver by the State driver licensing agency, a motor carrier may use that receipt as proof of the driver's medical certification.

(iii) If that driver obtained the medical certification based on having obtained a medical variance from FMCSA, the motor carrier must also include a copy of the medical variance documentation in the driver qualification file in accordance with § 391.51(b)(8); and

(8) A Skill Performance Evaluation Certificate obtained from a Field Administrator, Division Administrator, or State Director issued in accordance with § 391.49; or the Medical Exemption document, issued by a Federal medical program in accordance with part 381 of this chapter.

* * * * *

(d) * * *

(4) The medical examiner's certificate required by § 391.43(g), a legible copy of the certificate, or for CDL drivers any CDLIS MVR obtained as required by § 391.51(b)(7)(ii); and

(5) Any medical variance issued by FMCSA, including a Skill Performance Evaluation Certificate issued in accordance with § 391.49; or the Medical Exemption letter issued by a Federal medical program in accordance with part 381 of this chapter.

Issued on: November 20, 2008.

John H. Hill,

Administrator.

[FR Doc. E8–28173 Filed 11–28–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 390 and 391

[Docket No. FMCSA–2008–0363]

RIN 2126–AA97

National Registry of Certified Medical Examiners

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The FMCSA proposes to establish and maintain a National Registry of Certified Medical Examiners (NRCME) and to require that all medical examiners who conduct medical examinations for interstate commercial motor vehicle drivers complete certain training concerning FMCSA physical qualification standards, pass a test to verify an understanding of those standards, and maintain competence by periodic training and testing. Following establishment of the NRCME and a transition period, FMCSA would accept as valid only medical examiners' certificates issued by medical examiners listed on the NRCME. The FMCSA is developing the NRCME program to improve highway safety and driver health by requiring that medical examiners be trained and certified to determine effectively whether a commercial motor vehicle driver's health meets FMCSA standards. The program implements requirements in 49 U.S.C. 31149 and supports FMCSA's goal to improve safety and reduce fatalities on our Nation's highways.

DATES: Send your comments on or before January 30, 2009.

ADDRESSES: You may submit comments [identified by DOT Docket ID Number FMCSA–2008–0363] by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*, and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit *http://DocketInfo.dot.gov*.

Public participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Linda Phillips, Physical Qualifications Division (MC–PSP), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Telephone (202) 366–4001. E-mail: *linda.phillips@dot.gov.*

SUPPLEMENTARY INFORMATION: This document is organized as follows:

I. Legal Basis for the Rulemaking
II. Background
A. Role of Medical Examiners
B. Prior Developments Related to Medical Examiners
III. General Discussion of the Proposals
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B. Major Elements of the Proposed NRCME Program
C. Medical Examiner Training
D. Medical Examiner Certification Testing
E. Listing on the NRCME
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A. Section 390.5, Definitions
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1. Section 390.101, Scope
2. Section 390.103, Eligibility requirements for medical examiner certification
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5. Section 390.109, Issuance of the FMCSA medical examiner certification credential
6. Section 390.111, Requirements for continued listing on the NRCME
7. Section 390.113, Reasons for removal from the NRCME
8. Section 390.115, Procedure for removal from the NRCME
9. Appendix A to part 390, Medical examiner application data elements
C. Section 391.42, Schedule for use of medical examiners listed on the National Registry of Certified Medical Examiners
D. Section 391.43, Medical examination; certificate of physical examination
V. Regulatory Analyses and Notices

I. Legal Basis for the Rulemaking

The primary legal basis for the National Registry of Certified Medical Examiners (NRCME) program comes from 49 U.S.C. 31149, enacted by section 4116(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59, 119 Stat. 1726 (Aug. 10, 2005) (SAFETEA–LU). Subsection (d) of this section provides that:

> The Secretary, acting through the Federal Motor Carrier Safety Administration—
>
> (1) shall establish and maintain a current national registry of medical examiners who are qualified to perform examinations and issue medical certificates;
>
> (2) shall remove from the registry the name of any medical examiner that fails to meet or maintain the qualifications established by the Secretary for being listed in the registry or otherwise does not meet the requirements of this section or regulation issued under this section;
>
> (3) shall accept as valid only medical certificates issued by persons on the national registry of medical examiners; and
>
> (4) may make participation of medical examiners in the national registry voluntary if such a change will enhance the safety of operators of commercial motor vehicles.

In addition to implementing the provisions in subsection (d), which specifically directs the establishment of a national registry of qualified medical examiners, FMCSA proposes to implement through this rulemaking certain other provisions from new section 31149 related to a national

registry. First, subsection (c) requires FMCSA, with the advice of the Medical Review Board and Chief Medical Examiner (established by subsections (a) and (b), respectively), to develop, as appropriate, specific courses and materials for training required for medical examiners to be listed on a national registry. Medical examiners would be required to undergo initial and periodic training and testing in order to be listed on the national registry. (Section 31149(c)(1)(A)(ii) and (D)). Second, FMCSA would also implement requirements for medical examiners to transmit to FMCSA on a monthly basis certain information about completed Medical Examination Reports of commercial motor vehicle (CMV) drivers. (Section 31149(c)(1)(E)). Third, the proposed rule would require medical examiners to provide to FMCSA copies of Medical Examination Reports and medical examiner's certificates within 48 hours of the request, to enable FMCSA to investigate patterns of errors or improper certification by medical examiners, in accordance with 49 U.S.C. 31149(c)(2). Finally, the proposed rule would establish the procedures and grounds for removal of medical examiners from the national registry, as authorized by section 31149(c)(2) and (d)(2).

SAFETEA–LU also revised the statutory minimum standards for the regulation of CMV safety to ensure that medical examinations of CMV drivers are ''performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by the Department of Transportation * * * is established, are listed on such registry.'' (49 U.S.C. 31136(a)(3), as amended by section 4116(b) of SAFETEA–LU). The statute continues to require FMCSA, in developing its regulations, to consider both the effect of driver health on the safety of CMV operations and the effect of such operations on driver health (49 U.S.C. 31136(a)).

In addition to its general rulemaking authority in 49 U.S.C. 31136(a), FMCSA is specifically authorized by section 31149(e) to ''issue such regulations as may be necessary to carry out this section.'' Authority to establish and implement the NRCME program has been delegated to the Administrator of FMCSA. (Section 1.73(g) of Title 49, Code of Federal Regulations (49 CFR)).

II. Background

A. Role of Medical Examiners

The FMCSA's primary mission is to reduce crashes, injuries, and fatalities involving large trucks and buses. In carrying out its safety mandate, FMCSA develops and enforces regulations that enhance safety in the operation of CMVs. The FMCSA proposes to develop the NRCME program to improve highway safety and driver health by requiring that medical examiners be trained and certified to determine effectively whether an interstate CMV driver meets FMCSA physical qualification standards under 49 CFR part 391. Medical examiners are health care professionals who conduct the medical examinations as specified in subpart E of part 391.

With limited exceptions, all drivers who operate CMVs, as defined in 49 CFR 390.5, in interstate commerce must comply with the qualification requirements of part 391 (§ 391.1). Each driver subject to the physical qualification requirements must be examined and certified by a medical examiner, as defined in § 390.5, at least once every 2 years. For certain drivers, such as those with severe cases of hypertension or other acute medical conditions, more frequent medical reexamination by a medical examiner may be required to determine whether the driver can still be certified.

A medical examiner documents the results of the examination on a Medical Examination Report specified in § 391.43(f) (also referred to as the ''long form''). If the medical examiner determines that a driver is physically qualified in accordance with § 391.41(b), the examiner certifies that the driver meets the physical qualification standards by completing a medical examiner's certificate that complies with § 391.43(g) and (h). This certificate also contains check boxes to indicate whether the driver is subject to any restrictions while operating a CMV, such as wearing corrective lenses or a hearing aid, or whether the driver has been granted a medical variance requiring the certificate to be accompanied by a medical exemption document or a skill performance evaluation (SPE) certificate.

B. Prior Developments Related to Medical Examiners

National Highway Traffic Safety Administration (NHTSA) Study. Interest in certifying medical examiners to evaluate interstate CMV drivers dates back to 1978, when NHTSA commissioned a feasibility study on the issue [Feasibility of Certifying (Designating) Medical Examiners for Interstate Commercial Vehicle Drivers, National Highway Traffic Safety Administration, Final Report—June 1978].[1] This study addressed the primary weakness in the overall medical program for CMV drivers—the lack of understanding by medical examiners of the relationship between the driver's physical condition and the task of operating CMVs.

Amendment of the Definition of ''Medical Examiner.'' In 1992, the Federal Highway Administration (FHWA) (which was responsible for motor carrier safety until the fall of 1999) amended the Federal Motor Carrier Safety Regulations (FMCSRs) to expand the definition of ''medical examiner'' to allow other medical professionals such as physician assistants, advanced practice nurses, and doctors of chiropractic, in addition to medical doctors and doctors of osteopathy authorized previously, to perform medical examinations of CMV drivers (57 FR 33276; July 28, 1992). As a result of this action, the number of potential medical examiners increased. All medical examiners were required to be licensed, registered, or certified by their States to perform physical examinations, and to be proficient in the use of, and to use, medical protocols necessary to perform the examination in accordance with the FMCSRs.

Merger of Medical Certification and Commercial Drivers License (CDL) Processes Negotiated Rulemaking. In 1996–97, FHWA convened a negotiated rulemaking committee to consider merging the medical certification with the CDL function. Several of the proposals submitted included models for a national registry and for certification of medical examiners. (See 61 FR 18713, April 29, 1996, and 61 FR 38133, July 23, 1996.) However, the negotiated rulemaking committee was unable to reach a consensus and no rulemaking relating to a national registry resulted.

Motor Carrier Safety Improvement Act of 1999. When the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106–159, 113 Stat. 1748 (Dec. 9, 1999)), established FMCSA in the Department of Transportation (DOT), the idea of a national registry was again raised. A Senate version of MCSIA directed the Secretary of Transportation to initiate rulemaking to establish a national registry of preferred medical providers. However, the enacted legislation did not retain this language. MCSIA did direct the Secretary to

[1] Because of its age, FMCSA is not relying on this study in developing the proposed rule. However, because it is only available from the National Technical Information Service (NTIS Order No. PB–293 809/0), a copy has been placed in the docket solely for the limited purpose of convenient access by interested parties.

initiate rulemaking for the required medical certification to be made part of the CDL. The FMCSA published an NPRM to accomplish this combination on November 16, 2006 (71 FR 66723). The NPRM comment period closed on February 14, 2007, and a final rule is in development.

National Transportation Safety Board (NTSB) Public Hearing. The idea of a national registry was again discussed during a January 21, 2000, public hearing conducted by the NTSB concerning a 1999 multiple-fatality crash. It was determined that the CMV driver in this incident had several life-threatening and disqualifying medical conditions. The NTSB concluded that medical examiners might not have the knowledge and information necessary to make appropriate decisions about driver fitness. In its ''Highway Accident Report, Motorcoach Run-Off-The-Road Accident, New Orleans, Louisiana, May 9, 1999'' (NTSB/HAR–01/01, PB 2001—916201, Notation 7381, August 28, 2001), the NTSB recommended that FMCSA ''develop a comprehensive medical oversight program for interstate drivers * * * '' that includes requirements to ensure ''individuals performing medical examinations for drivers are qualified to do so and are educated about occupational issues for drivers.'' (Recommendations H–01–017 through H–01–024)

In 2003, NTSB added these recommendations for medical certification of commercial drivers to its ''Most Wanted'' list of Transportation Safety Improvements. In subsequent updates to this list, NTSB provided additional details regarding the recommendations. According to the 2008 NTSB Most Wanted Transportation Safety Improvements brochure, FMCSA should act to prevent medically unqualified drivers from operating commercial vehicles. This task includes: Establishing a comprehensive medical oversight program for interstate commercial drivers; ensuring that examiners are qualified and know what to look for; tracking all medical certificate applications; enhancing oversight and enforcement of invalid certificates; and providing mechanisms for reporting medical conditions.

SAFETEA–LU. Congress included a number of provisions in SAFETEA–LU to improve the quality of the medical certification of CMV drivers. Among those provisions is the establishment of a Medical Review Board and appointment of a Chief Medical Examiner to advise FMCSA on the qualifications and training for medical examiners to be listed on a national registry. When the prescribed provisions are fulfilled, all required medical examinations of CMV drivers would be performed only by trained and qualified medical examiners listed on the national registry, and their performance would be monitored by FMCSA. S. Rep. No. 109–120, at 2, 22 (2005) and H. R. Rep. No. 109–12, at 434 (2005).

Public meetings and listening sessions. During FMCSA's 2005 and 2006 public meetings and listening sessions,[2] a number of medical providers and industry representatives expressed concern about the idea of an NRCME, and about the current quality of the CMV driver medical examinations. Representatives provided anecdotal evidence about drivers qualified by health care providers who were clearly unaware of the medical standards, guidelines, and other information needed to properly determine whether a driver can safely operate a CMV.

Informal State analyses. In August 2005, informal FMCSA staff contacts with the State of California Department of Motor Vehicles (CDMV) revealed that of the 66,000 Medical Examination Reports received by CDMV between January and June of 2005, 10% of the drivers were issued certificates as physically qualified by the medical examiner even though the Medical Examination Report indicated that the driver should not have been qualified or should have received a medical certificate valid for a shorter time period than the certificate the medical examiner granted to the driver. Additionally, information obtained in July 2005 from the State of Indiana's CDL program indicated a general finding of mistakes on 28% of all Medical Examination Reports collected. These findings may be an indicator that some unqualified drivers are inappropriately being determined physically qualified.

III. General Discussion of the Proposals

A. Existing Medical Requirements and the Role of the Proposed NRCME Program

The physical qualification standards and medical examination process currently required under §§ 391.41 and 391.43 apply to drivers who operate CMVs, as defined in § 390.5. In other words, the medical requirements apply to drivers who operate: Trucks with a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, whichever is greater, of 10,001 pounds or more; passenger-carrying vehicles (either nine or more passengers for compensation or 16 or more passengers not for compensation); and vehicles used to transport hazardous materials that require placards on the vehicle.[3] After a transition period to establish the NRCME program, this proposal would require interstate drivers of CMVs who are required by the FMCSRs to receive medical examinations to obtain them from examiners listed on the NRCME. Under current rules, all such CMV drivers are required to obtain medical certification at least once every 2 years, although drivers with certain medical conditions must obtain medical certification more frequently. This requirement is unchanged by the proposed rule.

The Agency estimates that there are 3.1 million interstate CDL holders currently working as CMV drivers, and 1.3 million interstate CMV drivers who are not required to hold a CDL. The proposed rule applies to both categories, and would therefore apply directly to approximately 4.4 million active interstate commercial drivers.

All CMV drivers must be certified at least every 2 years, and as previously mentioned, some drivers are certified more frequently. For example, some carriers contract with occupational health clinics to examine the drivers they employ, and these carriers often insist that newly-hired drivers receive an examination from one of their medical examiners, even if the newly-hired driver already has a current valid medical certification. In addition, the FMCSRs advise medical examiners that drivers with certain medical conditions should receive more frequent monitoring, and drivers who have these conditions may be required to be examined more frequently than every 2 years (for example, 49 CFR 391.43(f) and instructions on high blood pressure and neurological disorders). Finally, drivers whose ability to perform their normal driving duties has been impaired by injury or disease are required by § 391.45 to be reexamined before resuming such duties. The FMCSA estimates that these exceptions to the

[2] Notices published May 18, 2005 (70 FR 28596), and May 18, 2006 (71 FR 28912).

[3] There are several limited exceptions and exemptions from the medical certification requirement provided by §§ 390.3(f), 391.2, 391.62, and 391.68(c). However, future implementation of section 4136 of SAFETEA–LU limits the exception in § 390.3(f)(6)(ii) for drivers of small passenger-carrying vehicles within a 75 air-mile radius of the driver's normal work reporting location. Canadian and Mexican drivers operating in the United States will continue to be governed by the provisions of existing reciprocity agreements with Canada and Mexico, because they are not in conflict with 49 U.S.C. 31136(a)(3) and 31149. See 67 FR 61818, 61819 (October 2, 2002) and 57 FR 31454, 31455 (July 16, 1992).

biennial examination schedule increase the total number of examinations conducted per year by 31 percent over that which would result if all drivers were examined every 2 years. This increase in examinations due to exceptions to the biennial certification requirement is based on limited industry data on driver turnover and medical certifications issued for time periods of less than 2 years. If we assume that half of the 4.4 million drivers described previously in this section would require examination each year, that is, 2.2 million drivers, and increase this number by 31 percent to account for drivers who are examined more frequently than every 2 years, an estimated 3 million examinations would be conducted annually. The FMCSA requests comment on how frequently drivers are examined more often than every 2 years.

Health care professionals in a general practice setting commonly examine 8 to 10 patients per day, and the Agency is aware of medical examiners who currently conduct over 1,000 medical certifications of drivers per year. The FMCSA estimates that 40,000 certified medical examiners would be sufficient to perform the estimated 3 million medical examinations per year. Each of these examiners would conduct an average of 75 examinations per year, which is a feasible volume for examiners in all types of practices.

Drivers are permitted by current regulations to be examined and certified by medical examiners in any State, and FMCSA does not propose to remove this flexibility with the implementation of the NRCME program.

B. Major Elements of the Proposed NRCME Program

In general, under this proposal, FMCSA would develop core curriculum specifications and administrative requirements for medical examiner training and provide these to private-sector training providers for their use. It would also develop a certification test for medical examiners and provide it to private-sector testing organizations. Under this proposal, training and testing would be delivered by these private organizations to medical examiners who meet specified eligibility requirements.

After a qualified applicant completes required medical examiner training and passes an FMCSA certification test, FMCSA would certify the applicant as a medical examiner and list that person on the NRCME. To ensure that medical examiners remain knowledgeable about driver qualification requirements as they are updated, examiners would be required to comply with periodic training and recertification requirements in order to remain listed on the NRCME. When the NRCME program is fully implemented, FMCSA would accept as valid only medical certificates issued to CMV drivers by medical examiners listed on the NRCME.

By implementing the NRCME program, FMCSA believes that it would improve the knowledge and capabilities of certified medical examiners about FMCSA's physical qualifications standards and guidelines for operators of CMVs. Medical examiners would also be more aware of the demands that operating a CMV can make on drivers and the impact such demands can have on their health. A CMV operator who does not meet the physical qualifications standards can have a direct impact on the safety of CMV operations. In addition, the demands of such operations may impact the health of CMV drivers. Based on its own knowledge and experience, FMCSA believes that the enhancement of the knowledge and capabilities of medical examiners would have a clear and direct positive impact on both safety of CMV operations and driver health. The FMCSA encourages commenters on this proposal to provide additional examples of such impacts, derived from their knowledge and experience.

Information for drivers, employers, and medical examiners about the NRCME program would be available primarily through an NRCME Web site, and a resource center with a toll-free phone number would also be available. On the Web site, drivers and employers could find names and addresses of nearby certified medical examiners listed on the NRCME. The NRCME Web site would also provide program information about training and testing requirements to certified medical examiners and medical examiners who wish to become certified. The NRCME Web site would also disseminate information to practitioners on new medical discoveries, policies, or requirements relevant to the examinations. FMCSA seeks comment on how the NRCME Web site and toll-free phone number could potentially be used to deliver and/or administer medical examiner testing and/or examination certification.

The FMCSA is developing the certification component of the NRCME program using the accreditation standards of the National Commission of Certifying Agencies (NCCA). NCCA is the accreditation body of the National Organization for Competency Assurance (NOCA). NOCA is the oldest and largest accreditation body for the certification industry, and is nationally recognized as the leader in setting quality standards for credentialing organizations, particularly in the healthcare industry. The FMCSA is considering applying for accreditation for the certification component of the NRCME program to demonstrate: Ongoing quality management for certification test development and security; fairness of test administration; appropriate use of test and candidate data; and consistency with private-sector best practices in the certification industry. FMCSA seeks comment on the criteria that should be in place for private organizations to be certified for administration of training and testing. FMCSA also seeks comment on alternative training, testing, and certification methods—taking into consideration applicable Federal requirements, cost-effectiveness, administrative simplification, and meeting performance based standards.

A new certification program (one that has not previously received NCCA accreditation) may apply for accreditation either after 1 year of administration of the certification test or when at least 500 candidates have been assessed with that test instrument, whichever comes first. The primary rationale for this requirement is that compliance with accreditation standards cannot be determined until after the program has demonstrated completion of all critical program activities, including development and implementation of policies and procedures and development, administration and scoring of the certification test. The FMCSA must also consider other programmatic and legal issues prior to making a decision to apply for accreditation. FMCSA seeks comment on this proposal for certification and accreditation, and seeks potential alternatives.

C. Medical Examiner Training

This NPRM would require that all medical examiners complete training conducted by a private-sector training provider accredited by a nationally-recognized medical profession accrediting organization to provide continuing education credits. The FMCSA would develop the core curriculum specifications and administrative requirements with the advice of the Medical Review Board and the Chief Medical Examiner, and provide these to the training providers to develop and deliver training for medical examiners. The FMCSA would initially base the core curriculum specifications on the current regulations and guidelines for conducting CMV driver medical examinations and would periodically review and update the

requirements and core curriculum. A training provider could expand its course content to tailor the training to the needs of its target audience, but the course must include the FMCSA core curriculum specifications. The length of the training would vary among providers depending on whether a training provider expands its course to include additional scope and depth. The FMCSA projects that it would take one day to teach the FMCSA core curriculum specifications. Current private-sector medical examiner training programs are generally one day in length and use the traditional classroom-based model. However, the training delivery method could also vary among providers and include self-paced, on-line training; the traditional classroom model; or a blended format that combines more than one model. FMCSA seeks comment on potential training delivery methods. FMCSA also seeks comment on how FMCSA could offer training directly to medical examiners in a cost-effective manner.

The FMCSA plans to require accreditation of the FMCSA medical examiner training programs because it would maximize consistency and quality assurance for the training and would be consistent with practices already embraced by the medical professions for continuing education. Each of the primary professions that currently perform medical examinations under part 391 (that is, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic) utilizes nationally-recognized organizations that accredit training programs providing continuing education credits to licensed medical professionals. FMCSA seeks comment on the costs of training certification programs, and whether there are any alternatives to ensure consistency and quality. In addition, we seek comment on how certification and accreditation requirements would impact the cost of training for medical examiners. FMCSA also seeks comment on whether existing certified medical training programs would be able to adapt their continuing education programs to meet these needs.

After the initial training, a medical examiner would be required to complete periodic retraining at least every 3 years to refresh his or her knowledge of both the medical standards for CMV drivers and any changes to FMCSA examination standards or guidelines. It is anticipated that FMCSA would provide this periodic retraining at no charge to the examiner, and that the retraining would be Web-based, allowing the medical examiner to verify completion of the training on-line. The proposed rule would also require the medical examiner to repeat once every 12 years, at a cost to be borne by the examiner, the complete initial training program (instead of the periodic retraining). FMCSA seeks comment on the cost to medical examiners, and potential training and re-training alternatives which would be more cost-effective.

D. Medical Examiner Certification Testing

The FMCSA would base the medical examiner certification test on the results of a Role Delineation Study, a rigorous methodology regularly employed in the certification and medical fields when developing a valid, reliable, and fair certification test. The FMCSA conducted an initial Role Delineation Study (the Study) that identified content for the certification test, which is intended to focus on competencies common to FMCSA medical examiners from a variety of professional backgrounds and work settings. It was completed in April 2007. The task list was validated and rated, according to importance of the task, by surveying more than 4,000 medical examiners who currently perform CMV driver medical examinations. The final report on the initial Study, when completed, will be made publicly available. The Study provided an assessment of the knowledge, skills, and abilities necessary for an FMCSA medical examiner to competently perform CMV driver medical examinations in accordance with current FMCSA standards and guidelines. The most important information derived from the Study—identification of critical tasks—is necessary to create specifications for the certification test and forms the basis of a professionally-sound quality management system that would support possible future accreditation for the certification component of the NRCME program. Therefore, a Role Delineation Study will be conducted periodically to capture relevant changes in medical practice, standards, and guidelines that affect the examination of CMV drivers in order to maintain a current and relevant certification test.

After completing the mandatory training, a medical examiner applying to be listed on the NRCME would have to pass the FMCSA medical examiner certification test. In addition to the initial certification test, medical examiners would be required to recertify by passing the medical examiner certification test every 6 years in order to remain listed on the registry.

Before taking the certification test, an applicant would provide the testing organization with information such as the applicant's medical profession, State medical license or certificate number, business address and phone number, and medical examiner training provider. In addition, the applicant would provide several statements, including a statement that the applicant is capable and willing to comply with FMCSA requirements; that upon request he or she would provide copies of documents showing evidence of completion of training, States licenses, etc.; and an affirmation that all of the information provided is true. Proposed Appendix A to part 390 contains a list of the minimum information and statements required of an applicant. The testing organization would review this information to ensure that the applicant provided all of the required information. After an applicant completed the test, the testing organization would forward to FMCSA the results (that is, the test scores and responses) along with the applicant's application package information. The FMCSA would periodically audit a percentage of medical examiners to obtain verification of eligibility (for example, proof of current State medical licensure, registration, or certification to perform physical examinations, and proof of completion of required training).

Under the proposed NRCME program model, an applicant would take a certification test provided by a private-sector professional testing organization that meets all testing criteria proposed in this NPRM, including test delivery and secure data handling criteria. The FMCSA expects that an applicant would have to travel to a testing center to take a proctored, secure certification test. FMCSA seeks comment on alternatives which would allow medical examiners to complete the testing requirements on-line, or in a manner which would meet testing criteria while reducing the cost and time burden on the medical examiner. FMCSA also seeks comment on whether the proposed requirements may deter otherwise qualified medical examiners from performing these types of examinations.

E. Listing on the NRCME

The FMCSA would issue an FMCSA medical examiner certification credential with a unique identification number and list on the NRCME at least the contact information of all medical examiners that meet FMCSA eligibility requirements, successfully complete required training, and pass the FCMSA medical examiner certification test. The certification and listing on the NRCME would expire 6 years after the date of issuance of the certification credential.

The FMCSA would maintain the NRCME on the Web, and drivers and employers of drivers would be able to access, by state or zip code, the names and contact information (from the information provided by the medical examiner under proposed Appendix A to part 390) for medical examiners listed on the NRCME. A communications resource center created to support medical examiners, drivers, and motor carriers—both with and without Internet access—would also be available. The FMCSA requests public comment on what types of medical examiner information should or should not be made available to the public by the NRCME program.

F. Implementation of the NRCME Program

The FMCSA proposes a phased approach to the required use of medical examiners listed on the NRCME. In the first phase, FMCSA proposes to require drivers who work for larger employers to have their medical examinations performed by medical examiners listed on the NRCME, because these drivers are less likely to have problems locating a medical examiner. The second phase would expand the requirement to the remaining drivers not covered in phase one. The additional time allowed for other drivers would allow for growth in the number of medical examiners who have completed the proposed certification process and have been listed on the NRCME. FMCSA seeks comment on ways to ensure that certified medical examiners are accessible to drivers in rural areas and areas where the demand for certification may be low, so that drivers do not have to travel excessive distances to locate a certified medical examiner. FMCSA also seeks comment on additional costs drivers may incur to locate and travel to a certified medical examiner for their periodic examinations.

For purposes of phase one, FMCSA proposes to define large employers as motor carriers that employ 50 or more CMV drivers. The FMCSA proposes that phase one begin 2 years after the effective date of the final rule. Any medical examination conducted for a CMV driver employed by a large employer under this phase must be conducted by a medical examiner listed on the NRCME. The second phase would begin 3 years after the effective date of the final rule, would apply to all CMV drivers, and would expand the requirement for medical examinations to be conducted by medical examiners listed on the NRCME to all CMV drivers regardless of the size of the employer. After the applicable compliance dates for the affected drivers, FMCSA would accept as valid *only* medical certificates issued by medical examiners listed on the NRCME.

G. Changes in Medical Examination Procedures

This NPRM also proposes implementation of the SAFETEA–LU requirement that medical examiners electronically transmit to the FMCSA Chief Medical Examiner on a monthly basis the name of the CMV driver and a numerical identifier for any completed Medical Examination Report required under § 391.43. (49 U.S.C. 31149(c)(1)(E)) Additionally, the proposed rule would require medical examiners to retain for 3 years the Medical Examination Report for each examination performed. It would also require medical examiners to provide copies of the Medical Examination Reports and medical examiner's certificates to FMCSA or to authorized Federal, State and local enforcement agency personnel, within 48 hours of the request, in order to allow for investigation of errors and improper certification of CMV drivers (49 U.S.C. 31149(c)(2)).

These requirements also establish the basis for future implementation of other statutory requirements for monitoring medical examiner performance. For example, although this rulemaking does not propose collection of a representative sample and storage of Medical Examination Reports and medical certificates in a central database (49 U.S.C. 31149(c)(1)(E)), in the future FMCSA could begin reviewing a representative sample of Medical Examination Reports and medical certificates for errors, omissions, or other indications of improper certification.

H. Removal From the NRCME and Appeal Process

This NPRM proposes to define the standards and process by which a medical examiner would be removed from the NRCME and the procedures provided for appealing such action within the Agency. Under 49 U.S.C. 31149(c)(2), if a medical examiner issues a medical examiner's certificate to a driver who fails to meet the applicable standards at the time of the examination or falsely claims to have completed required training in the physical qualification standards and medical certification process, FMCSA may remove the medical examiner from the NRCME. In addition, the statute requires FMCSA to monitor medical examiner performance and investigate patterns of errors or improper certification of CMV drivers by a medical examiner (49 U.S.C. 31149(c)(2)). The FMCSA also may remove from the NRCME any medical examiner who does not meet the qualification standards or otherwise fails to comply with section 31149 or the implementing regulations (49 U.S.C. 31149(d)(2)).

To monitor compliance with these statutory requirements, FMCSA may investigate whether medical examiners are complying with the requirement that they electronically transmit each month the name of the driver, an FMCSA numerical identifier for the driver, and the results of the examination to FMCSA (via an FMCSA-designated Web site, e-mail address, or facsimile number that will be published in the **Federal Register**) for each completed Medical Examination Report (including for individuals who failed to meet FMCSA medical standards).

The proposed rule would also require the medical examiner to provide to an authorized representative of FMCSA or to an authorized State or local enforcement agency representative, a copy of any Medical Examination Report or medical examiner's certificate, within 48 hours of the request, so that enforcement personnel can identify errors, omissions, or other indications of improper certification by medical examiners.

In addition, FMCSA would review changes submitted by medical examiners to their application information. These reviews, along with other mechanisms to be developed, would potentially identify medical examiners for removal from the NRCME.

The following are some examples of grounds for removal from the NRCME: The medical examiner no longer has at least one valid license, registration, or certification to perform physical examinations in any State; failure to comply with training requirements; failure to comply with FMCSA requirements for electronic transmittal of medical examination information to FMCSA; a demonstrated pattern of errors, omissions, or other indications of improper certification; and failure to provide copies of Medical Examination Reports and medical examiner's certificates upon demand. There may also be situations where a medical examiner would be voluntarily removed for personal reasons, such as health, travel, or retirement.

The proposed appeal process provides an opportunity for a medical examiner who has been proposed to be removed to correct an identified deficiency or request administrative review by FMCSA.

IV. Section-by-Section Discussion of the Proposals

A. Section 390.5, Definitions

Section 390.5 currently defines ''medical examiner'' as a person licensed by a State to perform physical examinations and lists examples of types of medical professions authorized to perform examinations of CMV drivers under part 391. Section 4116(c) of SAFETEA–LU adds a statutory definition of ''medical examiner'' to 49 U.S.C. 31132(6) as ''an individual licensed, certified, or registered in accordance with regulations issued by the Federal Motor Carrier Safety Administration as a medical examiner.'' The proposed revision of the definition of medical examiner in § 390.5 in this NPRM provides for the new statutory definition to replace the current regulatory definition once the final rule is completely implemented as provided in proposed § 391.42. The eligibility requirements regarding State medical licensure, registration, or certification would also appear in proposed § 390.103(a), covering eligibility requirements for medical examiner certification.

B. Subpart D of Part 390, National Registry of Certified Medical Examiners

The FMCSA proposes to establish a new subpart D in part 390 that would include the requirements for training and testing of medical examiners for listing on, and removal from, the NRCME, including appeal provisions. The requirements for medical examinations would remain in part 391.

1. Section 390.101, Scope

Proposed § 390.101 states that the new subpart would establish the minimum qualifications for FMCSA certification of medical examiners and for listing medical examiners on the NRCME. It also describes the NRCME program and explains that the registry itself is the component of the program that would provide the public with a national database listing certified medical examiners.

2. Section 390.103, Eligibility requirements for medical examiner certification

Section § 390.103 proposes the eligibility requirements for medical examiner certification. Paragraph (a)(1) incorporates the requirements from current § 390.5 that applicants must be licensed, certified, or registered under the applicable State requirements to perform physical examinations. Paragraphs (a)(2) and (a)(3) state that applicants must also obtain training and pass a certification test, as specified in proposed §§ 390.105 and 390.107, respectively. Proposed paragraph (b) states that to renew the certification, a medical examiner would have to remain licensed, registered, or certified by his or her State and complete additional testing and training as required by proposed § 390.111(a)(5).

3. Section 390.105, Medical examiner training programs

Proposed § 390.105 would require an applicant for medical examiner certification to complete an accredited training program that meets the core curriculum specifications and administrative requirements established by FMCSA for medical examiner training. The training program would have to be accredited by a nationally-recognized medical profession accrediting organization to provide continuing education courses. There is at least one such accrediting organization for each medical specialty.

This section clarifies that it is the sole responsibility of medical examiners to ensure their training meets these requirements. The FMCSA would maintain on the NRCME Web site a list of all training providers that have submitted for FMCSA review their course documentation that includes, but is not limited to, the course syllabus, sample slides, sample handouts, and a sample training module. A training provider included on the NRCME Web site would have to agree to submit documentation for future reviews to ensure continuing compliance with FMCSA requirements. If FMCSA finds that a particular training provider does not meet the core curriculum specifications and administrative requirements, the name of the training provider would be removed from the NRCME Web site. A medical examiner could arrange for training by an organization not included in the Web site, but the medical examiner would need to ensure that the training program meets FMCSA requirements.

4. Section 390.107, Medical examiner certification testing

Section 390.107 contains the proposed requirements for the medical examiner certification test. An applicant would take the certification test from a private-sector professional testing organization. As part of the testing process, the applicant would have to provide information to a private-sector testing organization. Proposed Appendix A to part 390 would list the minimum information that the applicants would be required to provide. The applicant would take the test at a testing center provided by a testing organization that meets FMCSA standards for delivering these tests. The testing organization would supply the applicant's personal application information and test results to FMCSA.

The testing organization would: (1) Submit for FMCSA review its documented policies and procedures to ensure they meet FMCSA criteria; and (2) agree to future FMCSA reviews to ensure continuing compliance. The FMCSA is considering the option of listing on the NRCME Web site testing organizations that meet FMCSA standards. However, the medical examiner would need to ensure that the testing organization he or she chooses to use meets FMCSA requirements.

5. Section 390.109, Issuance of the FMCSA medical examiner certification credential

Proposed § 390.109 states that FMCSA would issue an FMCSA medical examiner certification credential with a unique identification number to each applicant found to be in compliance with the requirements of §§ 390.103–390.107, and would list the medical examiner's name on the NRCME. In accordance with the phased-in schedule proposed in § 391.42, FMCSA proposes to accept as valid only medical certificates issued by medical examiners listed on the NRCME.

In addition, proposed § 390.109 specifies that the certification credential and the listing on the NRCME would expire 6 years after issuance. To maintain a listing on the NRCME and to receive a new credential, the medical examiner would need to comply with the training, testing, and other requirements of proposed § 390.111.

6. Section 390.111, Requirements for continued listing on the NRCME

Proposed § 390.111 explains how a medical examiner retains a listing on the NRCME. Each medical examiner must continue to be licensed, registered, or certified, and be authorized to perform physical examinations in accordance with the applicable State laws and regulations of each State in which the examiner performs examinations. For continued listing on the NRCME, the medical examiner would have to report to FMCSA changes to any information that the examiner previously provided to FMCSA, for example, any information related to any termination, suspension, or withdrawal of the medical examiner's license, registration, or certificate under State law.

The medical examiner must maintain documentation of his/her: (1) State

licensing, registration, or certification; and (2) completion of all training required under this notice. In addition the medical examiner would have to make this documentation available to an authorized representative of FMCSA, or an authorized representative of Federal, State or local government. The medical examiner would have to make the documentation available within 48 hours of a request for investigations and within 10 days of a request for regular audits.

The medical examiner also would have to complete periodic training and testing according to a schedule specified in paragraph (a)(5) of proposed § 390.111:

- Within 3 years of receiving the credential, the medical examiner must complete periodic training. The purpose of this training would be to refresh the medical examiner's knowledge of the medical standards for CMV drivers and to inform the medical examiner of any changes to FMCSA examination standards or guidelines. The FMCSA would monitor the results of the certification tests to identify gaps in knowledge, and analyze enforcement and crash data to identify other areas where additional training may improve the medical certification process.
- Within 6 years of receiving the credential, the medical examiner must complete the periodic training, plus repeat and pass the test taken for initial certification, under § 390.103(a)(3). However, in alternating 6 year periods, instead of taking the periodic training, the medical examiner would need to repeat the training taken for initial certification, under § 390.103(a)(2).

If a medical examiner complies with the proposed training and testing schedule and meets the other maintenance requirements of proposed § 390.111, FMCSA would issue a new medical examiner certification credential. It would be the responsibility of the medical examiner to ensure that he or she receives the new credential before the previous one expires.

7. Section 390.113, Reasons for removal from the NRCME

Section 390.113 proposes the reasons for removal of a medical examiner from the NRCME. The reasons include, but are not limited to, the following: The medical examiner's failure to continue compliance with the basic requirements for inclusion on the NRCME, such as maintaining a current State medical license, certification, or registration, receiving required periodic training, or renewing the FMCSA certification; the medical examiner's failure to comply with the FMCSA operational requirements, such as issuing a certificate to someone not medically qualified, failure to accurately complete the Medical Examination Report or medical examiner's certificate, or failure to regularly transmit the names and other information about the results of examinations conducted; false claims by the medical examiner of completion of any required training; and failure to provide access to examination data upon request.

8. Section 390.115, Procedure for removal from the NRCME

Section 390.115 proposes procedures for removal of a medical examiner from the NRCME, as well as the due process protections afforded to medical examiners subject to proposed involuntary removal. Any involuntary removal action must be undertaken by the FMCSA Director of Medical Programs (a new position to be established by the Agency).

The proposal states that a medical examiner could be removed voluntarily by submitting a request to the FMCSA Director of Medical Programs. Such a request could be submitted either in writing or through a proposed secure information system. The FMCSA is considering developing a secure information system through Web interface in which each medical examiner listed on the NRCME would receive a unique login identification and password upon their acceptance into the NRCME. The unique login ID and password would be used to authenticate each request for voluntary removal from the NRCME. A request for voluntary removal would be effective immediately.

The proposal then describes the process by which FMCSA would initiate and then complete the involuntary removal of a medical examiner from the NRMCE at the Agency's discretion. The FMCSA would issue to the medical examiner a notice of proposed removal, stating: (1) The reasons upon which the proposed removal is based under proposed § 390.113; and (2) any corrective actions necessary, if applicable, for the medical examiner to remain listed on the NRCME, if he/she so chooses. The medical examiner would have an opportunity to submit a response in writing no later than 30 days after the date of issuance of the notice. The medical examiner could submit to the Director of Medical Programs an explanation of any error(s) committed in proposing to remove the medical examiner from the NRCME. The Director of Medical Programs would review the explanation and could withdraw, modify, or affirm the notice of proposed removal. Alternatively, the medical examiner could submit to the Director of Medical Programs a written response indicating that he or she will come into compliance, if possible, and complete the corrective actions identified in the notice of proposed removal.

The medical examiner would have 60 days from either the date of issuance of the notice of proposed removal or the date the notice is affirmed or modified, whichever is later, to comply with the requirements of this subpart and complete the applicable corrective actions specified in the notice, as modified or affirmed. If the medical examiner fails to take these necessary actions, the proposed removal becomes effective. Additionally, if the medical examiner does not submit a written response in the 30-day period following issuance of the original notice of proposed removal, the medical examiner would be removed from the NRCME at the end of that 30-day period.

Although a person may voluntarily request to be removed from the NRCME under proposed § 390.115(a), a person may not request a voluntary removal from the NRCME after receiving a notice of proposed removal from the Director of Medical Programs. This proposed provision is intended to prevent the medical examiner from leaving the NRCME and later attempting reinstatement without meeting conditions for reinstatement and compliance identified in the notice of proposed removal. However, at any time before a notice of proposed removal becomes effective, the medical examiner could resolve the matter by mutual agreement with the Director of Medical Programs.

A person who has been removed from the NRCME could request an administrative review by submitting to the FMCSA Associate Administrator for Policy and Program Development a written request no later than 30 days after the date the removal becomes final. The Associate Administrator may request additional data or a conference to discuss the removal. After completing the review, the Associate Administrator would issue a written decision.

Under proposed § 390.115(e), and as authorized by the Administrative Procedure Act, 5 U.S.C. 558(c), the Director of Medical Programs would reserve the right to remove a medical examiner from the NRCME immediately, either in cases of willfulness or cases in which public health, interest, or safety requires. In these cases, the provisions for the medical examiner to submit a response

and take corrective action would not apply. However, the medical examiner could submit to the Associate Administrator for Policy and Program Development a request for administrative review of the emergency removal. The medical examiner must request such a review no later than 30 days after the date of removal from the NRCME.

Proposed § 390.115(f) describes how a person removed from the NRCME would request reinstatement. Such a request must be submitted no sooner than 30 days after removal from the NRCME. The person must provide documentation demonstrating he or she has taken whatever action(s) is necessary to correct the deficiencies that resulted initially in removal from the NRCME, and demonstrate he or she is in compliance with the eligibility requirements of § 390.103(a). The Director of Medical Programs may specify additional requirements for reinstatement in the notice of proposed removal. In the case of a voluntary removal, the person could be reinstated after providing documentary proof of satisfying the requirements to be listed on the NRCME.

If FMCSA removes a medical examiner from the NRCME, except at the request of the medical examiner, the certification credential issued under proposed § 390.109 would no longer be valid. If a medical examiner requests voluntary removal from the NRCME, the certification credential would remain valid until it expires, but that person would not be permitted to conduct FMCSA medical examinations until that person provided documentation showing proof of satisfying the requirements for continued listing on the NRCME. In either case, the removed person's information would still be publicly available on the NRCME Web site. A record of the removed person's previous certification would remain on the NRCME Web site, with the date of removal, so that enforcement personnel and employers of drivers could verify whether a medical examiner's certificate was issued by a person listed on the NRCME at the time of issuance.

9. Appendix A to part 390, Medical examiner application data elements

Proposed Appendix A shows the information applicants must provide when they arrange with a testing organization to take the FMCSA medical examiner certification test. The professional testing organization would provide this information to FMCSA along with the results of the certification test. When a medical examiner is added to the NRCME, FMCSA would post the person's name, business address, telephone number, and other contact information on the NRCME Web site. The applicant would need to supply a street address for the business location—not a post office box, although a post office box could be used for the mailing address. The Web site would contain a search function allowing drivers to locate certified medical examiners in a particular location. The other information required from applicants by Appendix A would be used to document a medical examiner's eligibility to be listed on the NRCME or to facilitate contact with the applicant by FMCSA.

C. Section 391.42, Schedule for Use of Medical Examiners Listed on the National Registry of Certified Medical Examiners

Under § 391.42, FMCSA proposes a schedule for implementation of the requirement that drivers must be examined only by persons who have been trained, tested, certified, and are listed on the NRCME, as set out in proposed subpart D of part 390. Specifically, beginning on a date 2 years after the effective date of the final rule, each medical examination required under subpart E of part 391 must be conducted by a medical examiner who is listed on the NRCME if the person is employed by a motor carrier that employs 50 or more drivers of CMVs. Subsequently, beginning on a date 3 years after the effective date of the final rule, every medical examination required under subpart E of part 391 must be conducted by a medical examiner who is listed on the NRCME. The FMCSA requests specific comments on the proposed compliance schedule and on the proposed threshold of 50 CMV drivers for the first phase of implementation.

D. Section 391.43, Medical Examination; Certificate of Physical Examination

Current § 391.43 contains the requirements for performing the medical examination, including instructions for the medical examiner, a sample Medical Examination Report form, and a sample medical examiner's certificate form. The NPRM contains several proposed amendments to § 391.43, including an addition to the information required on a medical examiner's certificate.

First, under the proposal, paragraph (a) would be revised to specify that, in accordance with the compliance schedule proposed in § 391.42, the medical examination must be performed by a medical examiner listed on the NRCME under proposed subpart D of part 390 of this chapter.

Second, paragraph (g) would be revised to add the new requirement that once every calendar month the medical examiner must electronically transmit certain information to the FMCSA Medical Program. For each medical examination of an interstate CMV driver performed during the previous month, the required information to be transmitted would be the driver's name, the driver's FMCSA numerical identifier, the date of the examination, the date of expiration of the medical examiner's certificate (the so-called ''medical card''), if issued, and the results of the medical examination. The FMCSA proposes to create a secure electronic transmission process that medical examiners could use to provide the information, such as a secure Web interface, e-mail address, or facsimile number. The medical examiner would be required to transmit this information not only for persons found to be medically qualified, but also for persons found to be medically unqualified or temporarily disqualified. Additionally, paragraph (g)(1) repeats part of the ''Instructions for Performing and Recording Physical Examinations'' in current § 391.43 that requires the medical examiner to date and sign the Medical Examination Report and provide the medical examiner's full name, office address, and telephone number.

Third, under the proposal the Medical Examiner's Certificate included in paragraph (h) would be revised to add a field for the medical examiner to enter the medical examiner's unique National Registry Number. Adding the National Registry Number allows FMCSA to identify medical examinations performed by particular medical examiners and to monitor compliance with these rules. Medical examiners would be allowed to use printed certificates they have on hand until 4 years after the effective date of the final rule.

Finally, paragraph (i) would be added to specify that the medical examiner must retain the original (paper or electronic) completed Medical Examination Report and a copy or electronic version of the medical examiner's certificate for 3 years and make them available, along with related medical documentation, to an authorized representative of the FMCSA or an authorized Federal, State or local enforcement agency representative, within 48 hours of the request. The requirement for retaining the Medical Examination Report already exists under the heading, ''Instructions for

Performing and Recording Physical Examinations'' in § 391.43.

V. Regulatory Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 and the Department of Transportation regulatory policies and procedures. This NPRM includes a summary of the Agency's preliminary regulatory analysis of the costs and benefits of this undertaking. A copy of the complete preliminary analysis is included in the docket referenced at the beginning of this notice. FMCSA seeks comment on the costs and benefits of this proposal as outlined, as well as alternatives to current cost-benefit data collection methods currently used to quantify the costs and benefits. FMCSA is particularly interested in developing a solid estimate of the cost-effectiveness, if not the benefits, of this rule. For example, it would be helpful to know what fraction of crashes involve drivers without a valid medical certificate and which aspects of this rule would be most effective at reducing both of those numbers.

Alternatives

This regulatory evaluation considers three alternatives for implementing this program. One alternative, referred to as the Public-Private Partnership Model or Alternative 1, would involve a partnership between the Agency and various private-sector training and testing organizations that currently exist to provide continuing professional education and credentialing to medical professionals. Under this partnership, the Agency would develop and provide core curriculum specifications and the certification test and protocols, and any interested organization that can meet FMCSA requirements would be eligible to deliver training or testing. Training would be delivered by private-sector professional associations, health care organizations, and other for-profit and non-profit training providers. Testing would be delivered by private-sector professional testing organizations. After completing required training, passing the certification test, and agreeing to comply with FMCSA administrative requirements, a medical examiner would be added to the NRCME, and would be authorized to conduct CMV driver physical examinations. After the NRCME is fully implemented, only physical examinations conducted by medical examiners listed on the NRCME would be recognized by FMCSA and enforcement personnel as proof of driver physical qualification.

Alternative 2 is based on the Federal Aviation Administration's (FAA) Aviation Medical Examiner Program (Government Model). This alternative would require the Agency to establish its own centralized training and testing program. All medical examiners would have to attend this Agency-run program and pass the test in order to be eligible for listing on the NRCME. This program's components are essentially the same as Alternative 1, but all training and testing would be conducted by the Agency rather than private-sector training and testing organizations. This alternative would also require all medical examiners to travel to the FMCSA facility to receive the FMCSA training, which involves greater travel expenses on the part of medical examiners when compared to Alternative 1, which has training programs distributed throughout the country. However, this option would give FMCSA optimal control over the quality and content of training provided to medical examiners.

Alternative 3 would be based on the current Department of Transportation (DOT) Medical Review Officer (MRO) program requirements. The MRO training program grew out of the DOT testing program that monitors use of controlled substances and alcohol. MROs are trained and certified by accredited training programs operated by professional associations in cooperation with DOT. Only licensed Medical Doctors (MD) or Doctors of Osteopathy (DO) are eligible to be MROs. MROs also review test results for other safety sensitive occupations such as airline mechanics, train operators, and ships' pilots.

The existing program specifies that MROs who oversee testing for commercial drivers must attend training and certification programs that satisfy the Department's requirements. Each of these programs maintains its own registry of graduates rather than contributing names to a single Federal database. DOT does not have direct control over the training curriculum or testing protocols for these programs. Thus, the Agency would exert less control over the program under a similar option. In addition, due to the limited number of organizations issuing MRO credentials, these programs are able to charge a higher fee for certification testing than would be the case under a more competitive atmosphere. Long distance travel for the initial training and testing could also be required under this alternative.

Summary of Costs and Benefits

The costs and benefits for all three alternatives are analyzed in this regulatory evaluation. It is anticipated that approximately 40,000 medical examiners would be needed for the NRCME to accommodate the demand for an estimated 3 million medical examinations per year. All alternatives involve an initial training phase in which the 40,000 medical examiners receive training. This phase is expected to last 3 years. Beginning with the third year, the Agency would require all drivers to be examined by medical examiners listed on the NRCME. Under Alternatives 1 and 3, medical examiners would be required to attend training conducted by a private-sector organization. The training and testing costs would be borne by medical examiners. Under Alternative 2, no training or testing fees would be incurred by medical examiners, but the Agency would bear the costs of providing the training and testing services. Long distance travel to the FMCSA training center would be required under Alternative 2. Long distance travel to a designated training program is also anticipated under Alternative 3. Under Alternative 1—the Public-Private Partnership Model—it is anticipated that training programs would be available throughout the country, and that some programs would offer on-line training courses, which would minimize the need for long distance travel.

By screening out physically unqualified drivers, this rule may impact the labor market in the motor carrier industry. Some commercial drivers may have to find alternative occupations because they cannot meet the FMCSA physical qualification standards. These alternatives are likely to pay less than commercial driving, and this loss of income represents the main cost of this impact. Motor carriers would also have to bear the burden of hiring new drivers. Each alternative is expected to have an equivalent impact on the quality of driver medical certification screening, and hence the impacts on the industry are likely to be the same for all alternatives.

The ten year total cost of Alternative 1 is estimated at $587 million, when discounted at a 7 percent rate. Alternative 2 has a total discounted ten year cost of $658 million. Alternative 3 has a total 10 year discounted cost of $617 million. In all alternatives, the lost income to disqualified drivers is the largest portion of cost. The costs of the training/testing, including lost time to medical examiners, is estimated to vary

between $31 million and $44 million (undiscounted) during the initial training phase, depending on the alternative, with Alternative 1 having the lowest cost. The lower cost associated with Alternative 1 is due to its minimization of travel and associated costs, both in expenses and lost time, to medical examiners.

Because all three alternatives are expected to improve the performance of medical examiners by equivalent amounts, total benefits are expected to be equivalent for all programs. These benefits are based on the reduction in CMV crashes that is likely to result from improved medical screening of drivers. It is estimated that physically impaired drivers operating in interstate commerce are responsible for approximately 5,800 of the roughly 420,000 CMV crashes that occur annually. Although it is not anticipated that this program would completely eliminate these crashes, it is expected to prevent a portion of them. Due to data limitations, we are unable to develop a precise estimate of the potential benefits of this rule. If this program were to prevent 25 percent of these crashes annually, it would eliminate approximately 1,451 crashes per year. The estimated annual benefit associated with avoiding these crashes would be $206 million per year. At a 7 percent discount rate, the 10 year net benefits under this assumption would be between $376—$447 million, depending on the alternative chosen.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), FMCSA has considered the effects of this proposed regulatory action on small entities and determined that it is not likely to have a significant impact on a substantial number of small entities, as defined by the U.S. Small Business Administration's Office of Size Standards.

The Small Business Administration (SBA) regulations (13 CFR part 121) require Federal agencies to analyze the impact of proposed and final rules on small entities. The regulations define a ''small entity'' in the motor carrier industry by average annual receipts, which are currently set at $21.5 million per firm.[4] The FMCSA has developed a model that uses data from the Economic Census (U.S. Census Bureau), North American Industrial Classification System (NAICS) Code 484 ''Truck Transportation'' segments, to assist us in determining the number of small trucking entities potentially affected by our proposed rules. Examining all property carriers within NAICS Code 484, roughly 75 percent had annual receipts of less than $21.5 million. Of the 475,500 current active, interstate motor carriers in the Motor Carrier Management Information System (MCMIS), approximately 356,625 are considered small entities, and this proposed rule would affect all of them. In the Regulatory Evaluation we estimated that the improvements in the screening of drivers that would result from the NRCME training program would result in some drivers being screened out of the occupation due to untreatable disqualifying medical conditions. Motor carriers would incur costs to replace these drivers. In the Regulatory Evaluation we estimated these costs as $1,600 per replaced driver.

Although smaller carriers make up the majority of the carrier population by number of firms, these firms only employ 20 percent of the driver population. In the regulatory evaluation, we estimated that approximately 44,000 drivers would be screened out of the CMV driving occupation and would have to be replaced. Since there is no reason to suspect that drivers for smaller firms are any more or less healthy than drivers for larger firms, we assume that 20 percent (8,800) of the drivers that would need to be replaced work for smaller carriers, resulting in a total cost to small businesses in this industry of $14.1 million. Spreading this cost among the carriers that qualify as small businesses results in a per-carrier cost of $39.48.

While these amounts do not represent a significant cost to the industry as a whole, or even the small business portion of it, it should be noted that the impacts are not spread evenly among all small businesses in the industry. Many small businesses in the industry would bear no additional costs from this rule, but a subset that employs drivers who do not meet current physical qualification standards would bear a cost of $1,600 for each driver they would have to replace. This may represent a significant cost to a small motor carrier employing only one or two drivers operating on a slim margin. However, the alternative is to continue allowing drivers who do not meet current FMCSA physical qualification requirements to operate CMVs in commerce, which would compromise public safety. The FMCSA does not see a way to reduce the impacts of this requirement to small businesses in the industry without compromising public safety.

The rule would, at a maximum, affect 8,800 motor carriers that qualify as small businesses. These carriers represent approximately 2.5 percent of small entities in the industry. While the costs to affected motor carriers may be significant, the total number of affected small entities does not appear to be significant when compared to the size of the industry and the number of small entities in the industry. Furthermore, this rule does not impose new physical requirements on drivers, but only enhances detection of drivers who do not meet current physical qualification requirements. These drivers are out of compliance with current requirements, and therefore should not be operating CMVs in commerce. Whether the cost of replacing these drivers should be considered as a cost of this rule is therefore debatable. However, the improvement in enforcement would impact the industry, so we have accounted for it here.

Another group of businesses that may be impacted by this rule change are the offices of health care providers who currently conduct driver medical examinations. Driver examinations would be conducted primarily by nurse practitioners, general internal and family physicians, and physician's assistants. Combining these groups yields a total of 317,000 health care providers who might perform driver physical examinations on a regular basis. In order to qualify as a small business, a physician's office must bring in $9 million or less in revenue annually.[5] The small-business threshold for nurse practitioners and physician assistants is $6.5 million. According to the American Academy of Family Physicians, the average gross revenue of family medical practices is $360,000 per year. However, it should be noted that many physicians and other medical professionals work for larger health care organizations such as HMOs and hospital outpatient care facilities. These larger organizations would have revenues exceeding the threshold for small businesses established by the Small Business Administration. Still, the vast majority of family care practices are likely to qualify as small businesses. Our best estimate is that 90 percent of the firms in this subset of the health care industry are small businesses. We estimate that these private health care practices have an average of 5 health care providers per firm. Given this average, there are likely to be in the neighborhood of 317,000/5 = 63,400

[4] Small Business Administration Table of Size Standards. Available online at: *http://www.sba.gov/services/contractingopportunities/sizestandardstopics/tableofsize/SERV_TABLE_HTML.html.*

[5] Ibid.

firms. Ninety percent of this number is 57,060. This is the number of firms that could potentially be impacted by this rule. We do not anticipate that the effects of this rule on firms in the health care industry would be large enough to be considered significant.

Unfunded Mandates Reform Act of 1995

This rulemaking would not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, *et seq.*), that would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.2 (2005 dollars) million or more in any 1 year.[6]

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

The FMCSA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. We have determined preliminarily that this rulemaking would not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

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

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The FMCSA has preliminarily determined that this rulemaking would have no significant cost or other effect on or for States. States would have policy-making discretion. Nothing in this document would preempt any State law or regulation.

[6] The accompanying Regulatory Evaluation for this NPRM presents costs and benefits in inflation-adjusted 2005 dollars. The $128.2 million figure was derived by inflation adjusting the $100 million cap in the original Act from 1995 to 2005 dollars using the Consumer Price Index.

Executive Order 12372 (Intergovernmental Review)

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

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this proposed rule as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Public Law 108–447, 118 Stat. 2809, 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. § 552a]. The assessment considers any impacts of the proposed rule on the privacy of information in an identifiable form and related matters. The entire privacy impact assessment for this proposal is available for review in the docket.

Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3507(d)), FMCSA has submitted the information requirements associated with this proposal to the Office of Management and Budget for its review.

Title: National Registry of Certified Medical Examiners (NRCME).

Summary: Under SAFETEA–LU, the Secretary of Transportation is required to establish and maintain a current national registry of medical examiners who are qualified to perform examinations and issue medical certificates that verify whether a CMV driver's health meets FMCSA standards. In addition, section 4116(b) of SAFETEA–LU requires that the medical examinations of CMV operators be performed by medical examiners who have received training in physical and medical examination standards, and, after the NRCME is established, are listed on the NRCME. SAFETEA–LU also requires medical examiners to electronically transmit the name of the applicant and FMCSA numerical identifier for any completed Medical Examination Report required under § 391.43 to the Chief Medical Examiner on a monthly basis.

Once the NRCME program is implemented, FMCSA would accept medical examinations performed only by certified medical examiners listed on the NRCME, as required by law. The NRCME program would require medical examiners to complete training developed from standardized curriculum specifications and pass a national certification test. The procedures used to develop and maintain the quality of the program are expected to be in accordance with national accreditation standards for certification programs established by the National Commission of Certifying Agencies (NCCA), the accreditation arm of the National Organization for Competency Assurance (NOCA).

Third-party requirements of this information collection are being considered since State laws are generally in substantial conformity with the Federal regulations for medical qualifications of commercial drivers. Consequently, the estimate of the number of CMV drivers (respondents) covered by this information collection reflects both interstate drivers subject to the Federal Motor Carrier Safety Regulations (FMCSRs) and intrastate drivers subject to compatible State regulations. Although Federal regulations do not require States to comply with the medical requirements in the FMCSRs, most States do mirror the Federal requirements; therefore, we are including intrastate drivers, which is consistent with other FMCSA information collections, to accurately reflect the burden of this information collection.

Close tracking and monitoring of certification activities and medical outcomes are crucial, and the NPRM addresses the information collection aspects of NRCME implementation.

To this end, the NPRM requires medical examiners to submit three types of data:

(1) Medical Examiner Application and Test Results Data: To be listed on the NRCME, medical examiners must first pass a certification test to ensure that they demonstrate an established level of competency. Private-sector testing organizations would collect data from medical examiners as the medical professionals apply to take this certification test. Data elements required of medical examiners at the time of application would include (but not be limited to) professional contact and identifying information such as job title, address, and training and State licenses obtained. This information would be collected each time the medical examiner applies to sit for the certification test, and updated with FMCSA as needed. Test results data would include total test score and responses for each test item. Private-sector testing organizations would regularly transmit medical examiner application and test results data electronically to FMCSA for inclusion in a centralized, confidential database.

(2) CMV Driver Examination Data: Once every calendar month, each

medical examiner listed on the NRCME would be required to transmit to FMCSA (via the Chief Medical Examiner) the following information about each CMV driver examined during the previous month: name, FMCSA numerical identifier, date of examination, an indication of the examination outcome (for example, ''medically qualified''), and date of expiration of the driver's medical certification, if issued. Data would be submitted electronically via a secure FMCSA-designated Web site, e-mail address, or facsimile number. In order to be listed on and to continue participation in the NRCME, medical examiners would need to comply with this requirement on a monthly basis.

(3) Medical Examination Reports and Medical Examiner's Certificates: This NPRM would require medical examiners to provide copies of Medical Examination Reports and medical examiner's certificates to authorized representatives of FMCSA or authorized State or local enforcement agency representatives. These documents contain the driver's social security number, date of birth, driver license number, and health and medical information.

Use of information collected: This proposal would support the information needs of the FMCSA in three different ways:

(1) Medical Examiner Test Application Data: These data would allow for the matching of documentation with verification of identity and testing eligibility (for example, proof of State licensure, registration or certification that allows performance of medical examinations, and completion of training by an accredited training provider. This information would also be utilized to track participant test taking trends as well as provide respondents with test results and follow-up information.

It is important to note that there is currently no mechanism for identifying medical examiners conducting CMV driver medical examinations. The size of this population, as well as characteristics related to their training and location, for example, is not known. This database would therefore serve as the only resource containing this information for all certified medical examiners in the United States.

Ultimately, these data would therefore be used to provide CMV drivers with contact information for those medical professionals who have passed the certification test; that is, this information would provide the content for the actual NRCME listing. In some cases, this medical examiner information would be needed to address removals from the NRCME.

(2) CMV Driver Examination Data: CMV driver examination data are intended to serve a monitoring function. First, these would be the only centralized, consistent national data that would enable FMCSA to link medical examiners to the examinations they have conducted. In addition, this would be the first national database that would, after several years of implementation, contain CMV driver medical examination certification outcomes.

(3) Medical Examination Reports and Medical Examiner's Certificates: Medical Examination Reports and medical examiner's certificates must be available to an authorized representative of FMCSA or an authorized Federal, State or local enforcement agency representative in order to determine whether a medical examiner has issued a medical certificate to a driver who fails to meet the applicable FMCSA medical standards. Failure to properly apply FMCSA medical standards may result in removal from the NRCME. Medical examiner's certificates provide additional documentation to determine proper application of FMCSA medical standards by linking the medical examiner to both the medical examination and the driver medical certification decision, and to ensure the certification decision matches the information in the medical examination and the certificate is completed correctly.

Respondents (including number of): The likely respondents to this proposed information requirement are 40,000 medical examiners from medical professions who are believed to conduct the majority of current CMV driver medical examinations (advanced practice nurses, doctors of chiropractic, doctors of osteopathy, medical doctors and physician assistants) and one or more national private-sector testing organizations that deliver the certification test. We are unable to estimate the number of private-sector organizations that might wish to perform testing.

Frequency: FMCSA estimates each of the respondents would provide medical examiner test application data every 6 years and updated information as needed, and would provide CMV driver examination data a maximum of 12 times per year. It is estimated that an average of approximately 13,333 medical examiners will apply to take the certification test annually for the first 3 years of NRCME implementation. It is estimated that one or more testing organizations will deliver the FMCSA medical examiner certification test to 13,333 medical examiners annually for the first 3 years following implementation of the NRCME program. It is projected that medical examiners would file 4,600,000 medical examiner's certificates per year and that authorized representatives of FMCSA or authorized State or local enforcement agency representatives would request medical examiners to provide copies of the Medical Report Form and the medical examiner's certificate 2,100 times a year.

Annual Burden Estimate: This proposal would result in an annual recordkeeping and reporting burden as follows:

FMCSA estimates that the total annual burden hours for the collection of the medical examiner test application data is 1,111 hours [13,333 applicants × 5 minutes/60 minutes per response = 1,111 hours]. This annual burden includes medical examiner time for submitting the application data to the private-sector testing organizations.

It is estimated that it will take private-sector testing organization personnel 5 minutes per medical examiner to collect and upload to FMCSA application data and test results. FMCSA estimates that the total annual burden hours for private-sector testing organizations to collect medical examiner application data and send medical examiner application and test results data to FMCSA is 1,111 hours [13,333 applicants × 5 minutes/60 minutes per medical examiner = 1,111 hours].

The transmission of CMV driver examination data would require approximately 46,000 hours of medical examiner administrative personnel time on a yearly basis, consisting of 8,000 hours for report filing (40,000 registered medical examiners × 1 minute/60 minutes to file a report × 12 reports per year = 8,000 hours) and 38,000 hours for data entry (4,600,000 reports × 30 seconds/3600 seconds to enter each driver's examination data elements = approximately 38,000 hours). Total hours for report filing and data entry is 8,000 hours + 38,000 hours = 46,000 hours]. It is estimated that it would take medical examiner administrative personnel 30 seconds to file the medical examiner's certificate. This would require approximately 38,000 hours of medical examiner administrative personnel time on a yearly basis [4,600,000 examinations × 30 seconds/3600 seconds per certificate = 38,000 hours].

It is estimated that it will take medical examiner administrative personnel 5 minutes to provide both the Medical Examination Report and the medical examiner's certificate to FMCSA or an

authorized State or local enforcement agency representative upon request, so this would require approximately 175 hours of administrative personnel time on a yearly basis [2,100 requests × 5 minutes/60 minutes per response = 175 hours].

The total estimated annual recordkeeping and time burden for these medical requirement components is approximately 86,397 hours.

The agency is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the Agency, including whether the information would have practical utility;

(2) Evaluate the accuracy of the Agency's estimate of the burden;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirement by January 30, 2009, and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Building, Room 10202, 725 17th Street, NW., Washington, DC 20053, Attention: Desk Officer for the Department of Transportation.

According to the 1995 amendments to the Paperwork Reduction Act (implemented by 5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. The OMB control number for this information collection would be published in the **Federal Register**, after the Office of Management and Budget approves it.

National Environmental Policy Act

The Agency analyzed this proposed rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1, issued March 1, 2004 (69 FR 9680), that this action requires an Environmental Assessment (EA) to determine if a more extensive Environmental Impact Statement (EIS) will be required. The FMCSA prepared an EA and placed it in the docket for this rulemaking. The EA found that there are no significant negative impacts expected from the result of the proposed actions. Although minor congestion and air emission impacts are discussed in the EA, the impacts are minimal and are not expected to alter the Nation's highway congestion or air emissions from roadway or air transportation vehicles. In addition, while not quantified in this analysis, minor benefits to the environment from reducing CMV crashes are expected.

We have also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's General conformity requirement since it involves rulemaking and policy development and issuance.

Executive Order 13211 (Energy Effects)

We have analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use. We have determined preliminarily that it would not be a ''significant energy action'' under that Executive Order because it would not likely have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

In consideration of the foregoing, FMCSA proposes to amend title 49, Code of Federal Regulations, parts 390 and 391, as follows:

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

1. The authority citation for part 390 is revised to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31132, 31133, 31136, 31149, 31502, 31504, and sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

2. Amend § 390.5 by revising the definition of ''medical examiner'' to read as follows:

§ 390.5 Definitions.

* * * * *

Medical examiner means the following:

(1) Except as provided in paragraph (2) of this definition, for medical examinations conducted before [Date 3 years after the effective date of the final rule], a person who is licensed, certified, and/or registered, in accordance with applicable State laws and regulations, to perform physical examinations. The term includes but is not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic.

(2) For medical examinations conducted on and after [Date 2 years after the effective date of the final rule] and for medical examination of persons employed by motor carriers who employ 50 or more CMV drivers, an individual certified by FMCSA and listed on the National Registry of Certified Medical Examiners in accordance with subpart D of this part.

(3) For medical examinations conducted on and after [Date 3 years after the effective date of the final rule], an individual certified by FMCSA and listed on the National Registry of Certified Medical Examiners in accordance with subpart D of this part.

* * * * *

3. Add subpart D, consisting of §§ 390.101 through 390.115, to read as follows:

Subpart D—National Registry of Certified Medical Examiners

390.101 Scope.
390.103 Eligibility requirements for medical examiner certification.
390.105 Medical examiner training programs.
390.107 Medical examiner certification testing.
390.109 Issuance of the FMCSA medical examiner certification credential.
390.111 Requirements for continued listing on the National Registry of Certified Medical Examiners.
390.113 Reasons for removal from the National Registry of Certified Medical Examiners.
390.115 Procedure for removal from the National Registry of Certified Medical Examiners.

Subpart D—National Registry of Certified Medical Examiners

§ 390.101 Scope.

The rules in this subpart establish the minimum qualifications for FMCSA certification of a medical examiner and

for listing the examiner on the FMCSA's National Registry of Certified Medical Examiners. The National Registry of Certified Medical Examiners program is designed to improve highway safety and driver health by requiring that medical examiners be trained and certified to determine effectively whether an interstate CMV driver meets FMCSA physical qualification standards under part 391 of this chapter. One component of the National Registry of Certified Medical Examiners program is the registry itself, which is a national database of names and contact information for medical examiners who are authorized by FMCSA to perform CMV driver medical examinations.

§ 390.103 Eligibility requirements for medical examiner certification.

(a) To receive medical examiner certification from FMCSA a person must—

(1) Be licensed, certified, or registered in accordance with applicable State laws and regulations to perform physical examinations. The applicant may be an advanced practice nurse, doctor of chiropractic, doctor of medicine, doctor of osteopathy, physician assistant, or other medical professional authorized by applicable State laws and regulations to perform physical examinations.

(2) Have completed a training program that meets the requirements of § 390.105.

(3) Have passed the FMCSA medical examiner certification test administered by a testing organization that meets the requirements of § 390.107 and that has electronically forwarded to FMCSA the applicant's completed test and application information contained in appendix A of this part.

(b) To renew medical examiner certification a medical examiner must remain qualified under paragraph (a)(1) of this section and complete additional testing and training as required by § 390.111(a)(5).

§ 390.105 Medical examiner training programs.

An applicant for medical examiner certification must complete a training program that:

(a) Is conducted by a training provider that:

(1) Is accredited by a nationally-recognized medical profession accrediting organization to provide continuing education units; and

(2) Meets the following administrative requirements:

(i) Provides training participants with proof of participation.

(ii) Provides FMCSA point of contact information to training participants.

(iii) Complies with section 508 of the Rehabilitation Act (29 U.S.C. 794d).

(b) Meets the core curriculum specifications established by FMCSA for medical examiner training. The curriculum must, at a minimum, include the following topics:

(1) Background, rationale, mission, and goals of the FMCSA medical examiner's role in reducing crashes, injuries, and fatalities involving commercial motor vehicles.

(2) Familiarization with the responsibilities and work environment of commercial motor vehicle operation.

(3) Identification of the driver and obtaining, reviewing, and documenting driver medical history, including prescription and over-the-counter medications.

(4) Performing, reviewing, and documenting the driver's medical examination.

(5) Performing, obtaining, and documenting additional diagnostic tests or medical opinion from a medical specialist or treating physician.

(6) Informing and educating the driver about medications and non-disqualifying medical conditions that require remedial care.

(7) Determining driver certification outcome and period for which certification should be valid.

(8) FMCSA reporting and documentation requirements.

§ 390.107 Medical examiner certification testing.

An applicant for medical examiner certification or recertification must apply, in accordance with the minimum specifications identified in the list of application data elements in appendix A of this part, to a testing organization that meets the following criteria:

(a) The testing organization has documented policies and procedures to:

(1) Use secure protocols to access, process, store, and transmit all test items, test forms, test data, and candidate information and ensure access by authorized personnel only.

(2) Ensure testing environments are reasonably comfortable and have minimal distractions.

(3) Prevent to the greatest extent practicable the opportunity for a test taker to attain a passing score by fraudulent means.

(4) Ensure that test center staff who interact with and proctor examinees or provide technical support have completed formal training, demonstrate competency, and are monitored periodically for quality assurance in testing procedures.

(5) Accommodate testing of individuals with disabilities or impairments to minimize the effect of the disabilities or impairments while maintaining the security of the test and data.

(b) The testing organization has submitted its documented policies and procedures as defined in paragraph (a) of this section to FMCSA; and agreed to future reviews by FMCSA to ensure compliance with the criteria listed in this section.

§ 390.109 Issuance of the FMCSA medical examiner certification credential.

Upon compliance with the requirements of §§ 390.103–390.107, FMCSA will issue to a medical examiner an FMCSA medical examiner certification credential with a unique National Registry Number and will add the medical examiner's name to the National Registry of Certified Medical Examiners. The certification and the listing on the National Registry of Certified Medical Examiners will expire 6 years after the date of issuance of the certification credential.

§ 390.111 Requirements for continued listing on the National Registry of Certified Medical Examiners.

(a) To continue to be listed on the National Registry of Certified Medical Examiners, each medical examiner must:

(1) Continue to meet the requirements of this subpart and the applicable requirements of part 391 of this chapter.

(2) Report to FMCSA any changes in the information submitted under § 390.107 within 30 days of the change.

(3) Continue to be licensed, certified, or registered, and authorized to perform physical examinations, in accordance with the applicable laws and regulations of each State in which the medical examiner performs examinations.

(4) Maintain documentation of State licensing, registration, or certification to perform physical examinations for each State in which the examiner performs examinations and completion of all training required by this section and § 390.105, and make this documentation available to an authorized representative of the FMCSA or an authorized representative of Federal, State or local government. The medical examiner must provide this documentation within 48 hours of the request for investigations and within 10 days of request for regular audits of eligibility.

(5) Maintain medical examiner certification by completing training and testing according to the following schedule:

(i) No sooner than 2 years and no later than 3 years after the date of issuance of the medical examiner certification

credential, complete periodic training as specified by FMCSA.

(ii) No sooner than 5 years and no later than 6 years after the date of issuance of the medical examiner certification credential:

(A) Complete periodic training as specified by FMCSA, except, in alternating 6 year periods, complete the training required by § 390.103(a)(2); and

(B) Pass the test required by § 390.103(a)(3).

(b) FMCSA will issue a new medical examiner certification credential to a medical examiner who complies with paragraphs (a)(1) through (4) of this section and who successfully completes the training and testing as required by paragraphs (a)(5)(i) and (ii) of this section.

§ 390.113 Reasons for removal from the National Registry of Certified Medical Examiners.

The FMCSA may remove a medical examiner from the National Registry of Certified Medical Examiners. The reasons for removal may include, but are not limited to:

(a) The medical examiner fails to comply with the requirements for continued listing on the National Registry of Certified Medical Examiners, as described in § 390.111.

(b) The FMCSA finds the medical examiner has made errors or omissions, or finds other indications of improper certification in completed Medical Examination Reports or medical examiner's certificates.

(c) The FMCSA determines the medical examiner issued a medical examiner's certificate to an operator of a commercial motor vehicle who failed to meet the applicable standards at the time of the examination.

(d) The medical examiner fails to comply with the examination requirements in § 391.43 of this chapter.

(e) The medical examiner falsely claims to have completed training in physical and medical examination standards as required by this subpart.

§ 390.115 Procedure for removal from the National Registry of Certified Medical Examiners.

(a) *Voluntary removal.* To be voluntarily removed from the National Registry of Certified Medical Examiners, a medical examiner must submit a request to the FMCSA Director of Medical Programs. Except as provided in paragraph (b) of this section, the Director will accept the request and the removal will become effective immediately. However, on and after the date of issuance of a notice of proposed removal from the National Registry, as described in paragraph (b) of this section, the Director will not approve the medical examiner's request for voluntary removal from the National Registry.

(b) *Notice of proposed removal.* Except as provided by paragraphs (a) and (e) of this section, FMCSA initiates the process for removal of a medical examiner from the National Registry of Certified Medical Examiners by issuing a written notice of proposed removal to the medical examiner, stating the reasons that removal is proposed under § 390.113 and any corrective actions necessary for the medical examiner to remain listed on the National Registry.

(c) *Response to notice of proposed removal and corrective action.* A medical examiner who has received a notice of proposed removal from the National Registry of Certified Medical Examiners must submit any written response to the Director of Medical Programs, no later than 30 days after the date of issuance of the notice of proposed removal. The response must indicate either that the medical examiner believes FMCSA has relied on erroneous reasons, in whole or in part, in proposing removal from the National Registry, as described in paragraph (c)(1) of this section, or that the medical examiner will comply and take any corrective action specified in the notice of proposed removal, as described in paragraph (c)(2) of this section.

(1) *Opposing a notice of proposed removal.* If the medical examiner believes FMCSA to have relied on an erroneous reason, in whole or in part, in proposing removal from the National Registry of Certified Medical Examiners, the medical examiner must explain why an erroneous reason has been relied on in proposing the removal. The Director will review the explanation.

(i) If the Director finds FMCSA has relied on a wholly erroneous reason for proposing removal from the National Registry, the Director will withdraw the notice of proposed removal and notify the medical examiner in writing of the determination. If the Director finds FMCSA has relied on a partly erroneous reason for proposing removal from the National Registry, the Director will modify the notice of proposed removal and notify the medical examiner in writing of the determination. No later than 60 days after the date the Director modifies a notice of proposed removal, the medical examiner must comply with this subpart and correct the deficiencies identified in the modified notice of proposed removal as described in paragraph (c)(2) of this section.

(ii) If the Director finds FMCSA has not relied on an erroneous reason in proposing removal, the Director will affirm the notice of proposed removal and notify the medical examiner in writing of the determination. No later than 60 days after the date the Director affirms the notice of proposed removal, the medical examiner must comply with this subpart and correct the deficiencies identified in the notice of proposed removal as described in paragraph (c)(2) of this section.

(iii) If the medical examiner does not submit a written response within 30 days of the date of issuance of a notice of proposed removal, the removal becomes effective and the medical examiner is immediately removed from the National Registry of Certified Medical Examiners.

(2) *Compliance and corrective action.* (i) The medical examiner must comply with this subpart and complete the corrective actions specified in the notice of proposed removal no later than 60 days after either the date of issuance of the notice of proposed removal or the date the Director of Medical Programs affirms or modifies the notice of proposed removal, whichever is later. The medical examiner must provide documentation of compliance and completion of the corrective actions to the Director. The Director may conduct any investigations and request any documentation necessary to verify that the medical examiner has complied with this subpart and completed the required corrective action(s). The Director will notify the medical examiner in writing whether he or she has met the requirements to continue to be listed on the National Registry.

(ii) If the medical examiner fails to complete the proposed corrective action(s) within the 60-day period, the removal becomes effective and the medical examiner is immediately removed from the National Registry. The Director will notify the medical examiner in writing that he or she has been removed from the National Registry.

(3) At any time before a notice of proposed removal from the National Registry becomes final, the recipient of the notice of proposed removal and the Director may resolve the matter by mutual agreement.

(d) *Request for administrative review.* If a person has been removed from the National Registry of Certified Medical Examiners under paragraph (c)(1)(iii), (c)(2)(ii), or (e) of this section, that person may request an administrative review no later than 30 days after the date the removal becomes effective. The request must be submitted in writing to the FMCSA Associate Administrator for Policy and Program Development. The

request must explain the error(s) committed in removing the medical examiner from the National Registry of Certified Medical Examiners, and include a list of all factual, legal, and procedural issues in dispute, and any supporting information or documents.

(1) *Additional procedures for administrative review.* The Associate Administrator may ask the person to submit additional data or attend a conference to discuss the removal. If the person does not provide the information requested, or does not attend the scheduled conference, the Associate Administrator may dismiss the request for administrative review.

(2) *Decision on administrative review.* The Associate Administrator will complete the administrative review and notify the person in writing of the decision. The decision constitutes final Agency action.

(e) *Emergency removal.* In cases of either willfulness or in which public health, interest, or safety requires, the provisions of paragraph (b) of this section are not applicable and the Director of Medical Programs may immediately remove a medical examiner from the National Registry and invalidate the certification credential issued under § 390.109. A person who has been removed under the provisions of this paragraph may request an administrative review of that decision as described under paragraph (d) of this section.

(f) *Reinstatement on the National Registry of Certified Medical Examiners.* No sooner than 30 days after the date of removal from the National Registry of Certified Medical Examiners, a person who has been removed may apply to the Director of Medical Programs to be reinstated. The person must provide documentation showing compliance with all the requirements of § 390.103(a) and completion of any additional corrective actions required in the notice of proposed removal. A person who has been voluntarily removed may be reinstated by the Director of Medical Programs after providing documentation showing proof of compliance with the requirements of § 390.111.

(g) *Effect of final decision by FMCSA.* If a person is removed from the National Registry of Certified Medical Examiners under paragraph (c) or (e), or a removal is affirmed under paragraph (d), of this section, the person's listing is removed and the certification credential issued under § 390.109 is no longer valid. However, the removed person's information remains publicly available for 3 years, with an indication that the person is no longer listed on the National Registry of Certified Medical Examiners as of the date of removal.

4. Add appendix A, Medical Examiner Application Data Elements, to part 390 to read as follows:

Appendix A of Part 390—Medical Examiner Application Data Elements

The following minimum data elements must be included in the application for medical examiner certification as specified by § 390.107:

1. Date of application.
2. Full Name.
3. Medical profession (Advanced Practice Nurse (APN), Doctor of Chiropractic (DC), Doctor of Osteopathy (DO), Medical Doctor (MD), Physician Assistant (PA), etc.).
4. Job title, if applicable (e.g., Director of * * *, etc.).
5. Current employer.
6. Employer mailing address.
7. Employer phone number.
8. Employer fax number.
9. Employer e-mail.
10. Business address (street, city, state, and zip code, if different from employer mailing address; P.O. Box is not sufficient).
11. Business phone number(s).
12. Business fax number(s).
13. Business e-mail.
14. Medical license, certificate, or registration number(s) and State(s) where issued.
15. Expiration date of State license(s), registration(s), or certification(s).
16. Statement self-certifying completion of training required by § 390.103(a) or (b).
17. Date training completed.
18. Training provider and address.
19. Group that accredited the training.
20. Type of certification: Initial—Recertification—Reinstatement.
21. Statement of capability and willingness to comply with FMCSA requirement to electronically transmit to FMCSA once every calendar month the following information about each person examined under part 391, subpart E, of this chapter:
    - Name.
    - FMCSA numerical identifier.
    - Date of examination.
    - An indication of whether the person was found to be medically qualified, medically unqualified, or temporarily disqualified.
    - Date of expiration of medical examiner's certificate, if applicable.
22. Statement agreeing to provide copies of certification of completion of training, and State license(s), certificate(s), or registration(s) to perform physical examinations to an authorized representative of FMCSA or to an authorized State or local enforcement agency representative upon request.
23. Statement affirming all information provided is true.

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTORS

5. Revise the authority citation for part 391 to read as follows:

Authority: 49 U.S.C. 322, 504, 508, 31133, 31136, 31149, and 31502; Sec. 4007(b) of Pub. L. 102–240 (105 Stat. 2152); Sec. 114, Pub. L. 103–311 (108 Stat. 1673, 1677); and 49 CFR 1.73.

6. Add § 391.42 to read as follows:

§ 391.42 Schedule for use of medical examiners listed on the National Registry of Certified Medical Examiners.

(a) On and after [Date 2 years after the effective date of the final rule] each medical examination required under this subpart for persons who are employed by motor carriers that employ 50 or more drivers of CMVs, as defined in § 390.5 of this chapter, must be conducted by a medical examiner who is listed on the National Registry of Certified Medical Examiners.

(b) On and after [Date 3 years after the effective date of the final rule] each medical examination required under this subpart must be conducted by a medical examiner who is listed on the National Registry of Certified Medical Examiners.

7. Amend § 391.43 by revising paragraph (a), paragraph (g), and the introductory text and the form in paragraph (h), and adding paragraph (i) to read as follows:

§ 391.43 Medical examination; certificate of physical examination.

(a) Except as provided by paragraph (b) of this section and by § 391.42, the medical examination must be performed by a medical examiner listed on the National Registry of Certified Medical Examiners under subpart D of part 390 of this chapter.

* * * * *

(g) Upon completion of the medical examination required by this subpart:

(1) The medical examiner must date and sign the Medical Examination Report and provide his or her full name, office address, and telephone number on the Report.

(2) If the medical examiner finds that the person is physically qualified to drive a commercial motor vehicle in accordance with § 391.41(b), he or she must complete a certificate in the form prescribed in paragraph (h) of this section and furnish one copy to the person who was examined and one copy to the motor carrier that employs the person examined.

(3) Once every calendar month, the medical examiner must electronically transmit to the FMCSA Medical Program the following information for each Medical Examination Report completed during the previous month, for any driver who is required to be examined by a medical examiner listed on the National Registry of Certified Medical Examiners:

(i) Driver's name.
(ii) Driver's FMCSA numerical identifier.
(iii) Date of the examination.
(iv) Whether the person was found to be medically qualified, medically unqualified, or temporarily disqualified.
(v) Date of expiration of medical examiner's certificate, if applicable.

(h) The medical examiner's certificate shall be substantially in accordance with the following form. Existing forms may be used until current printed supplies are depleted or until [Date 4 years after the effective date of the final rule], whichever occurs first.

BILLING CODE 4910–EX–P

MEDICAL EXAMINER'S CERTIFICATE

I certify that I have examined_____ in accordance with the Federal Motor Carrier Safety Regulations (49 CFR.41-391.49) and with knowledge of the driving duties, I find this person is qualified, and if applicable only when:

☐ wearing corrective lenses

☐ wearing hearing aid

☐ accompanied by a _____ waiver/exemption

☐ driving within an exempt intracity zone (49 CFR 391.62)

☐ accompanied by a Skill Performance Evaluation Certificate (SPE)

☐ Qualified by operation of 49 CFR 391.64

The information I have provided regarding this physical examination is true and complete. A complete examination form with any attachment embodies my findings completely and correctly, and is on file in my office.

SIGNATURE OF MEDICAL EXAMINER	TELEPHONE	DATE

MEDICAL EXAMINER'S NAME (PRINT)	☐ MD ☐ DO ☐ Physician Assistant	☐ Chiropractor ☐ Advanced Practice Nurse

MEDICAL EXAMINER'S LICENSE OR CERTIFICATE NO./ISSUING STATE	NATIONAL REGISTRY NO.

SIGNATURE OF DRIVER	DRIVER'S LICENSE NO.	STATE

ADDRESS OF DRIVER

MEDICAL CERTIFICATION EXPIRATION DATE

(i) Each original (paper or electronic) completed Medical Examination Report and a copy or electronic version of each medical examiner's certificate must be retained on file at the office of the medical examiner for 3 years from the date of examination. The medical examiner must make all records and information in these files available to an authorized representative of the FMCSA or an authorized State or local enforcement agency representative, within 48 hours after the request is made.

Issued on: November 20, 2008.

John H. Hill,

Administrator.

[FR Doc. E8–28172 Filed 11–28–08; 8:45 am]

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At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

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CFR CHECKLIST

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An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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1	(869–064–00001–7)	5.00	[4] Jan. 1, 2008
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430–End	(869–062–00177–1)	64.00	Oct. 1, 2007
43 Parts:			
1–999	(869–062–00178–9)	56.00	Oct. 1, 2007
1000–end	(869–062–00179–7)	62.00	Oct. 1, 2007
44	(869–062–00180–1)	50.00	Oct. 1, 2007
45 Parts:			
1–199	(869–062–00181–9)	60.00	Oct. 1, 2007
200–499	(869–060–00182–7)	34.00	[10] Oct. 1, 2007
500–1199	(869–062–00183–5)	56.00	Oct. 1, 2007
1200–End	(869–062–00184–3)	61.00	Oct. 1, 2007
46 Parts:			
1–40	(869–062–00185–1)	46.00	Oct. 1, 2007
41–69	(869–062–00186–0)	39.00	Oct. 1, 2007
70–89	(869–062–00187–8)	14.00	Oct. 1, 2007
90–139	(869–062–00188–6)	44.00	Oct. 1, 2007
140–155	(869–062–00189–4)	25.00	Oct. 1, 2007
156–165	(869–062–00190–8)	34.00	Oct. 1, 2007
166–199	(869–062–00191–6)	46.00	Oct. 1, 2007
200–499	(869–062–00192–4)	40.00	Oct. 1, 2007
500–End	(869–062–00193–2)	25.00	Oct. 1, 2007
47 Parts:			
0–19	(869–062–00194–1)	61.00	Oct. 1, 2007
20–39	(869–062–00195–9)	46.00	Oct. 1, 2007
40–69	(869–062–00196–7)	40.00	Oct. 1, 2007
70–79	(869–062–00197–5)	61.00	Oct. 1, 2007
80–End	(869–062–00198–3)	61.00	Oct. 1, 2007
48 Chapters:			
1 (Parts 1–51)	(869–062–00199–1)	63.00	Oct. 1, 2007
1 (Parts 52–99)	(869–062–00200–9)	49.00	Oct. 1, 2007
2 (Parts 201–299)	(869–062–00201–7)	50.00	Oct. 1, 2007
3–6	(869–062–00202–5)	34.00	Oct. 1, 2007

Title	Stock Number	Price	Revision Date
7–14	(869–062–00203–3)	56.00	Oct. 1, 2007
15–28	(869–062–00204–1)	47.00	Oct. 1, 2007
29–End	(869–062–00205–0)	47.00	Oct. 1, 2007
49 Parts:			
1–99	(869–062–00206–8)	60.00	Oct. 1, 2007
100–185	(869–062–00207–6)	63.00	Oct. 1, 2007
186–199	(869–062–00208–4)	23.00	Oct. 1, 2007
200–299	(869–062–00208–1)	32.00	Oct. 1, 2007
300–399	(869–062–00210–6)	32.00	Oct. 1, 2007
400–599	(869–062–00210–3)	64.00	Oct. 1, 2007
600–999	(869–062–00212–2)	19.00	Oct. 1, 2007
1000–1199	(869–062–00213–1)	28.00	Oct. 1, 2007
1200–End	(869–062–00214–9)	34.00	Oct. 1, 2007
50 Parts:			
1–16	(869–062–00215–7)	11.00	Oct. 1, 2007
17.1–17.95(b)	(869–062–00216–5)	32.00	Oct. 1, 2007
17.95(c)–end	(869–062–00217–3)	32.00	Oct. 1, 2007
17.96–17.99(h)	(869–062–00218–1)	61.00	Oct. 1, 2007
17.99(i)–end and 17.100–end	(869–062–00219–0)	47.00	[9] Oct. 1, 2007
18–199	(869–062–00226–3)	50.00	Oct. 1, 2007
200–599	(869–062–00221–1)	45.00	Oct. 1, 2007
600–659	(869–062–00222–0)	31.00	Oct. 1, 2007
660–End	(869–062–00223–8)	31.00	Oct. 1, 2007
CFR Index and Findings Aids	(869–064–00050–5)	65.00	Jan. 1, 2008
Complete 2008 CFR set		1,499.00	2008
Microfiche CFR Edition:			
Subscription (mailed as issued)		406.00	2008
Individual copies		4.00	2008
Complete set (one-time mailing)		332.00	2007
Complete set (one-time mailing)		332.00	2006

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2005, through January 1, 2006. The CFR volume issued as of January 1, 2005 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2007. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period April 1, 2006 through April 1, 2007. The CFR volume issued as of April 1, 2006 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2006, through July 1, 2007. The CFR volume issued as of July 1, 2006 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2007, through July 1, 2008. The CFR volume issued as of July 1, 2007 should be retained.

[9] No amendments to this volume were promulgated during the period October 1, 2005, through October 1, 2007. The CFR volume issued as of October 1, 2005 should be retained.

[10] No amendments to this volume were promulgated during the period October 1, 2006, through October 1, 2007. The CFR volume issued as of October 1, 2006 should be retained.

TABLE OF EFFECTIVE DATES AND TIME PERIODS—DECEMBER 2008

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
December 1	Dec 16	Dec 31	Jan 15	Jan 30	Mar 2
December 2	Dec 17	Jan 2	Jan 16	Feb 2	Mar 2
December 3	Dec 18	Jan 2	Jan 20	Feb 2	Mar 3
December 4	Dec 19	Jan 5	Jan 20	Feb 2	Mar 4
December 5	Dec 22	Jan 5	Jan 20	Feb 3	Mar 5
December 8	Dec 23	Jan 7	Jan 22	Feb 6	Mar 9
December 9	Dec 24	Jan 8	Jan 23	Feb 9	Mar 9
December 10	Dec 26	Jan 9	Jan 26	Feb 9	Mar 10
December 11	Dec 26	Jan 12	Jan 26	Feb 9	Mar 11
December 12	Dec 29	Jan 12	Jan 26	Feb 10	Mar 12
December 15	Dec 30	Jan 14	Jan 29	Feb 13	Mar 16
December 16	Dec 31	Jan 15	Jan 30	Feb 17	Mar 16
December 17	Jan 2	Jan 16	Feb 2	Feb 17	Mar 17
December 18	Jan 2	Jan 20	Feb 2	Feb 17	Mar 18
December 19	Jan 5	Jan 20	Feb 2	Feb 17	Mar 19
December 22	Jan 6	Jan 21	Feb 5	Feb 20	Mar 23
December 23	Jan 7	Jan 22	Feb 6	Feb 23	Mar 23
December 24	Jan 8	Jan 23	Feb 9	Feb 23	Mar 24
December 26	Jan 12	Jan 26	Feb 9	Feb 24	Mar 26
December 29	Jan 13	Jan 28	Feb 12	Feb 27	Mar 30
December 30	Jan 14	Jan 29	Feb 13	Mar 2	Mar 30
December 31	Jan 15	Jan 30	Feb 17	Mar 2	Mar 31