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Presidential Documents

Title 3—

The President

Proclamation 7659 of April 4, 2003

National Crime Victims' Rights Week, 2003

By the President of the United States of America

A Proclamation

Crime brings trauma, pain, and insecurity into the lives of too many Americans each year. As we work to reduce crime and protect the rights of the accused, we must take equal care to protect the rights of their victims. During National Crime Victims' Rights Week, we remember those who have suffered as a result of crime and honor those who have helped these victims.

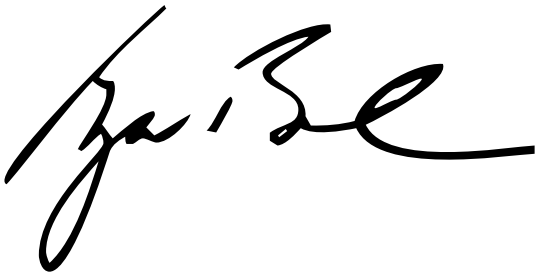
Americans suffered over 24 million crimes in 2001, 5.7 million of which involved violence. While we have improved policies and our justice system has treated victims with greater respect in recent years, we must continue our work to ensure the full rights of all crime victims and better protect our citizens. My Administration believes that victims of violent crime have important rights that deserve protection in our Constitution, and to guarantee these rights, I strongly support the passage of the bipartisan Crime Victims' Rights Amendment. This amendment will provide victims of violent crime the right to reasonable and timely notice of any public proceedings involving the crime or release of the perpetrator, and the right to be heard at public proceedings regarding the criminal's sentence or potential release. It will also assure that such victims receive timely notice of any escape of their attacker. Under this amendment, decision makers will duly consider the victim's safety and payment of restitution from the offender to the victim. This important amendment will strike the right balance in protecting individual rights and ensuring fairness and equity in our criminal justice system.

Across our Nation, victims' rights groups work on behalf of victims every day. Through care and compassion, these groups and individuals are bringing hope and comfort to their neighbors in need. Domestic violence shelters, support groups for families of homicide victims, rape crisis centers, and other organizations in our cities and communities offer vital assistance to individuals who have been affected by crime. In times of such crises, counselors, hotline operators, clergy, doctors, nurses, law enforcement, and countless others also help their fellow Americans cope with their pain and suffering.

As a Nation, we must continue to seek justice on behalf of all people who have been victimized by crime. The heroes in these efforts are the individuals and organizations who work to provide valuable support and assistance to those who have suffered from crime. This week allows us to recognize these heroes and renew our commitment to fulfilling the promise of our Nation of justice for all.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim April 6 through April 12, 2003, as National Crime Victims' Rights Week. I encourage every community to embrace the cause of victims' rights and to advance it in all sectors of our society.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of April, in the year of our Lord two thousand three, and of the Independence of the United States of America the two hundred and twenty-seventh



[FR Doc. 03–8831
Filed 4–8–03; 8:45 am]
Billing code 3195–01–P.

Presidential Documents

Executive Order 13295 of April 4, 2003

Revised List of Quarantinable Communicable Diseases

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 361(b) of the Public Health Service Act (42 U.S.C. 264(b)), it is hereby ordered as follows:

Section 1. Based upon the recommendation of the Secretary of Health and Human Services (the ''Secretary''), in consultation with the Surgeon General, and for the purpose of specifying certain communicable diseases for regulations providing for the apprehension, detention, or conditional release of individuals to prevent the introduction, transmission, or spread of suspected communicable diseases, the following communicable diseases are hereby specified pursuant to section 361(b) of the Public Health Service Act:

(a) Cholera; Diphtheria; infectious Tuberculosis; Plague; Smallpox; Yellow Fever; and Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named).

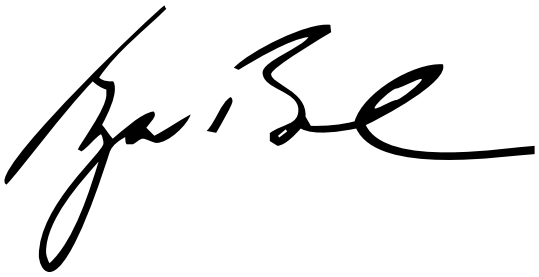
(b) Severe Acute Respiratory Syndrome (SARS), which is a disease associated with fever and signs and symptoms of pneumonia or other respiratory illness, is transmitted from person to person predominantly by the aerosolized or droplet route, and, if spread in the population, would have severe public health consequences.

Sec. 2. The Secretary, in the Secretary's discretion, shall determine whether a particular condition constitutes a communicable disease of the type specified in section 1 of this order.

Sec. 3. The functions of the President under sections 362 and 364(a) of the Public Health Service Act (42 U.S.C. 265 and 267(a)) are assigned to the Secretary.

Sec. 4. This order is not intended to, and does not, create any right or benefit enforceable at law or equity by any party against the United States, its departments, agencies, entities, officers, employees or agents, or any other person.

Sec. 5. Executive Order 12452 of December 22, 1983, is hereby revoked.



THE WHITE HOUSE,
April 4, 2003.

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Rules and Regulations

Federal Register

Vol. 68, No. 68

Wednesday, April 9, 2003

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV03–916–2 IFR]

Nectarines and Peaches Grown in California; Revision of Handling Requirements for Fresh Nectarines and Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule revises the handling requirements for California nectarines and peaches by modifying the grade, size, maturity, and container requirements for fresh shipments of these fruits, beginning with 2003 season shipments. This rule also continues a modification of the requirements for placement of Federal-State Inspection Service lot stamps for the 2003 season, establishes a net weight for a style of containers and exempts those containers from the well-filled requirement, and revises the weight-count standards for Peento type peaches. The marketing orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative and Peach Commodity Committees (committees). This rule would enable handlers to continue shipping fresh nectarines and peaches meeting consumer needs in the interests of producers, handlers, and consumers of these fruits.

DATES: Effective April 10, 2003. Comments received by June 9, 2003, will be considered prior to issuance of any final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or e-mail: *moab.docketclerk@usda.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection at the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California, 93721; telephone (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491; Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement Nos. 124 and 85, and Marketing Order Nos. 916 and 917 (7 CFR parts 916 and 917) regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the ''orders.'' The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Under the orders, lot stamping, grade, size, maturity, container, container marking, and pack requirements are established for fresh shipments of California nectarines and peaches. Such requirements are in effect on a continuing basis. The Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC), which are responsible for local administration of the orders, met on December 3, 2002, and unanimously recommended that these handling requirements be revised for the 2003 season, which begins about the first or second week of April. The changes: (1) Continue the lot stamping requirements which have been in effect since the 2000 season; (2) authorize shipments of ''CA Utility'' quality fruit to continue during the 2003 season; (3) revise weight-count standards for the Peento type peaches; (4) establish a net weight for all five-down containers and exempt those containers from the well-filled requirement; and (5) revise varietal maturity, quality, and size requirements to reflect changes in growing and marketing practices.

The committees meet prior to and during each season to review the rules and regulations effective on a continuing basis for California nectarines and peaches under the orders. Committee meetings are open to the public and interested persons are encouraged to express their views at these meetings. The committees held

such meetings on December 3, 2002. USDA reviews committee recommendations and information, as well as information from other sources, and determines whether modification, suspension, or termination of the rules and regulations would tend to effectuate the declared policy of the Act.

No official crop estimate was available at the time of the committees' meetings because the nectarine and peach trees were dormant. The committees will recommend a crop estimate at their meetings in early spring. However, preliminary estimates indicate that the 2003 crop will be similar in size and characteristics to the 2002 crop, which totaled 23,230,000 containers of nectarines and 22,124,000 containers of peaches.

Lot Stamping Requirements

Sections 916.55 and 917.45 of the orders require inspection and certification of nectarines and peaches, respectively, handled by handlers. Sections 916.115 and 917.150 of the nectarine and peach orders' rules and regulations, respectively, require that all exposed or outside containers of nectarines and peaches, and at least 75 percent of the total containers on a pallet, be stamped with the Federal-State Inspection Service (inspection service) lot stamp number after inspection and before shipment to show that the fruit has been inspected. These requirements apply except for containers that are loaded directly onto railway cars, exempted, or mailed directly to consumers in consumer packages.

Lot stamp numbers are assigned to each handler by the inspection service, and are used to identify the handler and the date on which the container was packed. The lot stamp number is also used by the inspection service to identify and locate the inspector's corresponding working papers or field notes. Working papers are the documents each inspector completes while performing an inspection on a lot of nectarines or peaches. Information contained in the working papers supports the grade levels certified to by the inspector at the time of the inspection.

The lot stamp number has value for the industries, as well. The committees utilize the lot stamp number and date codes to trace fruit in the container back to the orchard from which it was harvested. This information is essential in providing quick information for a crisis management program instituted by the industries. Without the lot stamp information on each container, the ''trace back'' effort, as it is called, would be jeopardized.

Over the last few years, several new containers have been introduced for use by nectarine and peach handlers. These containers are returnable plastic containers (RPCs). Use of RPCs may represent substantial savings to retailers for storage and disposal, as well as for handlers who do not have to pay for traditional, single-use, containers. Fruit is packed in the containers by the handler, delivered to the retailer, emptied, and returned to a central clearinghouse for cleaning and redistribution to the handler. However, because these containers are designed for reuse, RPCs do not support markings that are permanently affixed to the container. All markings must be printed on cards that slip into tabs on the front or sides of the containers. The cards are easily inserted and removed, and further contribute to the efficient reuse of RPCs.

The cards are a continuing concern for the inspection service and the industries because of their unique portability. There is some concern that the cards on pallets of inspected containers could easily be moved to pallets of uninspected containers, thus permitting a handler to avoid inspection on a lot or lots of nectarines or peaches. This would also jeopardize the use of the lot stamp numbers for the industries' ''trace back'' program.

To address this concern since the 2000 season, the committees have annually recommended that pallets of inspected fruit in RPCs be identified with a USDA-approved pallet tag containing the lot stamp number, in addition to the lot stamp number printed on the card on the container. In this way, noted the committees, an audit trail would be created, confirming that the lot stamp number on each container on the pallet corresponds to the lot stamp number on the pallet tag.

The committees and the inspection service presented their concerns to the manufacturers of these types of containers prior to the 2000 season. At that time, one manufacturer indicated a willingness to address the problem by offering an area on the principal display panel where the container markings would adhere to the container. Another possible improvement discussed was for an adhesive for the current style of containers which would securely hold the cards with the lot stamp numbers, yet would be easy for the clearinghouse to remove when the containers are washed. However, the changes offered by the manufacturers were not available for use in the previous three seasons, and there is no assurance that they will be available for the 2003 season.

In a meeting of the Stone Fruit Grade and Size Subcommittee on November 6, 2002, it was determined that given the different styles and configurations of RPCs available, having a standardized display panel or a satisfactory adhesive for placement of the cards may not be realistic and the industry needed to continue the lot stamping requirements in place since the 2000 season.

For those reasons, the subcommittee unanimously recommended to the committees that the regulation in effect since the 2000 season requiring lot stamp numbers on USDA-approved pallet tags, as well as on individual containers on a pallet, be again required for the 2003 season. The committees, in turn, recommended unanimously that such requirement be extended for the 2003 season, as well.

Thus, §§ 916.115 and 917.150 will be amended to require the lot stamp number to be printed on a USDA-approved pallet tag, in addition to the requirement that the lot stamp number be applied to cards on all exposed or outside containers, and not less than 75 percent of the total containers on a pallet, during the 2003 season.

Container and Pack Requirements

Sections 916.52 and 917.41 of the orders authorize establishment of container, pack, and marking requirements for shipments of nectarines and peaches, respectively. Under §§ 916.350 and 917.442 of the orders, the specifications of container markings, net weights, well-filled requirements, weight-count standards for various sizes of nectarines and peaches, and lists of standard containers are provided.

The committees unanimously recommended that a uniform net weight be established for all ''five down'' boxes (commonly referred to as ''Euro'' boxes), and that all such containers be exempted from the well-filled requirement. Currently, the net weight requirement of 31 pounds for ''five down'' boxes and the exemption from the well-filled requirement applies only to RPCs. However, as a handler noted at one meeting, the industry uses boxes of the same ''footprint'' (length and width dimensions) as the RPCs that are made of more traditional materials, such as corrugated cardboard. ''Five down'' boxes are containers that lay in a pattern of five containers per layer on each pallet. In other words, each layer of boxes on a pallet contains only five Euro boxes. Other container sizes and footprints may result in nine boxes per layer, etc.

Since applying the well-filled requirements to any five down Euro box

might result in bruising or other damage to fruit packed in it, the Stone Fruit Grade and Size Subcommittee voted unanimously to extend the current requirements applicable to RPCs with regard to net weight and well-filled requirements to all five down Euro containers. This would ensure that all five down Euro containers have a uniform net weight and ensure that the fruit in those containers is handled in such a way to minimize damage.

At the December 3, 2002, meeting, the NAC and PCC also unanimously recommended that all five down Euro boxes have an established net weight of 31 pounds, which is to be printed on the end of the container, and that those containers, like the RPCS, be exempt from the well-filled requirement.

Nectarines: For the reasons stated above, paragraphs (a)(1) and (a)(8) of § 916.350 are revised to refer to all five down Euro containers. Such changes will ensure that all five down Euro containers of nectarines are a net weight of 31 pounds and are exempt from the well-filled requirement. The container markings shall be placed on one outside end of the container in plain sight and in plain letters.

Peaches: For the reasons stated above, paragraphs (a)(1) and (a)(9) of § 917.442 are revised to refer to all five down Euro containers. Such changes will ensure that all five down Euro containers of peaches are a net weight of 31 pounds and are exempt from the well-filled requirement. The markings shall be placed on one outside end of the container in plain sight and in plain letters.

Weight-Count Standards for Peaches

Under the requirements of § 917.41 of the order, containers of peaches are required to meet weight-count standards for a maximum number of peaches in a 16-pound sample when such peaches, which may be packed in tray-packed containers, are converted to volume-filled containers. Under § 917.442 of the order's rules and regulations, weight-count standards are established for all varieties of peaches as Tables 1, 2, and 3 of paragraph (a)(5)(iv).

According to the PCC, the Peento type peaches have traditionally been packed in trays because they have been marketed as a premium variety, which justified the added packing costs.

However, as the volume has increased, the value of this peach has diminished in the marketplace, and some handlers converted their tray-packed containers of Peento types to volume-filled containers. Prior to the 2002 season, weight-count standards established for peaches and nectarines were developed for round fruit. Peento type peaches are shaped like donuts, and those weight-count standards were inappropriate. In an effort to standardize the conversion from tray-packing to volume-filling for Peento type peaches, the committee staff conducted weigh-count surveys during the 2001 season to determine the most optimum weight-counts for the varieties at varying fruit sizes.

As a result, a new weight-count table applicable to only the Peento type peaches was added for the 2002 season. However, during the 2002 season, the committee staff continued to conduct further weight-count surveys to ensure that the Peento type peaches packed in volume-filled containers meet the weight-count standards established for tray-packed fruit. During those studies, the committee staff learned that very large Peento type peaches that were not previously converted from tray-packs to volume-filled containers were being packed in volume-filled containers and did not meet the weight-count standards.

For this reason, Table 3 of paragraph (a)(5)(iv) in § 917.442 is being revised to include weight-count standards for two of the larger peach sizes, sizes 32 and 30. Table 3 will also be corrected with regard to the maximum number of fruit in a 16-pound sample for sizes 54 and 50. Also, the maximum number of fruit in a 16-pound sample of size 54 Peento type peaches currently is listed as 77 peaches, and the maximum number of size 50 Peento type peaches is listed as 80 peaches. The maximum numbers of fruit for these sizes were inadvertently reversed, and will be corrected to indicate that the maximum number of fruit in a 16-pound sample of size 54 Peento type peaches is 80, and the maximum number of fruit in a 16-pound sample of size 50 Peento type peaches is 77.

Grade and Quality Requirements

Sections 916.52 and 917.41 of the orders authorize the establishment of grade and quality requirements for nectarines and peaches, respectively. Prior to the 1996 season, § 916.356 required nectarines to meet a modified U.S. No. 1 grade. Specifically, nectarines were required to meet U.S. No. 1 grade requirements, except for a slightly tighter requirement for scarring and a more liberal allowance for misshapen fruit. Prior to the 1996 season, § 917.459 required peaches to meet the requirements of a U.S. No. 1 grade, except for a more liberal allowance for open sutures that were not ''serious damage.''

This rule revises §§ 916.350, 916.356, 917.442, and 917.459 to permit shipments of nectarines and peaches meeting ''CA Utility'' quality requirements during the 2003 season. (''CA Utility'' fruit is lower in quality than that meeting the modified U.S. No. 1 grade requirements.) Shipments of nectarines and peaches meeting ''CA Utility'' quality requirements have been permitted each season since 1996.

Studies conducted by the NAC and PCC in 1996 indicated that some consumers, retailers, and foreign importers found the lower-quality fruit acceptable in some markets. When shipments of ''CA Utility'' nectarines were first permitted in 1996, they represented 1.1 percent of all nectarine shipments, or approximately 210,000 containers. Shipments of ''CA Utility'' nectarines reached a high of 5.3 percent (1,239,000 containers) during the 2002 season, but usually represent approximately 4 percent of total nectarine shipments. Shipments of ''CA Utility'' peaches totaled 1.9 percent of all peach shipments, or approximately 366,000 containers, during the 1996 season. Shipments of ''CA Utility'' peaches reached a high of 5.6 percent of all peach shipments (1,231,000 containers) during the 2002 season, but usually represent approximately 4 percent of total peach shipments.

Handlers have also commented that the availability of the ''CA Utility'' quality option lends flexibility to their packing operations. They have noted that they now have the opportunity to remove marginal nectarines and peaches from their U.S. No. 1 containers and place this fruit in containers of ''CA Utility.'' This flexibility, the handlers note, results in better quality U.S. No. 1 packs without sacrificing fruit.

The Stone Fruit Grade and Size Subcommittee met on November 6, 2002, and did not make a recommendation to the NAC and PCC to continue shipments of ''CA Utility'' quality nectarines and peaches. Some subcommittee members raised concerns about ''CA Utility'' quality fruit, including concerns that growers'' returns on ''CA Utility'' quality fruit are lower. The issue of the authorized tolerance of 40 percent U.S. No. 1 fruit in each container of ''CA Utility'' quality was raised, and there was some discussion that the tolerance should be reduced so that less U.S. No. 1 fruit would be in a box of ''CA Utility'' quality fruit. However, ultimately no decisions were made by the subcommittee as the result of these discussions.

Subsequently, however, the NAC and PCC voted unanimously at their

December 3, 2002, meetings to authorize continued shipments of ''CA Utility'' quality fruit during the 2003 season.

Accordingly, based upon the recommendations, paragraph (d) of §§ 916.350 and 917.442, and paragraph (a)(1) of §§ 916.356 and 917.459 are revised to permit shipments of nectarines and peaches meeting ''CA Utility'' quality requirements during the 2003 season, on the same basis as shipments since the 2000 season.

Maturity Requirements

In §§ 916.52 and 917.41, authority is provided to establish maturity requirements for nectarines and peaches, respectively. The minimum maturity level currently specified for nectarines and peaches is ''mature'' as defined in the standards. For most varieties, ''well-matured'' determinations for nectarines and peaches are made using maturity guides (*e.g.*, color chips). These maturity guides are reviewed each year by the Shipping Point Inspection Service (SPI) to determine whether they need to be changed, based upon the most-recent information available on the individual characteristics of each nectarine and peach variety.

These maturity guides established under the handling regulations of the California tree fruit marketing orders have been codified in the Code of Federal Regulations as Table 1 in §§ 916.356 and 917.459, for nectarines and peaches, respectively.

The requirements in the 2003 handling regulations are the same as those that appeared in the 2002 handling regulations with a few exceptions. Those exceptions are explained in this rule.

Nectarines: Requirements for ''well-matured'' nectarines are specified in § 916.356 of the order's rules and regulations. This rule revises Table 1 of paragraph (a)(1)(iv) of § 916.356 to add maturity guides for four varieties of nectarines. Specifically, SPI recommended adding maturity guides for the Mango variety to be regulated at the B maturity guide, for the Honey Royale and the Sunny Red varieties at the J maturity guide, and the Prince Jim variety to be regulated at the L maturity guide.

The NAC recommended these maturity guide requirements based on SPI's continuing review of individual maturity characteristics and identification of the appropriate maturity guide corresponding to the ''well-matured'' level of maturity for nectarine varieties in production.

Peaches: Requirements for ''well-matured'' peaches are specified in § 917.459 of the order's rules and regulations. This rule revises Table 1 of paragraph (a)(1)(iv) of § 917.459 to add maturity guides for six peach varieties. Specifically, SPI recommended adding maturity guides for the September Flame variety to be regulated at the I maturity guide; Autumn Red, Magenta Queen, Pretty Lady, and the Prima Gattie 10 varieties to be regulated at the J maturity guide; and the Golden Princess variety to be regulated at the L maturity guide.

In addition, SPI requested that the language in paragraph (a)(1)(vi) of § 917.459 be revised with regard to the Joanna Sweet variety. Currently, the Joanna Sweet variety is required to have a one hundred percent surface color requirement for meeting the assigned color chip. SPI requested that the language be changed to reflect that any of the fruit surface that is not red shall meet the color guide established for the variety, including any color found in the stem cavity. This recommendation is based upon SPI's experience with the maturity characteristics of this variety.

Thus, paragraph (a)(1)(iv) of § 917.459 will be revised to reflect this recommendation.

The PCC recommended these maturity guide requirements based on SPI's continuing review of individual maturity characteristics and identification of the appropriate maturity guide corresponding to the ''well-matured'' level of maturity for peach varieties in production.

Size Requirements: Both orders provide (in §§ 916.52 and 917.41) authority to establish size requirements. Size regulations encourage producers to leave fruit on the tree longer, which improves both size and maturity of the fruit. Acceptable fruit size provides greater consumer satisfaction and promotes repeat purchases; and, therefore, increases returns to producers and handlers. In addition, increased fruit size results in increased numbers of packed containers of nectarines and peaches per acre, also a benefit to producers and handlers.

Varieties recommended for specific size regulations have been reviewed and such recommendations are based on the specific characteristics of each variety. The NAC and PCC conduct studies each season on the range of sizes attained by the regulated varieties and those varieties with the potential to become regulated, and determine whether revisions and additions to the size requirements are appropriate.

Nectarines: Section 916.356 of the order's rules and regulations specifies minimum size requirements for fresh nectarines in paragraphs (a)(2) through (a)(9). This rule revises § 916.356 to establish variety-specific minimum size requirements for four varieties of nectarines that were produced in commercially-significant quantities of more than 10,000 containers for the first time during the 2002 season. This rule also removes the variety-specific minimum size requirements for 11 varieties of nectarines whose shipments fell below 5,000 containers during the 2002 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Red Roy variety of nectarines, recommended for regulation at a minimum size 88. Studies of the size ranges attained by the Red Roy variety revealed that 100 percent of the containers met the minimum size of 88 during the 2002 season. Sizes ranged from size 40 to size 88, with 1.5 percent of the fruit in the 40 sizes, 22.2 percent of the packages in the 50 sizes, 55.8 percent in the 60 sizes, 14.6 percent in the 70 sizes, 5.4 in the 80 sizes, with .5 percent in the size 88.

A review of other varieties with the same harvesting period indicated that the Red Roy variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to handle the variety confirm this information regarding minimum size and harvesting period, as well. Thus, the recommendation to place the Red Roy variety in the variety-specific minimum size regulation at a minimum size 88 is appropriate. This recommendation results from size studies conducted over a two-year period.

Historical data such as this provides the NAC with the information necessary to recommend the appropriate sizes at which to regulate various nectarine varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at both NAC and subcommittee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, the introductory text of paragraph (a)(4) of § 916.356 is revised to include the Red Roy variety; and the introductory text of paragraph (a)(6) of § 916.356 is revised to include the Candy Gold, Candy Sweet, and Honey Royale nectarine varieties.

This rule also revises the introductory text of paragraphs (a)(3), (a)(4), and (a)(6) of § 916.356 to remove 11 varieties from the variety-specific minimum size

requirements specified in these paragraphs because less than 5,000 containers of each of these varieties were produced during the 2002 season. Specifically, the introductory text of paragraph (a)(3) of § 916.356 is revised to remove the Johnny's Delight and May Jim nectarine varieties; the introductory text of paragraph (a)(4) of § 916.356 is revised to remove the Scarlet Jewels and Star Brite nectarine variety; and the introductory text of paragraph (a)(6) of § 916.356 is revised to remove the Arctic Gold, Kay Diamond, Prima Diamond XVI, Spring Diamond, Spring Red, Summer Beaut, and Sunecteight (Super Star) nectarine varieties.

Nectarine varieties removed from the nectarine variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (a)(7), (a)(8), and (a)(9) of § 916.356.

Peaches: Section 917.459 of the order's rules and regulations specifies minimum size requirements for fresh peaches in paragraphs (a)(2) through (a)(6), and paragraphs (b) and (c). This rule revises § 917.459 to establish variety-specific minimum size requirements for 12 peach varieties that were produced in commercially-significant quantities of more than 10,000 containers for the first time during the 2002 season. This rule also removes the variety-specific minimum size requirements for 10 varieties of peaches whose shipments fell below 5,000 containers during the 2002 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Springtreat (60EF32) variety of peaches, which was recommended for regulation at a minimum size 80. Studies of the size ranges attained by the Springtreat (60EF32) variety revealed that 100 percent of the containers met the minimum size of 80 during the 2002 season. The sizes ranged from size 50 to size 80, with 8.2 percent of the containers meeting the size 50, 41.2 meeting the size 60, 37.6 percent meeting the size 70, and 12.9 percent meeting the size 80.

A review of other varieties with the same harvesting period indicated that the Springtreat (60EF32) variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to pack the variety confirm this information regarding minimum size and harvesting period, as well. Thus, the recommendation to place the Springtreat (60EF32) variety in the variety-specific minimum size regulation at a minimum size 80 is appropriate. This recommendation, as with all other size recommendations for peaches, results from size studies conducted over a three-year period.

Historical data such as this provides the PCC with the information necessary to recommend the appropriate sizes at which to regulate various peach varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at both PCC and subcommittee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, the introductory text of paragraph (a)(5) of § 917.459 is revised to include the Happy Dream, Magenta Queen, Springtreat (60EF32), and Spring Flame 21 peach varieties; and the introductory text of paragraph (a)(6) of § 917.459 is revised to include the August Flame, Henry II, June Flame, Pink Giant, Prima Peach XV, Red Giant, Snow Beauty, and Snow Princess peach varieties.

This rule also revises the introductory text of paragraph (a)(3) of § 917.459 to remove the Topcrest peach variety; revises the introductory text of paragraph (a)(5) of § 917.459 to remove the White Dream peach variety; and revises the introductory paragraph (a)(6) of § 917.459 to remove the Cal Red, Champagne, Flaming Dragon, Garnet Jewel, Lacey, Madonna Sun, Morning Lord, and Red Sun peach varieties from the variety-specific minimum size requirements specified in the section because less than 5,000 containers of each of these varieties was produced during the 2002 season.

Peach varieties removed from the peach variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (b) and (c) of § 917.459.

The NAC and PCC recommended these changes in the minimum size requirements based on a continuing review of the sizing and maturity relationships for these nectarine and peach varieties, and the consumer acceptance levels for various fruit sizes. This rule is designed to establish minimum size requirements for fresh nectarines and peaches consistent with expected crop and market conditions.

This rule reflects the committees' and USDA's appraisal of the need to revise the handling requirements for California nectarines and peaches, as specified. USDA believes that this rule will have a beneficial impact on producers, handlers, and consumers of fresh California nectarines and peaches.

This rule establishes handling requirements for fresh California nectarines and peaches consistent with expected crop and market conditions, and will help ensure that all shipments of these fruits made each season will meet acceptable handling requirements established under each of these orders. This rule will also help the California nectarine and peach industries to provide fruit desired by consumers. This rule is designed to establish and maintain orderly marketing conditions for these fruit in the interests of producers, handlers, and consumers.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 300 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 1,800 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (13 CFR 121.201) as those whose annual receipts are less than $5,000,000. Small agricultural producers are defined by the Small Business Administration as those having annual receipts of less than $750,000. A majority of these handlers and producers may be classified as small entities.

The committees' staff has estimated that there are less than 20 handlers in the industry who could be defined as other than small entities. For the 2002 season, the committees' staff estimated that the average handler price received was $9.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 556,000 containers to have annual receipts of $5,000,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2002

season, the committees' staff estimates that small handlers represent approximately 94 percent of all the handlers within the industry.

The committees' staff has also estimated that less than 20 percent of the producers in the industry could be defined as other than small entities. For the 2002 season, the committees' estimated the average producer price received was $4.00 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 187,500 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the committees' staff and the average producer price received during the 2002 season, the committees' staff estimates that small producers represent more than 80 percent of the producers within the industry. With an average producer price of $4.00 per container or container equivalent, and a combined packout of nectarines and peaches of 45,354,000 containers, the value of the 2002 packout level is estimated to be $181,416,000. Dividing this total estimated grower revenue figure by the estimated number of producers (1,800) yields an estimate of average revenue per producer of about $101,000 from the sales of peaches and nectarines.

Under §§ 916.52 and 917.41 of the orders, grade, size, maturity, container, container marking, and pack requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect on a continuing basis. The NAC and PCC met on December 3, 2002, and unanimously recommended that these handling requirements be revised for the 2003 season. These recommendations had been presented to the committees by various subcommittees, each charged with review and discussion of the changes. The changes: (1) Continue the lot stamping requirements for reusable plastic containers that have been in effect since the 2000 season; (2) authorize shipments of ''CA Utility'' quality fruit to continue during the 2003 season; (3) revise weight-count standards for the Peento type peaches; (4) establish a net weight for all five-down containers and exempt those containers from the well-filled requirement; and (5) revise varietal maturity, quality, and size requirements to reflect changes in growing and marketing practices.

This rule authorizes continuation of the lot stamping requirements for returnable plastic containers under the marketing orders' rules and regulations that have been in effect for such containers since the 2000 season for nectarine and peach shipments. The modified requirements of §§ 916.115 and 917.150 mandated that the lot stamp numbers be printed on a USDA-approved pallet tag, in addition to the requirement that the lot stamp number be applied to cards on all exposed or outside containers, and not less than 75 percent of the total containers on a pallet. Continuation of such requirements for the 2003 season would help the inspection service safeguard the identity of inspected and certified containers of nectarines and peaches, and would help the industry by keeping in place the information necessary to facilitate their ''trace-back'' program.

The Stone Fruit Grade and Size Subcommittee met on November 6, 2002, and considered possible alternatives to this action. Other alternatives were rejected because it was determined that given the different styles and configurations of RPCs available, having a satisfactory adhesive for placement of the cards may not be realistic, at least for the time being, given the reluctance of box manufacturers to respond to the industry's requests.

For those reasons, the subcommittee and the committees unanimously recommended extending the requirement for the lot stamp number to be printed on the cards on each container and for each pallet to be marked with a USDA-approved pallet tag, also containing the lot stamp number. Such safeguards are intended to ensure that all the containers on each pallet have been inspected and certified in the event a card on an individual container or containers is removed, misplaced, or lost.

The Stone Fruit Grade and Size Subcommittee also discussed the 31-pound net weight requirement for all five down Euro containers at its meeting on November 6, 2002. At that time, it was noted by one handler that the current net weight of 31 pounds and exemption from the well-filled requirement are applicable to only the RPCs. The handler noted, however, that the industry also currently uses five down Euro boxes that are not RPCs. He further suggested that all five down Euro boxes should be required to meet the net weight of 31 pounds and be exempted from the requirement to be well-filled. The subcommittee agreed and unanimously recommended the change to the committees. The alternative would have meant that only the RPC five down Euro containers would have been subject to the minimum regulated with a net weight of 31 pounds, and exempted from the requirement to be well-filled. In consideration of uniformity for five down Euro containers, this alternative was rejected.

In 1996, §§ 916.350 and 917.442 were revised to permit shipments of ''CA Utility'' quality nectarines and peaches as an experiment during the 1996 season only. Such shipments have subsequently been permitted each season. Since 1996, shipments of ''CA Utility'' have ranged from 1 to 5 percent of total nectarine and peach shipments. This rule authorizes continued shipments of ''CA Utility'' quality nectarines and peaches during the 2003 season.

The Grade and Size Subcommittee met on November 6, 2002, and briefly discussed ''CA Utility'' quality nectarines and peaches. The subcommittee ultimately did not make a recommendation to the NAC and PCC regarding continued shipments of ''CA Utility'' quality nectarines and peaches. The subcommittee did, however, request that the results of a grower survey on attitudes toward ''CA Utility'' quality fruit conducted in December of 2001 by the committees be provided to the committees at the December 3, 2002, meeting.

However, at their meetings on December 3, 2002, the NAC and PCC unanimously recommended to continue to allow shipments of ''CA Utility'' quality nectarines and peaches.

Sections 916.350 and 917.442 establish container, pack, and marking requirements for shipments of nectarines and peaches, respectively. This rule makes changes to the pack and container marking requirements of the orders' rules and regulations to establish a net weight of 31 pounds for all types of five down Euro boxes, and exempt such boxes from the well-filled requirement.

Section 917.442 also establishes minimum weight-count standards for containers of peaches. Under these requirements, containers of peaches are required to meet weight-count standards for a maximum number of peaches in a 16-pound sample when such peaches are packed in a tray-packed container. Those same maximum numbers of peaches are also applicable to volume-filled containers, based upon the tray-packed standard. The weight-count standard was developed so handlers may convert tray-packed peaches to volume-filled containers and be assured that fruit of a specific size in the volume-filled container will be the same as that in the tray-packed container.

When the Stone Fruit Grade and Size Subcommittee met, they discussed the recent changes in the packing and

marketing of Peento type peaches. When these varieties were first introduced and marketed, they were generally tray-packed because they were a novel and premium product. As production has increased, the value of the varieties has diminished in the marketplace, and some handlers have converted their tray-packed containers of Peento type peaches to volume-filled containers. Weight-count standards provide a basis for volume filling containers of other varieties of peaches. Currently, Peento type peaches are regulated under a new table of weight-count standards applicable to only these uniquely-shaped peaches.

The staff continued to conduct weight-count studies during the 2002 season so that weight-count standards could be perfected, thus ensuring that all handlers are handling a standard maximum number of peaches in a 16-pound sample. During the studies, the staff learned that all available sizes of Peento type peaches were being packed in volume-filled containers, including sizes for which there were not yet minimum weight-count standards. For that reason, modifications to Table 3 in paragraph (a)(5)(vi) of § 917.442 are made to include additional sizes 30 and 32, which are larger-sized Peento peaches.

Sections 916.356 and 917.459 establish minimum maturity levels. This rule makes annual adjustments to the maturity requirements for several varieties of nectarines and peaches. Maturity requirements are based on maturity measurements generally using maturity guides (*e.g.,* color chips), as recommended by Shipping Point Inspection. Such maturity guides are reviewed annually by SPI to determine the appropriate guide for each nectarine and peach variety. These annual adjustments reflect refinements in measurements of the maturity characteristics of nectarines and peaches as experienced over previous seasons' inspections. Adjustments in the guides utilized ensure that fruit has met an acceptable level of maturity, ensuring consumer satisfaction while benefiting nectarine and peach producers and handlers.

Currently, in § 916.356 of the nectarine order's rule and regulations, and in § 917.459 of the peach order's rule and regulations, minimum sizes for various varieties of nectarines and peaches, respectively, are established. This rule makes adjustments to the minimum sizes authorized for various varieties of nectarines and peaches for the 2003 season. Minimum size regulations are put in place to encourage producers to leave fruit on the trees for a longer period of time. This increased growing time not only improves maturity, but also increases fruit size. Increased fruit size increases the number of packed containers per acre, and coupled with heightened maturity levels, also provides greater consumer satisfaction, fostering repeat purchases. Such improved consumer satisfaction and repeat purchases benefit both producers and handlers alike.

Annual adjustments to minimum sizes of nectarines and peaches, such as these, are recommended by the NAC and PCC based upon historical data, producer and handler information regarding sizes attained by different varieties, and trends in consumer purchases.

An alternative to such action would include not establishing minimum size regulations for these new varieties. Such an action, however, would be a significant departure from the committees' practices and represent a significant change in the regulations as they currently exist; would ultimately increase the amount of less acceptable fruit being marketed to consumers; and, thus, would be contrary to the long-term interests of producers, handlers, and consumers. For these reasons, this alternative was not recommended.

The committees make recommendations regarding all the revisions in handling and lot stamping requirements after considering all available information, including recommendations by various subcommittees, comments of persons at subcommittee meetings, and comments received by committee staff. Such subcommittees include the Stone Fruit Grade and Size Subcommittee, the Inspection and Compliance Subcommittee, and the Executive Committee.

At the meetings, the impact of and alternatives to these recommendations are deliberated. These subcommittees, like the committees themselves, frequently consist of individual producers and handlers with many years' of experience in the industry who are familiar with industry practices and trends. Like all committee meetings, subcommittee meetings are open to the public and comments are widely solicited. In the case of the Stone Fruit Grade and Size Subcommittee, many growers and handlers who are affected by the issues discussed by the subcommittee attend and actively participate in the public deliberations. In addition, minutes of all subcommittee meetings are distributed to committee members and others who have requested them, thereby increasing the availability of information within the industry.

Each of the recommended handling requirement changes for the 2003 season is expected to generate financial benefits for produces and handlers through increased fruit sales, compared to the situation that would exist if the changes were not adopted. Both large and small entities are expected to benefit from the changes, and the costs of compliance are not expected to be substantially different between large and small entities.

This rule does not impose any additional reporting and recordkeeping requirements on either small or large handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule. However, as previously stated, nectarines and peaches under the orders have to meet certain requirements set forth in the standards issued under the Agricultural Marketing Act of 1946 (7 CFR 1621 *et seq.*). Standards issued under the Agricultural Marketing Act of 1946 are otherwise voluntary.

In addition, the committees' meetings are widely publicized throughout the nectarine and peach industry and all interested parties are encouraged to attend and participate in committee deliberations on all issues. These meetings are held annually during the last week of November or first week of December. Like all committee meetings, the December 3, 2002, meetings were public meetings, and all entities, large and small, were encouraged to express views on these issues. These regulations were also reviewed and thoroughly discussed at a subcommittee meeting held on November 6, 2002. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on changes to the handling requirements currently prescribed under the marketing orders for California fresh nectarines and peaches. Any comments

received will be considered prior to finalization of this rule.

After consideration of all relevant matters presented, the information and recommendations submitted by the committees, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined, upon good cause, that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) California nectarine and peach producers and handlers should be apprised of this rule as soon as possible, since shipments of these fruits are expected to begin in early April; (2) this rule relaxes grade requirements for nectarines and peaches; (3) the committees unanimously recommended these changes at public meetings and interested persons had opportunities to provide input at these meetings; and (4) the rule provides a 60-day comment period, and any written comments timely received will be considered prior to any finalization of this interim final rule.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR parts 916 and 917 are amended as follows:

■ 1. The authority citation for 7 CFR parts 916 and 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

■ 2. Section 916.115 is revised to read as follows:

§ 916.115 Lot stamping.

Except when loaded directly into railway cars, exempted under § 916.110, or for nectarines mailed directly to consumers in consumer packages, all exposed or outside containers of nectarines, and not less than 75 percent of the total containers on a pallet, shall be plainly stamped, prior to shipment, with a Federal-State Inspection Service lot stamp number, assigned by such Service, showing that such fruit has been USDA inspected in accordance with § 916.55: *Provided,* That for the period April 1 to October 31, 2003, pallets of returnable plastic containers shall have the lot stamp numbers affixed to each pallet with a USDA-approved pallet tag, in addition to the lot stamp numbers and other required information on cards on the individual containers.

■ 3. Section 916.350 is amended by:

■ A. Revising paragraph (a)(1);

■ B. Revising paragraph (a)(8); and

■ C. Revising paragraph (d) to read as follows:

§ 916.350 California nectarine container and pack regulation.

(a) * * *

(1) Such nectarines, when packed in any closed package or container, except master containers of consumer packages, individual consumer packages, and five down Euro containers, shall conform to the requirements of standard pack: *Provided,* That nectarines in any such volume-filled container need only be filled to within one-inch of the top of the container.

* * * * *

(8) Each five down Euro container of loose-filled nectarines shall bear on one outside end in plain sight and in plain letters the words ''31 pounds net weight.''

* * * * *

(d) During the period April 1 through October 31, 2003, each container or package when packed with nectarines meeting the ''CA Utility'' quality requirements, shall bear the words ''CA Utility,'' along with all other required container markings, in letters at least ⅜ inch in height on the visible display panel. Consumer bags or packages must also be clearly marked on the consumer bags or packages as ''CA Utility,'' along with all other required markings, in letters at least 3/8 inch in height.

■ 4. Section 916.356 is amended by:

■ A. Revising paragraph (a)(1) introductory text;

■ B. Revising Table 1; and

■ C. Revising the introductory text of paragraphs (a)(3), (a)(4), and (a)(6) to read as follows:

§ 916.356 California nectarine grade and size regulation.

(a) * * *

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided,* That nectarines 2 inches in diameter or smaller, shall not have fairly light-colored, fairly smooth scars which exceed an aggregate area of a circle 3/8 inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light-colored, fairly smooth scars which exceed an aggregate area of a circle 1/2 inch in diameter: *Provided further,* That an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen: *Provided further,* That all varieties of nectarines which fail to meet the U.S. No. 1 grade only on account of lack of blush or red color due to varietal characteristics shall be considered as meeting the requirements of this subpart: *Provided further,* That during the period April 1 through October 31, 2003, any handler may handle nectarines if such nectarines meet ''CA Utility'' quality requirements. The term ''CA Utility'' means that not more than 40 percent of the nectarines in any container meet or exceed the requirements of the U.S. No. 1 grade, except that when more than 30 percent of the nectarines in any container meet or exceed the requirements of the U.S. No. 1 grade, the additional 10 percent shall have non-scoreable blemishes as determined when applying the U.S. Standards for Grades of Nectarines; and that such nectarines are mature and are:

* * * * *

(iv) * * *

TABLE 1

Column A variety	Column B maturity guide
Alshir Red	J
April Glo	H
August Glo	L
August Lion	J
August Red	J
Aurelio Grand	F
Autumn Delight	L
Autumn Grand	L
Big Jim	J
Diamond Bright	J
Diamond Jewel	L
Diamond Ray	L
Earliglo	I
Early Diamond	J
Early May	F
Early May Grand	H
Early Red Jim	J
Early Sungrand	H
Fairlane	L
Fantasia	J
Firebrite	H
Fire Sweet	J
Flame Glo	L
Flamekist	L
Flaming Red	K
Flavortop	J
Grand Diamond	L
Gran Sun	L
Honey Blaze	J
Honey Kist	I

TABLE 1—Continued

Column A variety	Column B maturity guide
Honey Royale	J
Independence	H
July Red	L
June Brite	I
Juneglo	H
Kay Diamond	L
King Jim	L
Kism Grand	J
Late Le Grand	L
Late Red Jim	J
Mango	B
May Diamond	I
May Fire	H
Mayglo	H
May Grand	H
May Jim	I
May Kist	H
May Lion	J
Mid Glo	L
Moon Grand	L
Niagra Grand	H
P-R Red	L
Prince Jim	L
Prima Diamond XIII	L
Red Delight	I
Red Diamond	L
Red Fred	J
Red Free	L
Red Glen	J
Red Glo	I
Red Grand	H
Red Jewel	L
Red Jim	L
Red May	J
Rio Red	L
Rose Diamond	J
Royal Delight	F
Royal Giant	I
Royal Glo	I
Ruby Diamond	L
Ruby Grand	J
Ruby Sun	J
Ruby Sweet	J
Scarlet Red	K
September Free	J
September Grand	L
September Red	L
Sheri Red	J
Sparkling June	L
Sparkling May	J
Sparkling Red	L
Spring Bright	L
Spring Diamond	L
Spring Ray	L
Spring Sweet	J
Spring Red	H
Star Brite	J
Summer Beaut	H
Summer Blush	J
Summer Bright	J
Summer Diamond	L
Summer Fire	L
Summer Grand	L
Summer Lion	L
Summer Red	L
Sunburst	J
Sun Diamond	I
Sunecteight (Super Star)	G
Sun Grand	G
Sunny Red	J

TABLE 1—Continued

Column A variety	Column B maturity guide
Tom Grand	L
Zee Glo	J
Zee Grand	I

Note: Consult with the Federal or Federal-State Inspection Service Supervisor for the maturity guides applicable to the varieties not listed above.

* * * * *

(3) Any package or container of Mayglo variety of nectarines on or after May 6 of each year, or Crimson Baby, Earliglo, Early Diamond, Grand Sun, or May Kist variety nectarines unless:

* * * * *

(4) Any package or container of Arctic Rose, Arctic Star, Diamond Bright, Juneglo, June Pearl, Kay Glo, Kay Sweet, May Diamond, May Grand, Prima Diamond IV, Prima Diamond VI, Prima Diamond XIII, Prince Jim, Prince Jim 1, Red Delight, Red Glo, Red Roy, Rose Diamond, Royal Glo, Sparkling May, White Sun, or Zee Grand variety nectarines unless:

* * * * *

(6) Any package or container of Alta Red, Arctic Blaze, Arctic Ice, Arctic Jay, Arctic Mist, Arctic Pride, Arctic Queen, Arctic Snow (White Jewel), Arctic Sweet, August Glo, August Lion, August Pearl, August Red, August Snow, Big Jim, Bright Pearl, Bright Sweet, Candy Gold, Candy Sweet, Diamond Ray, Early Red Jim, Firebrite, Fire Pearl, Fire Sweet, Flame Glo, Flaming Red, Grand Diamond, Grand Pearl, Grand Sweet, Honey Blaze, Honey Kist, Honey Royale, July Pearl, July Red, June Lion, Kay Pearl, King Jim, Late Red Jim, P-R Red, Prima Diamond IX, Prima Diamond XVIII, Prima Diamond XIX, Prima Diamond XXIV, Prima Diamond XXVIII, Red Diamond, Red Glen, Red Jim, Regal Pearl, Regal Red, Royal Giant, Ruby Diamond, Ruby Pearl, Ruby Sweet, Scarlet Red, September Bright (26P–490), September Free, September Red, Sparkling June, Sparkling Red, Spring Bright, Spring Sweet, Summer Blush, Summer Bright, Summer Diamond, Summer Fire, Summer Grand, Summer Jewel, Summer Lion, Summer Red, Sunburst, Sun Diamond, Sunny Red, Sun Valley Sweet, Sweet White, Terra White, or Zee Glo variety nectarines unless:

* * * * *

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

■ 5. Section 917.150 is revised to read as follows:

§ 917.150 Lot stamping.

Except when loaded directly into railway cars, exempted under § 917.143, or for peaches mailed directly to consumers in consumer packages, all exposed or outside containers of peaches, and not less than 75 percent of the total containers on a pallet, shall be plainly stamped, prior to shipment, with a Federal-State Inspection Service lot stamp number, assigned by such Service, showing that such fruit has been USDA inspected in accordance with § 917.45: *Provided,* That for the period April 1 through November 23, 2003, pallets of returnable plastic containers shall have the lot stamp numbers affixed to each pallet with a USDA-approved pallet tag, in addition to the lot stamp numbers and other required information on cards on the individual containers.

■ 5. Section 917.442 is amended by:
■ A. Revising paragraph (a)(1);
■ B. Revising Table 3;
■ C. Revising paragraph (a)(9); and
■ D. Revising paragraph (d) to read as follows:

§ 917.442 California peach container and pack regulation.

(a) * * *

(1) Such peaches, when packed in any closed package or container, except master containers of consumer packages, individual consumer packages, and five down Euro containers, shall conform to the requirements of standard pack: *Provided,* That peaches in any such volume-filled container need only be filled to within one-inch of the top of the container.

* * * * *

(5) * * *

(iv) * * *

TABLE 3.—WEIGHT-COUNT STANDARDS FOR PEENTO TYPE PEACHES PACKED IN LOOSE-FILLED OR TIGHT-FILLED CONTAINERS

Column A— Tray pack size designation	Column B— Maximum number of peaches in a 16-pound sample
80	140
72	128
70	111
64	99
60	93
56	87
54	80
50	77
48	74
44	70

TABLE 3.—WEIGHT-COUNT STANDARDS FOR PEENTO TYPE PEACHES PACKED IN LOOSE-FILLED OR TIGHT-FILLED CONTAINERS—Continued

Column A— Tray pack size designation	Column B— Maximum number of peaches in a 16-pound sample
42	68
40	59
36	53
34	50
32	39
30	32

* * * * *

(9) Each five down Euro container of loose-filled peaches shall bear on one outside end in plain sight and in plain letters the words ''31 pounds net weight.''

* * * * *

(d) During the period April 1 through November 23, 2003, each container or package when packed with peaches meeting ''CA Utility'' quality requirements, shall bear the words ''CA Utility,'' along with all other required container markings, in letters at least ⅜ inch in height on the visible display panel. Consumer bags or packages must also be clearly marked on the consumer bags or packages as ''CA Utility,'' along with all other required markings, in letters at least ⅜ inch in height.

■ 7. Section 917.459 is amended by:

■ A. Revising the introductory text of paragraph (a)(1);

■ B. Revising the introductory text of paragraph (a)(1)(iv);

■ C. Revising Table 1; and

■ D. Revising the introductory text of paragraphs (a)(3), (a)(5), and (a)(6) to read as follows:

§ 917.459 California peach grade and size regulation.

(a) * * *

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade: *Provided*, That an additional 25 percent tolerance shall be permitted for fruit with open sutures which are damaged, but not seriously damaged: *Provided further*, That peaches of the Peento type shall be permitted a 10 percent tolerance for healed, non-serious, blossom-end growth cracks: *Provided further*, That during the period April 1 through November 23, 2003, any handler may handle peaches if such peaches meet ''CA Utility'' quality requirements. The term ''CA Utility'' means that not more than 40 percent of the peaches in any container meet or exceed the requirement of the U.S. No. 1 grade, except that when more than 30 percent of the peaches in any container meet or exceed the requirements of U.S. No. 1 grade, the additional 10 percent shall have non-scoreable blemishes as determined when applying the U.S. Standards for Grades of Peaches; and that such peaches are mature and are:

* * * * *

(iv) The Federal or Federal-State Inspection Service shall make the final determinations on maturity through the use of color chips or other tests as determined appropriate by the inspection agency. The Federal or Federal-State Inspection Service will use the maturity guides listed in Table 1 in making maturity determinations for the specified varieties when inspecting to the ''well matured'' level of maturity. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, except that for the Joanna Sweet variety of peaches, any of the fruit surface that is not red shall meet the color guide established for the variety, including any color noted in the stem cavity. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as it deems proper. A variance for any variety from the application of the maturity guides specified in Table 1 may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of ''well matured.''

TABLE 1

Column A variety	Column B maturity guide
Angelus	I
August Lady	L
Autumn Flame	J
Autumn Gem	I
Autumn Lady	H
Autumn Red	J
Autumn Rose	H
Blum's Beauty	G
Brittney Lane	J
Cal Red	I
Carnival	I
Cassie	H
Coronet	E
Crimson Lady	J
Crown Princess	J
David Sun	I
Diamond Princess	J
Earlirich	H

TABLE 1—Continued

Column A variety	Column B maturity guide
Earlitreat	H
Early Delight	H
Early Elegant Lady	L
Early May Crest	H
Early O'Henry	I
Early Top	G
Elberta	B
Elegant Lady	L
Fairtime	G
Fancy Lady	J
Fay Elberta	C
Fire Red	I
First Lady	D
Flamecrest	I
Flavorcrest	G
Flavor Queen	H
Flavor Red	G
Franciscan	G
Goldcrest	H
Golden Princess	L
Honey Red	G
Joanna Sweet	J
John Henry	J
July Elberta	C
June Lady	G
June Pride	J
Kern Sun	H
Kingscrest	H
Kings Lady	I
Kings Red	I
Lacey	I
Lady Sue	L
Late Ito Red	L
Madonna Sun	J
Magenta Queen	J
May Crest	G
May Sun	I
Merrill Gem	G
Merrill Gemfree	G
Morning Lord	J
O'Henry	I
Pacifica	G
Pretty Lady	J
Prima Gattie 8	L
Prima Gattie 10	J
Queencrest	G
Ray Crest	G
Red Dancer (Red Boy)	I
Redhaven	G
Red Lady	G
Redtop	G
Regina	G
Rich Lady	J
Rich May	H
Rich Mike	H
Rio Oso Gem	I
Royal Lady	J
Royal May	G
Ruby May	H
Ryan Sun	I
September Flame	I
September Sun	I
Sierra Crest	H
Sierra Lady	I
Sparkle	I
Sprague Last Chance	L
Springcrest	G
Spring Delight	G
Spring Lady	H
Springtreat	I

TABLE 1—Continued

Column A variety	Column B maturity guide
Summer Lady	L
Summerset	I
Summer Zee	L
Suncrest	G
Supechfour (Amber Crest)	G
Super Rich	H
Sweet Dream	J
Sweet Gem	J
Sweet Mick	J
Sweet Scarlet	J
Topcrest	H
Tra Zee	J
Vista	J
Willie Red	G
Zee Lady	L

Note: Consult with the Federal or Federal-State Inspection Service Supervisor for the maturity guides applicable to the varieties not listed above.

* * * * *

(3) Any package or container of Snow Kist or Super Rich variety peaches unless:

* * * * *

(5) Any package or container of Babcock, Bev's Red, Brittney Lane, Crimson Lady, Crown Princess, David Sun, Early May Crest, Flavorcrest, Happy Dream, June Lady, Kern Sun, Kingscrest, Magenta Queen, May Crest, May Sun, May Sweet, Pink Rose, Prima Peach IV, Queencrest, Ray Crest, Redtop, Rich May, Rich Mike, Snow Brite, Snow Prince, Springcrest, Spring Flame 21, Spring Lady, Spring Snow, Springtreat (60EF32), Sugar May, Sunlit Snow (172LE81), Sweet Scarlet, Zee Diamond, 012–094, or 172LE White Peach (Crimson Snow/Sunny Snow) variety peaches unless:

* * * * *

(6) Any package or container of August Flame, August Lady, Autumn Flame, Autumn Red, Autumn Rose, Autumn Snow, Cassie, Coral Princess, Country Sweet, Diamond Princess, Earlirich, Early Elegant Lady, Elegant Lady, Fairtime, Fancy Lady, Fay Elberta, Flamecrest, Full Moon, Henry II, Ivory Princess, Jillie White, Joanna Sweet, John Henry, July Flame, June Flame, June Pride, Kaweah, Kings Lady, Klondike, Late Ito Red, O'Henry, Pink Giant, Pretty Lady, Prima Gattie 8, Prima Peach 13, Prima Peach XV, Prima Peach 20, Prima Peach 23, Prima Peach XXV, Prima Peach XXVII, Princess Gayle, Queen Lady, Red Dancer, Red Giant, Rich Lady, Royal Lady, Ryan Sun, Saturn (Donut), Scarlet Snow, September Flame, September Snow, September Sun, Sierra Gem, Sierra Lady, Snow Beauty, Snow Blaze, Snow Fall, Snow Gem, Snow Giant, Snow Jewel, Snow King, Snow Princess, Sprague Last Chance, Spring Gem, Sugar Giant, Sugar Lady, Summer Dragon, Summer Lady, Summer Sweet, Summer Zee, Supechfour (Amber Crest), Sweet Dream, Sweet Gem, Sweet Kay, Sweet September, Tra Zee, Vista, White Lady, Zee Lady, or 24–SB variety peaches unless:

* * * * *

Dated: April 3, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–8650 Filed 4–4–03; 1:33 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Docket No. FV02–993–3 FR]

Dried Prunes Produced in California; Revising the Regulations Pertaining to a Voluntary Prune Plum Diversion Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule changes the administrative rules and regulations pertaining to a voluntary prune plum diversion program under the California prune marketing order (order). The order regulates the handling of dried prunes produced in California and is administered by the Prune Marketing Committee (Committee). The changes made reflect changes in industry structure and current economic conditions, and modify administrative procedures used in connection with implementing a diversion program. These changes will provide for more timely and efficient implementation of a diversion program if recommended in the future.

EFFECTIVE DATE: This final rule becomes effective May 9, 2003.

FOR FURTHER INFORMATION CONTACT: Richard P. Van Diest, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes produced in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA will rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises the administrative rules and regulations pertaining to a voluntary prune plum diversion program under the California prune marketing order (order). The order regulates the handling of dried prunes produced in California and is administered by the Committee. The changes made reflect changes in industry structure and current economic conditions, and modify administrative

procedures used in connection with implementing a diversion program. These changes will also provide for more timely and efficient implementation if a diversion program is needed in the future. These changes were unanimously recommended by the Committee at a meeting on November 29, 2001.

Volume Regulation Authority

Section 993.54 of the order provides authority for volume control in the form of reserve pooling. Volume control regulation is designed to promote orderly marketing conditions, stabilize prices and supplies, and improve producer returns. When volume regulation is in effect, a certain percentage of the California prune crop may be sold by handlers to any market (salable or free tonnage) while the remaining percentage must be held by handlers in a reserve pool (or reserve) for the account of the Committee. Reserve prunes are disposed of through various programs authorized under the order. Net proceeds generated from sales of reserve prunes are distributed to the reserve pool's equity holders, primarily producers.

Diversion Program Authority

The order also provides authority under § 993.62 for prune producers to participate in a voluntary prune plum diversion program when a reserve pool is implemented. Under this program, prune producers can elect to divert part of their prune plum crop from normal prune or prune product markets in lieu of placing prunes in a reserve pool. Section 993.62 also authorizes establishment of rules and regulations to implement and administer a diversion program.

Section 993.162 contains the rules and regulations necessary for governing the implementation of a diversion program.

Prune Marketing Committee Recommendations

Because a diversion program has not been implemented since the 1970's, the administrative rules and regulations contain several outdated provisions. Section 993.162(a) of the regulations currently establishes specific dryaway ratios by producing regions within the production area. Dryaway ratios represent the ratio of the weight of fresh prune plums needed to produce dried prunes, and are the basis for computing the dried weight equivalent of diverted fresh prune plums. The ratios range from 2.6 to 3.25 pounds of fresh plums to make a pound of French prunes, depending on the producing region. For non-French prunes, the dryaway ratio is established at 3.5 pounds of plums for one pound of non-French prunes for the entire production area.

The dryaway ratios can change from year to year depending upon weather conditions, fruit maturity at time of harvest, fruit solids and other factors. The dryaway ratios used in the early 1970's are no longer valid. Expanding production together with limited dehydration capacity has forced some growers to begin harvesting earlier and continue later than in the past. This has resulted in dryaway ratios higher than those currently specified. Because of this, and to provide more flexibility, the Committee recommended removing the specific dryaway ratios for non-French prunes from § 993.162(a) of the regulations and adding language that will allow the Committee to compute dryaway ratios for the applicable producing regions based on a survey of at least eight commercial prune dehydrators geographically dispersed within the production area.

When the Committee believes a diversion program is needed, the Committee will obtain annual average dryaway ratios from commercial dehydrators surveyed and compute a five-year average dryaway ratio for each dehydrator. The Committee will then add together the participating commercial dehydrators' five-year average dryaway ratios for each producing region within the production area, and divide the total dryaway ratio by the number of participating commercial dehydrators to obtain each year's average dryaway ratio by producing region. In the event any of the annual dryaway ratios for any of the crop years are abnormally high or low in any year, the Committee could replace the abnormal year's data with that of an earlier year. After the computations are made, the resulting ratios will be announced and commercial dehydrators will be notified by letter prior to the beginning of any crop year in which reserve pooling and a diversion program was being contemplated. This will result in more accurate dryaway ratios in determining the dried weight equivalent of fresh prune plums being diverted.

No change to the dryaway ratio for non-French prunes was recommended. Production of these prunes is small (0.06 percent of total prune production), little data is available, and it is believed that the currently listed ratio of 3.5 to 1 is accurate.

As previously mentioned, dryaway ratios for French prunes are calculated and applied to various producing regions within the production area. Section 993.162(a) of the regulations currently contains reference to 13 counties that no longer produce prunes. Prune production has shifted within the production area over the years. Thus, the Committee recommended updating the prune producing regions and condensing them into fewer regions. The regions used in determining dried weight equivalents for a diversion program in § 993.162(a) will be realigned as follows:

French Prunes

—North Sacramento Valley—The counties of Butte, Glenn, Shasta, and Tehama.

—South Sacramento, Napa, Sonoma, and Santa Clara Valleys and the counties of Amador, Colusa, Lake, Placer, Solano, Sutter, Yolo, Yuba, Napa, Sonoma, San Benito, and Santa Clara.

—San Joaquin Valley—The counties of Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, and Tulare.

This final rule also will allow the Committee to assign any new counties of production to one of these three regions or remove counties when production ceases. When prune acreage ceases to exist in a county, the Committee will remove that county from the existing production region, with the approval of the Secretary, and announce the removal to the industry. In like manner, if there were new producing counties within the State, the Committee will, with the approval of the Secretary, be allowed to assign them to one of the existing regions based on geographic proximity and/or production/dehydration characteristics, instead of listing the counties in the rules and regulations. These assignments also will be announced to the industry. This process will allow the Committee to make timely changes to the producing regions so they reflect the current industry situation. Section 993.162(a) is modified to reflect these changes.

The region for non-French prunes will continue to include all counties within the production area because specific information on growing regions within the State is not maintained.

Section 993.162(b) of the regulations currently establishes the following eligible diversion methods: (1) Disposing of harvested prune plums under Committee supervision for nonhuman use at a location and in a manner satisfactory to the Committee; and (2) Leaving unharvested the entire production of prune plums from a solid block of bearing trees designated by the producer applying for the diversion. This final rule will specifically

reference the removal of prune plum trees prior to harvest as an eligible diversion method. In the past, it has been determined that removing trees will qualify as unharvested production under the existing regulations. However, the Committee recommended adding clarifying language to the regulations to ensure that the removal of trees will qualify as an eligible diversion method.

A final change to § 993.162(b) will require the Committee to conduct a meeting prior to the beginning of any crop year in which a diversion program was being contemplated to determine which diversion method or methods may be used, and announce the eligible diversion method(s) to the industry. Section 993.162(b) is modified to reflect these changes.

To participate in the diversion program, producers must file an application with the Committee. Section 993.162(c) of the regulations currently requires that when a producer applies for the diversion program, a deposit fee shall accompany the application. The deposit fees established in the current regulations are as follows: For each producer application, the fee shall be the greater of either $100 or the amount obtained by multiplying the quantity, in tons, of prune plums to be diverted by $3.50. For commercial dehydrators acting as an agent for a group of four or more producers, the fee shall be the greatest of either $200 or the amount obtained by multiplying the aggregate quantity in tons of prune plums to be diverted by the group by $3.50. The deposit fees charged to diverting growers were intended to finance the Committee's administrative costs for the entire diversion program with any excess monies to be refunded on a prorate basis to participants. Because of changed economics since these fees were established in the 1970's, the deposit fees established in the regulations will not currently cover these costs. The Committee, therefore, recommended revising the regulations to provide that whenever a diversion program is implemented, the Committee shall, with the approval of the Secretary, compute and announce the deposit fees associated with filing applications for the diversion program. The deposit fees will be announced to the industry, instead of specifying the deposit fees in the rules and regulations. It is intended that the computed fees will reflect Committee administrative costs associated with administering a diversion program whenever such a program is recommended.

These changes will allow flexibility in the regulations by allowing the Committee to compute and announce the fees. Section 993.162(c) is modified to reflect these changes.

The Committee also recommended changes to § 993.162(d) of the regulations. This section includes criteria for approving diversion applications and establishes fees in connection with modifying applications. The changes will remove reference to specific fees and allow the Committee to apply fees consistent with the process regarding deposit fees. The changes also will increase the service charge for modifying applications from $1 to $2 per ton to reflect current administrative costs. Section 993.162(d) is modified accordingly.

The rules and regulations pertaining to implementing a prune diversion program were developed in the 1970's, and several provisions are outdated. These changes are designed to bring the rules and regulations in line with the present California prune industry practices. The changes also provide for flexibility in years when reserve pooling and a diversion program are implemented.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 1,205 producers of dried prunes in the production area and approximately 24 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

An updated industry profile shows that 9 out of 24 handlers (37.5 percent) shipped over $5,000,000 worth of dried prunes and could be considered large handlers by the Small Business Administration. Fifteen of the 24 handlers (62.5 percent) shipped under $5,000,000 worth of prunes and could be considered small handlers. An estimated 32 producers, or less than 3 percent of the 1,205 total producers, would be considered large growers with annual receipts over $750,000. The majority of handlers and producers of California dried prunes may be classified as small entities. USDA does not have precise numbers on the total number of commercial dehydrators in the industry or their size. However, it may be assumed that many may be considered small under SBA criteria.

Under § 993.62 of the order, when volume control in the form of a reserve pool is implemented, prune producers can elect to divert part of their prune plum crop from normal markets in lieu of placing prunes in a reserve pool. Section 993.162 contains the administrative rules and regulations necessary to administer a diversion program. This rule will revise those regulations.

One of the changes will remove references in the regulations to establish dryaway ratios for prune plums of the French variety. Dryaway ratios are used to determine the dried weight equivalent of fresh prune plums diverted from normal markets. Because these dryaway ratios are outdated, the Committee recommended replacing them by a process that will allow the Committee to compute and announce current dryaway ratios based on a survey of commercial dehydrators. Surveying commercial prune dehydrators will impose a minor information collection burden on such entities. It is estimated that between 8 and 15 commercial dehydrators will be requested to furnish information on their annual average dryaway ratios to the Committee, and that it will take approximately 15 minutes to furnish the information. The total estimated annual burden of collecting this information is estimated to be 225 minutes (3 hours and 45 minutes) for the industry. However, the Committee believes that the burden to complete a commercial dehydrator dryaway ratio survey will be outweighed by obtaining and using updated dryaway ratio data for French prunes when dryaway ratios are used to determine the dried weight equivalent of fresh prune plums diverted from normal markets.

Another change will update the prune producing regions to which the dryaway ratios for French prunes are applied, and allow the Committee to update the areas based on current production information. Dryaway ratios vary from area to area, and prune production shifts over time. Another change will specify in the regulatory text that tree removal is an acceptable diversion method, and

that the Committee may determine, with the approval of the Secretary, and announce which method(s) of diversion may be used whenever a program is implemented. Another change will remove from the regulations outdated deposit fees for diversion program participants and authorize the Committee to compute such fees based on current program administration costs.

The changes to the prune producing regions, addition of acceptable diversion methods, and the Committee's authority to determine which methods of diversion are to be used are not expected to have a significant impact on growers or handlers, either small or large. These changes will update the regulations to reflect changes in the industry and to facilitate administration and implementation of a voluntary diversion program, if recommended in the future.

The changes regarding deposit fees will allow the Committee to collect charges from diversion program participants that reflect actual administrative costs incurred by the Committee. The fees specified in the regulations are outdated and will not cover the Committee's actual costs if a diversion program was needed to be implemented in the future. These changes will help to ensure that the growers participating in a future diversion program will pay the administrative costs of the program, as specified in § 993.62(g) of the order. Because growers participating in a diversion program are the beneficiaries of the program, it is appropriate that they pay the administrative fees of the program. In addition, because the diversion program is voluntary, growers will determine individually whether the costs will outweigh the benefits prior to their participation. It is not known how many growers will participate in a diversion program, since there has not been one implemented under the marketing order since the 1970's.

This final rule will be applied to small and large entities equally, regardless of size. The Committee believes that these actions will benefit the prune industry by updating the regulations to reflect changes in the industry, and by providing a process that will facilitate timelier implementation of a diversion program, if recommended.

The Committee discussed alternatives to this change on November 29, 2001, including taking no action. However, that will leave any future diversion program a less viable supply management tool due to outdated program elements. Another alternative was to update the data on dryaway ratios, prune producing regions, and diversion application charges through informal rulemaking the next time a diversion program was considered, rather than changing to a formula or survey procedure as stated herein. This alternative was not recommended because the Committee believed that this final rule would provide for more flexibility in administering a future diversion program.

This action will allow the Committee to survey commercial prune dehydrators to estimate costs applicable to drying prune plums. The reporting and record keeping burdens are necessary for compliance purposes and for developing statistical data to administer a future program. This rule will impose some additional reporting or recordkeeping requirements on both small and large California prune plum commercial dehydrators. It is estimated that between 8 and 15 commercial dehydrators will be requested to furnish information on their annual average dryaway ratios to the Committee, and that it will take an average of 15 minutes per response to furnish this information. The total estimated annual burden of collecting this information is estimated to be 225 minutes (3 hours and 45 minutes) for the industry. However, the Committee believes that the burden to complete a commercial dehydrator dryaway ratio survey will be outweighed by obtaining and using updated dryaway ratio data for French prunes when dryaway ratios are used to determine the dried weight equivalent of fresh prune plums from normal markets.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS is seeking approval by the Office of Management and Budget (OMB) for the additional burden imposed by the commercial dryaway ratio survey. Upon OMB approval, the additional burden will be merged into the information collection currently approved under OMB No. 0581–0178, Vegetable and Specialty Crop Marketing Orders. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

In addition, the Committee's Supply Management Subcommittee meeting on November 28, 2001, and the Committee meeting on November 29, 2001, where this action was deliberated, were both public meetings widely publicized throughout the prune industry. All interested persons, both large and small, were invited to attend the subcommittee and Committee meetings and participate in the industry's deliberations.

A proposed rule concerning this action was published in the **Federal Register** on October 28, 2002, (67 FR 65732). Copies of this rule were mailed or sent via facsimile to all Committee members, alternates and dried prune handlers. Finally, the Office of the Federal Register and USDA made the rule available through the Internet. The rule provided a comment period that ended December 27, 2002. No comments were received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 993 is amended as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 993.162, paragraphs (a), (b), (c), and (d) are revised to read as follows:

§ 993.162 Voluntary prune plum diversion.

(a) *Quantity to be diverted.* The Committee shall indicate the quantity of prune plums that producers may divert pursuant to § 993.62 whenever it recommends to the Secretary that diversion operations for a crop year be permitted. Whenever diversion operation for a crop year have been authorized by the Secretary, the Committee shall notify producers, commercial dehydrators, and handlers, known to it of such authorization and diversion program procedures. The

Committee shall compute the dried weight equivalent of prune plums so diverted on a dryaway basis as follows:

(1) For prune plums of the French variety, the Committee shall survey at least eight commercial prune dehydrators that are geographically dispersed within the production area to obtain their annual dryaway ratios for each of the preceding five crop years, and compute a five-year average dryaway ratio for each dehydrator. The Committee shall then add together the participating commercial dehydrators' five-year average dryaway ratios for each producing region within the production area, and divide the total by the number of participating commercial dehydrators in that region to compute the dryaway ratio by producing region. In the event any of the annual dryaway ratios for any of the crop years is abnormally high or low in any year, the Committee may replace the abnormal year's data with that of an earlier year. The prune producing regions for which dryaway ratios shall be computed for prune plums of the French variety are as follows:

(i) North Sacramento Valley, which includes the counties of Butte, Glenn, Shasta, and Tehama;

(ii) South Sacramento, Napa, Sonoma, and Santa Clara Valleys, which includes the counties of Amador, Colusa, Lake, Placer, Solano, Sutter, Yolo, Yuba, Napa, Sonoma, San Benito, and Santa Clara; and

(iii) San Joaquin Valley, which includes the counties of Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, and Tulare.

(A) *New producing counties within the area.* If there were new producing counties within the State of California, the Committee will, with the approval of the Secretary, assign the new prune producing county or counties, as the case may be, to one of the prune producing regions based on geographic proximity and/or production/dehydration characteristics. The addition of a county or counties, as the case may be, to one of the producing regions will be announced to the industry.

(B) *Removal of a county from a production area.* When prune acreage ceases to exist in a county, the Committee will, with the approval of the Secretary, remove that county from the existing region. Removal of a county from a production region also will be announced to the industry.

(2) For prune plums of the non-French variety, the dryaway ratio shall be 1 pound for each 3.50 pounds of prune plums diverted. The prune-producing region for prune plums of non-French varieties is the State of California.

(b) *Eligible diversions.* Eligible diversions shall preclude prune plums from becoming prunes and may include the following methods:

(1) Disposing of harvested prune plums under Committee supervision for nonhuman use at a location and in a manner satisfactory to the Committee;

(2) Leaving unharvested the entire production of prune plums from a solid block of bearing trees designated by the producer applying for the diversion of removing prune plum trees prior to harvest; and/or

(3) Such other diversions as may be authorized by he Committee and approved by the Secretary.

(4) In accordance with § 993.62(c), eligible diversion shall not apply to prune plums, which would not, under normal producer practices, be dried and delivered to a handler. On or before July 20 of each crop year when the Committee recommends a reserve pool and diversion program (except the Committee with the approval of the Secretary may extend this date by not more than 10 business days if warranted by a late crop), the Committee shall identify, with the approval of the Secretary, the acceptable method(s) of voluntary prune plum diversion through reasonable publicity to producers, commercial dehydrators, handlers, and the cooperative bargaining association(s). For the purposes of this section, cooperative bargaining association means a nonprofit cooperative association of dried prune producers engaged within the production area in bargaining with handlers as to price and otherwise arranging for the sale of natural condition dried prunes of its members.

(c) *Applications for diversion.*

(1) *By producers.* Each producer desiring to divert prune plums of his own production shall, prior to diversion, file with the Committee a certified application on Form PMC 10.1 ''Application for Prune Plum Diversion'' containing at least the following information:

(i) The name and address of the producer; whether the producer is an owner-operator, share-landlord, share-tenant, or cash tenant; and the name and address of any other person or persons sharing a proprietary interest in such prune plums;

(ii) The proposed method of diversion and the location where the diversion is to take place;

(iii) The quantity and variety of prune plums proposed to be diverted; and

(iv) The approximate period of diversion.

(v) A deposit fee shall accompany each producer's application to cover costs associated with processing the application and administering the diversion program. The Committee shall compute, with the approval of the Secretary, and announce to the industry, the deposit fee. The deposit fee announced shall be a set dollar amount or a per ton cost based on the tonnage to be diverted. The fee paid by the applicant shall be the greater of these amounts.

(2) *By dehydrator as agent.* Any producer, or group of producers, may authorize a dehydrator to act as an agent to divert harvested prune plums. Prior to diversion such dehydrator shall submit to the Committee an application on Form PMC 10.1 ''Application for Prune Plum Diversion'' for each producer or group of producers under contract with the dehydrator. A deposit fee shall accompany each such application to cover the costs associated with processing the application and administration of the program. With respect to any group of four or more producers under contract with a dehydrator, the deposit fee for the group shall be the greater of either double the single deposit fee, pursuant to paragraph (c)(1) of this section, or the amount obtained by multiplying the total tonnage of prune plums to be diverted by the group of producers covered in the dehydrator's application times the per ton deposit rate announced by the Committee pursuant to (c)(1) of this section.

(3) *Receipt of applications.* The Committee shall establish, and give prompt notice to the industry, a final date for receipt of applications for diversion: *Provided*, That the Committee may extend such deadline if the total tonnage represented in all applications is substantially less than the total tonnage established by the Committee pursuant to paragraph (a) of this section.

(d) *Approval of applications.* No certificate of diversion shall be issued by the Committee unless it has approved the application covering such diversion.

(1) The Committee's approval of an application shall be in writing, and include at least the following:

(i) The details as to the method of diversion to be followed;

(ii) The method of appraisal to be used by the Committee to determine the quantity of prune plums diverted;

(iii) The lesser of either the quantity specified in the application to be diverted, or modification of that quantity as a result of any Committee action to prorate the total quantity to be diverted by all producers; and

(iv) Such other information as may be necessary to assist the applicant in meeting the requirements of this section, including the conditions for proof of diversion.

(2) If the Committee determines that it cannot approve an application it shall notify the applicant promptly. The Committee shall state the reason(s) for failing to approve the application, and request the applicant to submit, if practicable, an amended application correcting the deficiencies in the original application.

(3) The Committee shall establish, and give prompt notice to the industry of a final date by which a producer or dehydrator may modify an approved application, including changing the method of diversion or the quantity of prune plums to be diverted: *Provided*, That any such change shall include information on the location or quantity of such diversion and shall be accompanied by a payment of a second deposit fee, calculated pursuant to paragraph (c)(1) or (c)(2), as applicable, of this section, plus a $2 per ton service charge for any increase in tonnage to be diverted.

(4) If an applicant cancels an approved diversion application prior to diversion, no part of the deposit fee shall be refunded, except upon approval by the Committee following review of all circumstances in the matter.

* * * * *

Dated: April 3, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–8649 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1465

RIN 0578–AA31

Agricultural Management Assistance Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements section 2501 of the Farm Security and Rural Investment Act of 2002 (the 2002 Act) which amended section 524 of the Federal Crop Insurance Act which permits CCC to fund the Agricultural Management Assistance (AMA) program. This final rule describes how NRCS intends to implement AMA as authorized by the amendment in the 2002 Act.

EFFECTIVE DATE: May 9, 2003.

ADDRESSES: This rule may also be accessed via Internet. Users can access the Natural Resources Conservation Service (NRCS) homepage at *http://www.nrcs.usda.gov;* select Farm Bill 2002, and click on AMA Final rule.

FOR FURTHER INFORMATION CONTACT: Dave Mason, Program Manager, Conservation Operations Division, NRCS, P.O. Box 2890, Washington, DC 20013–2890, telephone: (202) 720–1873; fax: (202) 720–4265; e-mail: *dave.mason@usda.gov*, Attention: Agricultural Management Assistance.

SUPPLEMENTARY INFORMATION:

Discussion of Program

Section 2501 of the Farm Security and Rural Investment Act of 2002 (the 2002 Act) amended section 524 of the Federal Crop Insurance Act (7 U.S.C. 1524) to permit CCC to fund the Agricultural Management Assistance (AMA) program at the amount of $20,000,000 for each of the fiscal years 2003 through 2007. Section 524(b) of the Federal Crop Insurance Act of 2000, as amended by section 133 of the Agricultural Risk Protection Act of 2000, authorized the AMA program.

As provided by section 524 of the Federal Crop Insurance Act (7 U.S.C. 1524), as amended by the 2002 Act, the funds, facilities, and authorities of the Commodity Credit Corporation (CCC) are available to NRCS for carrying out AMA. (The Chief of the NRCS is vice-president of the CCC.) Accordingly, where NRCS is mentioned in this rule, it also refers to the CCC's funds, facilities, and authorities where applicable.

The Commodity Credit Corporation (CCC) administers the funds under the general supervision of a Vice President of the CCC who is the Chief of the Natural Resources Conservation Service (NRCS). These funds will be used annually for cost share assistance to producers in 15 States in which participation in the Federal Crop Insurance Program is historically low. The 15 States include Connecticut, Delaware, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming. The cost share assistance will encourage and assist producers in the selected States to adopt natural resources conservation practices and investment strategies that will reduce or mitigate risks to their agricultural enterprises.

NRCS will use an allocation formula to determine the amount of funds that each state will receive that have been weighted to meet National objectives for the AMA conservation program. The formula used to determine allocation of funds to states consists of ranking factors of natural resource concerns. The formula is similar in nature to ones that have been used for other NRCS conservation programs.

However, this formula is primarily used to allocate funds to the states for practices that will mitigate a producer's risk of production through the implementation of resource conservation practices that reduce soil erosion, utilize integrated pest management principles and assist producers in transition to organic farming based operations. Production and marketing diversification is enhanced by utilizing integrated pest management principles by reducing and applying chemicals for production as needed. Producers who elect to eliminate chemical usage by converting to organic farming will be able to provide products to a growing sector of the American population whose daily diet consists partially or totally of organically produced food items. This allows producers to use marketing diversification as a tool to enhance their operations. AMA is targeted to 15 states that have been historically low in participation in programs that provide opportunities for producers to environmentally and financially implement conservation practices and marketing strategies to provide safeguards against the cyclic economic variances of the agricultural economy.

Other practices that producers may elect to implement include the opportunity to construct or improve watershed management or irrigation structures and plant trees to form windbreaks or improve water quality.

Based on national program objectives and state priorities and resource concerns, the State Conservationist in conjunction with advice from the State Technical Committee will determine which practices are eligible for program payments. The practices must meet the purposes set out in section 1465.1 of this rule.

The State Conservationist or designated conservationist with advice from the State Technical Committee and using a locally led process will rank and select applications for contracting based on the state-developed ranking criteria and ranking process. The NRCS representative will work with the applicant to collect the necessary information to evaluate the application using the ranking criteria.

Executive Order 12866

Pursuant to Executive Order 12866 (58 FR 51735, October 4, 1993), the Office of Management and Budget has determined that this final rule is not a significant regulatory action.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because NRCS is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Analysis

NRCS has determined through an Environmental Assessment (EA) for the Agricultural Management Assistance Program that the issuance of this final rule would not have a significant impact on the human environment. Copies of the Environmental Assessment and the Finding of No Significant Impact may be obtained from Dave Mason, Conservation Operations Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890.

Civil Rights Impact Analysis

NRCS has determined through a Civil Rights Impact Analysis that the issuance of this final rule will not have a significant effect on minorities. Copies of the Civil Rights Impact Analysis and Finding of No Significant Impact may be obtained from Dave Mason, Conservation Operations Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890.

Paperwork Reduction Act

Section 2702 (b)(1)(A) of the 2002 Act exempts the promulgation of regulations and the administration of the AMA from the requirements of the Paperwork Reduction Act.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988. The provisions of this final rule are not retroactive. Furthermore, the provisions of this final rule preempt State and local laws to the extent such laws are inconsistent with this final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614, 780 and 11 must be exhausted.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, NRCS assessed the effects of this rulemaking action on State, local, and tribal governments, and the public. This action does not compel the expenditure of $100 million or more by any State, local, or tribal governments, or anyone in the private sector; therefore a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

USDA classified this final rule as ''not major'' under section 304 of the Department of Agriculture Reorganization Act of 1994, Pub. L. 104–354. Therefore, a risk assessment is not required.

Discussion of Comments

NRCS issued a proposed rule with request for comments on August 28, 2002, in the **Federal Register**, Volume 67, Number 167, Pages 55171–55175.

One comment was received during the comment period on the proposed regulation. The commenter stated that they were interested in organizing a meeting with a group of farmers in Illinois. Since the state of Illinois is not eligible for participation in the program and the comment was not directed to any section of the proposed rule, no changes were made to the rule.

List of Subjects in 7 CFR Part 1465

Conservation contract, Conservation plan, Conservation practices, Soil and water conservation.

■ Accordingly, Title 7 of the Code of Federal Regulations is amended by adding a new part 1465 to read as follows:

PART 1465—AGRICULTURAL MANAGEMENT ASSISTANCE

Subpart A—General Provisions

Sec.
1465.1 Purposes and applicability.
1465.2 Administration.
1465.3 Definitions.
1465.4 Program requirements.
1465.5 Conservation practices.

Subpart B—Contracts

1465.20 Applications for participation and selecting applications for contracting.
1465.21 Contract requirements.
1465.22 Conservation practice operation and maintenance.
1465.23 Cost-share payments.
1465.24 Contract modification, extension, and transfer of land.
1465.25 Contract violations and termination.

Subpart C—General Administration

1465.30 Appeals.
1465.31 Compliance with regulatory measures.
1465.32 Access to operating unit.
1465.33 Performance based upon advice or action of representatives of NRCS.
1465.34 Offsets and assignments.
1466.35 Misrepresentation and scheme or device.

Authority: 7 U.S.C. 1524(b), 16 U.S.C. 3801.

Subpart A—General Provisions

§ 1465.1 Purposes and applicability.

Through the Agricultural Management Assistance (AMA) program, the NRCS provides financial assistance funds annually to producers in 15 statutorily designated states to construct or improve water management structures or irrigation structures; to plant trees to form windbreaks or to improve water quality; and to mitigate risk through production diversification or resource conservation practices, including soil erosion control, integrated pest management, or transition to organic farming. The AMA Program is applicable in Connecticut, Delaware, Maryland, Massachusetts, Maine, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

§ 1465.2 Administration.

(a) Administration and implementation of the conservation provisions of AMA Program for the CCC is assigned to the Natural Resources Conservation Service (NRCS). The Farm Service Agency (FSA) is responsible for 'person' determinations under § 1465.23(c) and making cost-share payments.

(b) NRCS will:

(1) Provide overall management and implementation leadership for the AMA Program;

(2) Establish policies, procedures, priorities, and guidance for implementation;

(3) Establish cost-share payment limits;

(4) Determine eligible practices;

(5) Develop and approve conservation plans and contracts with selected participants;

(6) Provide technical leadership for implementation, quality assurance, and evaluation of performance; and

(7) Make funding decisions and determine allocations of AMA funds.

(c) FSA will:

(1) Determine 'person' and producer eligibility; and

(2) Make cost-share payments for practices completed.

§ 1465.3 Definitions.

The following definitions apply to this part and all documents issued in

accordance with this part, unless specified otherwise:

Applicant means an agricultural producer who has requested in writing to participate in the AMA Program. Producers who are members of a joint operation shall be considered one applicant.

Chief means the Chief of NRCS, or designee.

Conservation district means a political subdivision of a State, Indian tribe, or territory, organized pursuant to the State or territorial soil conservation district law, or tribal law. The subdivision may be a conservation district, soil conservation district, soil and water conservation district, resource conservation district, natural resource district, land conservation committee, or similar legally constituted body.

Conservation plan means a record of the participant's decisions, and supporting information, for treatment of a unit of land or water, and includes the schedule of operations, activities, and estimated expenditures needed to solve identified natural resource concerns.

Conservation practice means a specified treatment, such as a structural or vegetative practice or a land management practice, which is planned and applied according to NRCS standards and specifications.

Contract means a legal document that specifies the rights and obligations of any person who has been accepted for participation in the AMA Program.

Cost-share payment means the financial assistance from NRCS to the participant to share the cost of installing eligible practices.

Designated conservationist means an NRCS employee whom the State conservationist has designated as responsible for administration of the AMA Program.

Indian tribe means any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special assistance and services provided by the United States to Indians because of their status as Indians.

Indian trust lands means real property in which the United States holds title as trustee for an Indian or tribal beneficiary, or a Indian or tribal beneficiary holds title and the United States maintains a trust relationship.

Life-span means the minimum time period in which the conservation practices are to be maintained and used for their intended purpose.

Liquidated damages means a sum of money stipulated in the contract that the participant agrees to pay if the participant breaches the contract. The sum represents an estimate of the anticipated or actual harm caused by the breach, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Operation and maintenance means work that is to be performed by the participant to keep the applied conservation practice functioning for the intended purpose during its life span. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

Participant means a producer who is a party to an AMA contract.

Producer means a person who is engaged in agricultural production.

Secretary means the Secretary of the United States Department of Agriculture.

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Basin Area.

State Technical Committee means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

Technical assistance means the personnel and support resources needed to conduct conservation practice survey, layout, design, installation, and certification; training and providing quality assurance for professional conservationists; and evaluation and assessment of the AMA Program.

Unit of concern means a parcel of agricultural land that has natural resource conditions that are of concern to the participant.

§ 1465.4 Program requirements.

(a) Participation in the AMA Program is voluntary. The participant, in cooperation with the local conservation district, applies for practice installation for the farm or ranching unit of concern. The NRCS provides cost-share payments through contracts to apply needed conservation practices within a time schedule specified in the contract.

(b) The Chief determines the funds available for financial assistance according to the purpose and projected cost for which the financial assistance is provided in a fiscal year. The Chief allocates the funds available to carry out the AMA Program.

(c) To be eligible to participate in the AMA Program, an applicant must:

(1) Be an agricultural producer;

(2) Have control of the land for the life of the proposed contract period, except that:

(i) An exception may be made by the Chief in the case of land allotted by the Bureau of Indian Affairs (BIA), tribal land, or other instances in which the Chief determines that there is sufficient assurance of control; or

(ii) If the applicant is a tenant of the land involved in agricultural production the applicant shall provide NRCS with the written concurrence of the landowner in order to apply an eligible practice(s);

(3) Submit an application form CCC–1200;

(4) Supply information as required by NRCS to determine eligibility for the AMA Program; and

(5) States, political subdivisions, and entities thereof will not be persons eligible for payment. Any cooperative association of producers that markets commodities for producers shall not be considered to be a person eligible for payment.

(d) Land may only be considered for enrollment in the AMA program if NRCS determines that the land is:

(1) Privately owned land;

(2) Publicly owned land where:

(i) The land is under private control for the contract period and is included in the participant's operating unit;

(ii) Conservation practices will contribute to an improvement in the identified natural resource concern; and

(iii) The participant has provided NRCS with written authorization from the government landowner to apply the conservation practices; or

(3) The land is federally recognized Tribal, BIA allotted, or Indian trust land.

§ 1465.5 Conservation practices.

(a) The State Conservationist, with advice from the State Technical Committee, will determine the conservation practices eligible for AMA Program payments. To be considered eligible conservation practices, the practices must meet the purposes of the AMA as set out in § 1465.1.

(b) The conservation plan includes the schedule of operations, activities, and estimated expenditures of the practices needed to solve identified natural resource concerns.

Subpart B—Contracts

§ 1465.20 Applications for participation and selecting applications for contracting.

(a) Any producer who has eligible land may submit an application for participation in the AMA Program at a USDA service center. Producers who are members of a joint operation shall file

a single application for the joint operation.

(b) NRCS will accept applications throughout the year. The State Conservationist will distribute information on the availability of assistance and the state-specific goals. Information will be provided that explains the process to request assistance.

(c) The State Conservationist, with advice from the State Technical Committee, will develop ranking criteria and a ranking process to select applications, taking into account local and state priorities.

(d) The State Conservationist or designated conservationist with advice from the State Technical Committee and using a locally led process will rank and select applications for contracting based on the state-developed ranking criteria and ranking process.

(e) The State Conservationist or designated conservationist will work with the applicant to collect the information necessary to evaluate the application using the ranking criteria.

§ 1465.21 Contract requirements.

(a) In order for a participant to receive cost-share payments, the participant shall enter into a contract agreeing to implement eligible conservation practices.

(b) An AMA contract will:

(1) Incorporate by reference all portions of a unit applicable to the AMA Program;

(2) Be for a duration of 3 to 10 years;

(3) Incorporate all provisions as required by law or statute, including participant requirements to:

(i) Not conduct any practices on the farm or ranch unit of concern that would tend to defeat the purposes of the contract according to § 1465.25;

(ii) Refund any AMA Program payments received with interest, and forfeit any future payments under the AMA Program, on the violation of a term or condition of the contract, consistent with the provisions of § 1465.25;

(iii) Refund all AMA Program payments received on the transfer of the right and interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations of the contract, consistent with the provisions of § 1465.24; and

(iv) Supply information as required by NRCS to determine compliance with the contract and requirements of the AMA Program.

(4) Specify the participant's requirements for operation and maintenance of the applied conservation practices consistent with the provisions of § 1465.22; and

(5) Any other provision determined necessary or appropriate by NRCS.

(c) The participant must apply the practice(s) according to the schedule set out in the contract or conservation plan.

§ 1465.22 Conservation practice operation and maintenance.

The contract will incorporate the operation and maintenance of the conservation practice(s) applied under the contract. The participant must operate and maintain the conservation practice(s) for its intended purpose for the life span of the conservation practice, as identified in the contract or conservation plan, as determined by NRCS. NRCS may periodically inspect the conservation practices during the life span of the practices as specified in the contract to ensure that operation and maintenance is occurring.

§ 1465.23 Cost-share payments.

(a)(1) The Federal share of cost-share payments to a participant will be 75 percent of the actual cost of an eligible practice. In no instance shall the total financial contributions for an eligible practice from all public and private entity sources exceed 100 percent of the actual cost of the practice.

(2) Participants may contribute their portion of the costs of practices through in-kind contributions, including labor and materials, providing the materials contributed meet the NRCS standards and specifications for the practice being installed.

(3) Cost-share payments will not be made to a participant who has applied or initiated the application of a conservation practice prior to approval of the contract.

(b) The total amount of cost-share payments paid to a person under this part may not exceed $50,000 for any fiscal year.

(c) For purposes of applying the payment limitations provided for in this section, NRCS will use the provisions in 7 CFR part 1400 related to the definition of a ''person''and the limitation of payments, except that:

(i) The provisions in part 1400, subpart C for determining whether persons are actively engaged in farming, subpart E for limiting payments to certain cash rent tenants, and subpart F as the provisions apply to determining whether foreign persons are eligible for payment, will not apply.

(ii) With respect to land under an AMA Program contract which is inherited during the contract period, the $50,000 fiscal year limitation will not apply to the extent that the payments from any contracts on the inherited land cause an heir, who was party to an AMA Program contract on other lands prior to the inheritance, to exceed the annual limit.

(iii) With regard to contracts on tribal land, Indian trust land, or BIA allotted land, payments exceeding one limitation may be made to the tribal venture if an official of the BIA or tribal official certifies in writing that no one person directly or indirectly will receive more than the limitation.

(iv) The status of an individual or entity on the date of the application shall be the basis on which the determination of the number of persons involved in the farming operation is made.

(d) The participant and NRCS must certify that a conservation practice is completed in accordance with the contract before NRCS will approve the payment of any cost-share payment.

§ 1465.24 Contract modification, extension, and transfer of land.

(a) The participant and NRCS may modify a contract if the participant and NRCS agree to the contract modification.

(b) Contracts that run less than ten years may be extended for up to the 10-year limit in order for the participant to complete the practices scheduled in the contract, if such extension is requested by the participant before the contract expires.

(c) The parties may mutually agree to transfer a contract to a new participant. The transferee must be determined by NRCS to be eligible to participate in the AMA Program and shall assume full responsibility under the contract, including operation and maintenance of those conservation practices already installed and to be installed as a condition of the contract.

(d) NRCS may require a participant to refund all or a portion of any assistance earned under the AMA Program if the participant sells or loses control of the land under an AMA Program contract and the new owner or controller is not eligible to participate in the AMA Program or refuses to assume responsibility under the contract.

§ 1465.25 Contract violations and termination.

(a)(1) If NRCS determines that a participant is in violation of the terms of a contract or documents incorporated by reference into the contract, NRCS will give the participant a reasonable time, as determined by the State Conservationist, to correct the violation and comply with the terms of the contract and attachments thereto. If a

participant continues in violation, the State Conservationist may terminate the AMA Program contract.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, a contract termination shall be effective immediately upon a determination by the State Conservationist that the participant has submitted false information or filed a false claim, or engaged in any act for which a finding of ineligibility for payments is permitted under the provisions of § 1465.35, or in a case in which the actions of the party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(b)(1) If NRCS terminates a contract, the participant shall forfeit all rights for future payments under the contract and shall refund all or part of the payments received, plus interest determined in accordance with part 1403 of this chapter. The State Conservationist has the option of requiring only partial refund of the payments received if the State Conservationist determines that a previously installed conservation practice can function independently, is not affected by the violation or other conservation practices that would have been installed under the contract, and the participant agrees to operate and maintain the installed conservation practice for the life span of the practice.

(2) If NRCS terminates a contract due to breach of contract or the participant voluntarily terminates the contract before any contractual payments have been made, the participant shall forfeit all rights for further payments under the contract and shall pay such liquidated damages as are prescribed in the contract. The State Conservationist will have the option to waive the liquidated damages depending upon the circumstances of the case.

(3) When making all contract termination decisions, NRCS may reduce the amount of money owed by the participant by a proportion which reflects the good faith effort of the participant to comply with the contract, or the hardships beyond the participant's control that have prevented compliance with the contract.

(4) The participant may voluntarily terminate a contract if NRCS agrees based on NRCS's determination that termination is in the public interest.

(5) In carrying out NRCS's role in this section, NRCS may consult with the local conservation district.

Subpart C—General Administration

§ 1465.30 Appeals.

(a) A participant may obtain administrative review of an adverse decision under the AMA Program in accordance with parts 11 and 614 of this title, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

(1) Payment rates, payment limits, and cost-share percentages;

(2) Funding allocations;

(3) Eligible conservation practices; and

(4) Other matters of general applicability, including:

(i) Technical standards and formulas;

(ii) Denial of assistance due to lack of funds or authority; or

(iii) Science-based formulas and criteria.

§ 1465.31 Compliance with regulatory measures.

Participants who carry out conservation practices will be responsible for obtaining the authorities, rights, easements, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants will be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

§ 1465.32 Access to operating unit.

Any authorized NRCS representative shall have the right to enter an operating unit or tract for the purpose of ascertaining the accuracy of any representations made in a contract or in anticipation of entering a contract, as to the performance of the terms and conditions of the contract. Access shall include the right to provide technical assistance, inspect any work undertaken under the contract and collect information necessary to evaluate the performance of conservation practices in the contract. The NRCS representative will make a reasonable effort to contact the participant prior to the exercise of this provision.

§ 1465.33 Performance based upon advice or action of representatives of NRCS.

If a participant relied upon the advice or action of any authorized representative of NRCS, and did not know or have reason to know that the action or advice was improper or erroneous, the State Conservationist may accept the advice or action as meeting the requirements of the AMA Program and may grant relief, to the extent it is deemed desirable by NRCS, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant.

§ 1465.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States Government. The regulations governing offsets and withholdings found in part 1403 of this chapter shall be applicable to contract payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing assignment of payment found at part 1404 of this chapter.

§ 1465.35 Misrepresentation and scheme or device.

(a) A producer who is determined to have erroneously represented any fact affecting an AMA Program determination made in accordance with this part shall not be entitled to contract payments and must refund to NRCS all payments, plus interest determined in accordance with part 1403 of this chapter.

(b) A producer's interest in all contracts shall be terminated, and the producer shall refund to NRCS all payments, plus interest determined in accordance with part 1403 of this chapter, received by such producer with respect to all contracts if it is determined that the producer knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of the AMA Program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting an AMA Program determination.

Signed in Washington, DC, on March 28, 2003.

Bruce I. Knight,

Vice President, Commodity Credit Corporation, Chief, Natural Resources Conservation Service.

[FR Doc. 03–8452 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–16–P

HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

Food Additives Permitted for Direct Addition to Food for Human Consumption

CFR Correction

In Title 21 of the Code of Federal Regulations, parts 170 to 199, revised as of April 1, 2002, on page 63, § 172.615(a) is corrected in the table by removing the first entry for ''Pentaerythritol ester of gum or wood rosin'' and adding the following entry in its place:

§ 172.615 Chewing gum base.

* * * * *

(a) * * *

Plasticizing Materials (Softeners)	
*	*
Pentaerythritol ester of partially hydrogenated gum or wood rosin	Having an acid number of 7–18, a minimum drop-softening point of 102 °C, and a color of K or paler.
*	*

[FR Doc. 03–55510 Filed 4–8–03; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 54, and 602

[TD 9052]

RIN 1545–BA08

Notice of Significant Reduction in the Rate of Future Benefit Accrual

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance on the notification requirements under section 4980F of the Internal Revenue Code (Code) and section 204(h) of the Employee Retirement Income Security Act of 1974 (ERISA). Under these final regulations, a plan administrator must give notice of a plan amendment to certain plan participants and beneficiaries when the plan amendment provides for a significant reduction in the rate of future benefit accrual or the elimination or significant reduction in an early retirement benefit or retirement-type subsidy. These final regulations affect retirement plan sponsors and administrators, participants in and beneficiaries of retirement plans, and employee organizations representing retirement plan participants.

DATES: *Effective date.* These regulations are effective on April 9, 2003.

Applicability date. For dates of applicability of these regulations, *see* § 54.4980F–1, Q&A–18, of these regulations.

FOR FURTHER INFORMATION CONTACT: Pamela R. Kinard at (202) 622–6060 or Diane S. Bloom at (202) 283–9888 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1780. Responses to this collection of information are required to obtain a benefit for a taxpayer who wants to amend a plan with an amendment that significantly reduces the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

The estimated annual burden per respondent varies from 1 hour to 80 hours, depending on individual circumstances, with an estimated average of 10 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR parts 1, 54, and 602 under section 4980F of the Code and section 204(h) of ERISA. Prior to 2001, section 204(h) of ERISA had no analogous section in the Code, but pursuant to section 101(a) of the Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt, the Secretary of the Treasury has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including section 204(h) of ERISA. Under section 104 of the Reorganization Plan No. 4, the Secretary of Labor retains enforcement authority with respect to parts 2 and 3 of subtitle B of title 1 of ERISA, but, in exercising that authority, is bound by the regulations issued by the Secretary of Treasury. On December 15, 1995, temporary regulations (TD 8631), under section 411(d)(6) of the Code were published in the **Federal Register** (60 FR 64320), providing guidance on section 204(h) of ERISA. A notice of proposed rulemaking (EE–34–95), cross-referencing the temporary regulations was published in the **Federal Register** (60 FR 64401) on the same day. On

December 14, 1998, final regulations (TD 8795) addressing the notice requirements under section 204(h) of ERISA were published in the **Federal Register** (63 FR 68678) and were codified in § 1.411(d)–6. The final regulations in this Treasury decision remove Treasury regulation § 1.411(d)–6.

Section 659 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (EGTRRA) added section 4980F of the Code. Section 4980F imposes an excise tax when a plan administrator fails to provide timely notice of plan amendments that provide for a significant reduction in the rate of future benefit accrual. A reduction of an early retirement benefit or a retirement-type subsidy is also treated, for purposes of section 4980F of the Code, as a reduction in the rate of future benefit accrual. Section 659(b) of EGTRRA also amended section 204(h) of ERISA to treat the elimination of an early retirement benefit or a retirement-type subsidy as a reduction in the rate of future benefit accrual. The Job Creation and Worker Assistance Act of 2002, Public Law 107–147 (116 Stat. 21) included certain technical corrections to section 659 of EGTRRA.

On April 23, 2002, proposed regulations under section 4980F of the Code and section 204(h) of ERISA were published in the **Federal Register** (67 FR 19713). On August 15, 2002, the IRS held a public hearing on the proposed regulations. Written comments responding to the notice of proposed rulemaking were also received. After consideration of all the comments, the proposed regulations are adopted, as amended by this Treasury decision, and the regulations under § 1.411(d)–6 are removed. The revisions are discussed below.

The regulations retain the overall structure of the proposed regulations and, like the proposed regulations, include a number of examples illustrating applicable rules. Some of the examples show the information required to be furnished in a section 204(h) notice, both as to amendments that result in a simple reduction in the future rate of benefit accrual and as to those that result in more complex reductions. The most complex are examples in which a defined benefit plan is amended to change prospectively the plan's benefit accrual formula from a traditional formula to a formula that bases future benefits on an account balance—commonly called a conversion to a cash balance pension plan—with the result that, for purposes of the notice requirements of section 4980F and section 204(h), the future rate of benefit accrual may be reduced for some participants and increased for others, including a separate but similarly complex effect on future early retirement benefits.

None of the examples illustrates rules in any other regulation or positions of Treasury or the IRS regarding provisions of the Internal Revenue Code other than the notice requirements of section 4980F and section 204(h). Thus, the examples do not indicate any possible outcome regarding proposed regulations that were published in the **Federal Register** (67 FR 76123) on December 11, 2002 relating to sections 411(b)(1)(H) and 411(b)(2) of the Internal Revenue Code, which require that accruals or allocations under certain retirement plans not cease or be reduced because of the attainment of any age. Specifically, Treasury and the IRS are still considering comments received in connection with those proposed regulations, including comments relating to cash balance pension plans, and will only address the application of section 411(b)(1)(H) to cash balance plans as part of the process to issue regulations under sections 411(b)(1)(H).

Explanation of Revisions and Summary of Comments

A. Overview

Section 4980F of the Code and section 204(h) of ERISA require notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy. An applicable pension plan is a defined benefit plan and any individual account plan that is subject to the funding requirements of section 412 of the Code. The notice is required to be provided to participants and alternate payees for whom the amendment is reasonably expected to reduce significantly the rate of future benefit accrual and to employee organizations representing those participants. The statute generally requires the plan administrator to provide the notice within a reasonable time before the effective date of the plan amendment.

A plan amendment that is subject to the notice requirements of section 4980F of the Code and section 204(h) of ERISA (section 204(h) amendment) may be subject to additional reporting and disclosure requirements under title I of ERISA, such as the requirement to provide a summary of material modifications (SMM) describing the amendment. Notice under section 4980F of the Code and section 204(h) of ERISA (section 204(h) notice) must be provided in accordance with the provisions of these regulations even though sections 102(a) and 104(b) of ERISA also may require that an SMM describing the plan amendment be furnished to participants covered under the plan and beneficiaries receiving benefits under the plan. The Department of Labor has advised the IRS that a plan administrator who provides a section 204(h) notice to applicable individuals in accordance with this final rule will be treated as having furnished those individuals with an SMM regarding the section 204(h) amendment. The Department of Labor has also advised the IRS that furnishing the notice to the last known address of an individual would be sufficient for this purpose where the plan utilizes a method of delivery described in 29 CFR 2520.104b–1 and the fiduciaries of the plan have taken reasonable steps to keep plan records up-to-date and to locate lost or missing participants. Finally, the Department of Labor noted that the plan administrator is required to satisfy any other requirements regarding the furnishing of SMMs or updated summary plan descriptions, including, for example, satisfaction of the requirement to furnish an SMM to any other participants covered under the plan, and to beneficiaries receiving benefits under the plan, who are entitled to an SMM regarding the amendment.

B. Conversion of a Money Purchase Pension Plan into an Individual Account Plan That is Not Subject to Section 412

Rev. Rul. 2002–42 (2002–28 I.R.B. 76), provides that a conversion of a money purchase pension plan into a profit-sharing plan is considered a significant reduction in the rate of future benefit accrual under the money purchase pension plan, thus requiring notice under section 4980F of the Code and section 204(h) of ERISA. As stated in the revenue ruling, allocations under the profit-sharing plan are not benefit accruals under the money purchase pension plan for purposes of determining whether there is a reduction in the rate of future benefit accrual. Accordingly, the final regulations clarify that a plan amendment to convert a money purchase pension plan into a profit-sharing or any other individual account plan that is not subject to section 412 of the Code (including a merger, consolidation, or transfer) is deemed to be a plan amendment that provides for a significant reduction in the rate of

future benefit accrual for purposes of section 4980F of the Code and section 204(h) of ERISA.

C. Rate of Future Benefit Accrual Determined Annually

A commentator questioned the provisions of the proposed regulations under which the determination of whether there is a reduction in the rate of future benefit accrual would be based on the whether the amendment is reasonably expected to reduce ''the benefits accruing for a year.'' The commentator objected on the grounds that this could require section 204(h) notice for an amendment that increases benefits in one year and then reduces them in the next, even though the aggregate benefit over the two years might not be reduced or might even be increased in the aggregate. The final regulations retain this rule, but clarify in an example that where a reduction occurs at the same time as an immediate increase in accrued benefits such that the participant's aggregate benefit can never be less than what it would have been had the amendment not been adopted, the reduction is not significant.

D. Reduction in the Rate of Future Benefit Accrual for Individual Account Plans

A commentator suggested that the regulations be revised to clarify that only contributions or forfeitures that are allocated to a participant's account be considered in determining whether a plan amendment to an individual account plan reduces the rate of future benefit accrual. The commentator recommended this revision to clarify that an amendment reducing a contribution formula is not considered insignificant solely because expected future investment returns might offset a portion of the reduction in the contribution formula. A clarification that reflects this suggestion has been adopted in the final regulations.

E. Determination of Applicable Individuals

A commentator suggested that the regulations be revised to clarify the date as of which applicable individuals should be identified. The commentator argued that the lack of a clear determination date would make it difficult, from an administrative standpoint, for plans to identify applicable individuals due to turnover among participants. The final regulations provide that whether a plan participant or an alternate payee is an applicable individual is determined on a typical business day that is reasonably proximate to the time the section 204(h) notice is provided (or at the latest date for providing section 204(h) notice, if earlier), based on all relevant facts and circumstances. An example to this effect has been added to the final regulations.

F. Definition of Early Retirement Benefits and Retirement-Type Subsidies

A commentator stated that Treasury and IRS should issue regulations defining the terms *early retirement benefits* and *retirement-type subsidies*. The commentator noted that there are numerous references to the terms *early retirement benefit* or *retirement-type subsidy* in both the Code (section 4980F(f)(3) and section 411(d)(6)(B)(i)), ERISA (sections 204(g)(2)(A) and 204(h)(9)) and the regulations (§ 1.411(d)-4 and Proposed § 54.4980F–1), but the terms are not defined. The commentator expressed concern that adverse consequences might result from an egregious failure to identify a significant reduction in early retirement benefit or a retirement-type subsidy and guidance has not been issued to clarify the meaning of those terms. The definitions of *Early retirement benefits* and *retirement-type subsidies* affect more than determining whether an amendment requires a section 204(h) notice and, therefore, are beyond the scope of these final regulations. Treasury and IRS anticipate issuing proposed regulations under section 411(d)(6), including general guidance concerning early retirement benefits and retirement-type subsidies. Comments regarding the anticipated proposed regulations were requested, including comments on the guidance that should be provided regarding early retirement benefits and retirement-type subsidies, in Notice 2002–46 (2002–28 I.R.B. 96) and Notice 2003–10 (2003–5 I.R.B. 369).

G. Timing of Notice

A number of comments addressed what constitutes a reasonable period for providing a section 204(h) notice. The proposed regulations included a generally applicable 45-day advance notice rule with exceptions for amendments in connection with certain business transactions and small plans. Some comments recommended that notice generally be required to be provided more than 45 days in advance of the effective date of the section 204(h) amendment and others recommended that notice generally be allowed to be provided less than 45 days in advance of the effective date of the section 204(h) amendment. The approach in the proposed regulations was designed to strike a balance between providing participants with sufficient time to understand and consider the information in the notice and allowing employers to effect changes in their plans for business reasons within a reasonable time, and has been retained in the final regulations.

A commentator requested clarification that section 204(h) notice may be provided before the adoption date of the amendment. The commentator noted that neither section 4980F of the Code nor section 204(h) of ERISA prevents a plan administrator from providing section 204(h) notice before the adoption date of the amendment. The regulations have not been revised to reflect this suggestion because the statute is already sufficiently clear that section 204(h) notice may be provided before the adoption of the amendment.

H. Certification of Accuracy by Senior Officer

A commentator suggested that the regulations be revised to require that a senior officer of the plan sponsor or the plan administrator certify to employees of the plan sponsor and the IRS that the disclosures in the section 204(h) notice accurately describe the effects of the amendment and that the notice is presented in a manner that is understandable to the average applicable individual. The commentator also suggested that the senior officer should certify that the section 204(h) notice provided to applicable individuals does not contain any false or misleading information. The commentator argued that this certification would not be burdensome to plan sponsors if they have exercised due diligence concerning the content of the section 204(h) notice. Because of concerns about the usefulness of such a rule as well as whether there is statutory authority for such a rule, this suggestion has not been adopted.

I. Determination and Effects of Egregious Failures

A commentator suggested that the regulations revise the definition of an egregious violation to distinguish between intentional and negligent acts of failure. The commentator stated that it is possible that a trustee or plan sponsor may make a decision not to provide section 204(h) notice that the trustee or plan sponsor thought was prudent at the time but later determined was a mistake. The commentator argued that these types of decisions, which may be negligent but not intentional, should not be considered egregious failures. The commentator suggested that the final regulations be revised to provide that an egregious failure is an action resulting from a deliberate choice by the plan sponsor, in which the plan sponsor

knew or reasonably should have known that a section 204(h) notice would be required. The commentator also suggested that the final regulations be revised to provide that only applicable individuals who were adversely affected by the egregious failure be entitled to the greater of the old or new benefit formulas.

Section 204(h)(6)(B) of ERISA generally defines an egregious failure as a failure within the control of the plan sponsor that is either an intentional failure or a failure to provide most of the individuals with most of the information they are entitled to receive. Further, section 204(h)(6)(A) of ERISA provides that, in the case of any egregious failure to meet any requirement of section 204(h) with respect to any plan amendment, the provisions are applied so that all applicable individuals are entitled to the greater of the benefits to which they would have been entitled without regard to the amendment, or the benefits under the plan with regard to the amendment. Accordingly, these suggestions were not adopted in the final regulations because they would conflict with the plain language of section 204(h) of ERISA.

J. Content of Section 204(h) Notice

Section 4980F of the Code and section 204(h) of ERISA require that section 204(h) notice be written in a manner calculated to be understood by the average plan participant and that it provide sufficient information to allow applicable individuals to understand the effect of the amendment. Q&A–11 of these final regulations sets forth the content requirements for section 204(h) notice. The final regulations retain the basic structure of Q&A–11 in the proposed regulations, but include a number of clarifications, including clarifying that the content must permit the applicable individual to determine the approximate magnitude of the reduction applicable to that individual. The regulations provide that this requirement is deemed to be satisfied if the notice includes illustrative examples satisfying certain conditions. At the request of a commentator, the final regulations clarify that individualized benefit statements may be used in lieu of illustrative examples if the statements include the same information as illustrative examples, such as showing the approximate range of the reductions for the individual if the reductions vary over time and identification of the assumptions used in the projections.

K. Benefit Changes Made by Collective Bargaining Agreements

A commentator suggested that the final regulations be revised to distinguish between a reduction in the rate of future benefit accrual by collective bargaining agreements and a reduction in the rate of future benefit accrual by plan amendments. Multiemployer plans often incorporate the provisions of related collective bargaining agreements by reference. The commentator argued that when the rate of future benefit accrual is being reduced by a change to a collective bargaining agreement, section 204(h) notice is not required because there is no plan amendment relating to the reduction. The commentator suggested that the final regulations include an example clarifying that in situations where there is an automatic benefit change that is linked to a collective bargaining agreement, section 204(h) notice is not required, or at a minimum that some relief be provided to allow the amendment to go into effect quickly. The IRS and Treasury believe that when a benefit formula in a plan document incorporates provisions of the collective bargaining agreement by reference, those provisions are part of the plan. Accordingly, the final regulations provide a rule in Q&A–7(a)(2) that if all or a part of a plan's rate of future benefit accrual, or an early retirement benefit or retirement-type subsidy provided under the plan, depends on provisions in another document that are referenced in the plan document, a change in the provisions of the other document is an amendment of the plan. An example illustrating this rule has been added to the final regulations.

The IRS and Treasury recognize that multiemployer plans may need additional time to comply with the requirements of Q&A–7(a)(2) of these final regulations, therefore the effective date of this rule has been delayed until January 1, 2004. In addition, because of the special characteristics of multiemployer plans (*e.g.*, participating employers are often small businesses with fewer than 100 employees), the final regulations provide that, for a multiemployer plan, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment.

Effective Date

Except with respect to Q&A–7(a)(2), these regulations are applicable to amendments with an effective date that is on or after September 2, 2003.

The provisions of Q&A–7(a)(2) of these regulations are applicable to amendments with an effective date that is on or after January 1, 2004.

Special Analyses

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

It is hereby certified that the collection of information in these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that small entities generally do not have very complex benefit structures in their plans, or many different classes of participants who will be differently affected by an amendment reducing the rate of future benefit accrual. Small entities also have fewer employees, and thus they are required to provide section 204(h) notice to fewer individuals. Accordingly, the time required to for them to prepare and provide section 204(h) notice will usually be modest. Furthermore, because most small entities will only be affected when they amend the retirement plans they sponsor to reduce or eliminate benefits, and most small entities will not so amend their retirement plans frequently, it is generally expected that most small entities would be required to provide section 204(h) notice only once over the course of several years. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Pamela R. Kinard, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1, 54, and 602 are amended as follows:

PART 1—INCOME TAXES

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

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

§ 1.411(d)–6 [Removed]

■ **Par. 2.** Section 1.411(d)–6 is removed.

PART 54—PENSION EXCISE TAXES

■ **Par. 3.** The authority citation for part 54 is amended by adding the following citation in numerical order to read as follows:

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

Section 54.4980F–1 also issued under 26 U.S.C. 4980F.* * *

■ **Par. 4.** Section 54.4980F–1 is added to read as follows:

§ 54.4980F–1 Notice requirements for certain pension plan amendments significantly reducing the rate of future benefit accrual.

The following questions and answers concern the notification requirements imposed by 4980F of the Internal Revenue Code and section 204(h) of ERISA relating to a plan amendment of an applicable pension plan that significantly reduces the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or retirement-type subsidy.

List of Questions

Q–1. What are the notice requirements of section 4980F(e) of the Internal Revenue Code and section 204(h) of ERISA?
Q–2. What are the differences between section 4980F and section 204(h)?
Q–3. What is an ''applicable pension plan'' to which section 4980F and section 204(h) apply?
Q–4. What is ''section 204(h) notice'' and what is a ''section 204(h) amendment''?
Q–5. For which amendments is section 204(h) notice required?
Q–6. What is an amendment that reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy for purposes of determining whether section 204(h) notice is required?
Q–7. What plan provisions are taken into account in determining whether an amendment is a section 204(h) amendment?
Q–8. What is the basic principle used in determining whether a reduction in the rate of future benefit accrual or a reduction in an early retirement benefit or retirement-type subsidy is significant for purposes of section 4980F and section 204(h)?
Q–9. When must section 204(h) notice be provided?
Q–10. To whom must section 204(h) notice be provided?
Q–11. What information is required to be provided in a section 204(h) notice?
Q–12. What special rules apply if participants can choose between the old and new benefit formulas?
Q–13. How may section 204(h) notice be provided?
Q–14. What are the consequences if a plan administrator fails to provide section 204(h) notice?
Q–15. What are some of the rules that apply with respect to the excise tax under section 4980F?
Q–16. How do section 4980F and section 204(h) apply when a business is sold?
Q–17. How are amendments to cease accruals and terminate a plan treated under section 4980F and section 204(h)?
Q–18. What are the effective dates of section 4980F, section 204(h), as amended by EGTRRA, and these regulations?

Questions and Answers

Q–1. What are the notice requirements of section 4980F(e) of the Internal Revenue Code and section 204(h) of ERISA?

A–1. (a) *Requirements of Internal Revenue Code section 4980F(e) and ERISA section 204(h).* Section 4980F of the Internal Revenue Code (section 4980F) and section 204(h) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1054(h) (section 204(h)) each generally requires notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or retirement-type subsidy. The notice is required to be provided to plan participants and alternate payees who are applicable individuals (as defined in Q&A–10 of this section) and to certain employee organizations. The plan administrator must generally provide the notice before the effective date of the plan amendment. Q&A–9 of this section sets forth the time frames for providing notice, Q&A–11 of this section sets forth the content requirements for the notice, and Q&A–12 of this section contains special rules for cases in which participants can choose between the old and new benefit formulas.

(b) *Other notice requirements.* Other provisions of law may require that certain parties be notified of a plan amendment. See, for example, sections 102 and 104 of ERISA, and the regulations thereunder, for requirements relating to summary plan descriptions and summaries of material modifications.

Q–2. What are the differences between section 4980F and section 204(h)?

A–2. The notice requirements of section 4980F generally are parallel to the notice requirements of section 204(h), as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (2001) (EGTRRA). However, the consequences of the failure to satisfy the requirements of the two provisions differ: Section 4980F imposes an excise tax on a failure to satisfy the notice requirements, while section 204(h)(6), as amended by EGTRRA, contains a special rule with respect to an egregious failure to satisfy the notice requirements. See Q&A–14 and Q&A–15 of this section. Except to the extent specifically indicated, these regulations apply both to section 4980F and to section 204(h).

Q–3. What is an ''applicable pension plan'' to which section 4980F and section 204(h) apply?

A–3. (a) *In general.* Section 4980F and section 204(h) apply to an applicable pension plan. For purposes of section 4980F, an *applicable pension plan* means a defined benefit plan qualifying under section 401(a) or 403(a) of the Internal Revenue Code, or an individual account plan that is subject to the funding standards of section 412 of the Internal Revenue Code. For purposes of section 204(h), an *applicable pension plan* means a defined benefit plan that is subject to part 2 of subtitle B of title I of ERISA, or an individual account plan that is subject to such part 2 and to the funding standards of section 412 of the Internal Revenue Code. Accordingly, individual account plans that are not subject to the funding standards of section 412 of the Internal Revenue Code, such as profit-sharing and stock bonus plans and contracts under section 403(b) of the Internal Revenue Code, are not applicable pension plans to which section 4980F or section 204(h) apply. Similarly, a defined benefit plan that neither qualifies under section 401(a) or 403(a) of the Internal Revenue Code nor is subject to part 2 of subtitle B of title I of ERISA is not an applicable pension plan. Further, neither a governmental plan (within the meaning of section 414(d) of the Internal Revenue Code),

nor a church plan (within the meaning of section 414(e) of the Internal Revenue Code) with respect to which no election has been made under section 410(d) of the Internal Revenue Code is an applicable pension plan.

(b) *Section 204(h) notice not required for small plans covering no employees.* Section 204(h) notice is not required for a plan under which no employees are participants covered under the plan, as described in § 2510.3–3(b) of the Department of Labor regulations, and which has fewer than 100 participants.

Q–4. What is ''section 204(h) notice'' and what is a ''section 204(h) amendment''?

A–4. (a) *Section 204(h) notice* is notice that complies with section 4980F(e) of the Internal Revenue Code, section 204(h)(1) of ERISA, and this section.

(b) A *section 204(h) amendment* is an amendment for which section 204(h) notice is required under this section.

Q–5. For which amendments is section 204(h) notice required?

A–5. (a) *Significant reduction in the rate of future benefit accrual.* Section 204(h) notice is required for an amendment to an applicable pension plan that provides for a significant reduction in the rate of future benefit accrual.

(b) *Early retirement benefits and retirement-type subsidies.* Section 204(h) notice is also required for an amendment to an applicable pension plan that provides for the significant reduction of an early retirement benefit or retirement-type subsidy. For purposes of this section, *early retirement benefit* and *retirement-type subsidy* mean early retirement benefits and retirement-type subsidies within the meaning of section 411(d)(6)(B)(i).

(c) *Elimination or cessation of benefits.* For purposes of this section, the terms *reduce* or *reduction* include eliminate or cease or elimination or cessation.

(d) *Delegation of authority to Commissioner.* The Commissioner may provide in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter) that section 204(h) notice need not be provided for plan amendments otherwise described in paragraph (a) or (b) of this Q&A–5 that the Commissioner determines to be necessary or appropriate, as a result of changes in the law, to maintain compliance with the requirements of the Internal Revenue Code (including requirements for tax qualification), ERISA, or other applicable federal law.

Q–6. What is an amendment that reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy for purposes of determining whether section 204(h) notice is required?

A–6. (a) *In general.* For purposes of determining whether section 204(h) notice is required, an amendment reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy only as provided in paragraph (b) or (c) of this Q&A–6.

(b) *Reduction in rate of future benefit accrual*—(1) *Defined benefit plans.* For purposes of section 4980F and section 204(h), an amendment to a defined benefit plan reduces the rate of future benefit accrual only if it is reasonably expected that the amendment will reduce the amount of the future annual benefit commencing at normal retirement age (or at actual retirement age, if later) for benefits accruing for a year. For this purpose, the annual benefit commencing at normal retirement age is the benefit payable in the form in which the terms of the plan express the accrued benefit (or, in the case of a plan in which the accrued benefit is not expressed in the form of an annual benefit commencing at normal retirement age, the benefit payable in the form of a single life annuity commencing at normal retirement age that is the actuarial equivalent of the accrued benefit expressed under the terms of the plan, as determined in accordance with section 411(c)(3) of the Internal Revenue Code).

(2) *Individual account plans.* For purposes of section 4980F and section 204(h), an amendment to an individual account plan reduces the rate of future benefit accrual only if it is reasonably expected that the amendment will reduce the amount of contributions or forfeitures allocated for any future year. Changes in the investments or investment options under an individual account plan are not taken into account for this purpose.

(3) *Determination of rate of future benefit accrual.* The rate of future benefit accrual for purposes of this paragraph (b) is determined without regard to optional forms of benefit within the meaning of § 1.411(d)–4, Q&A–1(b) of this chapter (other than the annual benefit described in paragraph (b)(1) of this Q&A–6). The rate of future benefit accrual is also determined without regard to ancillary benefits and other rights or features as defined in § 1.401(a)(4)–4(e) of this chapter.

(c) *Reduction of early retirement benefits or retirement-type subsidies.* For purposes of section 4980F and section 204(h), an amendment reduces an early retirement benefit or retirement-type subsidy only if it is reasonably expected that the amendment will eliminate or reduce an early retirement benefit or retirement-type subsidy.

Q–7. What plan provisions are taken into account in determining whether an amendment is a section 204(h) amendment?

A–7. (a) *Plan provisions taken into account*—-(1) *In general.* All plan provisions that may affect the rate of future benefit accrual, early retirement benefits, or retirement-type subsidies of participants or alternate payees must be taken into account in determining whether an amendment is a section 204(h) amendment. For example, plan provisions that may affect the rate of future benefit accrual include the dollar amount or percentage of compensation on which benefit accruals are based; the definition of service or compensation taken into account in determining an employee's benefit accrual; the method of determining average compensation for calculating benefit accruals; the definition of normal retirement age in a defined benefit plan; the exclusion of current participants from future participation; benefit offset provisions; minimum benefit provisions; the formula for determining the amount of contributions and forfeitures allocated to participants' accounts in an individual account plan; in the case of a plan using permitted disparity under section 401(l) of the Internal Revenue Code, the amount of disparity between the excess benefit percentage or excess contribution percentage and the base benefit percentage or base contribution percentage (all as defined in section 401(l) of the Internal Revenue Code); and the actuarial assumptions used to determine contributions under a target benefit plan (as defined in § 1.401(a)(4)–8(b)(3)(i) of this chapter). Plan provisions that may affect early retirement benefits or retirement-type subsidies include the right to receive payment of benefits after severance from employment and before normal retirement age and actuarial factors used in determining optional forms for distribution of retirement benefits.

(2) *Provisions incorporated by reference in plan.* If all or a part of a plan's rate of future benefit accrual, or an early retirement benefit or retirement-type subsidy provided under the plan, depends on provisions in another document that are referenced in the plan document, a change in the provisions of the other document is an amendment of the plan.

(b) *Plan provisions not taken into account.* Plan provisions that do not

affect the rate of future benefit accrual of participants or alternate payees are not taken into account in determining whether there has been a reduction in the rate of future benefit accrual. Further, any benefit that is not a section 411(d)(6) protected benefit as described in § 1.411(d)–4, Q&A–1(d) of this chapter, or that is a section 411(d)(6) protected benefit that may be eliminated or reduced as permitted under § 1.411(d)–4, Q&A–2(a) or (b) of this chapter, is not taken into account in determining whether an amendment is a section 204(h) amendment. Thus, for example, provisions relating to vesting schedules or the right to make after-tax contributions or elective deferrals are not taken into account.

(c) *Examples*. The following examples illustrate the rules in this Q&A–7:

Example 1. (i) *Facts*. A defined benefit plan provides a normal retirement benefit equal to 50% of highest 5-year average pay multiplied by a fraction (not in excess of one), the numerator of which equals the number of years of participation in the plan and the denominator of which is 20. A plan amendment is adopted that changes the numerator or denominator of that fraction.

(ii) *Conclusion*. The plan amendment must be taken into account in determining whether there has been a reduction in the rate of future benefit accrual.

Example 2. (i) *Facts*. Plan C is a multiemployer defined benefit plan subject to several collective bargaining agreements. The specific benefit formula under Plan C that applies to an employee depends on the hourly rate of contribution of the employee's employer, which is set forth in the provisions of the collective bargaining agreements that are referenced in the Plan C document. Collective Bargaining Agreement A between Employer B and the union representing employees of Employer B is renegotiated to provide that the hourly contribution rate for an employee of B who is subject to the Collective Bargaining Agreement A will decrease. That decrease will result in a decrease in the rate of future benefit accrual for employees of B.

(ii) *Conclusion*. Under paragraph (a)(2) of this Q&A–7, the change to Collective Bargaining Agreement A is a plan amendment that is a section 204(h) amendment if the reduction in the rate of future benefit accrual is significant.

Q–8. What is the basic principle used in determining whether a reduction in the rate of future benefit accrual or a reduction in an early retirement benefit or retirement-type subsidy is significant for purposes of section 4980F and section 204(h)?

A–8. (a) *General rule*. Whether an amendment reducing the rate of future benefit accrual or reducing an early retirement benefit or retirement-type subsidy provides for a reduction that is significant for purposes of section 4980F and section 204(h) is determined based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted.

(b) *Application for determining significant reduction in the rate of future benefit accrual*. For a defined benefit plan, the determination of whether an amendment provides for a significant reduction in the rate of future benefit accrual is made by comparing the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later), as determined under Q&A–6(b)(1) of this section, under the terms of the plan as amended with the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later), as determined under Q&A–6(b)(1) of this section, under the terms of the plan prior to amendment. For an individual account plan, the determination of whether an amendment provides for a significant reduction in the rate of future benefit accrual is made in accordance with Q&A–6(b)(2) of this section by comparing the amounts to be allocated in the future to participants' accounts under the terms of the plan as amended with the amounts to be allocated in the future to participants' accounts under the terms of the plan prior to amendment. An amendment to convert a money purchase pension plan to a profit-sharing or other individual account plan that is not subject to section 412 of the Internal Revenue Code is, in all cases, deemed to be an amendment that provides for a significant reduction in the rate of future benefit accrual.

(c) *Application to certain amendments reducing early retirement benefits or retirement-type subsidies*. Because section 204(h) notice is required only for reductions that are significant, section 204(h) notice is not required for an amendment that reduces an early retirement benefit or retirement-type subsidy if the amendment is permitted under the third sentence of section 411(d)(6)(B) of the Internal Revenue Code and regulations thereunder (relating to the elimination or reduction of benefits or subsidies which create significant burdens or complexities for the plan and plan participants unless the amendment adversely affects the rights of any participant in a more than de minimis manner).

(d) *Example.* The following example illustrates the rules in this Q&A–8:

Example. (i) *Facts*. Pension Plan A is a defined benefit plan that provides a rate of benefit accrual of 1% of highest-five years' pay multiplied by years of service, payable annually for life commencing at normal retirement age (or at actual retirement age, if later). Plan A is amended, effective January 1, 2008, to provide that any participant who separates from service after December 31, 2007, and before January 1, 2013, will have the same number of years of service he or she would have had if his or her service continued to December 31, 2012.

(ii) *Conclusion*. While the amendment will result in a reduction in the annual rate of future benefit accrual from 2009 through 2012 (because under the amendment, benefits based upon an additional five years of service accrue on January 1, 2008, and no additional service is credited after January 1, 2008 until January 1, 2013), the amendment does not result in a reduction that is significant because the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) under the terms of the plan as amended is not under any conditions less than the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) to which any participant would have been entitled under the terms of the plan had the amendment not been made.

Q–9. When must section 204(h) notice be provided?

A–9. (a) *45-day general rule*. Except as described in paragraphs (b), (c), and (d) of this Q&A–9, section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment. See paragraph (e) of this Q&A–9 for special rules for amendments permitting participant choice.

(b) *15-day rule for small plans*. Except for amendments described in paragraph (d)(2) of this Q&A–9, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment in the case of a small plan. For purposes of this section, a small plan is a plan that the plan administrator reasonably expects to have, on the effective date of the section 204(h) amendment, fewer than 100 participants who have an accrued benefit under the plan.

(c) *15-day rule for multiemployer plans*. Except for amendments described in paragraph (d)(2) of this Q&A–9, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment in the case of a multiemployer plan. For purposes of this section, a multiemployer plan means a multiemployer plan as defined in section 414(f) of the Internal Revenue Code.

(d) *Special timing rule for business transactions*—(1) *15-day rule for section 204(h) amendment in connection with an acquisition or disposition*. Except for amendments described in paragraph (d)(2) of this Q&A–9, if a section 204(h) amendment is adopted in connection with an acquisition or disposition,

section 204(h) notice must be provided at least 15 days before the effective date of the section 204(h) amendment.

(2) *Later notice permitted for a section 204(h) amendment significantly reducing early retirement benefit or retirement-type subsidies in connection with certain plan transfers, mergers, or consolidations.* If a section 204(h) amendment is adopted with respect to liabilities that are transferred to another plan in connection with a transfer, merger, or consolidation of assets or liabilities as described in section 414(l) of the Internal Revenue Code and § 1.414(l)–1 of this chapter, the amendment is adopted in connection with an acquisition or disposition, and the amendment significantly reduces an early retirement benefit or retirement-type subsidy, but does not significantly reduce the rate of future benefit accrual, then section 204(h) notice must be provided no later than 30 days after the effective date of the section 204(h) amendment.

(3) *Definition of acquisition or disposition.* For purposes of this paragraph (d), see § 1.410(b)–2(f) of this chapter for the definition of acquisition or disposition.

(e) *Timing rule for amendments permitting participant choice.* In general, section 204(h) notice of a section 204(h) amendment that provides applicable individuals with a choice between the old and the new benefit formulas (as described in Q&A–12 of this section) must be provided in accordance with the time period applicable under paragraphs (a) through (d) of this Q&A–9. See Q&A–12 of this section for additional guidance regarding section 204(h) notice in connection with participant choice.

Q–10. To whom must section 204(h) notice be provided?

A–10. (a) *In general.* Section 204(h) notice must be provided to each applicable individual and to each employee organization representing participants who are applicable individuals. A special rule is provided in paragraph (d) of this Q&A–10.

(b) *Applicable individual.* Applicable individual means each participant in the plan, and any alternate payee, whose rate of future benefit accrual under the plan is reasonably expected to be significantly reduced, or for whom an early retirement benefit or retirement-type subsidy under the plan may reasonably be expected to be significantly reduced, by the section 204(h) amendment. The determination is made with respect to individuals who are reasonably expected to be participants or alternate payees in the plan at the effective date of the section 204(h) amendment.

(c) *Alternate payee.* Alternate payee means a beneficiary who is an alternate payee (within the meaning of section 414(p)(8) of the Internal Revenue Code) under an applicable qualified domestic relations order (within the meaning of section 414(p)(1)(A) of the Internal Revenue Code).

(d) *Designees.* Section 204(h) notice may be provided to a person designated in writing by an applicable individual or by an employee organization representing participants who are applicable individuals, instead of being provided to that applicable individual or employee organization. Any designation of a representative made through an electronic method that satisfies standards similar to those of Q&A–13(c)(1) of this section satisfies the requirement that a designation be in writing.

(e) *Facts and circumstances test.* Whether a participant or alternate payee is an applicable individual is determined on a typical business day that is reasonably proximate to the time the section 204(h) notice is provided (or at the latest date for providing section 204(h) notice, if earlier), based on all relevant facts and circumstances.

(f) *Examples.* The following examples illustrate the rules in this Q&A–10:

Example 1. (i) *Facts.* A defined benefit plan requires an individual to complete 1 year of service to become a participant who can accrue benefits, and participants cease to accrue benefits under the plan at severance from employment with the employer. There are no alternate payees and employees are not represented by an employee organization. On November 18, 2004, the plan is amended effective as of January 1, 2005 to reduce significantly the rate of future benefit accrual. Section 204(h) notice is provided on November 1, 2004.

(ii) *Conclusion.* Section 204(h) notice is only required to be provided to individuals who, based on the facts and circumstances on November 1, 2004, are reasonably expected to have completed at least 1 year of service and to be employed by the employer on January 1, 2005.

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that the sole effect of the plan amendment is to alter the pre-amendment plan provisions under which benefits payable to an employee who retires after 20 or more years of service are unreduced for commencement before normal retirement age. The amendment requires 30 or more years of service in order for benefits commencing before normal retirement age to be unreduced, but the amendment only applies for future benefit accruals.

(ii) *Conclusion.* Section 204(h) notice is only required to be provided to individuals who, on January 1, 2005, have completed at least 1 year of service but less than 30 years of service, are employed by the employer, have not attained normal retirement age, and will have completed 20 or more years of service before normal retirement age if their employment continues to normal retirement age.

Example 3. (i) *Facts.* A plan is amended to reduce significantly the rate of future benefit accrual for all current employees who are participants. Based on the facts and circumstances, it is reasonable to expect that the amendment will not reduce the rate of future benefit accrual of former employees who are currently receiving benefits or of former employees who are entitled to deferred vested benefits.

(ii) *Conclusion.* The plan administrator is not required to provide section 204(h) notice to any former employees.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that the plan covers two groups of alternate payees. The alternate payees in the first group are entitled to a certain percentage or portion of the former spouse's accrued benefit and, for this purpose, the accrued benefit is determined at the time the former spouse begins receiving retirement benefits under the plan. The alternate payees in the second group are entitled to a certain percentage or portion of the former spouse's accrued benefit and, for this purpose, the accrued benefit was determined at the time the qualified domestic relations order was issued by the court.

(ii) *Conclusion.* It is reasonable to expect that the benefits to be received by the second group of alternate payees will not be affected by any reduction in a former spouse's rate of future benefit accrual. Accordingly, the plan administrator is not required to provide section 204(h) notice to the alternate payees in the second group.

Example 5. (i) *Facts.* A plan covers hourly employees and salaried employees. The plan provides the same rate of benefit accrual for both groups. The employer amends the plan to reduce significantly the rate of future benefit accrual of the salaried employees only. At that time, it is reasonable to expect that only a small percentage of hourly employees will become salaried in the future.

(ii) *Conclusion.* The plan administrator is not required to provide section 204(h) notice to the participants who are currently hourly employees.

Example 6. (i) *Facts.* A plan covers employees in Division M and employees in Division N. The plan provides the same rate of benefit accrual for both groups. The employer amends the plan to reduce significantly the rate of future benefit accrual of employees in Division M. At that time, it is reasonable to expect that in the future only a small percentage of employees in Division N will be transferred to Division M.

(ii) *Conclusion.* The plan administrator is not required to provide section 204(h) notice to the participants who are employees in Division N.

Example 7. (i) *Facts.* The facts are the same facts as in *Example 6,* except that at the time the amendment is adopted, it is expected that thereafter Division N will be merged into Division M in connection with a corporate reorganization (and the employees in Division N will become subject to the plan's amended benefit formula applicable to the employees in Division M).

(ii) *Conclusion.* In this case, the plan administrator must provide section 204(h) notice to the participants who are employees in Division M and to the participants who are employees in Division N.

Example 8. (i) *Facts.* A plan is amended to reduce significantly the rate of future benefit accrual for all current employees who are participants. The plan amendment will be effective on January 1, 2004. The plan will provide the notice to applicable individuals on October 31, 2003. In determining which current employees are applicable individuals, the plan administrator determines that October 1, 2003, is a typical business day that is reasonably proximate to the time the section 204(h) notice is provided.

(ii) *Conclusion.* In this case, October 1, 2003 is a typical business day that satisfies the requirements of Q&A–10(e) of this section.

Q–11. What information is required to be provided in a section 204(h) notice?

A–11. (a) *Explanation of notice requirements*—(1) *In general.* Section 204(h) notice must include sufficient information to allow applicable individuals to understand the effect of the plan amendment. In order to satisfy this rule, a plan administrator providing section 204(h) notice must satisfy each of the following requirements of this paragraph (a).

(2) *Information in section 204(h) notice.* The information in a section 204(h) notice must be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice.

(3) *Required narrative description of amendment*—(i) *Reduction in rate of future benefit accrual.* In the case of an amendment reducing the rate of future benefit accrual, the notice must include a description of the benefit or allocation formula prior to the amendment, a description of the benefit or allocation formula under the plan as amended, and the effective date of the amendment.

(ii) *Reduction in early retirement benefit or retirement-type subsidy.* In the case of an amendment that reduces an early retirement benefit or retirement-type subsidy (other than as a result of an amendment reducing the rate of future benefit accrual), the notice must describe how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit before the amendment, how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit after the amendment, and the effective date of the amendment. For example, if, for a plan with a normal retirement age of 65, the change is from an unreduced normal retirement benefit at age 55 to an unreduced normal retirement benefit at age 60 for benefits accrued in the future, with an actuarial reduction to apply for benefits accrued in the future to the extent that the early retirement benefit begins before age 60, the notice must state the change and specify the factors that apply in calculating the actuarial reduction (for example, a 5% per year reduction applies for early retirement before age 60).

(4) *Sufficient information to determine the approximate magnitude of reduction*—(i) *General rule.* (A) Section 204(h) notice must include sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction for that individual. Thus, in any case in which it is not reasonable to expect that the approximate magnitude of the reduction for each applicable individual will be reasonably apparent from the description of the amendment provided in accordance with paragraph (a)(3) of this Q&A–11, further information is required. The further information may be provided by furnishing additional narrative information or in other information that satisfies this paragraph of this section.

(B) To the extent any expected reduction is not uniformly applicable to all participants, the notice must either identify the general classes of participants to whom the reduction is expected to apply, or by some other method include sufficient information to allow each applicable individual receiving the notice to determine which reductions are expected to apply to that individual.

(ii) *Illustrative examples*—(A) *Requirement generally.* The requirement to include sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction for that individual under (a)(4)(i)(A) of this Q&A–11 is deemed satisfied if the notice includes one or more illustrative examples showing the approximate magnitude of the reduction in the examples, as provided in this paragraph (a)(4)(ii). Illustrative examples are in any event required to be provided for any change from a traditional defined benefit formula to a cash balance formula or a change that results in a period of time during which there are no accruals (or minimal accruals) with regard to normal retirement benefits or an early retirement subsidy (a wear-away period).

(B) *Examples must bound the range of reductions.* Where an amendment results in reductions that vary (either among participants, as would occur for an amendment converting a traditional defined benefit formula to a cash balance formula, or over time as to any individual participant, as would occur for an amendment that results in a wear-away period), the illustrative example(s) provided in accordance with this paragraph (a)(4)(ii) must show the approximate range of the reductions. However, any reductions that are likely to occur in only a de minimis number of cases are not required to be taken into account in determining the range of the reductions if a narrative statement is included to that effect and examples are provided that show the approximate range of the reductions in other cases. Amendments for which the maximum reduction occurs under identifiable circumstances, with proportionately smaller reductions in other cases, may be illustrated by one example illustrating the maximum reduction, with a statement that smaller reductions also occur. Further, assuming that the reduction varies from small to large depending on service or other factors, two illustrative examples may be provided showing the smallest likely reduction and the largest likely reduction.

(C) *Assumptions used in examples.* The examples provided under this paragraph (a)(4)(ii) are not required to be based on any particular form of payment (such as a life annuity or a single sum), but may be based on whatever form appropriately illustrates the reduction. The examples generally may be based on any reasonable assumptions (for example, assumptions relating to the representative participant's age, years of service, and compensation, along with any interest rate and mortality table used in the illustrations, as well as salary scale assumptions used in the illustrations for amendments that alter the compensation taken into account under the plan), but the section 204(h) notice must identify those assumptions. However, if a plan's benefit provisions include a factor that varies over time (such as a variable interest rate), the determination of whether an amendment is reasonably expected to result in a wear-away period must be based on the value of the factor applicable under the plan at a time that is reasonably close to the date section 204(h) notice is provided, and any wear-away period that is solely a result of a future change in the variable factor may be disregarded. For example, to determine whether a wear-away occurs as a result of a section 204(h) amendment that converts a defined benefit plan to a cash balance pension plan that will credit interest based on a

variable interest factor specified in the plan, the future interest credits must be projected based on the interest rate applicable under the variable factor at the time section 204(h) notice is provided.

(D) *Individual statements.* This paragraph (a)(4)(ii) may be satisfied by providing a statement to each applicable individual projecting what that individual's future benefits are reasonably expected to be at various future dates and what that individual's future benefits would have been under the terms of the plan as in effect before the section 204(h) amendment, provided that the statement includes the same information required for examples under paragraphs (a)(4)(ii)(A) through (C) of this Q&A–11, including showing the approximate range of the reductions for the individual if the reductions vary over time and identification of the assumptions used in the projections.

(5) *No false or misleading information.* A section 204(h) notice may not include materially false or misleading information (or omit information so as to cause the information provided to be misleading).

(6) *Additional information when reduction not uniform*—(i) *In general.* If an amendment by its terms affects different classes of participants differently (*e.g.*, one new benefit formula will apply to Division A and another to Division B), then the requirements of paragraph (a) of this Q&A–11 apply separately with respect to each such general class of participants. In addition, the notice must include sufficient information to enable an applicable individual who is a participant to understand which class he or she is a member of.

(ii) *Option for different section 204(h) notices.* If a section 204(h) amendment affects different classes of applicable individuals differently, the plan administrator may provide to differently affected classes of applicable individuals a section 204(h) notice appropriate to those individuals. Such section 204(h) notice may omit information that does not apply to the applicable individuals to whom it is furnished, but must identify the class or classes of applicable individuals to whom it is provided.

(b) *Examples.* The following examples illustrate the requirements paragraph (a) of this Q&A–11. In each example, it is assumed that the actual notice provided is written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice in accordance with paragraph (a)(2) of this Q&A–11. The examples are as follows:

Example 1. (i) *Facts.* Plan A provides that a participant is entitled to a normal retirement benefit of 2% of the participant's average pay over the 3 consecutive years for which the average is the highest (highest average pay) multiplied by years of service. Plan A is amended to provide that, effective January 1, 2004, the normal retirement benefit will be 2% of the participant's highest average pay multiplied by years of service before the effective date, plus 1% of the participant's highest average pay multiplied by years of service after the effective date. The plan administrator provides notice that states: ''Under the Plan's current benefit formula, a participant's normal retirement benefit is 2% of the participant's average pay over the 3 consecutive years for which the average is the highest multiplied by the participant's years of service. This formula is being changed by a plan amendment. Under the Plan as amended, a participant's normal retirement benefit will be the sum of 2% of the participant's average pay over the 3 consecutive years for which the average is the highest multiplied by years of service before the January 1, 2004 effective date, plus 1% of the participant's average pay over the 3 consecutive years for which the average is the highest multiplied by the participant's years of service after December 31, 2003. This change is effective on January 1, 2004.'' The notice does not contain any additional information.

(ii) *Conclusion.* The notice satisfies the requirements of paragraph (a) of this Q&A–11.

Example 2. (i) *Facts.* Plan B provides that a participant is entitled to a normal retirement benefit at age 64 of 2.2% of the participant's career average pay multiplied by years of service. Plan B is amended to cease all accruals, effective January 1, 2004. The plan administrator provides notice that includes a description of the old benefit formula, a statement that, after December 31, 2003, no participant will earn any further accruals, and the effective date of the amendment. The notice does not contain any additional information.

(ii) *Conclusion.* The notice satisfies the requirements of paragraph (a) of this Q&A–11.

Example 3. (i) *Facts.* Plan C provides that a participant is entitled to a normal retirement benefit at age 65 of 2% of career average compensation multiplied by years of service. Plan C is amended to provide that the normal retirement benefit will be 1% of average pay over the 3 consecutive years for which the average is the highest multiplied by years of service. The amendment only applies to accruals for years of service after the amendment, so that each employee's accrued benefit is equal to the sum of the benefit accrued as of the effective date of the amendment plus the accrued benefit equal to the new formula applied to years of service beginning on or after the effective date. The plan administrator provides notice that describes the old and new benefit formulas and also explains that for an individual whose compensation increases over the individual's career such that the individual's highest 3-year average exceeds the individual's career average, the reduction will be less or there may be no reduction. The notice does not contain any additional information.

(ii) *Conclusion.* The notice satisfies the requirements of paragraph (a) of this Q&A–11.

Example 4. (i) *Facts.* (A) Plan D is a defined benefit pension plan under which each participant accrues a normal retirement benefit, as a life annuity beginning at the normal retirement age of 65, equal to the participant's number of years of service multiplied by 1.5 percent multiplied by the participant's average pay over the 3 consecutive years for which the average is the highest. Plan D provides early retirement benefits for former employees beginning at or after age 55 in the form of an early retirement annuity that is actuarially equivalent to the normal retirement benefit, with the reduction for early commencement based on reasonable actuarial assumptions that are specified in Plan D. Plan D provides for the suspension of benefits of participants who continue in employment beyond normal retirement age, in accordance with section 203(a)(3)(B) of ERISA and regulations thereunder issued by the Department of Labor. The pension of a participant who retires after age 65 is calculated under the same normal retirement benefit formula, but is based on the participant's service credit and highest 3-year pay at the time of late retirement with any appropriate actuarial increases.

(B) Plan D is amended, effective July 1, 2005, to change the formula for all future accruals to a cash balance formula under which the opening account balance for each participant on July 1, 2005, is zero, hypothetical pay credits equal to 5 percent of pay are credited to the account thereafter, and hypothetical interest is credited monthly based on the applicable interest rate under section 417(e)(3) of the Internal Revenue Code at the beginning of the quarter. Any participant who terminates employment with vested benefits can receive an actuarially equivalent annuity (based on the same reasonable actuarial assumptions that are specified in Plan D) commencing at any time after termination of employment and before the plan's normal retirement age of 65. The benefit resulting from the hypothetical account balance is in addition to the benefit accrued before July 1, 2005 (taking into account only service and highest 3-year pay before July 1, 2005), so that it is reasonably expected that no wear-away period will result from the amendment. The plan administrator expects that, as a general rule, depending on future pay increases and future interest rates, the rate of future benefit accrual after the conversion is higher for participants who accrue benefits before approximately age 50 and after approximately age 70, but is lower for participants who accrue benefits between approximately age 50 and age 70.

(C) The plan administrator of Plan D announces the conversion to a cash balance formula on May 16, 2005. The announcement is delivered to all participants and includes a written notice that describes the old formula, the new formula, and the effective date.

(D) In addition, the notice states that the Plan D formula before the conversion provided a normal retirement benefit equal to the product of a participant's number of years of service multiplied by 1.5 percent multiplied by the participant's average pay over the 3 years for which the average is the highest (highest 3-year pay). The notice includes an example showing the normal retirement benefit that will be accrued after June 30, 2005 for a participant who is age 49 with 10 years of service at the time of the conversion. The plan administrator reasonably believes that such a participant is representative of the participants whose rate of future benefit accrual will be reduced as a result of the amendment. The example estimates that, if the participant continues employment to age 65, the participant's normal retirement benefit for service from age 49 to age 65 will be $657 per month for life. The example assumes that the participant's pay is $50,000 at age 49. The example states that the estimated $657 monthly pension accrues over the 16-year period from age 49 to age 65 and that, based on assumed future pay increases, this amount annually would be 9.1 percent of the participant's highest 3-year pay at age 65, which over the 16 years from age 49 to age 65 averages 0.57 percent per year multiplied by the participant's highest 3-year pay. The example also states that the sum of the monthly annuity accrued before the conversion in the 10-year period from age 39 to age 49 plus the $657 monthly annuity estimated to be accrued over the 16-year period from age 49 to age 65 is $1,235 and that, based on assumed future increases in pay, this would be 17.1 percent of the participant's highest 3-year pay at age 65, which over the employee's career from age 39 to age 65 averages 0.66 percent per year multiplied by the participant's highest 3-year pay. The notice also includes two other examples with similar information, one of which is intended to show the circumstances in which a small reduction may occur and the other of which shows the largest reduction that the plan administrator thinks is likely to occur. The notice states that the estimates are based on the assumption that pay increases annually after June 30, 2005, at a 4 percent rate. The notice also specifies that the applicable interest rate under section 417(e) for hypothetical interest credits after June 30, 2005 is assumed to be 6 percent, which is the section 417(e) of the Internal Revenue Code applicable interest rate under the plan for 2005.

(ii) *Conclusion.* The information in the notice, as described in paragraph (i)(C) and (i)(D) of this *Example 4,* satisfies the requirements of paragraph (a)(3) of this Q&A–11 with respect to applicable individuals who are participants. The requirements of paragraph (a)(4) of this Q&A–11 are satisfied because, as noted in paragraph (i)(D) of this *Example 4,* the notice describes the old formula and describes the estimated future accruals under the new formula in terms that can be readily compared to the old formula, *i.e.*, the notice states that the estimated $657 monthly pension accrued over the 16-year period from age 49 to age 65 averages 0.57 percent of the participant's highest 3-year pay at age 65. The requirement in paragraph (a)(4)(ii) of this Q&A–11 that the examples include sufficient information to be able to determine the approximate magnitude of the reduction would also be satisfied if the notice instead directly stated the amount of the monthly pension that would have accrued over the 16-year period from age 49 to age 65 under the old formula.

Example 5. (i) *Facts.* The facts are the same as in *Example 4,* except that, under the plan as in effect before the amendment, the early retirement pension for a participant who terminates employment after age 55 with at least 20 years of service is equal to the normal retirement benefit without reduction from age 65 to age 62 and reduced by only 5 percent per year for each year before age 62. As a result, early retirement benefits for such a participant constitute a retirement-type subsidy. The plan as in effect after the amendment provides an early retirement benefit equal to the sum of the early retirement benefit payable under the plan as in effect before the amendment taking into account only service and highest 3-year pay before July 1, 2005, plus an early retirement annuity that is actuarially equivalent to the account balance for service after June 30, 2005. The notice provided by the plan administrator describes the old early retirement annuity, the new early retirement annuity, and the effective date. The notice includes an estimate of the early retirement annuity payable to the illustrated participant for service after the conversion if the participant were to retire at age 59 (which the plan administrator believes is a typical early retirement age) and elect to begin receiving an immediate early retirement annuity. The example states that the normal retirement benefit expected to be payable at age 65 as a result of service from age 49 to age 59 is $434 per month for life beginning at age 65 and that the early retirement annuity expected to be payable as a result of service from age 49 to age 59 is $270 per month for life beginning at age 59. The example states that the monthly early retirement annuity of $270 is 38 percent less than the monthly normal retirement benefit of $434, whereas a 15 percent reduction would have applied under the plan as in effect before the amendment. The notice also includes similar information for examples that show the smallest and largest reduction that the plan administrator thinks is likely to occur in the early retirement benefit. The notice also specifies the applicable interest rate, mortality table, and salary scale used in the example to calculate the early retirement reductions.

(ii) *Conclusion.* The information in the notice, as described in paragraphs (i)(C) and (D) of *Example 4* and paragraph (i) of this *Example 5,* satisfies the requirements of paragraph (a)(3) of this Q&A–11 with respect to applicable individuals who are participants. The requirements of paragraph (a)(4) of this Q&A–11 are satisfied because, as noted in paragraph (i) of this *Example 5,* the notice describes the early retirement subsidy under the old formula and describes the estimated early retirement pension under the new formula in terms that can be readily compared to the old formula, *i.e.*, the notice states that the monthly early retirement pension of $270 is 38 percent less than the monthly normal retirement benefit of $434, whereas a 15 percent reduction would have applied under the plan as in effect before the amendment. The requirements of paragraph (a)(4)(ii) of this Q&A–11 that the examples include sufficient information to be able to determine the approximate magnitude of the reduction would also be satisfied if the notice instead directly stated the amount of the monthly early retirement pension that would be payable at age 59 under the old formula.

Q–12. What special rules apply if participants can choose between the old and new benefit formulas?

A–12. In any case in which an applicable individual can choose between the benefit formula (including any early retirement benefit or retirement-type subsidy) in effect before the section 204(h) amendment (old formula) or the benefit formula in effect after the section 204(h) amendment (new formula), section 204(h) notice has not been provided unless the applicable individual has been provided the information required under Q&A–11 of this section, and has also been provided sufficient information to enable the individual to make an informed choice between the old and new benefit formulas. The information required under Q&A–11 of this section must be provided by the date otherwise required under Q&A–9 of this section. The information sufficient to enable the individual to make an informed choice must be provided within a period that is reasonably contemporaneous with the date by which the individual is required to make his or her choice and that allows sufficient advance notice to enable the individual to understand and consider the additional information before making that choice.

Q–13. How may section 204(h) notice be provided?

A–13. (a) *Delivering section 204(h) notice.* A plan administrator (including a person acting on behalf of the plan administrator, such as the employer or plan trustee) must provide section 204(h) notice through a method that results in actual receipt of the notice or the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice. Section 204(h) notice must be provided either in the form of a paper document or in an electronic form that satisfies the requirements of paragraph (c) of this Q&A–13. First class mail to the last known address of the party is an acceptable delivery method. Likewise, hand delivery is acceptable. However, the posting of notice is not considered provision of section 204(h) notice.

Section 204(h) notice may be enclosed with or combined with other notice provided by the employer or plan administrator (for example, a notice of intent to terminate under title IV of ERISA). Except as provided in paragraph (c) of this Q&A–13, a section 204(h) notice is deemed to have been provided on a date if it has been provided by the end of that day. When notice is delivered by first class mail, the notice is considered provided as of the date of the United States postmark stamped on the cover in which the document is mailed.

(b) *Example.* The following example illustrates the provisions of paragraph (a) of this Q&A–13:

Example. (i) *Facts.* Plan A is amended to reduce significantly the rate of future benefit accrual effective January 1, 2005. Under Q&A–9 of this section, section 204(h) notice is required to be provided at least 45 days before the effective date of the amendment. The plan administrator causes section 204(h) notice to be mailed to all affected participants. The mailing is postmarked November 16, 2004.

(ii) *Conclusion.* Because section 204(h) notice is given 45 days before the effective date of the plan amendment, it satisfies the timing requirement of Q&A–9 of this section.

(c) *New technologies*—(1) *General rule.* A section 204(h) notice may be provided to an applicable individual through an electronic method (other than an oral communication or a recording of an oral communication), provided that all of the following requirements are satisfied:

(i) Either the notice is actually received by the applicable individual or the plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice by the applicable individual.

(ii) The plan administrator provides the applicable individual with a clear and conspicuous statement, in electronic or non-electronic form, that the applicable individual has a right to request and obtain a paper version of the section 204(h) notice without charge and, if such request is made, the applicable individual is furnished with the paper version without charge.

(iii) The requirements of this section must otherwise be satisfied. Thus, for example, a section 204(h) notice provided through an electronic method must be delivered on or before the date required under Q&A–9 of this section and must satisfy the requirements set forth in Q&A–11 of this section, including the content requirements and the requirements that it be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice. Accordingly, when it is not otherwise reasonably evident, the recipient should be apprised (either in electronic or in non-electronic form), at the time the notice is furnished electronically, of the significance of the notice.

(2) *Examples.* The following examples illustrate the requirement in paragraph (c)(1)(i) of this Q&A–13. In these examples, it is assumed that the notice satisfies the requirements in paragraphs (c)(1)(ii) and (iii) of this section. The examples are as follows:

Example 1. (i) *Facts.* On July 1, 2003, M, a plan administrator of Company N's plan, sends notice intended to constitute section 204(h) notice to A, an employee of Company N and a participant in the plan. The notice is sent through e-mail to A's e-mail address on Company N's electronic information system. Accessing Company N's electronic information system is not an integral part of A's duties. M sends the e-mail with a request for a computer-generated notification that the message was received and opened. M receives notification indicating that the e-mail was received and opened by A on July 9, 2003.

(ii) *Conclusion.* With respect to A, although M has failed to take appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice, M satisfies the requirement of paragraph (c)(1)(i) of this Q&A–13 on July 9, 2003, which is when A actually receives the notice.

Example 2. (i) *Facts.* On August 1, 2003, O, a plan administrator of Company P's plan, sends a notice intended to constitute section 204(h) notice of ERISA to B, who is an employee of Company P and a participant in Company P's plan. The notice is sent through e-mail to B's e-mail address on Company P's electronic information system. B has the ability to effectively access electronic documents from B's e-mail address on Company P's electronic information system and accessing the system is an integral part of B's duties.

(ii) *Conclusion.* Because access to the system is an integral part of B's duties, O has taken appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice. Thus, regardless of whether B actually accesses B's email on that date, O satisfies the requirement of paragraph (c)(1)(i) of this Q&A–13 on August 1, 2003, with respect to B.

(3) *Safe harbor in case of consent.* The requirement of paragraph (c)(1)(i) of this Q&A–13 is deemed to be satisfied with respect to an applicable individual if the section 204(h) notice is provided electronically to an applicable individual, and—

(i) The applicable individual has affirmatively consented electronically, or confirmed consent electronically, in a manner that reasonably demonstrates the applicable individual's ability to access the information in the electronic form in which the notice will be provided, to receiving section 204(h) notice electronically and has not withdrawn such consent;

(ii) The applicable individual has provided, if applicable, in electronic or non-electronic form, an address for the receipt of electronically furnished documents;

(iii) Prior to consenting, the applicable individual has been provided, in electronic or non-electronic form, a clear and conspicuous statement indicating—

(A) That the consent can be withdrawn at any time without charge;

(B) The procedures for withdrawing consent and for updating the address or other information needed to contact the applicable individual;

(C) Any hardware and software requirements for accessing and retaining the documents; and

(D) The information required by paragraph (c)(1)(ii) of this Q&A–13; and

(iv) After consenting, if a change in hardware or software requirements needed to access or retain electronic records creates a material risk that the applicable individual will be unable to access or retain the section 204(h) notice—

(A) The applicable individual is provided with a statement of the revised hardware and software requirements for access to and retention of the section 204(h) notice and is given the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and

(B) The requirement of paragraph (c)(3)(i) of this Q&A–13 is again complied with.

Q–14. What are the consequences if a plan administrator fails to provide section 204(h) notice?

A–14. (a) *Egregious failures*—(1) *Effect of egregious failure to provide section 204(h) notice.* Section 204(h)(6)(A) of ERISA provides that, in the case of any egregious failure to meet the notice requirements with respect to any plan amendment, the plan provisions are applied so that all applicable individuals are entitled to the greater of the benefit to which they would have been entitled without regard to the amendment, or the benefit under the plan with regard to the amendment. For a special rule applicable in the case of a plan termination, *see* Q&A–17(b) of this section.

(2) *Definition of egregious failure.* For purposes of section 204(h) of ERISA and this Q&A–14, there is an egregious failure to meet the notice requirements if a failure to provide required notice is within the control of the plan sponsor and is either an intentional failure or a failure, whether or not intentional, to provide most of the individuals with most of the information they are entitled

to receive. For this purpose, an intentional failure includes any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements. A failure to give section 204(h) notice is deemed not to be egregious if the plan administrator reasonably determines, taking into account section 4980F, section 204(h), these regulations, other administrative pronouncements, and relevant facts and circumstances, that the reduction in the rate of future benefit accrual resulting from an amendment is not significant (as described in Q&A–8 of this section), or that an amendment does not significantly reduce an early retirement benefit or retirement-type subsidy.

(3) Example. The following example illustrates the provisions of this paragraph (a):

Example. (i) *Facts.* Plan A is amended to reduce significantly the rate of future benefit accrual effective January 1, 2003. Section 204(h) notice is required to be provided 45 days before January 1, 2003. Timely section 204(h) notice is provided to all applicable individuals (and to each employee organization representing participants who are applicable individuals), except that the employer intentionally fails to provide section 204(h) notice to certain participants until May 16, 2003.

(ii) *Conclusion.* The failure to provide section 204(h) notice is egregious. Accordingly, for the period from January 1, 2003 through June 30, 2003 (which is the date that is 45 days after May 16, 2003), all participants and alternate payees are entitled to the greater of the benefit to which they would have been entitled under Plan A as in effect before the amendment or the benefit under the plan as amended.

(b) *Effect of non-egregious failure to provide section 204(h) notice.* If an egregious failure has not occurred, the amendment with respect to which section 204(h) notice is required may become effective with respect to all applicable individuals. However, see section 502 of ERISA for civil enforcement remedies. Thus, where there is a failure, whether or not egregious, to provide section 204(h) notice in accordance with this section, individuals may have recourse under section 502 of ERISA.

(c) *Excise taxes.* See section 4980F and Q&A–15 of this section for excise taxes that may apply to a failure to notify applicable individuals of a pension plan amendment that provides for a significant reduction in the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy, regardless of whether or not the failure is egregious.

Q–15. What are some of the rules that apply with respect to the excise tax under section 4980F?

A–15. (a) *Person responsible for excise tax.* In the case of a plan other than a multiemployer plan, the employer is responsible for reporting and paying the excise tax. In the case of a multiemployer plan, the plan is responsible for reporting and paying the excise tax.

(b) *Excise tax inapplicable in certain cases.* Under section 4980F(c)(1) of the Internal Revenue Code, no excise tax is imposed on a failure for any period during which it is established to the satisfaction of the Commissioner that the employer (or other person responsible for the tax) exercised reasonable diligence, but did not know that the failure existed. Under section 4980F(c)(2) of the Internal Revenue Code, no excise tax applies to a failure to provide section 204(h) notice if the employer (or other person responsible for the tax) exercised reasonable diligence and corrects the failure within 30 days after the employer (or other person responsible for the tax) first knew, or exercising reasonable diligence would have known, that such failure existed. For purposes of section 4980F(c)(1) of the Internal Revenue Code, a person has exercised reasonable diligence, but did not know that the failure existed if and only if—

(1) The person exercised reasonable diligence in attempting to deliver section 204(h) notice to applicable individuals by the latest date permitted under this section; and

(2) At the latest date permitted for delivery of section 204(h) notice, the person reasonably believes that section 204(h) notice was actually delivered to each applicable individual by that date.

(c) *Example.* The following example illustrates the provisions of paragraph (b) of this Q&A–15:

Example. (i) *Facts.* Plan A is amended to reduce significantly the rate of future benefit accrual. The employer sends out a section 204(h) notice to all affected participants and other applicable individuals and to any employee organization representing applicable individuals, including actual delivery by hand to employees at worksites and by first-class mail for any other applicable individual and to any employee organization representing applicable individuals. However, although the employer exercises reasonable diligence in seeking to deliver the notice, the notice is not delivered to any participants at one worksite due to a failure of an overnight delivery service to provide the notice to appropriate personnel at that site for them to timely hand deliver the notice to affected employees. The error is discovered when the employer subsequently calls to confirm delivery. Appropriate section 204(h) notice is then promptly delivered to all affected participants at the worksite.

(ii) *Conclusion.* Because the employer exercised reasonable diligence, but did not know that a failure existed, no excise tax applies, assuming that participants at the worksite receive section 204(h) notice within 30 days after the employer first knew, or exercising reasonable diligence would have known, that the failure occurred.

Q–16. How do section 4980F and section 204(h) apply when a business is sold?

A–16. (a) *Generally.* Whether section 204(h) notice is required in connection with the sale of a business depends on whether a plan amendment is adopted that significantly reduces the rate of future benefit accrual or significantly reduces an early retirement benefit or retirement-type subsidy.

(b) *Examples.* The following examples illustrate the rules of this Q&A–16:

Example 1. (i) *Facts.* Corporation Q maintains Plan A, a defined benefit plan that covers all employees of Corporation Q, including employees in its Division M. Plan A provides that participating employees cease to accrue benefits when they cease to be employees of Corporation Q. On January 1, 2006, Corporation Q sells all of the assets of Division M to Corporation R. Corporation R maintains Plan B, which covers all of the employees of Corporation R. Under the sale agreement, employees of Division M become employees of Corporation R on the date of the sale (and cease to be employees of Corporation Q), Corporation Q continues to maintain Plan A following the sale, and the employees of Division M become participants in Plan B.

(ii) *Conclusion.* No section 204(h) notice is required because no plan amendment was adopted that reduced the rate of future benefit accrual. The employees of Division M who become employees of Corporation R ceased to accrue benefits under Plan A because their employment with Corporation Q terminated.

Example 2. (i) *Facts.* Subsidiary Y is a wholly owned subsidiary of Corporation S. Subsidiary Y maintains Plan C, a defined benefit plan that covers employees of Subsidiary Y. Corporation S sells all of the stock of Subsidiary Y to Corporation T. At the effective date of the sale of the stock of Subsidiary Y, in accordance with the sale agreement between Corporation S and Corporation T, Subsidiary Y amends Plan C so that all benefit accruals cease.

(ii) *Conclusion.* Section 204(h) notice is required to be provided because Subsidiary Y adopted a plan amendment that significantly reduced the rate of future benefit accrual in Plan C.

Example 3. (i) *Facts.* As a result of an acquisition, Corporation U maintains two defined benefit plans: Plan D covers employees of Division N and Plan E covers the rest of the employees of Corporation U. Plan E provides a significantly lower rate of future benefit accrual than Plan D. Plan D is merged with Plan E, and all of the employees of Corporation U will accrue benefits under

the merged plan in accordance with the benefit formula of former Plan E.

(ii) *Conclusion.* Section 204(h) notice is required.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that the rate of future benefit accrual in Plan E is not significantly lower. In addition, Plan D has a retirement-type subsidy that Plan E does not have and the Plan D employees' rights to the subsidy under the merged plan are limited to benefits accrued before the merger.

(ii) *Conclusion.* Section 204(h) notice is required for any participants or beneficiaries for whom the reduction in the retirement-type subsidy is significant (and for any employee organization representing such participants).

Example 5. (i) *Facts.* Corporation V maintains several plans, including Plan F, which covers employees of Division P. Plan F provides that participating employees cease to accrue further benefits under the plan when they cease to be employees of Corporation V. Corporation V sells all of the assets of Division P to Corporation W, which maintains Plan G for its employees. Plan G provides a significantly lower rate of future benefit accrual than Plan F. Plan F is merged with Plan G as part of the sale, and employees of Division P who become employees of Corporation W will accrue benefits under the merged plan in accordance with the benefit formula of former Plan G.

(ii) *Conclusion.* No section 204(h) notice is required because no plan amendment was adopted that reduces the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy. Under the terms of Plan F as in effect prior to the merger, employees of Division P cease to accrue any further benefits (including benefits with respect to early retirement benefits and any retirement-type subsidy) under Plan F after the date of the sale because their employment with Corporation V terminated.

Q–17. How are amendments to cease accruals and terminate a plan treated under section 4980F and section 204(h)?

A–17. (a) *General rule*—(1) *Rule.* An amendment providing for the cessation of benefit accruals on a specified future date and for the termination of a plan is subject to section 4980F and section 204(h).

(2) *Example.* The following example illustrates the rule of paragraph (a)(1) of this Q&A–17:

Example. (i) *Facts.* An employer adopts an amendment that provides for the cessation of benefit accruals under a defined benefit plan on December 31, 2003, and for the termination of the plan pursuant to title IV of ERISA as of a proposed termination date that is also December 31, 2003. As part of the notice of intent to terminate required under title IV in order to terminate the plan, the plan administrator gives section 204(h) notice of the amendment ceasing accruals, which states that benefit accruals will cease ''on December 31, 2003 whether or not the plan is terminated on that date.'' However, because all the requirements of title IV for a plan termination are not satisfied, the plan cannot be terminated until a date that is later than December 31, 2003.

(ii) *Conclusion.* Nonetheless, because section 204(h) notice was given stating that the plan was amended to cease accruals on December 31, 2003, section 204(h) does not prevent the amendment to cease accruals from being effective on December 31, 2003. The result would be the same had the section 204(h) notice informed the participants that the plan was amended to provide for a proposed termination date of December 31, 2003 and to provide that ''benefit accruals will cease on the proposed termination date whether or not the plan is terminated on that date.'' However, neither section 4980F nor section 204(h) would be satisfied with respect to the December 31, 2003 effective date if the section 204(h) notice had merely stated that benefit accruals would cease ''on the termination date'' or ''on the proposed termination date.''

(3) *Additional requirements under title IV of ERISA. See* 29 CFR 4041.23(b)(4) and 4041.43(b)(5) for special rules applicable to plans terminating under title IV of ERISA.

(b) *Terminations in accordance with title IV of ERISA.* A plan that is terminated in accordance with title IV of ERISA is deemed to have satisfied section 4980F and section 204(h) not later than the termination date (or date of termination, as applicable) established under section 4048 of ERISA. Accordingly, neither section 4980F nor section 204(h) would in any event require that any additional benefits accrue after the effective date of the termination.

(c) *Amendment effective before termination date of a plan subject to title IV of ERISA.* To the extent that an amendment providing for a significant reduction in the rate of future benefit accrual or a significant reduction in an early retirement benefit or retirement-type subsidy has an effective date that is earlier than the termination date (or date of termination, as applicable) established under section 4048 of ERISA, that amendment is subject to section 4980F and section 204(h). Accordingly, the plan administrator must provide section 204(h) notice (either separately, with, or as part of the notice of intent to terminate) with respect to such an amendment.

Q–18. What are the effective dates of section 4980F, section 204(h), as amended by EGTRRA, and these regulations?

A–18. (a) *Statutory effective date*—(1) *General rule.* Section 4980F and section 204(h), as amended by EGTRRA, apply to plan amendments taking effect on or after June 7, 2001 (statutory effective date), which is the date of enactment of EGTRRA.

(2) *Transition rule.* For amendments applying after the statutory effective date in paragraph (a)(1) of this Q&A–18 and prior to the regulatory effective date in paragraph (c) of this Q&A–18, the requirements of section 4980F(e)(2) and (3) of the Internal Revenue Code and section 204(h), as amended by EGTRRA, are treated as satisfied if the plan administrator makes a reasonable, good faith effort to comply with those requirements.

(3) *Special notice rule*—(i) *In general.* Notwithstanding Q&A–9 of this section, section 204(h) notice is not required by section 4980F(e) of the Internal Revenue Code or section 204(h), as amended by EGTRRA, to be provided prior to September 7, 2001 (the date that is three months after the date of enactment of EGTRRA).

(ii) *Reasonable notice.* The requirements of section 4980F and section 204(h), as amended by EGTRRA, do not apply to any plan amendment that takes effect on or after June 7, 2001 if, before April 25, 2001, notice was provided to participants and beneficiaries adversely affected by the plan amendment (and their representatives) which was reasonably expected to notify them of the nature and effective date of the plan amendment. For purposes of this paragraph (a)(3)(ii), notice that complies with § 1.411(d)–6 of this chapter, as it appeared in the April 1, 2001 edition of 26 CFR part 1, is deemed to be notice which was reasonably expected to notify participants and beneficiaries adversely affected by the plan amendment (and their representatives) of the nature and effective date of the plan amendment.

(b) *Regulatory effective date*—(1) *General effective date.* Except for Q&A–7(a)(2), Q&A–1 through Q&A–18 of this section apply to amendments with an effective date that is on or after September 2, 2003.

(2) *Effective date for Q&A–7(a)(2).* Q&A–7(a)(2) of this section applies to amendments with an effective date that is on or after January 1, 2004.

(c) *Amendments taking effect prior to June 7, 2001.* For rules applicable to amendments taking effect prior to June 7, 2001, *see* § 1.411(d)–6 of this chapter, as it appeared in the April 1, 2001 edition of 26 CFR part 1.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 5.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 6.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
54.4980F–1	1545–1780
* * * * *	

David A. Mader,

Assistant Deputy Commissioner of Internal Revenue.

Approved: March 27, 2003.

Pamela F. Olson,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 03–8290 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Tampa–03–006]

RIN 1625–AA00

Security Zones; Tampa Bay, Port of Tampa, Port of Saint Petersburg, Port Manatee, Rattlesnake, Old Port Tampa, Big Bend, Weedon Island, and Crystal River, FL; Correction

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule; correction.

SUMMARY: The Coast Guard published a final rule on March 25, 2003 establishing security zones in Tampa Bay, Port of Tampa, Port of Saint Petersburg, Port Manatee, Rattlesnake, Old Port Tampa, Big Bend, Weedon Island, and Crystal River, Florida. The rule erroneously listed the geographic positions, descriptions, and size of security zones located in the waters adjacent to the Big Bend and Weedon Island power facilities. This document corrects the geographic positions, descriptions, and size of those security zones.

DATES: This correction is effective on April 9, 2003.

FOR FURTHER INFORMATION CONTACT: LCDR Dave McClellan, Coast Guard Marine Safety Office, Tampa at (813)228–2189/91 X 102.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The Coast Guard published a final rule in the **Federal Register** of March 25, 2003 (68 FR 14328) establishing security zones in Tampa Bay, Port of Tampa, Port of Saint Petersburg, Port Manatee, Rattlesnake, Old Port Tampa, Big Bend, Weedon Island, and Crystal River, Florida. In our discussion of the rule and in paragraph (a)(14) of that rule, the geographic position, description, and size of the security zone for the Big Bend Power Facility were erroneously published as:

(14) Big Bend, Tampa Bay, Florida. All waters of Tampa Bay, from surface to bottom, extending 50 yards from the shore, seawalls and piers around the Big Bend Power Facility, encompassed by a line connecting the following points: 27°47.85′ N, 082°25.02′ W then east and south along the shore and pile to 27°47.63′ N, 082°24.70′ W then north along the shore to 27°48.17′ N, 082°24.70′ W then north and west along a straight line to 27°48.12′ N, 082°24.88′ W then south along the shore and pile to 27°47.85′ N, 082°25.02′ W, closing off entrance to the Big Bend Power Facility.

This correction changes the geographic description and positions to:

(14) Big Bend, Tampa Bay, Florida. All waters of Tampa Bay, from surface to bottom, adjacent to the Big Bend Power Facility, and within an area bounded by a line connecting the following points: 27°47.85′ N, 082°25.02′ W then east and south along the shore and pile to 27°47.63′ N, 082°24.70′ W then north along the shore to 27°48.02′ N, 082°24.70′ W then north and est along a straight line to 27°48.12′ N, 082°4.88′ W then south along the shore and pile to 27°47.85′ N, 082°25.02′ W, closing off entrance to the Big Bend Power Facility.

In our discussion of the rule and in paragraph (a)(15) of that rule, the geographic positions and description for the Weedon Island Power Facility were erroneously published as:

(15) Weedon Island, Tampa Bay, Florida. All waters of Tampa Bay, from surface to bottom, extending 50 yards from the shore, seawall and piers around the Power Facility at Weedon Island encompassed by a line connecting the following points: 27°51.52′ N, 082°35.82′ W then north and east along the shore to 27°51.54′ N, 082°35.78′ W then north to 27°51.68′ N, 082°35.78′ W then north to 27°51.75′ N, 082°35.78′ W closing off entrance to the canal then north to 27°51.89′ N, 082°35.82′ W then east along the shore to 27°51.89′ N, 082°36.10′ W then east to 27°51.89′ N, 082°36.14′ W closing off entrance to the canal.

This correction changes the geographic description and positions to:

(15) Weedon Island, Tampa Bay, Florida. All waters of Tampa Bay, from surface to bottom, extending 50 yards from the shore, seawall and piers around the Power Facility at Weedon Island encompassed by a line connecting the following points: 27°51.52′ N, 082°35.82′ W then north and east along the shore to 27°51.54′ N, 082°35.78′ W then north to 27°51.68′ N, 082°35.78′ W then north to 27°51.75′ N, 082°35.78′ W closing off entrance to the canal then north to 27°51.89′ N, 082°35.82′ W then west along the shore to 27°51.89′ N, 082°36.10′ W then west to 27°51.89′ N, 082°36.14′ W closing off entrance to the canal.

Need for Correction

This correction is needed to correct minor discrepancies in the coordinates and physical description for fixed security zones in waters adjacent to Big Bend and Weedon Island Power facilities in Tampa Bay.

Correction of Publication

■ In rule FR Doc. 03–6982 published on March 25, 2003 (68 FR 14328), make the following corrections:

■ a. On page 14329, in the third column, on lines 42 through 46, remove the words ''The security zone extends 50 yards from the shore or seawall and from all piers around facilities. The security zone is bounded by the following points'' and add, in their place, the words ''It includes all waters of Tampa Bay, from surface to bottom, adjacent to the Big Bend Power Facility, and within an area bounded by a line connecting the following points''.

■ b. On page 14329, in the third column on line 50 remove the latitude ''27°48.17′ N'' and add, in its place, the latitude ''27°48.02′ N''.

■ c. On page 14329, in the third column on line 69 remove the word ''east'' and add, in its place, the word ''west''.

■ d. On page 14330, in the first column on line 1 remove the word ''east'' and add, in its place, the word ''west''.

§ 165.T07–006 [Corrected]

■ e. On page 14332, in paragraph (a)(14), remove the words ''extending 50 yards from the shore, seawalls and piers around the Big Bend Power Facility, encompassed by a line connecting the following points'' and add, in their place, the words ''adjacent to the Big Bend Power Facility, and within an area bounded by a line connecting the following points,'' and remove the latitude ''27°48.17′ N'' and add, in its place, the latitude ''27°48.02′ N''.

■ f. On page 14332, in paragraph (a)(15) on lines 14 and 15 remove the word ''east'' and add, in its place, the word ''west''.

Dated: March 27, 2003.

James M. Farley,

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

[FR Doc. 03–8523 Filed 4–8–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AC91

Personal Watercraft Use at Lake Mead National Recreation Area

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule designates areas where personal watercraft (PWC) may be used in Lake Mead National Recreation Area, Nevada and Arizona. This rule implements the provisions of the National Park Service (NPS) general regulation authorizing parks to allow the use of PWC by promulgating a special regulation. The *NPS Management Policies 2001* provides that individual parks should determine whether PWC use is appropriate for a specific park area based on an evaluation of that area's enabling legislation, resources and values, other visitor uses, overall management objectives, and consistent with the criteria of the NPS for managing visitor use. This rule authorizes the use of PWC at Lake Mead National Recreation Area consistent with the Record of Decision for Lake Management Plan.

EFFECTIVE DATE: This rule becomes effective April 9, 2003.

ADDRESSES: Mail Inquiries to: Jim Holland, Management Assistant, Lake Mead National Recreation Area, 601 Nevada Way, Boulder City, Nevada 89005.

FOR FURTHER INFORMATION CONTACT: Kym Hall, Regulations Program Manager, National Park Service, 1849 C Street, NW., Room 7413, Washington, DC 20240. Phone: (202) 208–4206.

SUPPLEMENTARY INFORMATION:

Personal Watercraft Use and Regulatory Background

In May 1998 the Bluewater Network, a coalition of more than 70 organizations, filed a petition urging the National Park Service to initiate the rulemaking process to prohibit PWC use throughout the National Park System. In response to the petition, the NPS proposed a specific PWC regulation premised on the notion that PWC use should be evaluated by the individual park area to determine if the use is an appropriate use of the park (63 FR 49312, Sept. 15, 1998).

The NPS envisioned the servicewide regulation as an opportunity to evaluate impacts from PWC use before authorizing the use. The preamble to the servicewide regulation calls the regulation a ''conservative approach to managing PWC use'' considering the resource concerns, visitor conflicts, visitor enjoyment, and visitor safety. During a 60-day comment period, the NPS received nearly 20,000 comments.

After reviewing the public comments and further review, the NPS promulgated a final regulation that prohibited PWC use in all units, until the individual park areas determine PWC appropriateness for continued use (36 CFR 3.24(a), 65 FR 15077–90, Mar. 21, 2000). The final rule provided a 2-year grace period for 21 parks. Specifically, the regulation allowed the NPS to designate PWC areas and to continue PWC use by promulgating a special regulation in park areas, including Lake Mead National Recreation Area. Ten NRA's were given an additional option of authorizing PWC use through the units' superintendents' compendium (36 CFR 3.24(b)), but only if the requirements of 36 CFR 1.5 were met. This additional designation method was provided for in the units because of their congressional designation as national recreation areas and specific congressional intent to provide for motorized watercraft use in these parks.

In response to the PWC final regulation, Bluewater Network sued the NPS. The organization challenged the National Park Service decision to provide a 2-year grace period allowing continued PWC use in 21 park units while prohibiting PWC use in other park units. In addition, the organization also disputed the National Park Service decision to allow 10 park units the additional option of authorizing continued PWC use after 2002 using the procedures of the superintendents' compendium (36 CFR 1.5), which would not require the opportunity for public input through a notice and a comment rulemaking process.

In response to the suit, the National Park Service and the environmental group negotiated a settlement. The resulting settlement agreement accepted by the court on April 12, 2001, required each of those parks authorizing continued PWC use must promulgate a park-specific special regulation. The settlement agreement acknowledged that the NEPA analysis must, at a minimum, evaluate PWC impacts on water quality, air quality, soundscapes, wildlife, wildlife habitat, shoreline vegetation, visitor conflicts, and visitor safety.

In 2001 the National Park Service adopted its revised NPS Management Policies (NPS 2001) for the National Park System. The policy document included a provision addressing PWC use in park units and the need for proper evaluation before authorizing use in a specific park unit (8.2.3.3). The policy states that the use should be evaluated based on the park's enabling legislation, resources, values, other park uses, and overall management strategies.

On September 5, 2002, the National Park Service published a draft rule for the operation of PWC at Lake Mead NRA (67 FR 56785–94). The proposed rule for PWC use was based on alternative C (the preferred alternative) in the Draft Environment Impact Statement/Lake Management Plan (DEIS/LMP). The 60-day public comment period on the proposed rule ran from September 5 to November 4, 2002.

Overview of Recreational Use and Personal Watercraft

The NPS is granted broad statutory authority under various acts of Congress to manage and regulate water activities in areas of the National Park System, 16 U.S.C. 1, 1a–2(h) and 3. The NPS Organic Act, 16 U.S.C. 1 *et seq.*, authorizes the NPS to ''* * * regulate the use of Federal areas known as national parks, monuments, and reservations * * * by such means and measures as conform to the fundamental purpose of the said parks * * * which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'' Congress has also emphasized that the ''* * * authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the national park system and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.'' 16 U.S.C. 1a–1. The appropriateness of a visitor use or recreational activity will

vary from park to park. NPS Management Policies states that ''* * * the laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values'' (1.4.3). NPS Management Policies provide further that, ''* * * preserving park resources and values unimpaired is the core, or primary responsibility of NPS managers * * *. In cases of doubt as to impacts of activities on park natural resources, the Service will decide in favor of protecting the natural resources.'' (4: 1).

The Organic Act and the other statutory authorities of the NPS vest us with substantial discretion in determining how best to manage park resources and provide for park visitors. ''Courts have noted that the Organic Act is silent as to the specifics of park management and that under such circumstances, the NPS has broad discretion in determining which avenues best achieve the Organic Act's mandate * * *. Further, the NPS is empowered with the authority to determine what uses of park resources are proper and what proportion of the park resources are available for each use'' *Bicycle Trail Council of Marin* v. *Babbitt,* 82 F.3d 1445, 1454 (9th Cir. 1996), *quoting National Wildlife Federation* v. *National Park Service,* 669 F. Supp. 384, 390 (D. Wyo. 1987). In reviewing a challenge to NPS regulations at Everglades National Park, the court stated, ''The task of weighing the competing uses of Federal property have been delegated by Congress to the Secretary of the Interior * * *. Consequently, the Secretary has broad discretion in determining how best to protect public land resources.'' *Organized Fisherman of Florida* v. *Hodel,* 775 F.2d 1544, 1550 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

Over the years, NPS areas have been impacted with new, and what often prove to be controversial, recreational activities. These activities tend to gain a foothold in NPS areas in their infancy, before a full evaluation of the possible impacts and ramifications that expanded use will have on the area can be initiated, completed and considered. PWC use fits this category.

PWC use is a relative new recreational activity at Lake Mead NRA. PWC, primarily stand-up models, were first observed on Lakes Mead and Mohave in the mid-1970s. In the 1980s, the first sit-down models were available with one- or two-person capacities. During this time, PWC were manufactured by four companies, the first PWC magazines were published and the typical cost of a PWC was $6,600.

From the mid-1980s through the 1990s, sales grew rapidly, then leveled off starting in the mid-1990s. According to visitor use surveys in 1993, the use of PWCs at Lake Mead NRA during this time constituted 15% of the boats on the water at any one time. A rapid increase in PWCs was observed in 1994, when their use jumped to 30% of the boats on the water at any one time.

Today monitoring shows that PWC use constitutes 35% of the boats on the water at any one time. There are 11,000 PWC registered in Clark County, Nevada and thousands more in the region surrounding Lake Mead NRA. The highest densities are observed in the urban interface areas of Lake Mead and in the southern portions of Lake Mohave.

Changes to the Final Rule

Some changes have been made in the Lake Management Plan/Final Environmental Impact Statement. Five percent of the park waters will be managed for primitive and semiprimitive recreational settings. This is an increase of three percent over the acreage in the draft rule. PWC use is prohibited in primitive and semiprimitive zones.

Bonelli Bay in the southern portion of the Virgin Basin was added to the semiprimitive zone on Lake Mead, as was the Lake Mead confluence with the Muddy River. These two areas account for the increased acreage in the semiprimitive zoning over the draft plan. The Overton Wildlife Management Area boundary defines the semiprimitive area of the Muddy River confluence and it is presently managed during the waterfowl hunting season as a flat wake area. This revision prohibits the use of PWC in the Overton Wildlife Management Area year-round.

The recreational zoning in Black Canyon has been modified to allow additional boating access for five days per week during the peak boating season between Memorial Day and Labor Day each year. During this period the canyon will be managed as rural natural zone with no special speed or horsepower restrictions. PWC use in the canyon is authorized during this period. The remainder of the year Black Canyon will be managed for semiprimitive conditions with a 65-horsepower maximum. As proposed in the LMP/DEIS, Black Canyon will be managed as a primitive setting two days per week (Sunday and Monday) year round.

In response to comments from the States of Arizona and Nevada, the proposed 100-foot flat wake zone around the entire lakes has been revised to a 200-foot flat wake zone around beaches occupied by bathers, around boats at the shoreline and a person in the water or at the shoreline. This revision is more closely aligned with existing Nevada boating law and allows the NPS to move toward the goal of providing unified boating law for the interstate waters of Lakes Mead and Mohave.

There are a number of actions that will require subsequent rulemaking in the implementation of the Lake Management Plan. This rule has been tailored specifically to address PWC operation in response to the general regulation in 36 CFR 3.24 prohibiting PWC use except by special regulation. The National Park Service focused specifically on PWC to prevent or minimize the period that PWC use would be restricted at Lake Mead NRA. It is the National Park Service's intention to move ahead with the additional rulemaking that will apply the flat-wake rule to all watercraft and to implement other aspects of the approved Lake Management Plan (LMP).

Discussion of Economic Effects of PWC Use

From an economic perspective, both alternative C (the continued use of PWC in 95% of Lake Mead and other restrictions as presented in this rulemaking) and alternative D, which would permit all two stroke engines and PWC in all of Lake Mead, resulted in the highest quantified net benefits, with alternative D resulting in a slightly higher amount of net quantified benefits. However, the National Park Service chose alternative C because certain costs could not be quantified in the net economic benefits. Those costs, relating to non-PWC use, aesthetics, ecosystem protection, human health and safety, congestion, or non-use values, would likely be greater for alternative D than for alternative C. Given that the quantified net benefits of alternatives C and D are already similar (*see* the table below), further inclusion of these non-quantified costs could reasonably result in alternative C having the greatest level of net benefits. Therefore, based on these factors, alternative C was considered to provide the greatest level of net benefits.

Benefits

Alternative A, the no action alternative, represents the baseline conditions of this rulemaking. Under that alternative, all PWC use would be

prohibited from the park. Alternatives B and C would permit PWC use with certain restrictions, and alternative D would permit PWC use as currently managed in the park. The benefits of any alternative are measured relative to the baseline conditions, which are represented by alternative A. Therefore, there are no incremental benefits associated with alternative A. The primary beneficiaries of alternatives B, C, and D would be the park visitors who use PWCs and the businesses that provide services to PWC users such as rental shops, restaurants, gas stations, and hotels. Additional beneficiaries include individuals who use PWCs outside the park where PWC users displaced from the park may decide to ride if PWC use within the park were prohibited. Benefits accruing to individual PWC users are called consumer surplus gains, and those accruing to businesses are called producer surplus gains. Consumer surplus measures the net economic benefit obtained by individuals from participating in their chosen activities, while producer surplus measures the net economic benefit obtained by businesses from providing services to individuals. These benefits, projected over a 10-year horizon, are summarized in the table below.

PRESENT VALUE OF PROJECTED INCREMENTAL BENEFITS UNDER ALTERNATIVES B, C, AND D, 2002–2012

[dollars]

	PWC users	Businesses	Total
Alternative B:			
Discounted at 3%	74,112,030	2,031,990–11,232,060	76,144,020–85,344,090
Discounted at 7%	59,006,910	1,617,850–8,942,800	60,624,760–67,949,710
Alternative C:			
Discounted at 3%	100,580,610	2,477,690–12,863,370	103,058,300–113,443,980
Discounted at 7%	80,080,800	1,972,710–10,241,630	82,053,510–90,322,430
Alternative D:			
Discounted at 3%	105,874,320	2,597,680–13,426,400	108,472,000–119,300,720
Discounted at 7%	84,295,580	2,068,240–10,689,900	86,363,820–94,985,480

Costs

As with the benefits described above, the costs of any alternative are measured relative to the baseline conditions, which are represented by alternative A. Therefore, there are no incremental costs associated with alternative A. The primary group that would incur costs under alternatives B, C, and D are the park visitors who do not use PWCs and whose park experiences would be negatively affected by PWC use within the park. At Lake Mead, non-PWC uses include boating, canoeing, fishing, and hiking. Additionally, the public could incur costs associated with impacts from alternatives B, C, and D to aesthetics, ecosystem protection, human health and safety, congestion, and non-use values. However, these costs could not be quantified for all alternatives due to a lack of available data.

There are other costs associated with alternatives B, C, and D relating to NPS enforcement of PWC restrictions. Those costs, projected over a 10-year horizon, are summarized in the table below.

PRESENT VALUE OF PROJECT NPS ENFORCEMENT COSTS UNDER ALTERNATIVES B, C, AND D, 2001–2012

[dollars]

Alternative B:	
Discounted at 3%	3,523,950
Discounted at 7%	2,793,080
Alternative C:	
Discounted at 3%	4,195,180
Discounted at 7%	3,325,090

PRESENT VALUE OF PROJECT NPS ENFORCEMENT COSTS UNDER ALTERNATIVES B, C, AND D, 2001–2012—Continued

[dollars]

Alternative D:	
Discounted at 3%	5,202,030
Discounted at 7%	4,123,110

Quantified Net Benefits

The quantified net benefits associated with alternatives B, C, and D are presented in the table below. These net benefits do not account for the costs to non-PWC users, or those relating to aesthetics, ecosystem protection, human health and safety, congestion, or non-use values due to a lack of available data. Therefore, these net benefit estimates do not represent all costs. If all costs could be incorporated, the indicated net benefits for each alternative would be lower. Nevertheless, these estimates present a likely range of net benefits that can be estimated from available information.

PRESENT VALUE OF QUANTIFIED NET BENEFITS UNDER ALTERNATIVES B, C, AND D, 2002–2012

[dollars]

Alternative B:	
Discounted at 3%.	72,620,070–81,820,140
Discounted at 7%.	57,831,680–65,156,630
Alternative C:	

PRESENT VALUE OF QUANTIFIED NET BENEFITS UNDER ALTERNATIVES B, C, AND D, 2002–2012—Continued

[dollars]

Discounted at 3%.	98,863,120–109,248,800
Discounted at 7%.	78,728,420–86,997,340
Alternative D:	
Discounted at 3%.	103,269,970–114,098,690
Discounted at 7%.	82,240,710–90,862,370

Summary of Comments

A proposed rule was published for public comment on September 5, 2002 (67 FR 56785–94), with the comment period lasting until November 4, 2002. The NPS received 1,696 timely written responses regarding the proposed regulation. Of the responses, 1,636 were form letters in 3 separate form letter formats and 60 were individual letters. There were 1,060 electronic mailings. Responses received included 51 from individuals, 2 from businesses, 5 from organizations and 2 from public agencies.

Within the analysis, the term ''commenter'' refers to an individual, business, or organization that responded. The term ''comments'' refers to statements made by a commenter.

General Comments

1. There were a variety of commenters, including the Personal Watercraft Industry Association and United States Coast Guard (USCG), who

proposed the flat wake zone should apply to all motorized vessels.

NPS Response: The National Park Service concurs with the commenters. The preferred alternative in the LMP has been modified and clearly applies the flat wake zone to all motorized vessels. The intention of the flat wake zone is to provide a safe shoreline environment for water recreation. The Lake Management Plan has been modified based on public comment and consultation with the respective states of Nevada and Arizona to read, ''A 200-foot flat wake zone will be applied to all beaches occupied by bathers, boats at the shoreline, swimmers in the water or persons at the shoreline.'' A future rulemaking will extend this provision to all boats.

2. The PWIA requested that PWC used for water-skiing and wakeboarding be permitted to launch from the shoreline like other motorized boats.

NPS Response: The NPS agrees. The intention the Lake Management Plan is to afford PWC the same setting for beach starts for water-skiing purposes as other motorized boats. Persons operating boats would need to be at flat wake speed only if they are within 200-feet of a beach occupied by bathers, a boat at the shoreline or a person in the water or at the shoreline. It is the intention to apply this rule to all boats and this will be accomplished with a separate rulemaking as described in the preceding comment response.

3. There were a number of comments stating that restricted PWC use should be permitted in Black Canyon.

NPS Response: The preferred alternative in the final environmental impact statement (EIS) has been revised for recreational use of Black Canyon, allowing restricted PWC use. The final EIS states, ''In this area, temporal zoning would be applied, providing a range of recreational settings. The area would be managed for a primitive setting two days per week on a year-round basis. Between Labor Day and Memorial Day, the area would be managed for a semiprimitive setting five days per week. During the summer months between Memorial Day and Labor Day, the area would be managed for a rural natural setting with only houseboats, waterskiing, and wakeboarding prohibited. PWC use is consistent with the rural natural setting. However, due to the narrow canyon setting in Black Canyon (zones 8 and 9), PWC use would be monitored during this period and restricted if the safety of lake users becomes an issue. This would be determined by observed/reported conflict information and boating incidents.'' This authorization has been specifically included in the final rulemaking.

4. Numerous commenters stated that the National Park Service is suggesting that one type of recreational experience is more meaningful than another.

NPS Response: The NPS disagrees that we place a higher value on a one type of recreational experience over another. The implication is that we place less value on PWC use than other forms of recreation. The Organic Act and the Lake Mead enabling legislation are the standards by which the National Park Service manages recreational activities. For Lake Mead NRA we have evaluated PWC use and are authorizing their continued use throughout 95% of the park waters.

5. Many commenters believed they should be able to use their USCG legal boat in every waterway where similar motorized boating activity occurs (*i.e.* water skiing, wake boarding, speed boating, etc.) They suggested the Lake Mead regulation should be based on engine type not hull design.

NPS Response: The National Park Service definition of PWC as noted in the draft and final EIS under the ''Purpose of and Need for the Plan'' chapter, ''Background'' section under ''Personal Watercraft Use Regulatory Background'' is as follows: Personal watercraft refers to a vessel, usually less than 16-feet in length, which uses an inboard, internal combustion engine powering a water jet pump as its primary source of propulsion. The vessel is intended to be operated by a person or persons sitting, standing, or kneeling on the vessel, rather than within the confines of the hull.

As presented in the description of the alternatives in the draft and final EIS, the National Park Service evaluated and chose the best regulatory approach in the preferred alternative in order to maintain the opportunities for various types of recreation while protecting the resources of the Lake Mead NRA. Some elements of the final EIS modified preferred alternative/final rule, such as the proposed recreational opportunity zoning, regulate PWC separately from other motorcraft, while other aspects, such as the flat wake zone and phase-out of old engine technology, regulates engine type instead of hull design.

6. We received numerous comments citing the Organic Act and the mission of the National Park Service to leave the resources and wildlife under its care ''unimpaired for the enjoyment of future generations.'' We received a number of letters stating, federal law clearly prohibits activities that impair or derogate the NPA's resources or values.

NPS Response: The ''Introduction'' section of the ''Environmental Consequences'' chapter under ''Summary of Laws and Policies'' in the draft and final EIS summarizes the three overarching laws which guide the NPS in making decisions concerning protection of park resources. These laws, as well as others, are also reflected in the NPS Management Policies. In addition, in the ''Methodology'' section under the heading ''Impairment Analysis,'' the EIS explains how the NPS applied these laws and policies to analyze the effects of PWC on Lake Mead park resources and values.

An impairment to a particular park resource or park value occurs when in the professional judgment of the responsible NPS manager the impact would harm the integrity of park resources or values, including the opportunity that otherwise would be present for the enjoyment of those resources or values. In making these determinations, the NPS managers must consider the provisions of the park's enabling legislation. For each resource topic, the draft and final EIS establishes thresholds or indicators of magnitude of impact. Should the impact approach a ''major'' level of intensity, it is one indication that impairment could result. For each impact topic, when the intensity approached ''major,'' the team would consider mitigation measures to reduce the potential for ''major'' impacts, thus reducing the potential for impairment.

In response to growing concern regarding potential impacts from PWC, the National Park Service began an extensive review and regulation process. While comments were received opposing continued use of the vessel within units of the park system, other comments supported its use with certain conditions designed to protect park resources and values. Recognizing that some units needed to complete more local planning and analysis of impact was needed, the final servicewide PWC regulation provided for specified local decision-making on a park by park basis.

The servicewide regulation recognized the need for park areas wishing to continue PWC use to undertake and complete an analysis of the impacts to park resources and values that could result from continued use.

In the draft and final EIS, three of the four alternatives analyzed various PWC scenarios, along with other vessel management and recreational objectives. The alternatives also consider means to mitigate the effects of PWC on park resources and values, including limiting use in areas where management

objectives strive to create a visitor experience without these vessels or where sensitive park resources must be protected. The modified preferred alternative in the final EIS includes mitigation measures to protect other park users from potential conflicts with PWC (*see* the modified preferred alternative in the ''Environmental Consequences'' section of the FEIS), as well as other measures to protect species of special concern, water, and air resources.

The conclusion of the modified preferred alternative in the final EIS, was that continued PWC use, would not result in an impairment of park resources and values for which the Lake Mead Recreation Area was established to protect for future generations.

7. We received one comment from an individual who suggested we establish a Citizens Recreational Taskforce to address the future management of recreational use at Lake Mead NRA.

NPS Response: The rule takes a balanced approach to the management of PWC use within Lake Mead NRA. It takes into consideration resource impacts, conflicts with other visitors' use and enjoyment and safety concerns. It requires promulgation of park-specific regulation which is the same regulatory approach the National Park Service has taken to manage off-road vehicle use (36 CFR 4.10), aircraft, including powerless hang-gliders (36 CFR 2.17), and use of bicycles outside of developed areas (36 CFR 4.30(b)). This rule prohibits PWC use in areas where their use is inconsistent with the management objectives based on the Organic Act, enabling legislation, resources, values, and other visitor uses.

The National Park Service met with a wide variety of user groups concerning the management of recreational use of park waters. A listing of these meetings and organizations is included in the final EIS. These meetings represent the National Park Service approach to seeking specific user group input into the planning and decision making process. Because the park plans to continue this process, we do not think that a citizen's recreational taskforce is necessary.

Comments Related to Socioeconomic Resources

8. There were one or more commenters who expressed concern for the impact of the rule on the local economies of Laughlin/Bullhead City and the Las Vegas area.

NPS Response: The estimates (under alternative C) presented in the Economic Analysis of Personal Watercraft Regulations in Lake Mead NRA (NPS 2002), use 2012 as engine phase-in date when all two-stroke and four-stroke engines would have to become fuel injected, in accordance with EPA regulations. This date would cover the current life expectancy specified by the Personal Watercraft Industry Association of 5 to 7 years and the EPA estimate of 10 years. Under alternative C (the modified preferred), the National Park Service assumes that, as a result of PWC restrictions, businesses could experience a 5% reduction in PWC sales, service, and rentals related to the park. Some of this impact could occur as a result of engine-type restrictions, but there are also geographic restrictions proposed under this alternative that were taken into account. However, even under alternative A, as detailed in the draft and final EIS, where there would be a 100% reduction in PWC revenues related to the park, the impact on the regional economy would be very small, less than 0.1% of total economic activity.

The National Park Service expects that by 2012, most boat owners would already be in compliance with the 2006 EPA marine engine standards. The impact from the engine standards on boat owners is expected to be minimal. PWC manufacturers currently offer some models that are compliant with EPA's 2006 standards and PWC purchased after 2006 would be made compliant. Because the life of a PWC is estimated at 5 to 10 years (*see* final EIS, the ''Introduction'' section in the ''Purpose and Need for the Plan'' chapter), it is expected that the majority of noncompliant PWCs would no longer be in operation when the engine restrictions proposed under alternative C take effect in 2012. In addition, according to industry reports, it appears that the trend for conversion is toward the four-stroke model engines instead of direct injection two-stroke models. According to the PWIA, the two top selling PWC models for 2002 incorporated the four-stroke technology. Also, in discussions with PWC retailers in the vicinity of Lake Mead, NPS has been informed that the majority of new PWC purchases have been four-stroke engines.

It may be reasonable to assume that people shopping before 2006 for new watercraft would only consider purchasing those models with compliant engines in response to the public announcement that only 2006-compliant engines would be allowed at Lake Mead NRA after 2012. It is the NPS intention that the 10-year advance notice will provide ample opportunity for people to consider engine compliance when making a purchase.

Comments Related to Safety and Visitor Conflicts

9. There were numerous comments stating that ''much attention has been given to so-called 'cleaner and quieter' PWC.'' They say these machines do not solve all problems associated with the PWC and cite recent research studies that find that the new technology emits as much or more carbon monoxide and nitrogen oxide.

NPS Response: The NPS agrees that the new technology will not solve all the problems, but they do provide major improvements in a number of areas specifically in air quality and water quality. Although the cleaner four-stroke and two-stroke direct injected engines will emit more nitrogen oxide due to a higher ratio of fuel actually being burned, they emit less hydrocarbons, which reduces the likelihood of ozone formation. The newer engine technology will not reduce impacts to wildlife from factors such as noise or use of the craft in close proximity to wildlife but this problem is common to all vessels to various extents. However, phasing in of the new technology would reduce impacts to aquatic and shoreline species by greatly reducing the discharge of fuel components such as benzene, toluene, ethyl benzene, and BTEX into the water as stated in the draft and final EIS in the ''Methodology'' section in the ''Environmental Consequences'' chapter.

The safety record of PWC at Lake Mead can be improved by measures such as boater safety education. The preferred alternative in the draft EIS and the modified preferred alternative in the final EIS proposes a requirement of boater safety training for all vessel operators born after 1983. States such as California report operator inexperience as the leading cause of PWC-related accidents (NTSB 1998). Boater education incorporating PWC-specific instruction has been shown to reduce PWC accidents in Connecticut and Michigan (NTSB 1998).

The industry's conversion to the four-stroke technology and the use of resonators is reducing the noise. Manufacturers are using noise absorbing foam and rubber padding in the construction of PWCs. Consequently, the newer technology used in PWC construction is addressing noise concerns and improvements are being observed at Lake Mead NRA.

10. There were additional comments concerning the safety record of PWC.

NPS Response: Safety is an issue for all boaters, including PWC users. Boating safety issues for the Lake Mead NRA are described in the ''Recreational Use of the Lake'' section of the ''Affected Environment'' of the FEIS. Under the modified preferred alternative, unified boating laws for Lake Mead and Lake Mohave are proposed, including the requirement of boater safety education for any boater born after 1983. When applicable, the operator of a boat/vessel would be required to have in his/her possession, proof of completion of a safety course meeting the requirements of the National Association of Boating Law Administrators while operating a boat/vessel.

Safety is further addressed under the modified preferred alternative in the final EIS, where a 200-foot flat wake zone would apply to beaches occupied by swimmers, boats at the shoreline, and people at the shoreline or in the water. Coordination with the states of Nevada and Arizona would be required in order to achieve the desired uniformity of the proposed boating regulations.

When implemented, these safety measures would increase the safety of participating in all forms of recreation at Lake Mead NRA. Consequences of the preferred alternative in relation to PWC safety are described in the ''Environmental Consequences'' section of the draft and final EIS.

11. We received comments that cited user conflicts. Specific incidents included conflicts between PWC and kayakers, fishermen, and swimmers. A few PWC supporters said these conflicts resulted from a minority of inconsiderate PWC operators and that we should regulate inappropriate behavior or enforce existing regulations rather than prohibit PWC use.

NPS Response: The National Park Service is pursuing specific measures to provide a safe shoreline environment and to minimize conflict between user groups. Specifically, a 200-foot flat wake zone is proposed around beaches occupied by bathers, boats at the shoreline and people in the water or at the water's edge. This rule is designed to improve the shoreline environment on both reservoirs.

In addition, 5% of the park waters have been zoned as primitive or semiprimitive where the management objectives are for a more quiet and tranquil setting. Visitors seeking this environment can visit these areas with some expectation of slower speeds and quieter boat operations. In these areas PWCs are prohibited and other boating use will be limited to flat wake speeds and/or electric trolling motors.

Comments Related to the Phaseout of Carbureted Two-Stroke Engines

12. Some commenters cited the inefficiency of the carbureted two-stroke engines.

NPS Response: We are concerned about pollution in any form, and exhaust gasses from two-stroke marine engines is no exception. We recognize that a certain amount of exhaust smoke and smell is inherent with any two-cycle engine and that the comments addressed excessive amounts from PWC. We acknowledge the findings of the Environmental Protection Agency's (EPA) 1991 study that indicate two-stroke engines lose roughly 25% of the fuel they consume unburned into the water, resulting in high levels of hydrocarbon emissions from these engines. The excessive smoke and smell from PWC could be attributed to unique operational characteristics of those vessels. PWCs are often operated with throttle settings that transition from idle to full throttle and back to idle, typically in a rapid and repeated sequence. In response to these concerns, the rule will phase out the carbureted two-stroke engines over a 10-year period.

13. There were comments that suggested the 2012 prohibition on carbureted two-stroke engines is unnecessary.

NPS Response: As noted in alternative C in the draft and final EIS, two-stroke PWC and outboard vessels would be barred from Lake Mead NRA beginning in 2012 as a result of the prohibition on carbureted two-stroke engines. However, even with the increasing availability of new technology four-stroke and direct injection two-stroke engines, it is estimated by EPA that by 2012, they would only comprise approximately 50 percent of PWC in use at that time.

According to the Personal Watercraft Industry Association, PWC models on the market today include the new technology reduced-emissions vessels (*http://www.pwia.org facts_release.htm#qa*) and the two top selling models in 2002 were four-stroke models. The NPS has also learned in discussion with local PWC retailers that the majority of new PWC purchases have been four-stroke engines. The industry shows this trend, combined with the relatively short operating life of PWC, which range from 5 to 10 years (depending on the source), would result in only a small number of PWC users who would be displaced when the restrictions go into effect. The NPS hopes the industry prediction is correct. But if less than 100% of the PWCs in 2012 are the new technology reduced emission PWCs, then the PWC restriction will take effect and ensure that the resources of the park will be protected.

Comments Related to General Environmental Impacts

14. Some commenters were concerned that the Service often lacks site-specific studies upon which to base a sound judgement on PWC use at Lake Mead. The commenters also pointed out that the National Park Service appears to overlook important studies which detail the damage these machines cause to the environment and wildlife.

NPS Response: The NPS utilized site specific studies to evaluate air quality, water quality, cultural resources and visitor use in the LMP/FEIS. Shoreline vegetation in this arid setting is primarily composed of exotic salt cedar so site specific inventories were limited to sensitive inflow areas. Specific studies were not initiated for the wildlife and soundscape analyses.

The NPS determined that site-specific studies of PWC impacts on wildlife were not necessary given the limited extent of native shoreline vegetation and its limited value to wildlife. As stated in the ''Natural and Cultural Resources'' section of the ''Affected Environment'' chapter of the draft and final EIS ''* * * the majority of the shoreline in the recreation area contains nonnative salt cedar (*Tamarix* spp.), with relatively few areas supporting native vegetation. Fluctuating water levels along the shoreline make restoration of vegetation communities impossible in most situations.''

In those few areas where there is shoreline habitat that is valuable for wildlife, such as in the willow scrub inflow areas of the Virgin and Muddy Rivers where neotropical migratory songbirds potentially nest, primitive and semiprimitive zones are proposed under the modified preferred alternative which would prohibit PWC use, waterskiing, and wakeboarding. Given the overall lack of wildlife habitat along most of the remainder of the National Recreational Area's shoreline, and the fact that PWC would be prohibited in the few areas that are deemed valuable for wildlife, the park has identified sensitive vegetation and shoreline habitat and has incorporated appropriate mitigation measures into the modified preferred alternative in the final EIS. Regarding fisheries of Lake Mead NRA, the modified preferred alternative in the final EIS proposes to use temporal shoreline zonings to

reduce and/or prevent impacts to shallow water spawning areas.

The U.S. Fish and Wildlife Service Biological Opinion is included in the final EIS in Appendix F. The biological opinion has concurred with the National Park Service determination that the preferred alternative is not likely to jeopardize the continued existence of the Southwestern willow flycatcher, bonytail chub, razorback sucker, or desert tortoise, and is not likely to destroy or adversely modify designated critical habitat for bonytail, razorback, or tortoise. In addition, the U.S. Fish and Wildlife Service agreed with the determination of no effect on the bald eagle and Yuma clapper rail. The mitigation adopted under the modified preferred alternative in the final EIS includes measures to protect spawning and nesting areas.

There is no definitive literature describing scientific measurements of PWC noise (*see* DEIS, p. 144). To address this lack of scientific data, the National Park Service contracted noise measurements of motorized vessels, including PWC, at Glen Canyon in 2001. The noise source data from this study was used in the Lake Mead draft and final EIS soundscape analysis because the results were not dependent upon or influenced by park geology or other environmental factors.

At Glen Canyon, sound measurements were made of a number of boats and PWC as they passed by a microphone mounted above the front of an instrumented boat. As stated in the technical report (NPS, 2002 or HMMH, 2002—Draft Technical Report on Noise: Personal Watercraft and Boating Activities at Glen Canyon National Recreation Area), controlled pass-by measurements of three PWC and one motorboat were conducted at several different speeds. Many boats and PWC were also randomly measured. In all cases, a radar gun was used to determine speed and a laser range finder was used for distance. After normalizing measurements to a common distance, maximum sound levels were computed both for 15 and 25 meters, the distance at which National Park Service watercraft noise emission regulations apply. One of the conclusions from the measurements at Glen Canyon was that, except for the boats with V–8 engines (which were louder), no significant differences were found in the sound levels produced by PWC and the other boats that were measured in the study.

Comments Related to Water Quality

15. Some comments expressed concern about the amount of raw fuel spilled into the water or on the shoreline when PWC were refueled by owners/operators at sites other than fuel docks.

NPS Response: The refueling of boats at the shoreline is legal. Illegal refueling occurs when the refueling results in the pollution or contamination of park waters. As noted in the final EIS under alternative C, ''Resource Protection'' section, the spillage of fuel during shoreline operations is a concern at Lakes Mead and Mohave. Polluting or contaminating park waters during refueling, including fuel spillage, is a citable offense under 36 CFR, 2.14(a)(6). Safe refueling practices need to be included in boating safety courses. The National Park Service will recommend the States of Nevada and Arizona include these procedures as part of the boating education curriculum.

16. A single commenter stated, the proposed rule, at page 56790, states that ''based on fuel consumption estimates, between 1½ and 3 gallons of fuel is discharged into the water during a two-hour ride on a PWC.'' The rule goes on to say that during the summer weekends in high use areas, there are as many as 1,700 PWCs on the lakes, which ''could result in 1,275 and 3,400 gallons of unburned fuel discharged per hour into Lakes Mead and Mohave combined.'' The commenter goes on to say that these statements are nonsense and supported by no technical information.

NPS Response: The National Park Service is concerned about pollution in any form and exhaust gasses from two-stroke marine engines is no exception. We recognize that a certain amount of exhaust smoke and smell is inherent with any two-stroke engine and that the comment addressed excessive amounts from PWC. We acknowledge the findings of the Environmental Protection Agency's (EPA) 1991 study that indicate two stroke engines lose roughly 25% of the fuel they consume unburned into the water, resulting in high levels of hydrocarbon emissions from these engines. The smoke and smell from PWC could be attributed to unique operational characteristics of those vessels. PWC are often operated with throttle settings that transition from idle to full throttle and back to idle, typically in a rapid and repeated sequence. These are the basis for the above analysis. While some PWC are converting to the new technology, the percentage of the PWC fleet has not yet made the conversion to the more efficient models. Consequently, the calculation of the potential discharge is valid.

17. One comment stated, the primary water quality concern that has been identified regarding continued PWC use is the discharge of unburned gasoline and gasoline additives from conventional carbureted two-stroke engines, as well as the spilling of such components during refueling (National Park Rulemaking at page 56790, DLMP/EIS (Lake Management Plan/Draft EIS) at pages 102, 133, 124, 188). PWC emissions in the Lake Mead area have already been reduced 25% below the 1998 baseline conditions.

NPS Response: We agree that water quality impacts from PWC and other carbureted two-stroke engines have declined since 1998 due to the conversion of carbureted two-stroke engine technology to cleaner technology. However, our goals for the reduction of emissions cannot be achieved without the proposed 2012 restrictions.

The final EIS addresses impacts from PWC use as well as all watercraft on Lake Mead and Lake Mohave. Four alternatives were analyzed. Alternative A would continue the prohibition of use of PWC in the Lake Mead NRA. Alternative B would prohibit all carbureted two-stroke engines beginning in 2004. Alternative C assumes a ban on two-stroke carbureted engines for all vessels, including PWC, after 2012. Alternative D assumes that no ban would take place and that two-stroke engines would be converted in accordance with the Environmental Protection Agency's assumptions (40 CFR parts 89–91, ''Air Pollution Control; Gasoline Spark-Ignition and Spark-Ignition Engines, Exemptions;'' rule, 1996). Alternative C (the modified preferred alternative) is compared to alternative D because alternative D allows for a mix of older model-two stroke carbureted engines with the EPA compliant cleaner engine models (two stroke fuel injected and four stroke engines) through the life of the plan. A brief summary of the analysis of surface water quality impacts to Lakes Mead and Mohave found in the Final EIS for alternatives C and D are described below.

The approach to evaluating surface water quality impacts is found in Appendix G of the Final EIS. Engine conversion, restriction by engine type, and the total boating capacity used to calculate impacts varies between alternatives C and D. Alternative C uses a combined total boating capacity of boats for both Lakes Mead and Mohave of 5,055 boats at one time, while alternative D uses a combined total boating capacity of 5,800 boats at one time. These boating capacities reflect the heaviest use period of the summer. The threshold volumes required to meet water quality standards at Lake Mead

under alternative C are 48% less than alternative D in 2012. The threshold volumes required to meet water quality standards at Lake Mohave under alternative C are 61% less than alternative D in 2012 because of the combination of fewer boats on the water in alternative C and the ban on two-stroke carbureted engines after 2012. Complete results of the water quality analysis are found in the water quality section of the Environmental Consequences section of the Final EIS and in appendix H of the Final EIS.

IMPACTS OF ALL WATERCRAFT ON SURFACE WATER QUALITY—THRESHOLD VOLUME OF WATER NEEDED TO MEET WATER QUALITY STANDARDS

[In acre-feet]

Alt/Year	Ecological benchmark					Arizona standards for fish consumption	Human health criteria	
	Benzo (a)pyrene (fuel and exhaust)	Naphthalene	1-methyl Naphthalene	Benzene	MTBE	Benzo (a)pyrene (fuel and exhaust)	Benzo (a)pyrene (fuel and exhaust	Benzene
Lake Mead (assuming minimum pool elev. 1,150 feet, volume above thermocline 2,085,000 acre-feet)								
C–2004	4,047	1,602	4,554	1,836	58	28,331	12,878	198,900
D–2004	4,593	1,818	5,167	2,083	66	32,149	14,613	225,702
C–2012	1,754	694	1,973	795	25	12,275	5,580	86,179
D–2012	3,371	1,334	3,793	1,529	48	23,597	10,726	165,662
Lake Mohave (assuming minimum pool elev. 634 feet, volume above thermocline 687,800 acre-feet)								
C–2004	3,352	1,326	3,771	1,520	48	23,461	10,664	164,706
D–2004	3,925	1,553	4,416	1,780	56	27,473	12,488	192,874
C–2012	1,035	410	1,165	470	15	7,247	3,294	50,877
D–2012	2,652	1,049	2,983	1,203	38	18,561	8,437	130,307

18. One commenter stated, EPA has confirmed that studies show most unburned gasoline and gasoline additives emitted from two-stroke marine engines evaporate from water within the first hour and 15 minutes after they are released. More specifically, at 86 degrees Fahrenheit 84% of the unburned gasoline/additive mix released into the water evaporated within 75 minutes.

NPS Response: We generally agree with this comment. The commenter includes a quantitative discussion of the volatility of many of the components found in gasoline and gasoline additives emitted from carbureted two-stroke engines. As stated in the Final Environmental Impact Statement, many organic pollutants that are initially dissolved in the water volatilize to the atmosphere, especially if they have high vapor pressures, are lighter than water, and mixing occurs at the air/water interface (Final EIS, Methodology section, under Water Resources, Assumptions for Evaluating Impacts from Marine Engines, Including Personal Watercraft). Therefore, NPS analyses accounts for evaporative rates in its methodology and believes it has accurately portrayed potential effects to water quality.

19. There were a number of commenters concerned that the changeover to four-stroke and two-stroke direct injection PWC engines to meet the requirements of the EPA 2006 and CARB 2008 emission standards is occurring much more rapidly than EPA and National Park Service has estimated. Amounts of unburned fuel released at Lake Mead and Lake Mohave will accordingly continue to decline rapidly, achieving a reduction of approximately 90% from the 1998 baseline levels by 2012.

NPS Response: In the water quality analysis presented in the Final EIS, the assumption was made that clean technology engines (any engine not using carbureted two-stroke technology) would be 90% cleaner than the carbureted two-stroke engines. Under alternative C, conversion to all clean technology engines would be completed by 2012, while alternative D uses the rate of conversion of the engines from carbureted two-stroke to clean engines consistent with the EPA rule, ''Final Rule for New Gasoline Spark-Ignition Marine Engines'' (US EPA, 1996). The NPS used the EPA data where it was assumed that 21.6% of the carbureted two-stroke engines in use in 1998 would be replaced by 2004 and that 58.4% would be replaced by 2012. One of the commenter's (Personal Watercraft Industry Association) assertion is principally based on confidential, proprietary PWC sales and forecast data prepared by PWC manufacturers. This proprietary data was not supplied with the comment, and therefore has not been available to the NPS.

The commenter states that the data indicates that the conversion of PWC models to cleaner engines is occurring more rapidly than anticipated in the 1996 EPA analysis of the effects of the conversion rule. While the National Park Service has no reason to doubt that PWC conversions and sales may be proceeding at a greater rate than forecast by EPA, there is no survey or similar data available at this time that indicates that the engine mix at Lake Mead is proceeding at a faster or slower rate than the EPA forecast. Therefore, use of the EPA rates is considered appropriate in disclosing potential impacts to water quality.

20. One commenter stated the National Park Service committed to investigate the extent of oil and gas spills at refueling operations in the Lake Mead NRA, and to mitigate the impacts from these activities. This will further reduce the amount of unburned fuel released into the waters of the Lake Mead NRA from PWC use. Expected

reductions in PWC emission of unburned fuel and mitigation to limit spills from refueling operations will serve to alleviate any continuing concern regarding the possibility of surface oil sheen in areas of concentrated boating activity.

NPS Response: As stated in the Final EIS in the Environmental Consequences section, under Impacts of Alternatives A, B, C, and D, Water Resources, Impacts, the National Park Service provides best management practices for the handling of fueling areas and boat maintenance for concessioners and the boating public. The purpose of these practices is to reduce the pollutants entering the lakes due to fueling and boat maintenance activities. With the management requirements and public education reducing the levels of these impacts, the impacts would be expected to be minor. NPS has agreed to evaluate the operations of all fueling facilities on Lakes Mead and Mohave.

21. One commenter was concerned that the USGS sampling data showed the presence of the gasoline additive MTBE. The federal government, Nevada or Arizona have not established standards or maximum contaminant levels for MTBE. EPA has adopted an advisory level of 20–40 μg/l for drinking water. The highest sample measured by USGS was 4.16 μg/l, well below this EPA advisory level. The reduction in PWC engine emissions (as well as emissions from other marine engines) at Lake Mead since the sample was measured in 1999 is not likely to be repeated.

NPS Response: The water intake that delivers drinking water to the Las Vegas Valley is located at an elevation of 1,050 feet above mean sea level in Lake Mead, while the elevation of the lake surface is usually above 1,180 feet. This puts the intake at a depth of 130 feet or more. Gasoline compounds have not been detected in water samples regularly taken near the water intake by staff of the Southern Nevada Water System. In addition, the testing at water intake facilities has shown that levels of these compounds do not exceed advisory standards.

In the analysis presented in the Final EIS in Table 50, Toxicity Benchmarks, the ecological benchmark for MTBE, which is considered preliminary chronic water quality criteria, of 51,000 μg/l was used. The table found in response to Comment Number 17 shows a negligible impact from MTBE under the modified preferred alternative (alternative C) and the baseline (alternative D). We are aware California has mandated removal of MTBE from gasoline by next year, and the EPA is considering doing the same within the near future.

22. One commenter is concerned that recent studies show that PAH emissions might increase as carbureted two-stroke PWC engines are replaced by direct injection two-stroke models and that increased PAH emissions will have adverse impacts on aquatic organisms in the Lake Mead NRA. The Kado study measured only PAH air emissions from the test chamber while the outboard engine ran in a water tank. The study says nothing about what levels of PAHs were deposited in water. It therefore can provide no basis whatsoever for suggesting that the use of current and future direct injection two-stroke PWC engines present a risk to aquatic organisms or will impair water resources in the Lake Mead NRA.

NPS Response: PAHs were addressed in the draft and final EIS in the issues and impact topics and water quality section of Environmental Consequences. Text in the draft EIS impact analysis (alternatives B, C and D) was changed in the final EIS to read, ''* * * changing from carbureted two-stroke engines to two-stroke fuel-injected engines may result in increases of airborne particulate-associated PAH. Further research, outside the scope of this planning effort, is needed to identify what impact this would have on PAH concentrations in water.'' However, the preferred alternative, which bans two-stroke carbureted engines after 2012, would greatly reduce the impact of petroleum emissions on water quality. PWC would contribute 19% of total hydrocarbon pollution in Lake Mead in 2012. Given the volume of available water in Lake Mead for mixing these compounds, NPS concludes the impact to water quality and aquatic organisms is minor and would not result in impairment to park resources.

In addition, according to industry reports, it appears that the trend for conversion is toward the four-stroke model engines instead of direct injection two-stroke models. According to the PWIA, the two top selling PWC models for 2002 incorporated the four-stroke technology, which have shown to produce fewer PAH emissions. Also, in discussions with PWC retailers in the vicinity of Lake Mead, NPS has been informed that the majority of new PWC purchases have been four-stroke engines. If this trend in sales is realized and it continues, PAH emissions would be less than indicated in the analysis.

Comments Related to Air Quality

23. One commenter stated the National Park Service analysis does not reflect the dramatic decrease in PWC hydrocarbon plus nitrogen oxides ($HC+NO_X$) emissions projected to occur over the next ten years that strongly suggests that the National Park Service's proposed ban on the use of carbureted two-stroke models after 2012 is unnecessary.

NPS Response: As part of the Final Environmental Impact Statement (EIS) for the Lake Management Plan, the National Park Service prepared a quantitative analysis of air quality impacts for each of the proposed alternatives. The Final EIS analysis addressed emissions of all watercraft, including PWC, on Lakes Mead and Mohave. Four alternatives were analyzed. Alternative A would continue the prohibition of PWC in the Lake Mead NRA. Alternative B would prohibit all carbureted two-stroke engines beginning in 2004. Alternative C assumes a ban on two-stroke carbureted engines for all vessels, including PWC, after 2012. Alternative D assumes that no ban would take place and that two-stroke engines would be converted in accordance with the Environmental Protection Agency's assumptions (40 CFR parts 89–91, ''Air Pollution Control; Gasoline Spark-Ignition and Spark-Ignition Engines, Exemptions;'' rule, 1996). The Final EIS emission projections for HC and NO_X for alternatives C and D are shown in the table below. Emission forecasts for other pollutants and for alternatives A and B are included in the Final EIS.

ESTIMATED HYDROCARBON AND NITROGEN OXIDES EMISSIONS FOR ALTERNATIVES C AND D

[Tons per year]

	Alternative C [1]				Alternative D [2]				Difference [3]	
	2004		2012		2004		2012		2012	
Percent of carbureted two-stroke engines replaced	21.6%		100%		21.6%		58.4%			
Pollutant	All watercraft	PWC	All watercraft	PWC	All watercraft	PWC	All watercraft	PWC	All watercraft	PWC
Hydrocarbons (HC)	904	689	360	199	918	701	659	467	299	268
Nitrogen oxides (NO_X)	159	16	186	40	161	16	174	28	−12	−12
HC+NO_X	1063	705	546	239	1079	717	833	495	287	256

[1] Alternative C (modified preferred alternative): After 2012, all boats on the lakes would be compliant with the EPA 2006 emission standards.
[2] Alternative D (baseline alternative): By 2012, 58.4% of carbureted two-stroke engines on the lakes would be compliant with the EPA 2006 emission standards. Using EPA's assumptions, by 2025, 75% of engines on the lakes would be compliant with the EPA emission standards.
[3] Difference between alternative C and alternative D in 2012. Negative values indicate an increase in NO_X emissions.

Note that in 2004 the conversion of carbureted two-stroke engines to cleaner engines is assumed to be the same for both alternatives C and D, but the emissions for alternative D would be higher than for alternative C. This would occur because alternative D would allow more watercraft to be in operation, compared to alternative C. The important result shown in the above table is that in 2012, alternative C would result in 287 fewer tons per year of HC+NO_X than alternative D. Alternative C proposed elimination of these annual emissions through the life of the plan (2003 through 2023) would be a significant contribution to the efforts to reduce ozone concentrations in the region. This is because even though the cleaner four-stroke and two-stroke direct injected engines will emit more NO_X due to a higher ratio of fuel actually being burned, they emit less hydrocarbons which reduces the likelihood of ozone formation.

Emission levels shown in the table above are not directly comparable with the emission levels submitted by the commenter because the National Park Service—Air Quality Division calculates emissions on an annual basis, and the commenter's calculations are for an average boating day during the boating season. Some assumptions made for National Park Service calculations are more conservative than those used for commenter's calculations. The National Park Service assumed that the conversions from carbureted two-stroke engines to cleaner engines would occur at the rate forecast by the Environmental Protection Agency. As shown in the table above for tons per year of estimated hydrocarbon and nitrogen oxides emissions for alternatives C and D, 21.6% conversion is assumed from 1998 levels by 2004, and 58.4% conversion by 2012. The commenter assumes a faster conversion. The commenter assumes that emissions would be reduced because a significant portion of PWC would be cleaner than EPA requirements due to compliance with the more restrictive California requirements. However, our goals for the reduction of emissions can not be achieved without the proposed 2012 restrictions.

24. One commenter expressed concern that PWC emissions are declining faster than forecast by the EPA. The existing fleet of PWC has achieved a 25% reduction in the pre-1999 baseline of HC+NO_X emissions, and will achieve over an 80% reduction by 2012.

NPS Response: The comment is principally based on two assumptions made by the commenter. The first is based on confidential, proprietary PWC sales and forecast data prepared by PWC manufacturers. No supporting data was supplied with the comment. The commenter states that the data indicates that the conversion of PWC models to cleaner engines is occurring more rapidly than anticipated in the 1996 EPA analysis of the effects of the conversion rule. While the National Park Service has no reason to doubt that PWC conversions and sales may be proceeding at a greater rate than forecast by EPA, there is no survey or similar data available at this time indicating the engine conversion at Lake Mead is proceeding at a faster or slower rate than the EPA forecast. Therefore, use of the EPA rates is considered appropriate—and use of an accelerated rate may be considered speculative without additional supporting data.

The second assumption by the commenter is that 75% of the PWC at Lake Mead will have engines that comply with the California (CARB) conversion rule for all years, which requires that marine engine emission reductions targeted by the EPA for 2006 be achieved in California by 2001. The California rule then requires further emission reductions by 2004 and 2008 (title 13, California Code of Regulations, sections 2440–2448). The commenter assumes that 50% of the PWC users at Lake Mead will be from California and all will have CARB-compliant watercraft, and that, because of manufacturing and sales efficiencies outside of California, an additional 25% of the Lake Mead PWC users will have CARB-compliant watercraft. The National Park Service concurs that many watercraft users at Lake Mead have California-registered PWC, and that they will meet the California Air Resources Board standards.

There is no data relative to PWC at Lake Mead to confirm the 75% figure assumed by the commenter. The National Park Service emissions calculations are conservative only in the sense that it does not specifically account for watercraft that have already or will be converted to meet California Air Resources Board standards. This is not considered ''overly'' conservative because 50% of the park visitors originate from California, and a certain percentage of these visitors will have PWC that are compliant with the EPA 2006 rule. There is currently no data to support or refute this 75% estimate. Under the preferred alternative, the engines would be 100% compliance after 2012.

25. One commenter stated that PWC emissions of HC+NO_X at Lake Mead during the boating season were 3.9 tons per day prior to 1999, and are estimated at 2.9 tons per day for 2002 and 0.7 tons per day in 2012. Clark County, Nevada emissions are estimated at 450 tons per day. Therefore, PWC emissions at Lake Mead pose no public health risks.

NPS Response: The NPS-estimated emissions are a small fraction of Clark

County emissions. The NPS-estimated emissions are on the same order of magnitude as those presented by the commenter, even though the NPS estimates a larger amount of emissions. The argument that a single source has negligible impact because of its small size compared to all the sources in the region is not valid. This point was effectively stated in *Kings County Farm Bureau* v. *City of Hanford,* a 1990 California case that has been widely publicized and used in subsequent environmental analyses. The *Kings County* case also addressed the impacts of ozone-forming pollutants, and emphasized that each source is important when considering cumulative impacts.

Clark County is currently in attainment of the federal 1-hour ozone standard. The EPA has not yet made attainment designations for the 8-hour ozone standard that was promulgated in 1997 but was delayed by litigation in implementation. Preliminary data indicates that Clark County might not attain the 8-hour ozone standard (*http://www.epa.gov/ttn/naaqa/ozone/areas/maps/nv8hr.gif*). Therefore, reduction of emissions from all sources in the county is an issue.

As shown in the previous responses, the proposed elimination of two-stroke carbureted engines from Lake Mead NRA after 2012 would result in a substantial reduction in emissions, and would contribute to the improvement of air quality in Clark County.

26. National Park Service notes that recent studies suggest changing from two-stroke carbureted to two-stroke direct injection PWC engines might increase PAH emissions. A study by Norman Y. Kado et al, *Airborne Particle Emissions from 2- and 4-stroke Outboard Marine Engines: Polycyclic Aromatic Hydrocarbon and Bioassay Analysis,* (Kado study) quantified PAH concentrations in airborne particulate emissions. The Kado study showed that the PAH emissions from the direct-injected two-stroke engines tested were greater than from carbureted two-stroke engines. The direct-injected two-stroke outboard engine used in that study was a 1999 model and represented very early technology, and the results of the study are not applicable to newer model direct-injection outboard engines, much less PWC engines.

NPS Response: The commenter rejects the applicability of the Kado study to newer engines including PWC engines. However, since no comparable data for newer engines was presented, and many older engines would be allowed to operate at the recreation area through 2012, the Kado study is relevant. NPS acknowledges in the final EIS that further research is needed to identify what effect the conversion of two-stroke carburated engines to two stroke fuel injected engines would have on PAH concentrations in water.

In speaking with local PWC businesses the NPS was informed that the majority of newer PWC models being sold are four-stroke engines, not two-stroke fuel injected engines, but no specific data is available. These comments concerning four-stroke sales are consistent with statements made by PWIA that nationally the two top-selling PWC models are four-stroke models. Nevertheless, while conversion of some carbureted two-stroke engines to direct-injected two-stroke engines would result in increased PAH emissions, the concurrent conversion to four-stroke engines would result in reduced PAH emissions. As shown by the commenter, using Kado data, the combined PAH emissions of one direct-injected two-stroke engine and one four-stroke engine would be slightly less than the PAH emissions of the two carbureted two-stroke engines that would be replaced. Therefore, the increase or decrease of PAH emissions as carbureted two-stroke engines are converted to cleaner engine types would depend on the relative numbers of the types of cleaner engines. The speculation of the mix of engine types would not appreciably change NPS conclusions made in the final EIS.

27. Continued PWC use on Lake Mead under the proposed rule will not pose any adverse health risks for park visitors under even the ''worst case'' airborne PAH concentrations that could theoretically be generated by the vessels.

NPS Response: A relevant study concluded that there are some health effects associated with PAH emissions. (*See Environmental and Occupational Exposure to Toxic Air Pollutants from Winter Snowmobile Use in Yellowstone National Park* (Kado, Kuzmicky, and Okamoto)). Therefore the NPS cannot support a conclusion as the commenter suggests, that PWC use at Lake Mead would pose no adverse health risks from toxic air pollutant emissions; however the final EIS does acknowledge that the impact would likely be minor.

Comments Related to Wildlife and Wildlife Habitat

28. One commenter questions the occurrence of the Southwestern willow flycatcher at the inflow areas of the Muddy and Virgin Rivers and stated that no Southwestern willow flycatchers nest within Lake Mead NRA.

NPS Response: Southwestern willow flycatchers have been recorded within Lake Mead NRA, and are known to nest in certain areas. Monitoring has been conducted by the San Bernardino County Museum, the Bureau of Reclamation, and the National Park Service. The most recent published report (McKernan and Braden 2002) for the 2001 field season found flycatchers at the Virgin River-Lake Mead delta. In addition, since 1997, flycatchers have been observed breeding along the lower Muddy River on the Overton Wildlife Management Area, within Lake Mead NRA. There have also been flycatchers observed in the lower Grand Canyon, adjacent to the recreation area, in suitable habitat at Lake Mohave.

As stated in the draft and final EIS under the ''Affected Environment'' section, much of the shoreline areas of Lakes Mead and Mohave have riparian stands that are comprised of non-native tamarisk, or are too young to provide suitable nesting habitat. However, several areas have been determined suitable, and nest sites have been located. Of particular importance are the sensitive inflow areas, which will be protected by zoning for primitive and semi-primitive settings. In addition, if surveys find nesting pairs elsewhere along Lakes Mead and Mohave, closing the area under temporal zoning could be implemented to protect these sites.

29. One commenter takes issue with the impact discussion on shorebirds and other wildlife. They state, ''on the basis of anecdotal evidence (chiefly testimony from park staff) the proposed rule concludes that PWCs could disturb wildlife through the interruption of normal activities, alarm or flight, avoidance and displacement of habitat, and nest abandonment. The term ''could'' demonstrates that National Park Service has not obtained evidence that such disturbance actually occurs at Lake Mead NRA.''

NPS Response: There are many studies that relate to the impacts of motorized vessels, including PWC, on shorebirds, bald eagles, and other wildlife. These studies were considered in the development of the draft and final EIS. Buffer zones to protect foraging and loafing waterbirds from disturbance by personal watercraft in Florida (Rodgers 2000) determined that a buffer zones for motorized vessels would protect waterbirds. Effects of Motorboats and Personal Watercraft on Flight Behavior over a Colony of Common Terns (Burger 1998) showed disturbance responses from the use of motorized vessels, and recommended speed and distance restrictions close to tern colonies. Effects of Recreational Activities on Wintering Bald Eagles (Stalmaster and Kaiser 1998) showed that high

recreational use, including foot traffic and motorized vessels, can disrupt feeding activities.

In addition, National Park Service biologists provided information related to disturbance from motorized vessels to birds and other wildlife, and information pertaining to the sensitive shoreline areas around Lakes Mead and Mohave. This information was used in the draft and final EIS for developing mitigation and monitoring activities, and in establishing protective measures for wildlife within the recreation area. These measures, including establishing primitive and semi-primitive zones in the selected shoreline areas, will protect sensitive bird species from disturbance associated with the use of motorized vessels, including noise that flushes the birds, and wakes that disrupt nests.

30. There was concern expressed about the occurrence of the Yuma clapper rail. One commenter references the draft rule where it states that while the inflow areas of the Muddy and Virgin Rivers contain habitat that might support the endangered Yuma clapper rail, no confirmed sightings have occurred within the recreation area. The EIS concurs with this statement. However, on page 56788, the proposed rule contradicts itself, and states incorrectly that the Yuma clapper rail resides at Lake Mead NRA.

Clearly, the Yuma clapper rail cannot be said to ''occupy'' the shoreline or habitat of Lake Mead NRA if no one has ever seen it at the lake. This mistake should be corrected in the final rule.

NPS Response: Suitable habitat for the Yuma clapper rail does occur within the recreation area, in particular, in the inflow areas of the Muddy and Virgin Rivers. The commenter is correct that no Yuma clapper rail have been recorded within the recreation area. They have been recorded nearby in the Virgin River area. This has been corrected in the final rule.

31. There was one comment on the razorback sucker. The commenter points out the proposed rule states that biologists have studied the effect of motorized vessels on razorback sucker spawning areas at Lake Mead NRA for 10 years, and have concluded that such vessels, when passing through these areas interrupt spawning and generally interfere with the reproductive process. Nor do they include the studies or their data as appendices. As a result, the public and other scientists have no ability to determine whether the conclusions drawn by the ''biologists'' are valid. This is poor science. In addition, it appears that the proposed rule may be overstating the effects of PWCs and other vessels on the spawning habitats of the razorback sucker, given that the fish spawn between January and April, when few people visit Lake Mead NRA.

NPS Response: Fish species have been shown to be negatively affected by motorized watercraft emissions (Oris, *et al.* 1998). As stated in the draft and final EIS, temporary disturbance to spawning razorback suckers from the use of motorized vessels has been observed by biologists conducting fish monitoring activities (Marsh 2001). Visitation is currently low during spawning, and is likely to remain low between January and April, when the fish are spawning. Therefore, the impact from the continued use of motorized vessels is considered not likely to adversely affect the razorback sucker, and is not likely to jeopardize the continued existence of this species. In addition, under the mitigation outlined in the U.S. Fish and Wildlife Service Biological Opinion and in the draft and final EIS, biologists from Lake Mead NRA will continue to work with the Native Fish Work Group to monitor fish species and visitation to determine if temporal zoning of spawning areas is necessary to further protect razorback suckers and their habitat. The Native Fish Workgroup is composed of representative of Federal and State agencies as well as scientists with the respective state universities.

32. One commenter noted the proposed rule claims that use of motorized vessels, including PWCs ''likely'' disturbs bonytail chubs attempting to spawn in Lake Mead NRA. Again, no technical studies have been conducted to support these hypotheses.

NPS Response: According to the U.S. Fish and Wildlife Service Biological Opinion, appendix G of the final EIS, the largest remaining populations of bonytail chub in the wild are in Lake Mohave and in Lake Havasu. Both populations are the result of stocking young fish born from the existing broodstock into the declining wild populations. Efforts are underway by the U.S. Fish and Wildlife Service and the Bureau of Reclamation to refine rearing techniques and develop additional rearing facilities to increase production.

While it is true that no technical studies have been conducted to study the impacts of recreational use on the bonytail chub, as stated in the draft and final EIS, scientists who have studied native fish in the recreation area in the past 10 years have observed that motorized use around spawning areas of razorback suckers can temporarily disrupt spawning activities, and the same is likely true for bonytail chub (Marsh 2001). Since bonytail chub are known to spawn in April and May, it can be hypothesized that some disturbance impacts from recreational use could temporarily affect the bonytail chub spawning activities. In addition, bony tail chub are known to spawn in the southern portion of Lake Mohave, just north of Katherine Landing. This area receives increased use starting in May, when spawning activities are known to occur.

Fish species have also been shown to be negatively affected by motorized watercraft emissions (Oris, *et al.* 1998). Reduced water quality could harm aquatic organisms through algae blooms, suspended solids and turbidity, and oxygen depletion. However, Lake Mohave holds an immense amount of water, with a large volume of water flowing through the system. Therefore, even though there are contaminants entering the system from motorized vessels and from other sources such as fuel spills and parking lot runoff, these contaminants have not been recorded at concentrations that are known to result in impairment to the aquatic system or to human health.

The National Park Service is required by law and policy to survey for, protect, and strive to recover all species native to the national park system units that are listed under the Endangered Species Act (Management Polices 2001). The policy further states that the National Park Service will undertake active management programs to inventory, monitor, restore, and maintain listed species' habitats, including controlling detrimental visitor access, and enhancing critical habitat. The National Park Service and the U.S. Fish and Wildlife Service have determined that the temporal zoning which could be imposed around spawning habitat would protect these species, and could enhance critical habitat. As stated in the Biological Opinion, the use of temporal zoning will not be imposed until recommended by Federal biologists working in consultation with the Native Fish Workgroup.

Comments Related to Soundscape

33. One commenter suggested the National Park Service should insist that all watercraft have the quieter four-stroke engines.

NPS Response: The final rule would phase out the carbureted two-stroke engines over a 10-year period. The rule would only allow the use of direct injection two-stroke engines and four-stroke engines. Direct inject two-stroke and four-stroke engines have been shown to be quieter than the carbureted two-stroke engines. The NPS does not

believe it is necessary to require only four-stroke engines.

34. We received a number of comments citing a variety of concerns over the noise associated with PWC use. In almost all cases this noise was characterized as ''annoying''. Specific concerns included the constant and repeated fluctuation in engine tone and pitch as PWCs enter and exit the water while jumping wakes, changing speed and performing other quick maneuvers along with the persistent noise associated with remaining in one general location rather than traveling from point-to-point.

NPS Response: National Park Service *Management Policies* for Soundscapes, as stated in Management Policies 2001 (4.9), require superintendents to ''identify what levels of human-caused sound can be accepted within the management purposes of parks. The sound considered acceptable will vary throughout the park, being generally greater in developed areas and generally lesser in undeveloped areas * * *. The service will take action to prevent or minimize all noise that * * * exceeds levels that have been identified as being acceptable to, or appropriate for, visitor uses at the sites being monitored.'' Management Policies for Visitor Use (8.2) indicate that unless mandated by statute, the National Park Service will not allow visitors to conduct activities that would unreasonably interfere with the atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park.

As written in the enabling legislation, the management purpose of Lake Mead is to provide public recreation, benefit, and use in a manner that will preserve, develop, and enhance, so far as practicable, the recreation potential and preserve the scenic, historic, scientific, and important features of the area. Recreational uses specifically listed in the act include bathing, boating, camping, and picnicking. Various levels of sound are associated with some of those uses, such as boating and PWC, and are consistent with the park's purpose as defined by the legislation.

To provide a ''peaceful and tranquil'' experience in some locations, PWC use would be prohibited within the primitive and semiprimitive recreational opportunity zones. These zones also place restrictions on wake speed and identify acceptable motor types, such as electric trolling motors in primitive zones. These prohibitions or restrictions in alternatives B and C (the preferred alternative) of the draft and final EIS and the modified preferred alternative of the final EIS would provide for a peaceful and tranquil visitor experience. In areas such as Black Canyon, where a diverse range of visitors use a variety of nonmotorized and motorized watercraft, the National Park Service would temporally zone this unique area to accommodate all users and provide experiences that range from tranquil to more rural and mechanized. All alternatives include plans and policies for enforcement of noise regulations. These elements of the Environmental Impact Statement are consistent with NPS Management Policies.

35. One commenter stated, testing at the Glen Canyon National Recreation Area indicate that the maximum noise levels for PWC are lower than the maximum noise levels for other motorized vessels.

NPS Response: It is more appropriate to say that maximum noise levels for PWC were found to be similar to outboards and inboards of similar size and power. The Glen Canyon test data show that, except boats with V–8 engines (V–8 ''muscle boats''), which were clearly louder than all other craft, at a given speed, the noise levels of PWC were sometimes greater and sometimes less than those of other watercraft.

36. One commenter stated, since 1998, PWC engine sound levels have been reduced by up to 70%.

NPS Response: NPS has acknowledged that the newer model PWC are quieter than the older models. One might interpret a reduction from 100 to 30 decibels (dBA) as a 70% reduction. A noise level reduction of 5.2 dBA results from a 70% reduction in noise sources, for example if one had 10 like machines running, and turned off 7 of them. It is commonly accepted that people perceive a 10 dBA reduction in noise as about half (50%) as loud, such that a 70% reduction by perception would be something greater than 10 dBA. However the NPS can not state the exact percentage of sound emissions between the various models.

37. The commenter notes opponents of PWC have claimed that the vessels emit noises as high as 102 decibels, without specifying distances or the method of sound measurement. These unsubstantiated claims are refuted by the National Park Service's recent testing at Glen Canyon, and cannot be reproduced under accepted sound measurement standards.

NPS Response: As noted in the comment, no distance was specified for the 102-decibel (dBA) measurement. A noise source of 76 dBA at 82 feet, which was measured for a PWC, would be 102 dBA at 4 feet. Other conditions that could contribute to PWC noise of 102 dBA at distances greater than 4 feet would be PWC operation without a muffler or with a faulty muffler, and if the noise was measured when the PWC was airborne. This response is not to imply that 102 dBA is a typical PWC noise, but to indicate that while a data point of 102 dBA without description is of little value.

38. One commenter stated, ''The National Marine Manufacturers Association has published a Model Noise Act for use by state legislatures or other agencies with jurisdiction over the manufacture and operation of watercraft. The Model Noise Act promotes regulation or legislation that would prohibit the operation of watercraft in a manner to exceed 75 dBA at the shoreline. The model noise act would also promote regulation or legislation that would prohibit the manufacture of watercraft that could not operate in compliance with the 75 dBA standard.''

NPS Response: The 75 dBA shoreline noise level limit is consistent with a relatively recent state of Nevada standard that will be enforced at Lake Mead (Nevada Administrative Code Section 488.460). The National Park Service is currently revising boating regulations and is proposing to adopt the 75 dBA standard and will encourage the state of Arizona to adopt a similar standard.

Drafting Information

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Compliance with Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This determination is based upon the findings in a report prepared by the National Park Service entitled

''Economic Analysis of Personal Watercraft Regulations in Lake Mead National Recreation Area'' (Law Engineering and Environmental Services, Inc., March 2002). The focus of this study was to document the impact of this rule on a variety of small entities including PWC dealerships and repair shops, PWC rental business, and other local businesses that provide services to PWC users. The Economic Analysis may be viewed on the Lake Mead Web site at *http://www.nps.gov/lame.*

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies, or controls. This is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule will have no effects on entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other forms of monetary supplements are involved.

(4) This rule raises novel legal or policy issues. This rule is among the first of its kind for managing PWC use in National Park Units and the first for managing use in a National Recreation Area. The National Park Service published general regulations (36 CFR 3.24) in March 2000, requiring individual park areas to adopt special regulations to authorize PWC use. The implementation of the requirements of the general regulation continues to generate interest and discussion from the public concerning the overall effect of authorizing PWC use and National Park Service policy and park management.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The preferred alternative C, which would allow PWC use in 95% of Lake Mead, is expected to result in net economic benefits to those small businesses in the Lake Mead area that rent or sell personal watercraft. This net benefit is compared to the baseline, or alternative A, which is a complete ban of PWC in the Lake Mead National Recreation Area.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The National Park Service has completed an economic analysis to make this determination. This rule:

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

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

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

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. This rule is an agency specific rule and imposes no other requirements on other agencies, governments, or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A taking implication assessment is not required. No taking of personal property will occur as a result of this rule.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This proposed rule only affects use of NPS administered lands and waters. It has no outside effects on other areas by allowing PWC use in specific areas of the park.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB form 83-I is not required.

National Environmental Policy Act

The National Park Service has analyzed this rule in accordance with the criteria of the National Environmental Policy Act and has prepared a draft Environmental Impact Statement (EIS). The draft EIS was made available for public review and comment on April 24, 2002, and the final EIS was made available for public review on January 10, 2003. A copy of the LMP/FinalEIS is available on the Lake Mead NRA Web page (*http://www.nps.gov/lame/planning*), at regional libraries or a copy may be obtained by contacting the Superintendent, Lake Mead NRA.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government to Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2: We have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects.

Administrative Procedures Act

This final rule will be effective upon publication in the **Federal Register**. In accordance with the Administrative Procedures Act, specifically, 5 U.S.C. 553 (d)(1), this rule (36 CFR 7.48 (g)) is exempt from the requirement of publication of a substantive rule not less than 30-days before its effective date.

As discussed in the preamble of this rule, the final rule is a part 7 special regulation for Lake Mead National Recreation Area that relieves the restrictions imposed by the general regulation, 36 CFR 3.24. The general regulation, 36 CFR 3.24, prohibits the use of personal watercraft in units of the national park system unless an individual park area has designated the use of personal watercraft by adopting a part 7 special regulation. The proposed rule was published in the **Federal Register** (67 FR 56,785) on September 5, 2002, with a 60-day period for notice and comment consistent with the requirements of 5 U.S.C. 553 (b). The Administrative Procedures Act, pursuant to the exception in (d)(1), waives the section 553 (d) 30-day waiting period when the published rule ''grants or recognizes an exemption or relieves a restriction.'' In this rule the NPS is authorizing the use of PWCs, which is otherwise prohibited by 36 CFR 3.24. As a result, the 30-day waiting period does not apply to the Lake Mead National Recreation Area final rule.

The Attorney General's Manual on the Administrative Procedures Act, explained that the ''reason for this exception would appear to be that the persons affected by such rules are benefited by them and therefore need no time to conform their conduct so as to avoid the legal consequences of violation. The fact that an interested person may object to such issuance, amendment, or repeal of a rule does not change the character of the rule as being one ''granting or recognizing exemption or relieving restriction'', thereby exempting it from the thirty-day requirement.'' This rule is within the scope of the exception as described by the Attorney General's Manual and the 30-day waiting period should be waived. *See also, Independent U.S. Tanker Owners Committee* v. *Skinner,* 884 F.2d 587(DC Cir. 1989). In this case, the court found that (d)(1) is a statutory exception that applies automatically for substantive rules that relieves a restriction and does not require any justification to be made by the agency. ''In sum, the good cause exception must be invoked and justified; the (d)(1) exception applies automatically'' at 591. The facts are that Lake Mead National Recreation Area is promulgating this special regulation for the purpose of relieving the restriction, prohibition of PWC use, imposed by 36 CFR 3.24 and therefore, the (d)(1) exception applies to this rule.

In accordance with the Administrative Procedures Act, this rule is also excepted from the 30-day waiting period by 5 U.S.C. 553 (d)(3) and is effective upon publication in the **Federal Register**. As discussed above, the purpose of this rule is to comply with 36 CFR 3.24 requirement for authorizing PWC use in park areas by promulgating a special regulation. ''The legislative history of the APA reveals that the purpose for deferring the effectiveness of a rule under section 553(d) was 'to afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance may prompt.' S.Rep. No. 752, 79th Cong., 1st Sess.15 (1946); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946).'' *United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977). The persons affected by this rule are PWC users and delaying the implementation of this rule for 30-days will not benefit them; but instead will be counterproductive by denying them, for an additional 30-days, the benefits of the rule.

The rule has been developed in full compliance with section 553(b) and (c) rulemaking requirements. The proposed rule was published in the **Federal Register** and provided 60 days for public comments. The public comments received are summarized and analyzed in this rule. Also as part of this process, the park prepared an environmental impact statement (EIS) that was made available to the public on April 24, 2002, for public review and comment. The EIS evaluated the various alternatives for managing PWC use at Lake Mead, including an alternative with no PWC use. This rule will now implement the preferred alternative identified in the EIS with some changes as a result of the public comments received on both the proposed rule and the draft EIS.

''In determining whether to invoke the exception, the agency is 'required to balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable time to prepare for the effective date of its ruling.' '' *The Northern Arapahoe Tribe* v. *Hodel,* 808 F.2d 741, 752 (10th Cir. 1987). Since the primary purpose of the 30-day waiting period is so the public can prepare for the changes caused by the new rule. This rule authorizes the continued use of PWCs at Lake Mead National Recreation Area and will not require any changes that will require a 30-day waiting period for the public to prepare itself. Because of the ongoing grace period, PWC use has been allowed to continue at Lake Mead despite the prohibition in 36 CFR 3.24. The intent of the grace period was to provide time for parks, such as Lake Mead National Recreation Area, to promulgate special regulations without having the prohibition of 36 CFR 3.24 take effect and, for other parks that decided not to promulgate special regulations authorizing PWC use such as Cape Cod National Seashore and Delaware Water Gap National Recreational Area, to give people additional time to adjust their recreational use patterns, *i.e.*, find alternative places to use their PWCs. There is no need to utilize the 30-day waiting period for the benefit of the affected parties, instead there is good cause for making this rule effective upon publication so that affected parties can continue using PWCs.

List of Subjects in 36 CFR Part 7

District of Columbia, National parks, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, the National Park Service amends 36 CFR part 7 as follows:

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

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

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); sec. 7.96 also issued under DC Code 8–137(1981) and DC Code 40–721 (1981).

■ 2. Section 7.48 is amended by adding paragraph (g) to read as follows:

§ 7.48 Lake Mead National Recreation Area.

* * * * *

(g) *Personal Watercraft* (1) A person may launch and operate a personal watercraft in park waters or beach a personal watercraft on park lands, except in the following areas:

(i) In the designated Primitive area known as the Gypsum Beds, which is described as Arizona T31N; R20W Portions of sections 2, 3, 10 and 11; and

(ii) In the designated Primitive area known as the Virgin River, which is described as Nevada T36N; R68E Portions of Sections 25, 26, 34, 35, 36; and

(iii) In the designated Primitive/Semiprimitive area in Black Canyon, from the Willow Beach Harbor to Hoover Dam, prohibited from the first Tuesday following Labor Day weekend through Friday of Memorial Day weekend; and prohibited only on Sundays and Mondays from the Sunday of Memorial Day weekend through the Monday of Labor Day weekend, which is described as Nevada T22S; R65E Portions of Sections 32; T23S; R65E Portions of Sections 5, 8, 17, 20, 21, 28, 29, 34; T23½S; R65E Portions of Sections 34; T23S; R65E Portions of Sections 1, 2, and 12. Arizona T30N; R23W Portions of Sections 3, 10, 15, 22, 27, 34; T29N; R23W Portions of Sections 2, 12, 13; T29N; R22W Portions of Sections 18, 19, 20, 29; and

(iv) In the designated Semiprimitive area known as the Muddy River Confluence with Lake Mead (Overton Wildlife Management Area), which is described as Nevada T16S; R68E Portions of Sections 28, 29, 32, 33 and 34 and T17; R68E; and

(v) In the designated Semiprimitive area known as Grand Wash Bay, which is described as Arizona T33N; R16W Portions of Sections 16, 17, 21, 22, 27, 28, 29, 33 and 34, and T32½ N; R16W Portions of Sections 32 and 33; and

(vi) In the designated Semiprimitive area known as Bonelli Bay, which is described as Arizona T31N; R20W Portions of Sections 4, 5, 7, 8, 9, 16, 17, 18, 19, 20, 21, 29 and 30.

(2) A person may not operate a personal watercraft at a speed in excess

of flat wake speed within 200 feet of any beach occupied by bathers, boats at the shoreline, or persons in the water or at the shoreline.

(3) After December 31, 2012, no one may operate a personal watercraft that does not meet the 2006 emission standards set by EPA for the manufacturing of two-stroke engines. A person operating a personal watercraft that meets the EPA 2006 emission standards through the use of direct-injection two-stroke or four-stroke engines, or the equivalent thereof, is not subject to this prohibition and will be allowed to operate as described in this section.

(4) The Superintendent may limit, restrict, or terminate access to the areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

* * * * *

Dated: March 28, 2003.

Paul Hoffman,

Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 03–8546 Filed 4–8–03; 8:45 am]

BILLING CODE 4310–70–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2002–0272; FRL–7296–9]

Decanoic Acid; Exemption from the Requirement of a Pesticide Tolerance; Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical correction.

SUMMARY: EPA issued a final rule in the **Federal Register** of February 19, 2003, establishing an exemption from the requirement of a tolerance for residues of decanoic acid (capric acid) in or on all foods when applied/used as a component of a food contact surface sanitizing solution in food handling establishments. This document makes a technical correction to the exemption from the requirement of a tolerance for decanoic acid to correct typographical errors.

DATES: This document is effective on February 19, 2003.

FOR FURTHER INFORMATION CONTACT: Adam Heyward, Antimicrobials Division, (7510C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–6422; e-mail address: heyward.adam@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the final rule a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2002–0272. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at http://www.epa.gov/fedrgstr/. A frequently updated electronic version of 40 CFR part 180 is available at http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr180_00.html, a beta site currently under development.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at http://www.epa.gov/edocket/ to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. What Does this Correction Do?

An exemption from the requirement of a tolerance for decanoic acid was added to 40 CFR part 180 in the **Federal Register** issue of February 19, 2003, (68 FR 7939) (FRL–7178–6). Inadvertently, the tolerance exemption for decanoic acid was assigned § 180.1223, which had previously been assigned to another pesticide which was published in the **Federal Register** issue of February 14, 2003 (68 FR 7433) (FRL–7291–3). This document corrects the section number for the Decanoic acid tolerance exemption.

III. Why is this Correction Issued as a Final Rule?

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's technical correction final without prior proposal and opportunity for comment, because EPA is merely correcting the section number that was inadvertently assigned to the Decanoic acid tolerance exemption. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

IV. Do Any of the Statutory and Executive Order Reviews Apply to this Action?

This final rule implements a technical correction to the CFR, and it does not otherwise impose or amend any requirements. As such, the Office of Management and Budget (OMB) has determined that a technical correction is not a ''significant regulatory action'' subject to review by OMB under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Nor does this final rule contain any information collection requirements that require review and approval by OMB pursuant to the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*).

Since the Agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute (see Unit III.), this action is not subject to provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, this action does not significantly or uniquely affect small governments or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates

Reform Act of 1995 (UMRA) (Public Law 104–4).

This final rule will not have substantial direct effects on the States or on one or more Indian tribes, on the relationship between the national government and the States or one or more Indian tribes, or on the distribution of power and responsibilities among the various levels of government or between the Federal government and Indian tribes. As such, this action does not have any ''federalism implications'' as described in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), or any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249), November 6, 2000).

Since this final rule is not a ''significant regulatory action'' as defined by Executive Order 12866, it does not require OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), and is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001).

This action does not involve any technical standards that require the Agency's consideration of voluntary consensus standards pursuant to 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).

This action will not result in environmental justice related issues and does not, therefore, require special consideration under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994) or Executive Order 12630, entitled *Governmental Actions and Interference with Constitutionally Protected Property Rights* (53 FR 8859, March 15, 1988).

In issuing this final rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988, entitled *Civil Justice Reform* (61 FR 4729, February 7, 1996).

V. 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 this final rule in the **Federal Register**. This final rule is not a ''major rule '' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and record keeping requirements.

Dated: March 17, 2003.

James Jones

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR part 180 is corrected as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346(a) and 371.

■ 2. In FR Doc. 03–3843, published in the **Federal Register** of February 19, 2003, (68 FR 7939) (FRL–7278–6), in the 3rd column, the number 2 instruction is corrected to read ''2. Section 180.1225 is added to subpart D to read as follows:'' and that the section heading is corrected to read as follows:

§ 180.1225 Decanoic acid; exemption from the requirement of a tolerance.

[FR Doc. 03–8370 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7479–1]

Oklahoma: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA)

ACTION: Immediate final rule.

SUMMARY: The State of Oklahoma has applied for Final authorization of the changes to its Hazardous Waste Program under the Resource Conservation and Recovery Act (RCRA). The EPA has determined that these revisions satisfy all requirements needed to qualify for Final authorization, and is authorizing the State's changes through this immediate final action. The EPA is publishing this rule to authorize the revisions without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we get adverse comments which oppose this authorization during the comment period, the decision to authorize the Oklahoma Department of Environmental Quality's (ODEQ) revisions to their hazardous waste program will take effect. If adverse comments are received, we will publish a document in the **Federal Register** either: A withdrawal of the immediate Final decisions and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the changes, or a document containing a response to comments and which either affirms that the immediate Final decision takes effect or reverses the decision.

EFFECTIVE DATE: This immediate final rule is effective on June 9, 2003, unless EPA receives adverse written comments by May 9, 2003. Should EPA receive such comments, it will publish a timely document either: Withdrawing the immediate final publication or affirming the publication and responding to comments.

ADDRESSES: Written comments, referring to Docket Number OK–01–03, should be sent to Alima Patterson Region 6 Regional Authorization Coordinator, Grants and Authorization Section (6PD–G), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733. Copies of Oklahoma program revision application and the materials which EPA used in evaluating the revisions are available for inspection and copying from 8:30 a.m. to 4 p.m. Monday through Friday at the following address: Oklahoma Department of Environmental Quality, 707 North Robinson, Oklahoma City, Oklahoma 73101–1677, (405) 702–7180 and EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–6444.

FOR FURTHER INFORMATION CONTACT: Alima Patterson (214) 665–8533.

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States that receive final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal Hazardous Waste Program. As the Federal program changes, States must

change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260–266, 268, 270, 273, and 279.

B. What Is The Effect Of Today's Authorization Decision?

The effect of this decision is that a facility in Oklahoma subject to RCRA will have to comply with the authorized State Requirements (Cluster X listed in this document) instead of the equivalent federal requirements in order to comply with RCRA. Oklahoma has enforcement responsibilities under its state hazardous waste program for violations of such program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to: (1) Do inspections, and require monitoring, tests, analyses or reports, (2) enforce RCRA requirements and suspend or revoke permits. This action does not impose additional requirements on the regulated community because the regulations for which Oklahoma is being authorized by today's action are already effective, and are not changed by today's action.

C. What Is the History of Oklahoma's Final Authorization and Its Revisions?

Oklahoma initially received Final Authorization on January 10, 1985, (49 FR 50362–50363) published December 27, 1984 to implement its base hazardous waste management program. We authorized the following revisions: Oklahoma received authorization for revisions to its program with publication dates: April 17, 1990 (55 FR 14280–14282), effective June 18, 1990; September 26, 1990 (55 FR 39274) effective November 27, 1990; April 2, 1991 (56 FR 13411–13413) effective June 3, 1991; September 20, 1991 (56 FR 47675–47677) effective November 19, 1991; September 29, 1993 (58 FR 50854–50856) effective November 29, 1993; October 12, 1993 (52679–52682) effective December 13, 1993; October 7, 1994 (59 FR 51116–51122) effective December 21, 1994; January 11, 1995 (60 FR 2699–2702) effective April 27, 1995; October 9, 1996 (61 FR 52884–52886) effective December 23, 1996; Technical Correction March 14, 1997 (12100–12101) effective March 14, 1997; September 22, 1998 (63 FR 50528–50531) effective November 23, 1998; March 29, 2000 (65 FR 16528–16532) effective May 30, 2000; May 10, 2000 (65 FR 29981–29985) effective June 9, 2000; and January 2, 2001 (66 FR 28–33) effective March 5, 2001. The authorized Oklahoma RCRA program was incorporated by reference into the CFR published on December 9, 1998 (67800–67834) effective February 8, 1999 and August 26, 1999 (46567–46571) effective October 25, 1999. On October 15, 2001, Oklahoma submitted a final complete program revision application, seeking authorization of its program revision in accordance with 40 CFR 271.21.

Oklahoma statutes provide authority for a single State agency, the Oklahoma Department of Environmental Quality (ODEQ), to administer the provisions of the State Hazardous Waste Management Program. These statutes are the Oklahoma Department of Environmental Quality Act, 27 O.S. Supplement (Supp.) 2000 §§ 1–1–101 *et seq.* General provisions of the Oklahoma Environmental Quality Code which may affect the Hazardous Waste Program are 27A O.S. Supplement (Supp.). 2000 §§ 2–1–101 through 2–3–507; and the Oklahoma Hazardous Waste Management Act (OHWMA), 27A O.S. Supp. 2000 §§ 2–7–101 *et seq.,* specifically § 2–7–104 and 27A O.S. Supp. 2000 §§ 2–14–305 allows for issuance of general permits. No amendments were made to the above statutory authorities during the 2001 legislative session which will substantially affect the State Hazardous Waste Management Program.

The Oklahoma Board adopted RCRA Cluster X rules on February 23, 2001, as permanent rules. These permanent rules became effective on June 11, 2001, to implement the State hazardous waste program, which are codified in OAC 252:205 *et seq.* These rules include provisions, found at OAC 252:205–3–1 through 252:205–3–6, to incorporate by reference, in accordance with the *Guidelines For State Adoption of Federal Regulations By Reference,* the following EPA Hazardous Waste Management Regulations as amended through July 1, 2000: The provisions of Title 40 CFR part 124.31, 124.32 and 124.33; 40 CFR parts 260–266, with the exception of 40 CFR 260.21, 264.(f), 264.150, 264.301(1), 264.1030(d), 264.1050(g), 264.1080(e), 264.1080(f), 264.1080(g), 265.1(c)(4), 265.149, 265.150, 265.1030(c), 265.1010(f), 265.1080(e), 265.1080(f), and 265.1080(g); 40 CFR part 268 except 268.5, 268.6, 268.13, 268.42(b), 268.44(a) through (g), and 268.44(m) through (p); 40 CFR part 270 except 271.14(b)(18); 40 CFR part 273; and 40 CFR part 279.

The ODEQ remains the official agency of the State of Oklahoma, as designated by 27A O.S. Supp. 2000 Section 2–7–105(13) to cooperate with Federal agencies for purposes of hazardous waste regulation. The OHWMA delegates authority to the ODEQ to administer the State hazardous waste program, including the statutory and regulatory provisions necessary to administer the RCRA Cluster X provisions. The DEQ is the sole State agency responsible for administering the provisions of the OHWMA.

At the present, the Oklahoma Corporation Commission (OCC) regulates certain aspects of the oil and gas production and transportation industry in Oklahoma, including certain waste generated by pipelines, bulk fuel sales terminals and certain tank farms. The ODEQ and the OCC have in place a ODEQ/OCC Jurisdictional Guidance Document that reflects the current state of affairs between the two agencies. The current ODEQ/OCC jurisdictional Guidance Document was amended and signed on January 27, 1999.

The revisions of the State program to include administration of the provisions of portions of RCRA Cluster X will not require a change in responsibility for administration of the State hazardous waste program.

D. What Changes Are We Approving With Today's Action?

On October 15, 2001 the State of Oklahoma submitted a final complete program application, seeking authorization of their changes in accordance with 40 CFR 271.21. We now make an immediate Final decision, subject to receipt of written comments that oppose this action, that the State of Oklahoma's hazardous waste program revision satisfies all of the requirements necessary to qualify for Final authorization. The State of Oklahoma revisions consist of regulations which specifically govern Federal Hazardous Waste promulgated from July 1, 1999 to June 30, 2000 (RCRA Cluster X) Oklahoma requirements are included in a chart with this document.

Federal Citation	State Analog
1. Delisting Waste, [50 FR 28702] July 15, 1985. (Checklist 17B)	27A O.S. Supp. 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27A. O.S. Supp § 2–2–106 Amended by Laws 1981, effective July 1, 1981; Amended by Laws 1993, Rules 252:205:3–1 through 252:205:3–7 permanent effective date June 11, 2001.
2. Universal Waste Rule: Specific Provisions for Hazardous Waste Lamps, [64 FR 36466–36490] July 6, 1999. (Checklist 181).	27A O.S. Supp. 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27 A. O.S. Supp 2000 § 2–2–106 Amended by Laws 1981, effective July 1, 1981; Amended by Laws 1993, Rules 252:205:3–1 through 252:205–3–7 permanent effective date June 11, 2001.
3. Hazardous Waste Recycling; Land Disposal Restrictions; Final Rule, Hazardous Waste Air Pollutant Standards for Combustors, Miscellaneous Units, and Secondary Lead Smelters; Clarification of BIF Requirements; Technical Correction to Fast-track Rule, [64 FR 52828–53077; 64 FR 63209–63213] September 30, 1999; and November 19, 1999. (Checklist 182).	27A O.S. Supp. 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27 A. O.S. Supp 2000 § 2–2–106 Amended by Laws 1981, effective July 1, 1981; Amended by Laws 1993, Rules 252:205–3–1 through 252:205–3–7 permanent effective date June 11, 2001.
4. Land Disposal Restrictions Phase IV: Final Rule Promulgating Treatment Standards for Metal Wastes and Mineral Processing Wastes; Mineral Processing Secondary Materials and Bevill Exclusion Issues; Treatment Standards for Hazardous Soils, and Exclusion of Recycled Wood Preserving Wastewaters, [64 FR 56469–56472] October 20, 1999. (Checklist 183).	27A O.S. Supp 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27 A. O.S. Supp 2000 § 2–2–106 amended by Laws 1981, effective July 1, 1981; amended by Laws 1993, Rules 252:205:3–1 through 252:205–3–7 permanent effective date June 11, 2001.
5. Accumulation Time Under RCRA for Waste Water Treatment Sludges From the Metal Finishing Industry; Final Rule: Vacatur of Organobromine Production Waste Listings, [65 FR 12378–12398] March 8, 2000. (Checklist 184).	27A O.S. Supp. 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27 A. O.S. Supp 2000 § 2–2–106 Amended by Laws 1981, effective July 1, 1981; Amended by Laws 1993, Rules 252:205:3–1 through 252:205–3–7 permanent effective date June 11, 2001.
6. Organobromine Production Waste; Identification and Listing of Hazardous Waste; Land Disposal Restrictions; Listing of CERCLA Hazardous Substances, Reportable Quantities; Final Rule, [65 FR 14472–14475] March 17, 2000. (Checklist 185).	27A O.S. Supp 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27 A. O.S. Supp 2000 § 2–2–106 Amended by Laws 1981, effective July 1, 1981; Amended by Laws 1993, Rules 252:205:3–1 through 252:205–3–7 permanent effective date June 11, 2001.
7. Accumulation Time Under RCRA for Waste Water Treatment Sludges From the Metal Finishing Industry; Final Rule: Petroleum Refining Process Wastes-Clarification, [64 FR 36365–36367] June 8, 2000. (Checklist 187).	27A O.S. Supp. 2000 § 2–2–104 Added by Laws 1994, effective July 1, 1994, Annotated Oklahoma Statutes 27 A. O.S. Supp 2000 § 2–2–106 Amended by Laws 1981, effective July 1, 1981; Amended by Laws 1993, Rules 252:205:3–1 through 252:205–3–7 permanent effective date June 11, 2001.

E. What Decisions has EPA Made?

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

F. How do the Revised State Rules Differ From the Federal Rules?

In this authorization of the State of Oklahoma's program revisions for RCRA Cluster X, there are no provisions that are more stringent or broader in scope. Broader in scope requirements are not part of the authorized program and EPA can not enforce them.

G. Who Handles Permits After This Authorization Takes Effect?

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

H. Why was There not a Proposal Rule Before Today's Notice?

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

I. Where do I Send My Comments and When are They Due?

You should send written comments to Alima Patterson, Regional Authorization Coordinator, Grants and Authorization Section (6PD–G), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–8533. Please refer to Docket Number OK–01–03). We must receive your comments by May 9, 2003. You may not have an opportunity to comment again. If you want to comment on this action, you must do so at this time.

J. What Happens if EPA Receives Comments Opposing This Action?

If EPA receives comments that oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

K. When Will This Approval Take Effect?

Unless EPA receives comments opposing this action, this final authorization approval will become effective without further notice on June 9, 2003.

L. Where Can I Review The State's Application?

You can review and copy the State of Oklahoma's application from 8:30 a.m. to 4 p.m. Monday through Friday at the following addresses: Oklahoma Department of Environmental Quality, 707 North Robinson, Oklahoma City, Oklahoma 73101–1677, (405) 702–7180 and EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–6444. For further information contact Alima Patterson, Regional Authorization Coordinator, Grants and Authorization Section (6PD–G), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–8533.

M. Does Today's Action Affect Indian Country In Oklahoma?

Oklahoma is not authorized to carry out its Hazardous Waste Program in Indian Country within the State. This authority remains with EPA. Therefore, this action has no effect on Indian Country.

N. What Is Codification?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the CFR. The EPA does this by referencing the authorized State rules in 40 CFR part 272. The EPA reserves the amendment of 40 CFR part 272, Subpart LL for this codification of Oklahoma's program changes until a later date.

Administrative Requirements

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore, this action is not subject to review by OMB. This rule incorporated by reference Oklahoma's authorized hazardous waste management regulations, and imposes no additional requirements beyond those imposed by State law. This final rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et. seq.*). Incorporation by reference will not impose any new burdens on small entities. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 3501 *et. seq.*). Because this rule merely incorporates by reference certain existing State hazardous waste management program requirements which EPA already approves under CFR part 271, and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely incorporates by reference existing State hazardous waste management program requirements without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also does not have Tribal implications within the meaning of Executive Order 13175 (65 FR 67249, November 6, 2000).

This action also is not subject to Executive Order 13045 (62 FR 19885M April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Action Concerning Regulations That Significantly Affect Energy Supply Distribution or Use'' (66 FR 28344, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), EPA grants a State's application for incorporation by reference as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State incorporation by reference application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. The final rule does not include environment justice issues that require consideration under Executive Order 12898 (59 FR 7629, February 16, 1994). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

The Congressional Review Act, 5 U.S.C. 3501 *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 prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective on June 9, 2003.

List of Subjects in 40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

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

Dated: March 27, 2003.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. 03–8667 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 95–178; FCC 99–116]

Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules

AGENCY: Federal Communications Commission.

ACTION: Correcting amendments.

SUMMARY: This document makes a minor correction to part 76 of the Commission's rules pertaining to definition of markets which were published in the **Federal Register**, 64 FR 33796, June 24, 1999, regarding cable television broadcast signals.

DATES: Effective April 9, 2003.

FOR FURTHER INFORMATION CONTACT: Kenneth Lewis, Media Bureau (202) 418–2622.

SUPPLEMENTARY INFORMATION: The Order on Reconsideration and Second Report and Order, FCC 99–116, adopted May 21, 1999; released May 26, 1999, approved a final rule regarding the change of market definitions from Arbitron's areas of dominant influence to Nielsen Media Research's designated market areas for must-carry/retransmission elections. In this document we make a non-substantive change to update Nielsen Media Research's address in the publication of § 76.55(e)(2)(i) of the Commission's rules.

Need for Correction

As published, the final regulations contain an old address for Nielsen Media Research.

List of Subjects in 47 CFR Part 76

Cable television.

■ Accordingly, 47 CFR part 76 is corrected by making the following correcting amendments:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

§ 76.35 [Amended]

■ 2. In § 76.55, in paragraph (e)(2)(i), ''299 Park Avenue'' is revised to read ''770 Broadway''.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–8577 Filed 4–8–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1109, 1111 and 1114

[STB Ex Parte No. 638]

Procedures to Expedite Resolution of Rate Challenges to be Considered Under the Stand-Alone Cost Methodology

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rules and request for comments.

SUMMARY: The Board amends its regulations to expedite the resolution of rail rate challenges considered under the stand-alone cost (SAC) methodology. The revisions institute a requirement for mandatory, non-binding post-complaint mediation between the shipper and railroad under Board auspices, and establish expedited processes, using Board staff, for resolving discovery and evidentiary disputes. The Board also requests comments on the following discovery-related issues: developing a list of standard information that should be routinely made available in discovery; limiting the number of discovery requests available to the parties; limiting the number of years of data for which discovery responses would be required, and establishing a cut-off date for updating discovery responses; and cost-sharing for production of discovery responses.

DATES: The final rules are effective on May 9, 2003; comments are due on June 9, 2003, with reply comments due on June 19, 2003.

ADDRESSES: Send comments (an original plus 10 copies) referring to Ex Parte No. 638 to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Jamie P. Rennert (202) 565–1566. [Federal Information Relay Service (FIRS) (Hearing Impaired): (800) 877–8339.]

SUPPLEMENTARY INFORMATION: The Surface Transportation Board requests comments as follows:

Standard Discovery Requests

We are asking each interested party to (1) submit lists of all of the information and documents that (a) it believes it should be entitled to obtain as a matter of course in discovery in a SAC case and (b) it would expect to produce to the other party as a matter of course in discovery in a SAC case, and then (2) comment on the lists submitted by other parties in this proceeding. After reviewing the parties' lists and comments, we will decide whether to issue a list of standard information and documents that the parties to a SAC case would be required to produce. We also seek comment on the practical aspects of this proposal, such as the appropriate timing for such initial disclosures. For example, would it be practical to require the complainant's initial disclosures to be made contemporaneously with the filing of the complaint, and to make the defendant's initial disclosures due at the same time as its answer to the complaint?

Additional Discovery

A suggestion was made to place a limit on the number of discovery requests that each party would be allowed to make, absent permission from the Board. This is the procedure that applies to complex commercial litigation conducted in the federal courts, in Rule 33(a) of the Federal Rules of Civil Procedure (which limits a party to 25 written interrogatories, including all discrete subparts, without leave of court). We seek comment on (1) the appropriate number of interrogatories and document requests that could be made without our leave, and why, and (2) whether such a limitation is a necessary and appropriate measure to prevent parties from requesting data in multiple formats or versions. Commenters should address this proposal both as if it were to be adopted alone and as if it were to be adopted in conjunction with a list of standard information and documents that the parties to a SAC case would be required to produce as initial disclosures.

Time Periods

Suggestions were also made to limit the number of years for which data would need to be produced for a SAC case, absent permission from the Board, and to establish a cut-off date for discovery after which responses to discovery requests would not need to be updated. We seek comment on (1) the advantages and disadvantages of establishing such limits, (2) whether

such limits should be standard or determined on a case-by-case basis at an initial discovery conference, (3) what the appropriate limitations would be, and for which types of data, and (4) an appropriate cut-off point in the procedural schedule for making additional discovery requests.

Costs

Finally, a suggestion has been made that the parties share the costs of production of data in response to discovery requests, rather than the responding party alone shouldering what can be substantial costs. We seek comment on (1) our authority to require such cost-sharing, (2) the circumstances, if any, under which parties should be required to share those costs, (3) how the costs of production would be quantified, and (4) how, if at all, the costs should be divided between the parties.

Additional information is contained in the Board's decision. To obtain a copy of the full decision, visit the Board's Web site at *http://www.stb.dot.gov;* or call the Board's Information Officer at (202) 565–1674. To purchase a copy of the decision, write to, call, email, or pick up in person from Dā-2-Dā Legal Copy Service, Room 405, 1925 K Street, NW., Washington, DC 20006, (202) 293–7776, *da2dalegal@earthlink.net.* [Federal Information Relay Service (FIRS) (Hearing Impaired): (800) 877–8339.]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

We conclude that our action will not have a significant effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act because small entities are not litigants in the rail rate cases that are the subject of this proceeding.

List of Subjects in 49 CFR Parts 1109, 1111 and 1114

Practice and procedure, Railroads.

Decided: April 3, 2003.
By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams,

Secretary.

■ The Surface Transportation Board amends 49 CFR parts 1109, 1111 and 1114 as follows:

PART 1109—USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

■ 1. The authority citation for part 1109 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

■ 2. Add new § 1109.4, to read as follows:

§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

(a) A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon filing a formal complaint under 49 CFR Part 1111.

(b) Within 10 business days after the shipper files its formal complaint, the Board will assign a mediator to the case. Within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting. At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present.

(c) The mediator will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. If the parties reach a settlement, the mediator may assist in preparing a settlement agreement.

(d) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party before the Board or in any other forum without the consent of the other party.

(e) The mediation shall be completed within 60 days of the appointment of the mediator. The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator to the Board. Requests to extend mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(f) Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in stand-alone cost rate cases, set forth at 49 CFR 1111.8(a).

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

■ 1. The authority citation for part 1111 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

■ 2. Redesignate the current text in § 1111.8 as § 1111.8(a), add a new paragraph heading to redesignated paragraph (a), and add new paragraph (b) to read as follows:

§ 1111.8 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* * * *

(b) *Conferences with parties.* (1) The Board will convene a technical conference of the parties with Board staff prior to the filing of any evidence in a stand-alone cost rate case, for the purpose of reaching agreement on the operating characteristics that are used in the variable cost calculations for the movements at issue. The parties should jointly propose a schedule for this technical conference.

(2) In addition, the Board may convene a conference of the parties with Board staff, after discovery requests are served but before any motions to compel may be filed, to discuss discovery matters in stand-alone cost rate cases. The parties should jointly propose a schedule for this discovery conference.

PART 1114—EVIDENCE; DISCOVERY

■ 1. The authority citation for part 1114 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

■ 2. Revise § 1114.31(a) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a)(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology, the time for filing a reply to a motion to compel is governed by section 1104.13.

(2) *Reply to motion to compel in stand-alone cost rate cases.* A reply to a motion to compel must be filed with the Board within 10 days thereafter in a rate case to be considered under the stand-alone cost methodology.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost rate cases.* Within 5 business days after a conference with the parties convened pursuant to subparagraph (a)(3) of this section, the Secretary will issue a summary ruling on the motion to compel discovery in a stand-alone cost rate case. If no

conference is convened, the Secretary will issue this summary ruling within 10 business days after the filing of the reply to the motion to compel. Appeals of a Secretary's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

* * * * *

[FR Doc. 03–8645 Filed 4–8–03; 8:45 am]

BILLING CODE 4915–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 011128283–3075–03; I. D. 111401B]

RIN 0648–AN55

Fisheries of the Exclusive Economic Zone Off Alaska; Correction

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

ACTION: Final rule; Technical amendment.

SUMMARY: This document corrects a cross reference in the regulatory text of 50 CFR part 679. The action is necessary to correct an error in a cross reference at § 679.20(a)(5)(iii)(B).

DATES: Effective April 8, 2003.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, NMFS, 907–586–7228 or e-mail at *patsy.bearden@noaa.gov*.

SUPPLEMENTARY INFORMATION: A final rule, which published December 30, 2002 (67 FR 79692), redesignated § 679.20(a)(5)(ii) as § 679.20(a)(5)(iii). This paragraph redesignation affected a cross reference in existing § 679.20(a)(5)(iii)(B) but the change was not made. This error is corrected by this action.

Need for Corrections

This rule corrects a cross reference in § 679.20(a)(5)(iii)(B) by removing the reference to ''(a)(5)(ii)(A)'' and adding in its place ''(a)(5)(iii)(A).''

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator of Fisheries (AA), NOAA, finds good cause to waive prior notice and an opportunity for public comment. NOAA finds that prior notice and comment are unnecessary as this rule makes a minor, non-substantive change to correct a mis-citation to another section of the regulation. Because this action is not substantive, 5 U.S.C. 553(d) does not apply. Therefore, this final rule is not subject to a 30–day delay in effectiveness.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: April 2, 2003.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ Accordingly, 50 CFR part 679 is corrected by making the following correcting amendments:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*; 3631 *et seq.*; Title II of Division C, Pub. L. 105–277; Sec 3027, Pub. L. 106–31; 113 Stat. 57; 16 U.S.C. 1540(f); and Sec. 209, Pub, L, 106–554.

§ 679.20 [Corrected]

In § 679.20(a)(5)(iii)(B), the cross-reference ''(a)(5)(ii)(A)'' is corrected to read ''(a)(5)(iii)(A)''.

[FR Doc. 03–8684 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 68, No. 68

Wednesday, April 9, 2003

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 870

RIN: 3206–AJ46

Federal Employees' Group Life Insurance Program: Removal of Premiums and Age Bands From Regulations

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to remove the premium rates and age bands under the Federal Employees' Group Life Insurance (FEGLI) Program from regulation. The information will be maintained on the FEGLI Web site at *http://www.opm.gov/insure/life.* Future rate and age band changes will be announced in the **Federal Register**.

DATES: Submit comments on or before June 9, 2003.

ADDRESSES: Send written comments to Abby L. Block, Special Advisor for Employee and Family Support, Strategic Human Resources Policy Division, Office of Personnel Management, Washington, DC 20415–3666; or deliver to OPM, Room 3425, 1900 E Street NW., Washington, DC; or FAX to (202) 606–0633.

FOR FURTHER INFORMATION CONTACT: Karen Leibach, (202) 606–0004.

SUPPLEMENTARY INFORMATION: OPM is removing the premiums and age bands from the regulations to streamline the process used by OPM to adjust premium rates based on mortality and claims experiences, and actuarial determinations. The premiums in the FEGLI Program represent actuarial estimates of premium income necessary to pay future expected benefits costs. The rates for all coverage categories are specific to the experience of the FEGLI group and are not based on mortality rates within the general population. Actuarial analysis of changing mortality rates and Program changes, if any, make periodic premium adjustments necessary. OPM needs a simplified process to ensure that premium income can pay the future expected benefit costs in the FEGLI Program.

When OPM determines rate changes are needed, we will announce them in a public notice in the **Federal Register**. We also will issue guidance to all agencies for the purpose of counseling employees and we will notify affected annuitants directly. We will update the FEGLI Program Booklet when necessary to reflect changes and maintain the Booklet and premium rates on the FEGLI Web site *www.opm.gov/insure/life.*

Although members of the public will no longer have the opportunity to comment on changes through the formal regulatory process, they can continue as always to comment through emails and letters to OPM. Almost all the comments we receive regarding premium and age band changes are in response to these types of notification, rather than formal responses to regulations. We will accept and reply to comments from members of the public as always. Publishing these changes in the **Federal Register** will allow OPM to implement them in a more timely and efficient manner.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, because the regulation only affects life insurance benefits of Federal employees and retirees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

U.S. Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, OPM is proposing to amend 5 CFR part 870 as follows:

PART 870—FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM

1. The authority citation for part 870 is revised to read as follows:

Authority: 5 U.S.C. 8716; subpart J also issued under sec. 599C, Pub. L. 101–513, 104 Stat. 2064, as amended; § 870.302(a)(3)(ii) also issued under sec. 153, Pub. L. 104–134, 110 Stat. 1321; § 870.302(a)(3) also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251 and section 7(e), Pub. L. 105–274, 112 Stat. 2419.

Subpart D—Cost of Insurance

2. In § 870.401, paragraphs (a), (b)(1), and (d) are revised to read as follows:

§ 870.401 Withholdings and contributions for Basic insurance.

(a)(1) The cost of Basic insurance is shared between the insured individual and the Government. The employee pays two thirds of the cost, and the Government pays one-third.

(2) When OPM makes any adjustment to the Basic life insurance premium, we will issue a public notice in the **Federal Register**.

(b)(1) During each pay period in which an insured employee is in pay status for any part of the period, the employee's share of the premium must be withheld from the employee's biweekly pay. The amount withheld from the pay of an employee who is paid on other than a biweekly basis must be prorated and adjusted to the nearest one-tenth of one cent.

* * * * *

(d)(1) For an annuitant or compensationer who elects to continue Basic insurance and chooses the maximum reduction of 75 percent after age 65, under § 870.702(a)(2), the annuitant's share of the premium is withheld monthly and the compensationer's share is withheld every four weeks. These withholdings stop the month after the month in which the annuitant or compensationer reaches age 65. There are no withholdings from individuals who retired or began receiving compensation before January 1, 1990, and who elected the 75 percent reduction. For the purpose of this paragraph, an individual who separates from service after meeting the requirements for an immediate annuity under 5 U.S.C. 8412 (g) is considered to retire on the day before the annuity begins.

(2) An annuitant or compensationer who elects to continue Basic insurance and chooses either the reduction election of 50 percent or the no reduction after age 65, under § 870.702(a)(3) or § 870.702(a)(4), pays an additional premium for the 50 percent or no reduction election. This additional premium is withheld for each $1,000 of the BIA. At age 65, the Basic premium will stop, but the annuitant or compensationer must continue to pay the additional premium for either the 50 percent or the no reduction election.

* * * * *

3. Revise § 870.402 to read as follows:

§ 870.402 Withholdings for Optional insurance.

(a)(1) The insured individual pays the full cost of all Optional insurance. There is no Government contribution toward the cost of any Optional insurance.

(2) Optional insurance premiums are based on 5-year age bands beginning at age 35. The last age band for Option A is age 60+. The last age band for Options B and C is 80+. For the purpose of this subpart, effective April 24, 1999, an individual is considered to reach the next age band the 1st day of the pay period following the pay period in which his/her birthday occurs.

(3) When OPM makes any adjustment to the Optional life insurance premiums, we will issue a public notice in the **Federal Register**.

(b) During each pay period in any part of which an insured employee is in pay status, the employing agency must withhold the full cost of Optional insurance from his/her pay.

(c)(1) Subject to the provisions for reemployed annuitants in § 870.707, the full cost of Optional insurance must be withheld from the annuity of an annuitant and the compensation of a compensationer.

(2) The withholdings for Option A stop the month after the month in which an annuitant or compensationer reaches age 65.

(3) For an annuitant or compensationer who elects Full Reduction for any Option B or Option C multiples, the withholdings for those multiples stop the month after the month in which he/she reaches age 65.

(4) For an annuitant or compensationer who elects No Reduction for any Option B or Option C multiples, the withholdings for those multiples continue, as long as he/she remains insured.

(d)(1) For Option A and Option C, the amount withheld from pay, annuity, or compensation paid on other than a biweekly basis must be prorated and adjusted to the nearest cent.

(2) For Option B, the amount withheld from pay, annuity, or compensation paid on other than a biweekly basis must be prorated and adjusted to the nearest one-tenth of 1 cent.

(e) If an employee's annual pay is paid during a period shorter than 52 work weeks, the employing office must determine the amount to withhold. To do this, it converts the biweekly cost to an annual cost and prorates it over the number of installments of pay regularly paid during the year.

(f) When an agency withholds less than or none of the proper amount of Optional life insurance deductions from an individual's pay, annuity or compensation, the agency must submit an amount equal to the uncollected deductions required under 5 U.S.C. 8714a, 8714b, 8714c to OPM for deposit in the Employees' Life Insurance Fund.

4. In § 870.404, paragraph (d) is revised to read as follows:

§ 870.404 Withholdings and contributions provisions that apply to both Basic and Optional insurance.

* * * * *

(d) The deposit described in §§ 870.401(f) and 870.402(f) must be made no later than 60 calendar days after the date the employing office determines the amount of the underdeduction that has occurred, regardless of whether or when the underdeduction is recovered by the agency. The agency must determine whether to waive collection of the overpayment of pay, in accordance with 5 U.S.C. 5584, as implemented by 4 CFR chapter I, subchapter G. However, if the agency involved is excluded from the provisions of 5 U.S.C. 5584, it may use any applicable authority to waive the collection.

* * * * *

5. In § 870.801, paragraph (e) is revised to read as follows:

§ 870.801 Order of precedence and payment of benefits.

* * * * *

(e) Upon the death of an insured family member, Option C benefits are paid to the employee, annuitant or compensationer responsible for withholdings under § 870.402(a), except as provided in paragraph (f) of this section.

* * * * *

[FR Doc. 03–8610 Filed 4–8–03; 8:45 am]

BILLING CODE 6325–50–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Rural Housing Service

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Parts 762, 1941, 1943 and 1951

RIN 0560–AG81

2002 Farm Bill Regulations—Loan Eligibility Provisions

AGENCY: Farm Service Agency, USDA.

ACTION: Proposed rule.

SUMMARY: The Farm Service Agency (FSA) proposes to amend the regulations for direct and guaranteed farm operating loans (OL) to implement the provision of the Farm Security and Rural Investment Act of 2002 (2002 Act) relating to loan eligibility for applicants with prior debt forgiveness resulting from a disaster or emergency designated by the President. FSA is proposing that borrowers who are current on an FSA loan at the onset of a Presidentially-declared disaster or emergency, but who receive debt forgiveness on that loan following the disaster, would be eligible for OL loan assistance if all other regulatory requirements were met. FSA is also proposing to amend the regulations for direct farm ownership (FO) loans to comply with the 2002 Act. FSA is proposing that applicants may qualify for a loan if they participated in the business operations of a farm or ranch for at least three of the past five years, rather than having operated a farm or ranch for that length of time. This portion of the rule is intended to make more borrowers eligible for FSA farm loan assistance. Finally, FSA is proposing to amend regulations concerning reamortization of amortized Shared Appreciation Agreement (SAA) recapture debt.

DATES: Comments on the rule must be received on or before June 9, 2003, to be assured of consideration.

ADDRESSES: Submit written comments to the Director, Loan Making Division, Farm Loan Programs, Farm Service Agency, United States Department of Agriculture, STOP 0522, 1400 Independence Avenue, SW., Washington, DC 20250–0522.

FOR FURTHER INFORMATION CONTACT: Kathy Zeidler, Senior Loan Officer, USDA, FSA, Farm Loan Programs, Loan Making Division, STOP 0522, 1400 Independence Avenue, SW., Washington, DC 20250–0522; telephone

(202) 720–5199; or e-mail *kathy_zeidler@wdc.usda.gov.* Comments on the rule may be inspected by contacting Ms. Zeidler for arrangements during normal business hours. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

Notice and Comment

This rule is issued as a proposed rule. Upon completion of the public comment period and consideration of the comments received, FSA will issue a final rule addressing the comments, announcing the final determination, and making the provisions effective.

Executive Order 12866

This rule has been determined to be not significant under Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Catalog of Federal Domestic Assistance, to which the rule applies are:

10.406—Farm Operating Loans.

10.407—Farm Ownership Loans.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–602), the undersigned has determined and certified by signature of this document that this rule will not have a significant economic impact on a substantial number of small entities. New provisions included in this rule will not impact a substantial number of small entities to a greater extent than large entities. Therefore, a regulatory flexibility analysis was not performed.

Unfunded Mandates

This rule contains no Federal mandates under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988. This rule preempts State laws that are inconsistent with it. This rule is not retroactive. Before judicial action may be brought concerning this rule, administrative remedies must be exhausted.

Environmental Assessment

The environmental impacts of this rule have been considered in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulations for compliance with NEPA, 7 CFR parts 799, and 1940, subpart G. FSA has completed an environmental evaluation and concluded that the rule requires no further environmental review. No extraordinary circumstances or other unforeseeable factors exist which would require preparation of an environmental assessment or environmental impact statement. A copy of the environmental evaluation is available for inspection and review upon request.

Executive Order 12372

This rule is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. *See* the notice related to 7 CFR part 3015 subpart V published at 48 FR 29115 (June 24, 1983).

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Paperwork Reduction Act

The Agency's information collection requirements, currently approved under OMB control numbers 0560–0155, 0560–0157, and 0560–0167 are not affected by the proposed rule.

Government Paperwork Elimination Act

FSA is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require Government agencies in general and FSA in particular to provide the option of submitting information or transacting business electronically to the maximum extent possible. The forms and other information collection activities required for participation in the program are not yet fully implemented for the public to conduct business with FSA electronically. However, loan application forms are available electronically for downloading through the USDA eForms Web site at *http://www.sc.egov.usda.gov.*

Background

Section 5319 of the 2002 Act provides another exception to the general rule prohibiting farm loans to borrowers who have received prior debt forgiveness. Under this provision, FSA farm loan borrowers who received debt forgiveness on not more than one occasion resulting directly and primarily from a major disaster or emergency designated by the President on or after April 4, 1996, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), may be eligible for direct or guaranteed farm operating loans to pay annual farm or ranch operating expenses. Note that while FSA makes emergency loans also when emergencies are designated by the USDA Secretary or FSA Administrator (physical loss loans only), only Presidentially-designated emergencies trigger this exception. In developing the proposed rule, FSA reasoned that if a borrower is operating in an area where a disaster or emergency is designated by the President, and the borrower is current on their FSA loan obligations prior to the designation, any subsequent debt forgiveness can be ''directly and primarily'' attributed to the major disaster or emergency. Therefore, the Agency is proposing that borrowers who are current on FSA loans at the onset of a Presidentially-declared disaster or emergency, but receive debt forgiveness on the loans within three years following the disaster, fall within the legislative exception and, therefore, would be eligible for OL loan assistance for paying annual farm operating expenses if all other loan requirements were met. The Agency specifically seeks comments on this issue.

Section 5001 of the 2002 Act revised an eligibility requirement for FSA's direct FO loan program. Applicants may now be eligible for this program if they participated in the business operations of a farm or ranch for at least three years, rather than having operated a farm or ranch for that length of time. FSA has in place a policy in its direct OL program defining farm participation with regard to acceptable farm experience and on-the-job training. Because this policy was already in effect, it was expanded to cover the new participation requirement for direct FO loans through administrative notice. The policy notice issued to field offices clarified the participation requirement by stating that applicants who: (1) Owned, managed, or operated a farm or ranch business for at least three years worth of complete production and

marketing cycles; (2) have been employed as a farm manager or farm management consultant for at least three years worth of complete production and marketing cycles; or (3) participated in the operation of a farm or ranch by being raised or working on a farm or ranch and having had significant responsibility for the day-to-day decision-making for at least three years' worth of complete production and marketing cycles meet the participation requirement. This rule proposes to amend FO regulations accordingly and to limit the three years of participation to the five years prior to the date the loan application is submitted. Only the last five years should be considered because this is consistent with OL eligibility requirements, which specify that applicants must have sufficient applicable educational and/or on-the-job training or farming experience in managing and operating a farm or ranch (one year's complete production and marketing cycle within the last five years). Recent farming experience is a better indicator of future success.

Section 5314 of the 2002 Act authorizes FSA to consider reamortization of amortized SAA recapture debt for up to 25 years from the date of the original amortization agreement when the borrower becomes delinquent on this non-program debt. To be eligible for this reamortization, the default must be due to circumstances beyond the borrower's control, and the borrower must have acted in good faith in attempting to repay the recapture amount. As this reamortization can be considered even when a borrower has no outstanding FLP loans, or when the SAA was triggered by all FSA loans being paid in full, FSA is proposing to amend 7 CFR 1951.901, 1951.907, 1951.909, and 1951.914 to comply with this requirement.

List of Subjects

7 CFR Part 762

General—Agriculture, Loan programs—Agriculture.

7 CFR Part 1941

Crops, Livestock, Loan programs—Agriculture, Rural areas, Youth.

7 CFR Part 1943

Crops, Loan programs—Agriculture, Recreation, Water resources.

7 CFR Part 1951

Account servicing, Credit, Debt restructuring, Loan programs—Agriculture, Loan Programs—Housing and community development.

Accordingly, 7 CFR is revised as follows:

PART 762—GUARANTEED FARM LOANS

1. The authority citation for part 762 continues to read as follows:

Authority: 5 U.S.C. 301, 7 U.S.C. 1989.

2. Amend § 762.102(b) by adding a definition of ''Presidentially-designated emergency'' to read as follows:

§ 762.102 Abbreviations and definitions.

* * * * *

(b) *Definitions.*

* * * * *

Presidentially-designated emergency. A major disaster or emergency designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*)

3. Amend § 762.120 by revising paragraph (a) to read as follows:

§ 762.120 Loan applicant eligibility.

* * * * *

(a) *Agency loss.* (1) Except as provided in paragraph (a)(2) of this section, the loan applicant, and anyone who will execute the promissory note, has not caused the Agency a loss by receiving debt forgiveness on all or a portion of any direct or guaranteed loan made under the authority of the CONACT by debt write-down or write-off; compromise, adjustment, reduction, or charge-off under the provisions of section 331 of the CONACT; discharge in bankruptcy; or through payment of a guaranteed loss claim on:

(i) More than three occasions on or prior to April 4, 1996; or

(ii) Any occasion after April 4, 1996.

(2) The applicant may receive a guaranteed OL to pay annual farm and ranch operating and family living expenses, provided the applicant meets all other requirements for the loan, if the applicant and anyone who will execute the promissory note:

(i) Received a write-down under section 353 of the CONACT;

(ii) Is current on payments under a confirmed bankruptcy plan; or

(iii) Received debt forgiveness on not more than one occasion after April 4, 1996, resulting directly and primarily from a Presidentially-designated emergency for the county in which the applicant operates. Only applicants who were current on all existing direct and guaranteed FSA loans prior to the onset of a Presidentially-designated emergency and received debt forgiveness on that debt within three years after the onset of such emergency meet this exception.

* * * * *

PART 1941—OPERATING LOANS

4. The authority citation for part 1941 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

Subpart A—Operating Loan Policies, Procedures and Authorizations

5. Amend § 1941.4 by adding a definition of ''Presidentially-designated emergency'' to read as follows:

§ 1941.4 Definitions.

* * * * *

Presidentially-designated emergency. A major disaster or emergency designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*).

* * * * *

6. Amend § 1941.12 by revising paragraphs (a)(8) and (b)(11) to read as follows:

§ 1941.12 Eligibility requirements.

* * * * *

(a) * * *

(8) *Agency loss.* (i) Except as provided in paragraph (a)(8)(ii) of this section, the loan applicant, and anyone who will execute the promissory note, has not caused the Agency a loss by receiving debt forgiveness on all or a portion of any direct or guaranteed loan made under the authority of the CONACT by debt write-down or write-off; compromise, adjustment, reduction, or charge-off under the provisions of section 331 of the CONACT; discharge in bankruptcy; or through payment of a guaranteed loss claim.

(ii) The applicant may receive a direct OL loan to pay annual farm and ranch operating and family living expenses, provided the applicant meets all other requirements for the loan, if the applicant and anyone who will execute the promissory note:

(A) Received a write-down under section 353 of the CONACT;

(B) Is current on payments under a confirmed bankruptcy plan; or

(C) Received debt forgiveness on not more than one occasion after April 4, 1996, resulting directly and primarily from a Presidentially-designated emergency for the county in which the applicant operates. Only applicants who were current on all existing direct and guaranteed FSA loans prior to the onset of a Presidentially-designated emergency and received debt forgiveness on that debt within three

years after the onset of such emergency meet this exception.

* * * * *

(b) * * *

(11) *Agency loss.* (i) Except as provided in paragraph (b)(11)(ii) of this section, the loan applicant, and anyone who will execute the promissory note, has not caused the Agency a loss by receiving debt forgiveness on all or a portion of any direct or guaranteed loan made under the authority of the CONACT by debt write-down or write-off; compromise, adjustment, reduction, or charge-off under the provisions of section 331 of the CONACT; discharge in bankruptcy; or through payment of a guaranteed loss claim.

(ii) The applicant may receive a direct guaranteed OL loan to pay annual farm and ranch and operating and family living expenses, provided the applicant meets all other requirements for the loan, if the applicant and anyone who will execute the promissory note,

(A) Received a write-down under section 353 of the CONACT;

(B) Is current on payments under a confirmed bankruptcy plan; or

(C) Received debt forgiveness on not more than one occasion after April 4, 1996, resulting directly and primarily from a Presidentially-designated emergency for the county in which the applicant operates. Only applicants who were current on all existing direct and guaranteed FSA loans prior to the onset of a Presidentially-designated emergency and received debt forgiveness on that debt within three years after the onset of such emergency meet this exception.

* * * * *

PART 1943—FARM OWNERSHIP, SOIL AND WATER AND RECREATION

7. The authority citation for part 1943 continues to read as follows:

Authority: 5 U.S.C. 301, 7 U.S.C. 1989.

Subpart A—Direct Farm Ownership Loan Policies, Procedures, and Authorizations

8. Amend § 1943.4 by adding a definition of ''participated in the business operations of a farm or ranch'' to read as follows:

§ 1943.4 Definitions.

* * * * *

Participated in the business operations of a farm or ranch. An applicant has participated in the business operations of a farm or ranch if the applicant has:

(1) Been the owner, manager or operator of a farm business for the year's complete production and marketing cycle as evidenced by tax returns, FSA farm records or similar documentation;

(2) Been employed as a farm manager or farm management consultant for the year's complete production and marketing cycle; or

(3) Participated in the operation of a farm by virtue of being raised on a farm or worked on farm with significant responsibility for the day-to-day decisions for the year's complete production and marketing cycle.

* * * * *

9. Amend § 1943.12 by revising the introductory text in paragraphs (a)(6) and (b)(8) to read as follows:

§ 1943.12 Farm ownership loan eligibility requirements.

(a) * * *

(6) Have participated in the business operations of a farm or ranch for at least 3 years out of the 5 years prior to the date the application is submitted and satisfy at least one of the following conditions:

* * * * *

(b) * * *

(8) Have one or more members, constituting a majority interest in the business entity, who have participated in the business operations of a farm or ranch for at least 3 years out of the 5 years prior to the date the application is submitted and satisfy at least one of the following conditions:

* * * * *

PART 1951—SERVICING AND COLLECTIONS

10. The authority citation for part 1951 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932 Note; 7 U.S.C. 1989; 31 U.S.C. 3716; 42 U.S.C. 1480.

Subpart S—Farm Loan Programs Account Servicing Policies

11. Amend § 1951.901 by revising the third sentence to read as follows:

§ 1951.901 Purpose.

* * * Shared Appreciation amortized payments (SA) may be reamortized in accordance with §§ 1951.907(e), 1951.909(c)(6) and 1951.909(e)(2).

* * * * *

12. In § 1951.907, revise the second and third sentences of paragraph (c), introductory text, redesignate paragraph (e) as (f) and add a new paragraph (e) to read as follows:

§ 1951.907 Notice of loan service programs.

* * * * *

(c) * * * If the borrower submits an incomplete application, see paragraph (f) of this section for procedures on requesting additional information. Delinquent borrowers who have also violated their loan agreements with the agency will be handled in accordance with paragraph (f) of this section. * * *

* * * * *

(e) The Agency will notify delinquent NP borrowers who have only SA amortization agreements that all items in paragraph (f)(5) of this section, with the exception of Attachment 2 or 4 of exhibit A and information for conservation contracts or debt settlement, must be submitted within 60 days or the account will be accelerated. If a complete application has not been submitted within 30 days, one additional notice will be sent to the NP borrower indicating the remaining information needed and the last day which it can be submitted.

* * * * *

13. Amend § 1951.909 by adding a new paragraph (c)(6) to read as follows:

§ 1951.909 Processing primary loan service program requests.

* * * * *

(c) * * *

(6) Non-Program borrowers who have only SA amortization agreements must meet the eligibility requirement in paragraph (c)(1) of this section, have acted in good faith in attempting to repay the recapture amount, and develop a feasible plan. Borrowers who do not meet the eligibility or feasibility requirements of this section will be notified of the adverse decision, and the account will be liquidated according to subpart J of this part.

* * * * *

14. Amend § 1951.914 by revising paragraphs (e), introductory text, and (e)(11) to read as follows:

§ 1951.914 Servicing shared appreciation agreements.

* * * * *

(e) *Shared appreciation amortization.* Shared appreciation due under this section may be amortized to a nonprogram amortized payment unless the amount is due because of acceleration or the borrower ceases farming. The amount due may be amortized as an SA amortized payment under the following conditions:

* * * * *

(11) If a borrower with an SA amortized payment also has outstanding Farm Loan Program loan(s) and becomes delinquent or financially distressed in accordance with § 1951.906 or if a borrower with an SA amortized

payment has no outstanding Farm Loan Program loans and becomes delinquent on the SA amortized payment, the SA payment agreement may be reamortized in accordance with § 1951.909.

* * * * *

Dated: March 24, 2003.

J.B. Penn,

Under Secretary for Farm and Foreign Agricultural Services.

Dated: April 1, 2003.

Thomas C. Dorr,

Under Secretary for Rural Development.

[FR Doc. 03–8646 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Rural Housing Service

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Parts 772, 1901, and 1951

RIN 0560–AG67

Servicing Minor Program Loans

AGENCY: Farm Service Agency, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to consolidate, clarify and revise the servicing regulations for the Minor Programs currently administered by the Farm Service Agency, Farm Loan Programs (FSA). Minor Program loans involve existing loans only since there is no longer funding for new loans in these programs. FSA Minor Programs consist of the following loan types: Grazing Association loans and Irrigation and Drainage Association loans previously administered by the U.S. Department of Agriculture's Rural Development (RD) mission area, and Non-Farm enterprise and Recreation Loans made to individuals which have previously been administered by FSA. Recreation loans to associations will continue to be serviced by RD.

DATES: Comments on the proposed rule must be received on or before June 9, 2003 to be assured of consideration.

ADDRESSES: Mail comments on the proposed rule to: Veldon Hall, Director, Farm Loan Programs, Loan Servicing and Property Management Division, Farm Service Agency, USDA, 1400 Independence Avenue, SW. Stop 0523, Washington, DC 20250–0523, or hand deliver to Suite 500, 1250 Maryland Avenue, SW., Washington, DC 20024 during normal business hours. Comments and supporting documents may be viewed by contacting the information contact listed below. All comments, including names and addresses, will become part if the public record. Comments on the paperwork burden of this proposed rule must be sent to the addresses listed in the Paperwork Reduction Act section of this Rule.

FOR FURTHER INFORMATION CONTACT: Mel Thompson, Senior Loan Officer, Farm Service Agency; telephone: 202–720–7862; Facsimile: 202–690–1196; e-mail: *mel_thompson@wdc.fsa.usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule was determined to be not significant under Executive Order 12866 and was not reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Agency certifies that this rule will not have a significant economic effect on a substantial number of small entities, because it does not require any action by the borrower who may be a small entity. The Agency, therefore, is not required to perform a Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act, Pub. L. 96–534, as amended (5 U.S.C. 601). This rule does not impact small entities to a greater extent than large entities.

Environmental Evaluation

The environmental impacts of this proposed rule have been considered in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulations for compliance with NEPA, 7 CFR parts 799, and 1940, subpart G. FSA completed an environmental evaluation and concluded that this proposed rule, if enacted, requires no further environmental review because no new loans are authorized. Servicing existing loans in accordance with previously published rules containing environmental requirements is not a major Federal action significantly affecting the quality of the human environment. No extraordinary circumstances or other unforeseeable factors exist which would require preparation of an environmental assessment or environmental impact statement. A copy of the environmental evaluation is available for inspection and review upon request.

Executive Order 12988

This rule has been reviewed in accordance with E.O. 12988, Civil Justice Reform. In accordance with that Executive Order: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings in accordance with 7 CFR parts 11 and 780 must be exhausted before requesting judicial review.

Executive Order 12372

As stated in the Notice related to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983) the programs and activities within this rule do not require consultation with state and local officials under the scope of Executive Order 12372.

Unfunded Mandates Reform Act

This rule contains no Federal mandates as defined in Title II of the Unfunded Mandates Reform Act of 1995 (UMRA). Thus, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose any new significant loan servicing criteria on state and local governments. The proposed rule revises the citation references and consolidates the servicing regulations to streamline loan servicing criteria applicable to Minor Programs. Therefore, consultation with the states is not required.

Paperwork Reduction Act

The amendments to 7 CFR parts 772, 1901, subpart E, and 1951, subparts E and F, contained in this rule only delete requirements and propose no new collections nor do they significantly affect the aggregate information collection burden of the Agencies. Certain forms and information collection are included and approved in the Information Collection Package for OMB control number 0560–0158 and are not impacted by this collection. Still, this rule transfers some of the information collections assigned OMB control numbers 0575–0118, 0575–0093, and 0575–0066, to the proposed part 772. This will result in certain burden that is currently assigned by OMB to the

Rural Development Agencies of USDA being shifted to FSA. Consequently, FSA is requesting comments on the information collection requirements in this rule that are being moved from those currently in parts 1901, subpart E and 1951, subparts E and F as required by the Paperwork Burden Reduction Act. After publication of this rule in final, the Agency will submit documents to OMB to modify the currently approved burden to reflect this shift between control numbers. An estimate of the paperwork burden of the regulations as affected by this proposed rule are as follows:

Title: 7 CFR part 772, Servicing Minor Program Loans.

OMB Control Number: 0560–NEW.

Type of request: Approval of new information collection.

Abstract: This part contains FSA policies and procedures for servicing Minor Program loans which include: Grazing Associations, Irrigation and Drainage Associations, Non-Farm Enterprise loans and Recreation loans to individuals.

Estimate of burden: Public reporting burden for this collection of information is estimated to average less than 1 hour per response.

Respondents: Individuals and businesses.

Estimated number of respondents: 338

Estimated number of responses per respondent: 1

Estimated total annual burden on respondents: 179 hours Comments are requested regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimates of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments should be sent to Mel Thompson, Loan Servicing and Property Management Division, Farm Service Agency, United States Department of Agriculture, STOP 0523, 1400 Independence Avenue, SW., Washington, DC 20250–0523; or e-mail: *mel_thompson@wdc.usda.gov*.

Federal Assistance Program

These proposed changes affect no programs listed in the Catalog of Federal Domestic Assistance.

Discussion of the Proposed Rule

This proposed rule consolidates and clarifies the servicing policies of the Farm Service Agency's Minor Loan Programs. The Minor Programs were administered by the former Farmers Home Administration (FmHA). Under the discretionary authority of the Department of Agriculture Reorganization Act of 1994, Pub. L. 103–354, on October 20, 1994, the Individual-type loans (Non-Farm Enterprise and Recreation loans) were assigned to FSA. The Association-type loans (Grazing Associations and Irrigation and Drainage loans) were assigned to USDA's Rural Development mission area. Regulations for servicing the Association-type loans of these programs are currently found at 7 CFR part 1901, subpart E for Civil Rights Compliance; 7 CFR part 1951, subpart E for servicing; 7 CFR part 1951, subpart F for graduation; 7 CFR part 1956, subpart C for debt settlement; and 7 CFR part 1962 subpart A for bankruptcy. Individual-type Minor Program loans are the Non-Farm enterprise loans which are a subgroup of FSA, Farm Operating and Farm Ownership loans defined in 7 CFR 1941.4 and 1943.4 and Recreation loans, which are defined as Farm Loan Program (FLP) loans under 7 CFR 1951.906. Although these loans are no longer made by FSA, both categories are serviced as FLP loans in accordance with 7 CFR part 1951, subpart S.

Because the current delegation of these similar loan programs between FSA and the agencies of the Rural Development mission area is inefficient, this rule proposes to remove parts of regulations that are currently shared by FSA and the agencies of the Rural Development mission area and publish a consolidated FSA regulation governing these programs. Consolidating these scattered regulations will result in more efficient and proper administration of the servicing requirements for the Minor Programs. Information not specific to the Minor Programs will be eliminated and language will be improved for readability. Only requirements specific to the Minor Programs will be included. The result will be better service to the borrowers with these types of loans, and, at the same time, ease the agency officials' burden in administering these programs. The regulations for servicing bankruptcy (7 CFR part 1962, subpart A) and debt settlement (7 CFR part 1956, subparts B and C) previously applied to all Minor Program loans and will continue to apply under this rule. This proposed rule contains no new requirements, nor does it eliminate any provision currently contained in existing regulations. The intended effect of this rule is to transfer and consolidate authorities contained within separate Federal regulations into one part.

List of Subjects

Part 772

Agriculture, Credit, Rural areas.

Part 1901

Civil rights, Compliance reviews, Minority groups.

Part 1951

Account servicing, Grant programs—housing and community development, Reporting requirements, Rural areas.

Accordingly, for the reasons stated in the preamble, 7 CFR part 772 is added and 7 CFR parts 1901 and 1951 are amended as follows:

1. Add part 772 to read as follows:

PART 772—SERVICING MINOR PROGRAM LOANS

Sec.

772.1 Policy.
772.2 Abbreviations and definitions.
772.3 Compliance.
772.4 Environmental requirements.
772.5 Security maintenance.
772.6 Subordination of security.
772.7 Leasing Minor Program loan security.
772.8 Sale or exchange of security property.
772.9 Releases.
772.10 Transfer and assumption—AMP loans.
772.11 Transfer and assumption—IMP loans.
772.12 Graduation.
772.13 Delinquent account servicing.
772.14 Reamortization of AMP loans.
772.15 Protective advances.
772.16 Liquidation.
772.17 Equal opportunity and non-discrimination requirements.
772.18 Exception authority.

Authority : 5 U.S.C. 301, 7 U.S.C. 1989, and 25 U.S.C. 490.

§ 772.1 Policy.

(a) *Purpose.* This part contains the Agency's policies and procedures for servicing Minor Program loans which include: Grazing Associations, Irrigation and Drainage Associations, Non-Farm Enterprise loans and Recreation loans to individuals.

(b) *Appeals.* The regulations at 7 CFR parts 11 and 780 apply to decisions made under this part.

§ 772.2 Abbreviations and definitions.

(a) Abbreviations.

AMP Association-Type Minor Program loan
CFR Code of Federal Regulations
FO Farm Ownership Loan
FSA Farm Service Agency
IMP Individual-type Minor Program loan
OL Operating Loan
USDA United States Department of Agriculture

(b) *Definitions.*

Association-type Minor Program loans: Means Minor Program loans to Grazing Associations and Irrigation and Drainage Associations.

Entity: Cooperatives, corporations, partnerships, joint operations, trusts, or limited liability companies.

Graduation: The requirement contained in loan documents of a Minor Program borrower that they pay their FSA loan in full with funds received from a commercial lending source as a result of improvement in their financial condition.

Individual-type Minor Program loans: Means Minor Program Non-Farm Enterprise or Individual Recreation loans that are serviced under existing regulations as program OL and FO loans. These loans were made to both entities and individuals.

Member: Means any individual who has an ownership interest in the entity which has received the Minor Program loan.

Minor Program: Non-Farm Enterprise, Individual Recreation, Grazing Association, or Irrigation and Drainage loan programs administered or to be administered by FSA that are subject to prescribed program loan servicing requirements, and, of which, each program has fewer than 500 outstanding loans and less than $100 million in outstanding debt.

Review official. An agency employee, contractor or designee who is authorized to conduct a compliance review of a Minor Program borrower.

§ 772.3 Compliance.

(a) *Requirements.* No Minor Program borrower shall directly, or through contractual or other arrangement, subject any person or cause any person to be subjected to discrimination on the basis of race, color, national origin, or disability. Borrowers must comply with all applicable Federal laws and regulations regarding equal opportunity in hiring, procurement, and related matters. FSA's civil rights requirements applicable to Minor Program borrowers are contained in title 7, part 15, subpart A and part 15b.

(b) *Reviews.* In accordance with Title VI of the Civil Rights Act of 1964, the Agency will conduct a compliance review of all Minor Program borrowers, to determine if a borrower has directly, or through contractual or other arrangement, subjected any person or cause any person to be subjected to discrimination on the basis of race, color, or national origin. The borrower must allow the review official access to their premises and all records necessary to carry out the compliance review as determined by the review official.

(c) *Frequency and timing.* Compliance reviews will be conducted no later than October 31 of every third year until the Minor Program loan is paid in full or otherwise satisfied.

(d) *Violations.* If a borrower refuses to provide information or access to their premises as requested by a review official during a compliance review, or is determined by the Agency to be not in compliance in accordance with this section, the Agency will service the loan in accordance with the provisions of § 772.14 of this part.

§ 772.4 Environmental requirements.

Servicing activities such as transfers, assumptions, subordinations, sale or exchange of security property, and leasing of security will be reviewed for compliance with title 7, part 1940, subpart G of chapter XVIII of the Code of Regulations and the exhibits to that subpart.

§ 772.5 Security maintenance.

(a) *General.* Borrowers are responsible for maintaining the collateral that is serving as security for their Minor Program loan in accordance with their lien instruments, security agreement and promissory note.

(b) *Security Inspection.* The Agency will inspect real estate that is security for a Minor Program loan at least once every three years, and chattel security at least annually. More frequent security inspections may be made as determined necessary by the Agency. Borrowers will allow representatives of the Agency, or any agency of the U.S. Government, in accordance with statutes and regulations, such access to the security property as the agency determines is necessary to document compliance with the requirements of this section.

(c) *Violations.* If the Agency determines that the borrower has failed to adequately maintain security, made unapproved dispositions of security, or otherwise has placed the repayment of the Minor Program loan in jeopardy, the Agency will:

(1) For chattel security, service the account according to title 7, part 1962, subpart A of chapter XVIII of the Code of Federal Regulations. If any normal income security as defined in that subpart secures a Minor Program loan, the reporting, approval and release provisions in that subpart shall apply.

(2) For real estate security for AMP loans, contact the Office of General Counsel for advice on the appropriate servicing including liquidation if warranted.

(3) For real estate security for IMP loans, service the account according to title 7, part 1951, subpart S, of chapter XVIII of the Code of Federal Regulations.

§ 772.6 Subordination of security.

(a) *Eligibility.* The Agency shall grant a subordination of Minor Program loan security when the transaction will further the purposes for which the loan was made, and:

(1) The loan will still be adequately secured after the subordination or the value of the loan security will be increased by the amount of advances to be made under the terms of the subordination.

(2) The borrower can document the ability to pay all debts including the new loan.

(3) The action does not change the nature of the borrower's activities to the extent that they would no longer be eligible for a Minor Program loan.

(4) The subordination is for a specific amount.

(5) The borrower is unable, as determined by the Agency, to refinance its loan and graduate in accordance with this subpart.

(6) The loan funds will not be used in such a way that will contribute to erosion of highly erodible land or conversion of wetlands for the production of an agricultural commodity according to title 7, part 1940, subpart G of chapter XVIII of the Code of Federal Regulations.

(7) The borrower has not been convicted of planting, cultivating, growing, producing, harvesting or storing a controlled substance under Federal or state law. ''Borrower'', for purposes of this subparagraph, specifically includes an individual or entity borrower and any member, stockholder, partner, or joint operator, of an entity borrower. ''Controlled substance'', for the purpose of this subparagraph, is defined at 21 CFR part 1308. The borrower will be ineligible for a subordination for the crop year in which the conviction occurred and the four succeeding crop years. An applicant must attest on the Agency application form that it and its members, if an entity, have not been convicted of such a crime.

(b) *Application.* To request a subordination, a Minor Program

borrower must make the request in writing and provide the following:

(1) The specific amount of debt for which a subordination is needed;

(2) An appraisal in accordance with § 761.7 of this chapter, if the request is for more than $10,000, unless an appraisal report that is sufficient, as determined by the Agency, that is less than one year old, is on file with the Agency; and

(3) Consent and subordination, as necessary, of all other creditors' security interests.

(c) *Approval.* SEDs are authorized to approve subordination requests.

(1) If a subordination request does not meet the requirements of this part, the SED may reject it and offer appeal rights, or recommend it to the Administrator, FSA, pursuant to exception authority, for approval.

(2) When the SED rejects a subordination request, the State Office will notify the borrower of the decision.

(3) When recommending to the Administrator for an exception, the SED must provide documentation on how approval of the subordination is in the best interest of the Government.

§ 772.7 Leasing Minor Program loan security.

(a) *Eligibility.* The Agency may consent to the borrower leasing all or a portion of security property for Minor Program loans to a third party when:

(1) Leasing is the only feasible way to continue to operate the enterprise and is a customary practice;

(2) The lease will not interfere with the purpose for which the loan was made;

(3) The borrower retains ultimate responsibility for the operation, maintenance and management of the facility or service for its continued availability and use at reasonable rates and terms;

(4) The lease prohibits amendments to the lease or subleasing arrangements without prior written approval from the Agency;

(5) The lease terms provide that the Agency is a lien holder on the subject property and, as such, the lease is subordinate to the rights and claims of the Agency as lien holder; and

(6) The lease is for less than three years and does not constitute a lease/purchase arrangement, unless the transfer and assumption provisions of this subpart are met.

(b) *Application.* The borrower must submit a written request for Agency consent to lease the property.

§ 772.8 Sale or exchange of security property.

(a) *AMP loans.* (1) Sale of all or a portion of security property for an AMP loan may be approved when:

(i) The property is sold for market value based on a current appraisal in accordance with the standards at § 761.7 of this chapter;

(ii) The sale will not prevent carrying out the original purpose of the loan. The borrower must execute RD Form 400–4 ''Assurance Agreement'' or successor form. The covenant involved will remain in effect as long as the property continues to be used for the same or similar purposes for which the loan was made. The instrument of conveyance will contain the nondiscrimination covenants contained in 7 CFR 1951.204;

(iii) The remaining security for the loan is adequate or will not change after the transaction;

(iv) Sale proceeds remaining after paying any reasonable and necessary selling expenses are applied to the Minor Program loan according to lien priority;

(2) Exchange of all or a portion of security property for an AMP loan may be approved when:

(i) The Agency will obtain a lien on the property acquired in the exchange.

(ii) Property more suited to the borrower's needs related to the purposes of the loan is to be acquired in the exchange;

(iii) The AMP loan will be as adequately secured after the transaction as before;

(iv) It is necessary to develop or enlarge the facility, improve the borrower's debt-paying ability, place the operation on a more sound financial basis or otherwise further the loan objectives and purposes, as determined by the Agency.

(b) *IMP loans.* (1) A sale or exchange of chattel that is serving as security for an IMP loan is governed by title 7, part 1962, subpart A of chapter XVIII of the Code of Federal Regulations.

(2) A sale or exchange of real estate that is serving as security for an IMP loan is governed by title 7, part 1965, subpart A of chapter XVIII of the Code of Federal Regulations.

§ 772.9 Releases.

(a) *Security.* Minor Program liens may be released when:

(1) The debt is paid in full.

(2) Security property is sold for market value and sale proceeds are received and applied to the borrower's creditors according to lien priority, or

(3) An exchange in accordance with § 772.7(b) of this subpart has been concluded.

(b) *Borrower liability.* The Agency may release a borrower from liability when the Minor Program loan, plus all administrative collection costs and charges are paid in full. IMP borrowers who have had previous debt forgiveness on a farm loan program loan as defined in 7 CFR 1951.906 cannot be released from liability by FSA until the previous loss to the Agency has been repaid with interest from the date of debt forgiveness.

(c) *Servicing of debt not satisfied through liquidation.* Balances remaining after sale or liquidation will be subject to administrative offset in accordance with 7 CFR part 1951, subpart C, including internal agency administrative offset, Department of Treasury Offset and Treasury Cross-Servicing. Thereafter, the debt settlement provisions in part 1956, subpart B (for IMP loans) and subpart C (for AMP loans) of chapter XVIII of the Code of Federal Regulations apply.

§ 772.10 Transfer and assumption—AMP loans.

(a) *Eligibility.* The Agency may approve transfers and assumptions of AMP loans when:

(1) The present borrower is unable or unwilling to accomplish the objectives of the loan.

(2) The transfer will not harm the Government or adversely affect the Agency's security position.

(3) The transferee will continue with the original purpose of the loan.

(4) The transferee will assume an amount at least equal to the present market value of the loan security.

(5) The transferee documents the ability to pay the AMP loan debt as provided in the assumption agreement and has the legal capacity to enter into the contract.

(6) If there is a lien or judgment against the Agency security being transferred, the transferee is subject to such claims. The transferee must document the ability to repay the claims against the land.

(7) If the transfer is to one or more members of the borrower's organization and there is no new member, there must not be a loss to the Government.

(b) *Withdrawal.* Withdrawal of a member and transfer of the withdrawing member's interest in the Association to a new eligible member may be approved by the Agency if all of the following conditions are met:

(1) The entire unpaid balance of the withdrawing member's share of the AMP loan must be assumed;

(2) In accordance with the Association's governing articles, the required number of remaining members

must agree to accept any new member; and

(3) The transfer will not adversely affect collection of the AMP loan.

(c) *Requesting a transfer and assumption.* The transferor borrower and transferee applicant must submit:

(1) The written consent of any other lien holder, if applicable.

(2) A current balance sheet and cash flow statement.

(d) *Terms.* The interest rate and term of the assumed AMP loan will not be changed. Any delinquent principal and interest of the AMP loan must be paid current before the transfer of an assumption will be approved by the Agency.

(e) *Release of liability.* Transferors may be released from liability with respect to an AMP loan by the Agency when:

(1) The full amount of the loan is assumed.

(2) Less than the full amount of the debt is assumed, and the balance remaining will be serviced in accordance with § 772.9(c) of this subpart.

§ 772.11 Transfer and assumption—IMP loans.

Transfers and assumptions for IMP loans are processed in accordance with title 7, part 1962, subpart A of chapter XVIII of the Code of Federal Regulations for chattel secured loans and part 1965, subpart A of chapter XVIII of the Code of Federal Regulations for real estate secured loans. Any remaining transferor liability will be serviced in accordance with § 772.9(c) of this subpart.

§ 772.12 Graduation.

(a) *General.* Agency loan programs do not supplant or compete with credit available to borrowers from non-Governmental credit sources. Agency credit is intended to be available for a temporary period of time until the borrower has made sufficient progress to obtain credit from commercial lenders. This section does not apply to Minor Program borrowers with promissory notes which do not contain provisions requiring graduation.

(b) *Graduation reviews.* Borrowers shall provide current financial information when requested by the Agency or its representatives to conduct graduation reviews. After screening out the non-commercial and non-standard borrowers, the Agency will conduct a thorough review of the financial information provided by the borrower and request additional information as needed.

(1) AMP loans shall be reviewed at least every two years. In the year to be reviewed, each borrower must submit, at a minimum, a year-end balance sheet and cash flow projection for the current year.

(2) All IMP borrowers classified as ''commercial'' or ''standard'' in accordance with title 7, part 1951, subpart F of chapter XVIII of the Code of Federal Regulations shall be reviewed at least every two years. In the year to be reviewed, each borrower must submit a year-end balance sheet, actual financial performance for the most recent year, and a projected budget for the current year.

(c) *Criteria.* Borrowers will be requested to graduate from the Minor Programs as follows:

(1) Borrowers with IMP loans that are classified as ''commercial'' or ''standard'' will be requested to apply for private financing within 30 days from the date the borrower is notified of lender interest, if an application is required by the lender. For good cause, the Agency may grant the borrower a reasonable amount of additional time to apply for refinancing.

(2) Borrowers with AMP loans will be considered for graduation at least every two years or as otherwise determined by the Agency that the borrower's financial condition has significantly improved.

(d) *Enforcement.* The Agency shall take action to enforce graduation, when the Agency has evidence that commercial credit can be obtained at reasonable rates and terms.

(1) The Agency will accelerate the loan of a Minor Program borrower who fails to provide requested documents, does not take positive steps to refinance the loan when commercial credit can be obtained at reasonable rates and terms, or refuses to cooperate in any way with the requirements of this section.

(2) The Agency must inform the borrower in writing of the specific request of which the borrower failed or refused to cooperate and provide appeal rights in accordance with 7 CFR part 780 and 7 CFR part 11.

§ 772.13 Delinquent account servicing.

(a) *AMP loans.* The Agency will take the following actions on delinquent AMP borrowers:

(1) *First contact.* The Agency will attempt to contact the borrower 10 days after the payment due date, advise the borrower of the amount past due, and request that the payment be remitted immediately.

(2) *Second contact.* If within 20 days the borrower has not responded to the initial contact, a delinquency letter will be sent notifying the borrower that if the account is not brought current within 30 days, the Agency will take action to protect the Government's interest.

(3) *Third contact.* If within 30 days the borrower has not responded to the second contact delinquency letter or the borrower will not or cannot make satisfactory arrangements to bring the account current, the borrower will be notified by letter of the option of selling their security property to recover any equity, and advising that further collection action, including internal agency offset and referral to the Department of Treasury Offset Program and Treasury Cross-Servicing, will be taken if payment is not received or satisfactory arrangements are not made to bring the account current within 15 days.

(4) *Liquidation.* If the borrower does not make arrangements to cure the default and is not eligible for reamortization in accordance with § 772.14 of this subpart, liquidation action will be taken according to § 772.16 of this subpart.

(b) *IMP loans.* Delinquent IMP borrowers will be serviced according to part 1951, subpart S, of chapter XVIII of the Code of Federal Regulations and title 7 parts 3 and 1951, subpart C of chapter XVIII of the Code of Federal Regulations, concerning internal agency offset and referral to the Department of Treasury Offset Program and Treasury Cross-Servicing.

§ 772.14 Reamortization of AMP loans.

(a) The Agency may approve reamortization of AMP loans when there is no extension of the final maturity date of the loan and no intervening lien exists on the security for the loan which would jeopardize the Government's security position, and when:

(1)(i) The account is delinquent and cannot be brought current within one year; and

(ii) The borrower has presented a cash flow budget which demonstrates the ability to meet the proposed new payment schedule; or

(2) The account is current, but due to circumstances beyond the borrower's control, the borrower will be unable to meet the annual loan payments;

(b) An exception may be provided by and at the discretion of the Agency Administrator to the conditions in paragraph (a) of this section in accordance with § 772.18.

§ 772.15 Protective advances.

(a) The Agency may approve, without regard to any loan or total indebtedness limitation, vouchers to pay costs, including insurance and real estate taxes, to preserve and protect the security, the lien, or the priority of the

lien securing the debt owed to the Agency if the debt instrument provides that the Agency may voucher the account to protect its lien or security.

(b) The Agency may pay protective advances only when it determines it to be in the Government's best financial interest.

(c) Protective advances are immediately due and payable.

§ 772.16 Liquidation.

When the Agency determines that continued servicing will not accomplish the objectives of the loan and the delinquency or financial stress cannot be cured by the options in § 772.13, the borrower will be encouraged to dispose of the Agency security voluntarily through sale or transfer and assumption. If a transfer or voluntary sale is not carried out, the loan will be liquidated according to title 7, part 1955, subpart A of chapter XVIII of the Code of Federal Regulations.

§ 772.17 Equal opportunity and non-discrimination requirements.

With respect to any aspect of a credit transaction, the Agency will comply with the requirements of the Equal Credit Opportunity Act as implemented in § 1910.2 of title 7, part 1910, subpart A of chapter XVIII of the Code of Federal Regulations, and the Department's civil rights policy in 7 CFR part 15d.

§ 772.18 Exception authority.

Exceptions to any requirement in this subpart can be approved in individual cases by the Administrator if application of any requirement or failure to take action would adversely affect the Government's interest. Any exception must be consistent with the authorizing statute and other applicable laws.

PART 1901—PROGRAM-RELATED INSTRUCTIONS

Subpart E—Civil Rights Compliance Requirements.

2. The authority citation for part 1901 is revised to read as follows:

Authority : 5 U.S.C. 301; 7 U.S.C. 1989; 40 U.S.C. 442; 42 U.S.C. 1480.

3. Amend § 1901.204 by:

a. Removing paragraphs (a)(1), (2), (4), and (10);

b. Redesignating paragraph (a)(3) as paragraph (a)(1);

c. Redesignating paragraphs (a)(5) through (9) as paragraphs (a)(2) through (6); and

d. Redesignating paragraphs (a)(11) through (28) as paragraphs (a)(7) through (24).

PART 1951—SERVICING AND COLLECTIONS

Subpart E—Servicing of Community and Direct Business Programs Loans and Grants

4. The authority citation for part 1951 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932 note; 7 U.S.C.1989; 42 U.S.C. 1480.

5. Amend § 1951.201 by removing the words ''loans for Grazing and other shift-in-land-use projects;'' and ''Association Irrigation and Drainage loans;''.

§ 1951.221 [Amended]

6. Amend § 1951.221 in paragraph (b) heading by removing the words ''Grazing Association Loans, Irrigation and Drainage and other''.

Signed in Washington, DC, on April 2, 2003.

J.B. Penn,

Under Secretary for Farm and Foreign Agricultural Services.

[FR Doc. 03–8597 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–05–U

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 956

[Docket No. FV03–956–1 PR]

Sweet Onions Grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon; Fiscal Period Change

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on a proposed change in the fiscal period under the Walla Walla sweet onion marketing order from June 1 through May 31 to January 1 through December 31. This rule was recommended by the Walla Walla Sweet Onion Marketing Committee (Committee), the agency responsible for local administration of the marketing order regulating the handling of sweet onions grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon. The current fiscal period has been in place since the marketing order's inception in 1995. Because of advance planning needed for market promotion, including paid advertising, the Committee now develops its budget of expenditures before June 1, but delays actual expenditures until that date. This has made it more difficult for the Committee to coordinate the timing of marketing promotion activities with the short harvest and marketing season for Walla Walla sweet onions. The recommended change is expected to help the Committee better coordinate its marketing promotion activities with the marketing season—mid-June into September.

DATES: Comments must be received by June 9, 2003.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or E-mail: *moab.docketclerk@usda.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Robert J. Curry, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, suite 385, Portland, Oregon 97204–2807; telephone: (503) 326–2724, Fax: (503) 326–2724; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small business may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 956 (7 CFR part 956) regulating the handling of Walla Walla sweet onions grown in Southeast Washington and Northeast Oregon, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would change the fiscal period from June 1 through May 31 to January 1 through December 31. This rule would also make conforming changes to the order's administrative rules and regulations. This change was unanimously recommended by the Committee at its December 17, 2003, meeting.

Section 956.40 of the order provides authority for the Committee to incur expenses that are reasonable and necessary to operate the program. Section 956.42 provides that these expenses be paid by assessments levied on fresh shipments of Walla Walla sweet onions. Further, § 956.41 provides that an annual budget of expenses be prepared by the Committee based on the defined fiscal period. Section 956.13 of the order defines ''fiscal period'' to mean the period beginning on June 1 and ending on May 31 of each year, or such other period as may be recommended by the Committee and approved by USDA.

Walla Walla sweet onions are traditionally harvested from about mid-June through about mid-August, although in recent years harvest has been extended into September due to an increase in spring planted onions and the use of better storage facilities. Walla Walla sweet onions have a short shelf life and are therefore generally marketed within a relatively short period of time following harvest. During the promulgation of the order in 1995, the proponent industry committee—the organization responsible for drafting the order and presenting it during the promulgation hearing—was of the opinion that the new order's fiscal period should begin shortly before the marketing season began. Testimony during the hearing supported the position that the start of the fiscal period should be close to the beginning of the season. This was so a minimum of expenses would be incurred prior to the time assessment revenue was received by the Committee following the sweet onion harvest.

Experience gained over the last eight years has shown the Committee that the June 1 through May 31 fiscal period is not conducive to coordinating the timing of its marketing promotion, including paid advertising activities, with the short harvest and marketing season for Walla Walla sweet onions. The crop is harvested and marketed during a four-month period—mid-June into September.

Because of advance planning needed for marketing promotion projects, the Committee now develops its budget of expenditures before June 1, but delays actual expenditures until that date. This has made it more difficult for the Committee to coordinate the timing of its promotion activities with the short harvest and marketing season. The Committee believes that better timing of marketing promotion activities with the harvest and marketing of Walla Walla sweet onions would improve the distribution and consumption of sweet onions. Hence, the Committee recommended that the fiscal period begin January 1 and end December 31 each year.

As previously stated, the Committee's current fiscal period is June 1 through May 31. The Committee plans on formulating a budget for the twelve-month period beginning June 1, 2003, and submitting it to the USDA for approval prior to that date. The Committee could then begin expending funds in early June for its 2003–2004 promotion and research plans, as well as for administration costs. Any final rule issued as a consequence of this proposed rule would be made effective January 1, 2004. Thus, the Committee would meet after this proposed change is issued as a final rule, but prior to January 1, 2004, to reformulate and resubmit a new budget for USDA approval for the new fiscal period beginning January 1, 2004, and ending December 31, 2004.

As conforming changes to the proposed fiscal period change, this rule would also update language in § 956.142, Interest charges, and § 956.180, Reports by removing the words ''of each fiscal period'' wherever they appear.

Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 21 handlers of Walla Walla sweet onions subject to regulation under the order and approximately 37 Walla Walla sweet onion producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

The Committee estimates that in 2002, 611,955 50-pound units of Walla Walla sweet onions were marketed at an average FOB price of about $9.00 per unit. Thus the total industry value at shipping point was about $5,507,595. Thus, a majority of handlers and producers of Walla Walla sweet onions may be classified as small entities.

This proposal would change the current fiscal period from June 1 through May 31 to January 1 through December 31. The current fiscal period has been in place since the marketing order's inception in 1995. Because of advance planning needed for marketing promotion projects, including paid advertising, the Committee now develops its budget of expenditures before June 1, but delays actual expenditures until that date. This has made it more difficult for the Committee to coordinate the timing of marketing promotion activities with the short harvest and marketing season for Walla Walla sweet onions—mid-June into September. The Committee believes that better timing of marketing promotion and marketing would result with a January 1 through December 31 fiscal period and improve the distribution and consumption of Walla Walla sweet onions.

Section 956.13 of the order defines ''fiscal period'' and provides the authority by which this recommended change is being proposed. This rule is a change to Committee operations which would not impose any new requirements or costs on Walla Walla sweet onion handlers or producers. It could, on the other hand, simplify the business operations within the Walla Walla sweet onion industry by putting the order's fiscal period on the same basis as that of normal business recordkeeping practices.

The Committee discussed the alternative of leaving the fiscal period as it presently exists, but unanimously concluded that this change, as recommended, would improve program administration.

This rule would not impose any additional reporting or recordkeeping requirements on either small or large Walla Walla sweet onion handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

The Committee's meeting was widely publicized throughout the Walla Walla sweet onion industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the December 17, 2002, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ama.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 956

Marketing agreements, Onions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 956 is proposed to be amended as follows:

PART 956—SWEET ONIONS GROWN IN THE WALLA WALLA VALLEY OF SOUTHEAST WASHINGTON AND NORTHEAST OREGON

1. The authority citation for 7 CFR part 956 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. A new § 956.113 is added to subpart ''Rules and Regulations'' to read as follows:

§ 956.113 Fiscal period.

Pursuant to § 956.13, *fiscal period* shall mean the period beginning January 1 and ending December 31 of each year.

§ 956.142 [Amended]

3. Section 956.142 is amended by removing the words ''of each fiscal period'' in the second sentence.

§ 956.180 [Amended]

4. Section 956.180 is amended by removing the words ''of each fiscal period'' in the introductory text.

Dated: April 3, 2003.

A. J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–8648 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 105 and 115

[Docket No. 02–107–1]

Viruses, Serums, Toxins, and Analogous Products; Suspension, Revocation, or Termination of Biological Licenses or Permits; Inspections

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the Virus-Serum-Toxin Act regulations to specify the actions that would have to be taken by veterinary biologics licensees and permittees upon their receipt of notice from the Animal and Plant Health Inspection Service (APHIS) to stop the preparation, distribution, sale, barter, exchange, shipment, or importation of any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product. After receiving notice from APHIS to stop the preparation, distribution, sale, barter, exchange, shipment, or importation of any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product, licensees and permittees would be required to notify wholesalers, dealers, jobbers, or other persons known to have veterinary biological products in their possession to stop the preparation, distribution, sale, barter, exchange, shipment, or importation of any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product. In addition, licensees and permittees would be required to submit a complete accounting of the inventory of affected serials or subserials of biological products in the current possession of each person involved in the distribution or sale of the product, and provide written documentation concerning the required notifications as directed by the Administrator of APHIS. These proposed changes are necessary in order to clarify the regulations, provide for the most expeditious means of notification, and to prevent the risk that any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product may cause harm to animals, the public health, or to the environment.

DATES: We will consider all comments that we receive on or before June 9, 2003.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 02–107–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 02–107–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 02–107–1'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related

information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Albert P. Morgan, Chief of Operational Support, Center for Veterinary Biologics, Licensing and Policy Development, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231, (301) 734–8245.

SUPPLEMENTARY INFORMATION:

Background

Parts 105 and 115 of the Virus-Serum-Toxin Act regulations (9 CFR parts 105 and 115, referred to below as the regulations) provide, respectively, for the suspension, revocation, or termination of biological licenses or permits and for the inspection of veterinary biologics establishments and veterinary biological products. These regulations also contain provisions that address the actions to be taken by veterinary biologics licensees, permittees, jobbers, wholesalers, dealers, or other persons known to have veterinary biologics in their possession, upon their receipt of notice from the Animal and Plant Health Inspection Service (APHIS) to stop the preparation, distribution, sale, barter, exchange, shipment, or importation of worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product.

Section 105.3 of the regulations provides, in relevant part, that APHIS may notify a licensee or permittee to stop the preparation, sale, barter, exchange, shipment, or importation of any veterinary biological product if at any time it appears that such product may be dangerous in the treatment of domestic animals, or found to be unsatisfactory according to applicable Standard Requirements.

Similarly, § 115.2 provides, in relevant part, that if as a result of any inspection it appears that any veterinary biological product is worthless, contaminated, dangerous, or harmful, the Secretary will give notice of that finding to the manufacturer or importer and to any jobbers, wholesalers, dealers or other persons known to have any of such product in their possession. After receiving such notice, no person may sell, barter, or exchange any such product in any place under the jurisdiction of the United States or ship or deliver for shipment any such product in or from any State, Territory, or the District of Columbia.

Typically, before the stop distribution and sale notifications provided for by §§ 105.3 and 115.2 can be given, APHIS must obtain from the licensees and permittees (manufacturers or importers) the names and addresses of the wholesalers, dealers, jobbers, consignees, or other persons known to have any of the product in their possession. Any delay in obtaining the names and addresses of persons in possession of biological products subject to a stop distribution and sale action increases the risk that such product may cause harm to animals, the public health, or to the environment. APHIS believes that it is prudent to use the most expeditious means available to notify wholesalers, dealers, jobbers, consignees, or other persons concerning the stop distribution and sale action. Therefore, this proposed rule would amend §§ 105.3 and 115.2 to specify actions that veterinary biologics licensees and permittees would have to take when APHIS issues a stop distribution and sale notice concerning a veterinary biological product.

Specifically, APHIS is proposing to amend the regulations to provide that APHIS would contact veterinary biologics licensees and permittees concerning stop distribution and sale actions against any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product. After being contacted by APHIS, veterinary biologics licensees or permittees would be required to immediately provide stop distribution and sale notification to wholesalers, jobbers, dealers, consignees or other persons in their respective distribution systems known to be in possession of such product. APHIS believes that having licensees or permittees provide stop distribution and sale notification to wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems known to be in possession of any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product is the most expeditious means of notification. Licensees and permittees have information readily available to them concerning the products that have been shipped to wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems.

In addition, veterinary biologics licensees and permittees also would be required to document, in writing, all communications with wholesalers, dealers, jobbers, consignees, or other persons concerning the stop distribution and sale action; obtain a complete accounting of the inventory of such product in the possession of such wholesalers, jobbers, dealers, and other persons; and, as directed by the Administrator, submit records of all actions taken to ensure compliance with the stop distribution and sale notification.

Executive Order 12866 and Regulatory Flexibility Act

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

APHIS issues stop distribution and sale actions if information is received indicating that a serial or subserial of a licensed veterinary biological product is worthless, contaminated, dangerous, harmful, or unsatisfactory. Such information may come from inspection findings, an investigation, an adverse event report, or tests conducted by the Center for Veterinary Biologics Laboratory or by the licensee or permittee. Stop distribution and sale actions may be necessary to prevent risk to the health of animals, to the public health or well-being, or to the environment. Currently, the regulations in §§ 105.3 and 115.2 provide that APHIS may issue a notice requiring veterinary biologics licensees and permittees to stop distribution and sale if a product is found to be unsatisfactory according to applicable standard requirements or if it appears that such product is worthless, contaminated, dangerous, or harmful.

APHIS is proposing to amend the regulations to provide that APHIS would contact veterinary biologics licensees and permittees concerning stop distribution and sale actions against any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product. After being contacted by APHIS, veterinary biologics licensees or permittees would be required to immediately provide stop distribution and sale notification to wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems known to be in possession of such product. APHIS believes that having licensees or permittees provide stop distribution and sale notification to wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems known to be in possession of any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product is the most expeditious means of notification. Licensees and permittees have information readily available to them

concerning which wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems are known to be in possession of products.

In addition, veterinary biologics licensees and permittees also would be required to document, in writing, all communications with wholesalers, dealers, jobbers, consignees, or other persons concerning the stop distribution and sale action; obtain a complete accounting of the inventory of such product in the possession of such wholesalers, jobbers, dealers, and other persons; and, as directed by the Administrator, submit records of all actions taken to ensure compliance with the stop distribution and sale notification.

The effect of this action would be to clarify the regulations, provide for the most expeditious means of notification, and to prevent the risk that any worthless, contaminated, dangerous, harmful, or unsatisfactory veterinary biological product may cause harm to animals, the public health, or to the environment.

This proposed rule would affect all veterinary biologics licensees and permittees. Currently, there are approximately 135 veterinary biological establishments, including permittees. According to the standards of the Small Business Administration, most veterinary biological establishments would be classified as small entities.

Section 116.2 of the regulations currently requires licensees and permittees to maintain records of the quantity and location of each biological product that is prepared, that is in storage, and that is in distribution channels. In addition, each licensee, distributor, and permittee must maintain detailed disposition records showing the sale, shipment, or other disposition of any biological products that they have handled. Given these existing recordkeeping requirements, APHIS believes that the proposed requirement that licensees and permittees submit to APHIS a complete accounting of the inventory of an affected serial or subserial of a biological product in the current possession of each person involved in the distribution or sale of the product should not impose any undue recordkeeping burden. APHIS also believes that the current requirement for the maintenance of detailed disposition records would enable licensees and permittees to notify persons in their distribution system concerning stop distribution and sale notifications issued by APHIS without having to incur any undue recordkeeping burden.

APHIS anticipates that the only economic effects that would be associated with this proposed rule would be related to the costs incurred by licensees and permittees in connection with the notification process itself. This proposed rule does not specify the means by which licensees and permittees are required to give notification, only that the notification be made by them immediately upon receipt of the stop distribution and sale notification from APHIS. APHIS expects that most licensees and permittees would use electronic mail or facsimile to notify wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems known to be in possession of any biological product for which APHIS has issued a stop distribution and sale action. Both of these methods are inexpensive, so the actual transmittal costs associated with the proposed notification requirement would be minimal.

Licensees and permittees could retain electronic mail return receipts or facsimile confirmation sheets to address the proposed requirement for documentation that notifications have been made, both of which can be produced automatically by the sender's electronic mail system or facsimile machine. There would be some personnel costs associated with producing and addressing the notification document that would have to be sent out, but the existing requirement for the maintenance of detailed disposition records discussed in the previous paragraph should serve to minimize, to the extent possible, the time spent engaging in those activities.

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

Executive Order 12372

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

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. The Virus-Serum-Toxin Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. 02–107–1. Please send a copy of your comments to: (1) Docket No. 02–107–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

In this document, we are proposing to amend the regulations in §§ 105.3 and 115.2 to specify actions that veterinary biologics licensees and or permittees would have to take when APHIS issues a stop distribution and sale notice concerning a veterinary biological product. This process would entail the use of two new information collection activities.

First, after being contacted by APHIS, veterinary biologics licensees or permittees would be required to immediately provide stop distribution and sale notification to wholesalers, jobbers, dealers, consignees, or other persons in their respective distribution systems known to be in possession of such product.

Second, veterinary biologics licensees and permittees would have to obtain a complete accounting of the inventory of such product in the possession of such wholesalers, jobbers, dealers, and other persons in their distribution system.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

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

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the

validity of the methodology and assumptions used;

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

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

Estimate of burden: Public reporting burden for this collection of information is estimated to average 1.7666 hours per response.

Respondents: Licensees and permittees and wholesalers, dealers, jobbers, consignees, or other persons in their distribution system.

Estimated annual number of respondents: 55.

Estimated annual number of responses per respondent: 1.0909.

Estimated annual number of responses: 60.

Estimated total annual burden on respondents: 106 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects

9 CFR Part 105

Animal biologics, Exports, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

9 CFR Part 115

Animal biologics, Exports, Imports, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR parts 105 and 115 as follows:

PART 105—SUSPENSION, REVOCATION, OR TERMINATION OF BIOLOGICAL LICENSES OR PERMITS

1. The authority citation for part 105 would continue to read as follows:

Authority: 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

2. Section 105.3 would be amended by adding a new paragraph (c) to read as set forth below:

105.3 Notices re: worthless, contaminated, dangerous, or harmful biological products.

* * * * *

(c) When notified to stop distribution and sale of a serial or subserial of a veterinary biological product under the provisions of paragraph (a) or (b) of this section, veterinary biologics licensees or permittees shall:

(1) Stop the preparation, distribution, sale, barter, exchange, shipment, or importation of the affected serial(s) or subserial(s) of any veterinary biological product pending further instructions from APHIS.

(2) Immediately send stop distribution and sale notifications to any jobbers, wholesalers, dealers, foreign consignees, or other persons known to have any such veterinary biological product in their possession, which instruct them to stop the preparation, distribution, sale, barter, exchange, shipment, or importation of any such veterinary biological product. All notifications shall be documented in writing by the licensee or permittee.

(3) Account for the quantity of each serial(s) or subserial(s) of any veterinary biological product at each location in the distribution channel.

(4) When required by the Administrator, submit complete and accurate reports of all notifications concerning stop distribution and sale actions to the Animal and Plant Health Inspection Service pursuant to § 116.5 of this subchapter.

PART 115—INSPECTIONS

3. The authority citation for part 115 would continue to read as follows:

Authority: 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

4. Section 115.2 would be revised to read as follows:

§ 115.2 Inspections of biological products.

(a) Any biological product, the container of which bears a United States veterinary license number or a United States veterinary permit number or other mark required by these regulations, may be inspected at any time or place. If, as a result of such inspection, it appears that any such product is worthless, contaminated, dangerous, or harmful, the Secretary shall give notice to stop distribution and sale to the manufacturer or importer and may proceed against such product pursuant to the provisions of part 118 of this subchapter.

(b) When notified to stop distribution and sale of a serial or subserial of a veterinary biological product by the Secretary, veterinary biologics licensees or permittees shall:

(1) Stop the preparation, distribution, sale, barter, exchange, shipment, or importation of the affected serial(s) or subserial(s) of any veterinary biological product pending further instructions from APHIS.

(2) Immediately send stop distribution and sale notifications to any jobbers, wholesalers, dealers, foreign consignees, or other persons known to have any such veterinary biological product in their possession, which instruct them to stop the preparation, distribution, sale, barter, exchange, shipment, or importation of any such veterinary biological product. All notifications shall be documented in writing by the licensee or permittee.

(3) Account for the quantity of each serial(s) or subserial(s) of any veterinary biological product at each location in the distribution channel.

(4) When required by the Administrator, submit complete and accurate reports of all notifications concerning stop distribution and sale actions to the Animal and Plant Health Inspection Service pursuant to § 116.5 of this subchapter.

(c) Unless and until the Secretary shall otherwise direct, no persons so notified shall thereafter sell, barter, or exchange any such product in any place under the jurisdiction of the United States or ship or deliver for shipment any such product in or from any State, Territory, or the District of Columbia. However, failure to receive such notice shall not excuse any person from compliance with the Virus-Serum-Toxin Act.

Done in Washington, DC, this 2nd day of April, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–8599 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–34–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IN153–1;FRL–7478–2]

Approval and Promulgation of Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions to particulate matter (PM) regulations for Richmond Power and Light Company (RPL) of Wayne County, Indiana. On January 31, 2003, Indiana requested that EPA ''parallel process'' this State Implementation Plan (SIP) revision request, as an amendment to 326 Indiana Administrative Code (IAC) 6–1–14. RPL operates a power plant with two coal-fired boilers. EPA approved revisions to the short-term PM limits for these boilers on April 9, 1996 (61 FR 15704). Indiana is now seeking to revise the long-term (annual) PM limits for RPL to make them consistent with the short-term limits. The new PM limits are 320 tons per year (TPY) for boiler no. 1 and 700 TPY for boiler no. 2. Modeling analyses show that air quality is expected to be maintained.

DATES: The EPA must receive written comments by May 9, 2003.

ADDRESSES: You should mail written comments to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

You may inspect copies of Indiana's submittal at: Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, Telephone: (312) 886–6524.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' are used we mean the EPA.

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V. Summary of EPA action.
VI. Statutory and Executive Order Reviews.

I. What Is the EPA Proposing to Approve?

The EPA is proposing, through ''parallel processing,'' to approve revisions to the annual (long-term) PM limits for two boilers at the Richmond Power and Light facility. These revisions to the limits in 326 IAC 6–1–14 make these long-term limits consistent with the short-term limits previously approved by EPA as SIP revisions. The requested new PM limits are 320 TPY for boiler no. 1 and 700 TPY for boiler no. 2.

Parallel processing enables EPA to propose action on a state rule before it becomes final under state law. If the final, adopted state rule is substantially unchanged from the submission on which the proposed rule is based, then EPA may take final action based on its proposal. Significant changes in the rule between the version reviewed and the final, adopted version, may result in a new EPA proposed rule on the adopted rule. Without such significant changes, EPA will proceed with final rulemaking.

II. What Are the Proposed Changes From the Current Rule?

Indiana submitted, as a parallel processing request, revisions to 326 IAC 6–1–14 on January 31, 2003. Indiana revised the long-term PM limits for the two RPL boilers to make them consistent with their short-term limits. For boiler no. 1, the new limit is 320 TPY; for boiler no. 2, the new limit is 700 TPY. The previous limits were 71.6 TPY and 233.3 TPY, respectively. RPL's short-term limits remain at 0.19 pounds per million British Thermal Units (lb/MMBTU) and 0.22 lb/MMBTU, respectively. The combined short-term emissions limit for both boilers stays at 0.22 lb/MMBTU.

III. What Is the EPA's Analysis of the Supporting Materials?

Indiana submitted a PM modeling analysis for RPL on August 8, 1995 as part of the SIP revision request approved by EPA in April 1996. This modeling analysis applies to both the short-term limits approved in 1996 and to the new long-term limits. The maximum modeled annual PM concentration was 42.5 micrograms per meter cubed ($\mu g/m^3$). This is 1.7 $\mu g/m^3$ above the measured background concentration of 40.8 $\mu g/m^3$. The annual National Ambient Air Quality Standard (NAAQS) for PM is 50 $\mu g/m^3$. As the modeled concentration is below the NAAQS, the air quality of Wayne County, Indiana should be protected.

IV. What Are the Environmental Effects of These Actions?

Particulate matter interferes with lung function when inhaled. Exposure to PM can cause heart and lung disease. PM also aggravates asthma and bronchitis. Airborne particulate is the main source of haze that causes a reduction in visibility. It also is deposited on the ground and in the water. This harms the environment by changing the nutrient and chemical balance.

Each boiler is equipped with a control device. A common 325-foot tall stack replaced two 150-foot tall stacks in 1989. Both of these features help reduce PM concentration. Although the proposed new long-term emission limits are an increase over current limits, they are consistent with the short-term limits. The short-term limits should protect against brief, high concentration episodes. The modeling analysis found that with the new limits, the annual PM NAAQS should be maintained. Therefore, the new limits being proposed should protect the air quality of Wayne County, Indiana.

V. Summary of EPA Action

EPA is proposing, through parallel processing, to approve revisions to 326 IAC 6–1–14, the PM emission limits for Wayne County, Indiana. These revisions change the long-term (annual) PM emission limits for both boilers at the RPL facility to make them consistent with short-term limits for these sources. EPA approved revisions to the short-term limits for RPL on April 9, 1996. The PM modeling analysis show concentrations below the NAAQS level, demonstrating that the air quality of Wayne County, Indiana should be protected.

VI. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

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

For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001).

Regulatory Flexibility Act

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator 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.*).

Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

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

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

National Technology Transfer Advancement Act

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 9, 2003. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: April 1, 2003.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 03–8538 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7478–9]

Hazardous Waste Management Program: Final Authorization of State Hazardous Waste Management Program Revisions for State of Oklahoma

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and request for comment.

SUMMARY: The EPA (also ''the Agency'' in this preamble) is proposing to grant final authorization to the State of Oklahoma Department of Environmental Quality (ODEQ) for its hazardous waste program revisions, specifically, revisions needed to meet the Resource Conservation and Recovery Act (RCRA), Cluster X which contains Federal rules promulgated from July 1, 1999, to June 30, 2000. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is authorizing the revisions as an immediate final rule without prior proposal because the EPA views this action as noncontroversial and anticipates no adverse comments. The Agency has explained the reasons for this authorization in the preamble to the immediate final rule. If EPA does not receive adverse written comments, the immediate final rule will become effective and the Agency will not take further action on this proposal. If EPA receives adverse written comments, a second **Federal Register** document will be published before the time the immediate final rule takes effect. The second document may withdraw the immediate final rule or identify the issues raised, respond to the comments and affirm that the immediate final rule will take effect as scheduled. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received on or before May 9, 2003.

ADDRESSES: Mail written comments to Alima Patterson, Region 6, Regional Authorization Coordinator, Grants and Authorization Section (6PD–G), Multimedia Planning and Permitting Division, at the address shown below. You can examine copies of the materials

submitted by the State of Oklahoma during normal business hours at the following locations: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–6444; or Oklahoma Department of Environmental Quality, 707 North Robinson, Oklahoma City, Oklahoma 73101–1677, (405) 702–7180.

FOR FURTHER INFORMATION CONTACT: Alima Patterson (214) 665–8533.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: March 27, 2003.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. 03–8668 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[I.D. 032803B]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permit (EFP)

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

ACTION: Notification of a proposal for EFPs to conduct experimental fishing; request for comments.

SUMMARY: The Administrator, Northeast Region, NMFS (Regional Administrator) has made a preliminary determination that the subject EFP application contains all the required information and warrants further consideration. The Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Northeast (NE) Multispecies Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue the EFP. Therefore, NMFS announces that the Regional Administrator proposes to issue an EFP that would allow three vessels to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. The EFP would exempt three vessels from the minimum mesh size requirements for the Gulf of Maine (GOM) Regulated Mesh Area (RMA); regulations pertaining to the GOM Rolling Closure Areas III and V; days-at-sea (DAS) restrictions; and minimum fish size requirements. The experiment proposes to conduct a study to target cod and other groundfish species using modified bottom trawl gear to assess the effectiveness of square and hexagonal mesh escape windows, both with and without visual stimuli, in reducing the bycatch of non-target and undersized fish in the GOM groundfish fishery. The EFP would allow these exemptions for three commercial fishing vessels, for not more than 24 days of sea trials. All experimental work would be monitored at sea by observers trained to NMFS standards as part of this Cooperative Research Partners Initiative-funded project. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments on this document must be received on or before April 24, 2003.

ADDRESSES: Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on the Cooperative Research Partners Initiative Escape Window and Visual Stimuli Selectivity Study.'' Comments may also be sent via facsimile (fax) to (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Douglas W. Christel, Fisheries Management Specialist, 978–281–9141.

SUPPLEMENTARY INFORMATION: A completed application for an EFP was submitted by Dr. Christopher Glass as part of a Cooperative Research Partners Initiative-funded project on January 28, 2003. The EFP would exempt three federally permitted commercial fishing vessels from the following NE multispecies provisions: The minimum mesh size requirements for the GOM RMA at 50 CFR 648.80(a)(3)(i); regulations pertaining to the GOM Rolling Closure Areas III and V at 50 CFR 648.81(g)(1)(iii) and (v), respectively; NE multispecies DAS restrictions at 50 CFR 648.82(a); and minimum fish size requirements specified at 50 CFR 648.83(a)(1).

The EFP would allow the commercial vessels to conduct the proposed study using modified bottom trawl gear. A total of four experimental codend configurations would be developed, including: (1) A codend made of 6.5–inch (16.51–cm) diamond mesh preceded by a 7–inch (17.78–cm) square mesh escape window in the extension; (2) a codend made of 6.5–inch (16.51–cm) diamond mesh preceded by a 7–inch (17.78–cm) hexagonal mesh escape window in the extension; (3) a codend made of 6.5–inch (16.51–cm) diamond mesh preceded by a 7–inch (17.78–cm) square mesh escape window in the extension, with additional visual stimulus by a black panel wrapped around the codend between the escape window and the codend; (4) a codend made of 6.5–inch (16.51–cm) diamond mesh preceded by a 7–inch (17.78–cm) hexagonal mesh escape window in the extension, with additional visual stimulus by a black panel wrapped around the codend between the escape window and the codend. Two conventional nets of 6.5–inch (16.51–cm) diamond mesh and 6.5–inch (16.51–cm) square mesh codends would be used to compare the effectiveness of the experimental extension configurations. For each of the four experimental codend configurations, a total of 30 valid tows would be conducted, while a total of 18 valid tows would be conducted for each of the two control codends, for a project total of approximately 156 tows of 20 minutes each in duration. Each of the three participating vessels would test all six of the codend configurations, concurrently, in different portions of the intended sampling area. Sampling would occur during two seasons (spring and fall), with operations taking place in May and October 2003, respectively.

A total of 24 DAS would be used during the course of this research. Each vessel would conduct 4–day fishing trips during each of the two seasons to carry out the sea trials. Vessels would target the following species: Atlantic cod, haddock, yellowtail flounder, winter flounder, summer flounder, and American plaice. The incidental catch is expected to be comprised mainly of skate, smooth and spiny dogfish, sculpin, sea raven, and sea robin.

The applicant requested that the research be conducted in the GOM in an area including 30–minute statistical squares 124, 125, 132, and 133; *i.e.,* between 42°00' and 43°00' N. lat. and between 70°00' and 71°00' W. long. All fish retained by the experimental nets would be weighed and measured as quickly as possible. Undersized fish would be returned to the sea as quickly as possible after measurement, while legal-sized fish would be landed and sold to offset vessel costs.

The catches of each codend configuration would be compared and analyzed to assess the effectiveness of

the escape windows, visual stimuli, and codend mesh shapes (diamond versus square mesh). Length frequency distributions and catch rates would be compared for each species by vessel, area, and experimental net configuration. Selectivity parameters would be developed for each species, including a determination of the 50–percent retention length, the selection factor, and the selection range for each species targeted in this study.

The participating vessels would be required to report all landings in their Vessel Trip Reports. The data collection activities aboard the participating vessel would be observers trained to NMFS standards to ensure compliance with the experimental fishery objectives. The EFP would also contain a provision that the Regional Administrator has the authority to reconsider the continuation of the experimental fishery on a month-to-month basis, based upon a monthly status report outlining total catch and bycatch submitted by the applicant, and would authorize the Regional Administrator to terminate the experimental fishery at any time, at her discretion.

Based on the results of the EFPs, this action may lead to future rulemaking.

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

Dated: April 3, 2003.

Richard W. Surdi,

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

[FR Doc. 03–8685 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 68, No. 68

Wednesday, April 9, 2003

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–033–1]

National Wildlife Services Advisory Committee; Meeting

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, we are giving notice of a meeting of the National Wildlife Services Advisory Committee.

DATES: The meeting will be held on June 24, 2003, from 8 a.m. to 5 p.m. and June 25, 2003, from 8 a.m. to noon.

ADDRESSES: The meeting will be held at the USDA Center at Riverside, 4700 River Road, Riverdale, MD.

FOR FURTHER INFORMATION CONTACT: Mrs. Joanne Garrett, Director, Operational Support Staff, WS, APHIS, 4700 River Road, Unit 87, Riverdale, MD 20737–1234, (301) 734–7921.

SUPPLEMENTARY INFORMATION: The National Wildlife Services Advisory Committee (Committee) advises the Secretary of Agriculture concerning policies, program issues, and research needed to conduct the Wildlife Services (WS) program. The Committee also serves as a public forum enabling those affected by the WS program to have a voice in the program's policies.

The meeting will focus on operational and research activities and will be open to the public. Due to time constraints, the public will not be able to participate in the Committee's discussions. However, written statements concerning meeting topics may be filed with the Committee before or after the meeting by sending them to Mrs. Joanne Garrett at the address listed under **FOR FURTHER INFORMATION CONTACT,** or may be filed at the meeting. Please refer to Docket No. 03–033–1 when submitting your statements.

This notice of meeting is given pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. App. II).

Done in Washington, DC, this 2nd day of April, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–8600 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–035–1]

Determination of Regulatory Review Period for Purposes of Patent Extension; Poulvac® ST Vaccine

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has determined the regulatory review period for Poulvac® ST Vaccine and is publishing this notice of that determination as required by law. We have made this determination in response to the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent that claims that veterinary biologic.

DATES: We will consider all requests for revision of the regulatory review period determination that we receive on or before May 9, 2003. We will consider all due diligence petitions that we receive on or before October 6, 2003.

ADDRESSES: You may submit revision requests and due diligence petitions by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your request or petition (an original and three copies) to: Docket No. 03–035–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your request or petition refers to Docket No. 03–035–1. If you use e-mail, address your request or petition to *regulations@aphis.usda.gov.* Your request or petition must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–035–1'' on the subject line.

You may request a copy of the regulatory review period determination by writing to Dr. Patricia L. Foley, USDA, APHIS, VS, CVB–LPD, 510 South 17th Street, Suite 104, Ames, IA 50010–8197, or by calling (515) 232–5785. Please refer to the docket number, date, and complete title of this notice when requesting copies.

A copy of the regulatory review period determination and any revision requests or due diligence petitions that we receive on this determination are available for public inspection in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Albert P. Morgan, Chief Staff Officer, Operational Support Section, Center for Veterinary Biologics, Licensing and Policy Development, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231; phone (301) 734–8245; fax (301) 734–4314. For information regarding the regulatory review period determination, contact Dr. Patricia L. Foley, APHIS, VS, CVB–LPD, 510 South 17th Street, Suite 104, Ames, IA 50010–8197; phone (515) 232–5785.

SUPPLEMENTARY INFORMATION: The provisions of 35 U.S.C. 156, ''Extension of patent term,'' provide, generally, that a patent for a product may be extended for a period of up to 5 years as long as the patent claims a product that, among other things, was subject to a regulatory review period before its commercial marketing or use. (The term ''product'' is defined in that section as ''a drug product'' [which includes veterinary

biological products] or ''any medical device, food additive, or color additive subject to regulation under the Federal Food, Drug, and Cosmetic Act.'') A product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

The regulations in 9 CFR part 124, ''Patent Term Restoration'' (referred to below as the regulations), set forth procedures and requirements for the Animal and Plant Health Inspection Service's (APHIS) review of applications for the extension of the term of certain patents for veterinary biological products pursuant to 35 U.S.C. 156. As identified in the regulations, the responsibilities of APHIS include:

- Assisting Patent and Trademark Office of the U.S. Department of Commerce in determining eligibility for patent term restoration;
- Determining the length of a product's regulatory review period;
- If petitioned, reviewing and ruling on due diligence challenges to APHIS's regulatory review period determinations; and
- Conducting hearings to review initial APHIS findings on due diligence challenges.

The regulations are designed to be used in conjunction with regulations issued by the Patent and Trademark Office concerning patent term extension, which may be found at 37 CFR 1.710 through 1.791.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For veterinary biologics, the testing phase begins on the date the authorization to prepare an experimental veterinary biologic became effective and runs until the approval phase begins. The approval phase begins on the date an application for a license was initially submitted for approval and ends on the date such license was issued. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award, APHIS' determination of the length of a regulatory review period for a veterinary biologic will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(5)(B).

APHIS recently licensed for production and marketing the veterinary biologic Poulvac® ST Vaccine. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for Poulvac® ST Vaccine (U.S. Patent No. 4,735,801) from the Board of Trustees of Leland Stanford Junior University, and the Patent and Trademark Office requested APHIS' assistance in determining this patent's eligibility for patent term restoration. In a letter dated January 22, 2003, APHIS advised the Patent and Trademark Office that this veterinary biologic had undergone a regulatory review period and that the approval of Poulvac® ST Vaccine (Salmonella Typhimurium Vaccine, Live Virus) represented the first permitted commercial licensing or use of the product. Subsequently, the Patent and Trademark Office requested that APHIS determine the product's regulatory review period.

APHIS has determined that the applicable regulatory review period for Poulvac® ST Vaccine is 1,695 days. Of this time, 128 days occurred during the testing phase of the regulatory review period, and 1,567 days occurred during the approval phase. These periods were derived from the following dates:

1. *The date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act (21 U.S.C. 151 et seq.) became effective:* September 26, 1996. APHIS has verified the applicant's claim that the test was begun on September 26, 1996.

2. *The date the application for a license was initially submitted for approval under the Virus-Serum-Toxin Act:* January 31, 1997. APHIS has verified the applicant's claim that the application was initially submitted on January 31, 1997.

3. *The date the license was issued:* May 16, 2001. APHIS has verified the applicant's claim that the license for the commercial marketing of the vaccine was issued on May 16, 2001.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for for patent extension, this applicant seeks 1,695 days of patent term extension.

Section 124.22 of the regulations provides that any interested person may request a revision of the regulatory review period determination within 30 days of the date of this notice (see **DATES** above). The request must specify the following:

- The identity of the product;
- The identity of the applicant for patent term restoration;
- The docket number of this notice; and
- The basis for the request for revision, including any documentary evidence.

Further, under § 124.30 of the regulations, any interested person may file a petition with APHIS, no later than 180 days after the date of this notice (see **DATES** above), alleging that a license applicant did not act with due diligence in seeking APHIS approval of the product during the regulatory review period. The filing, format, and content of a petition must be as described in the regulations in ''Subpart D-Due Diligence Petitions'' (§§ 124.30 through 124.33).

Authority: 35 U.S.C. 156.

Done in Washington, DC, this 2nd day of April, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–8601 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Commodity Credit Corporation's (CCC) intention to request an extension for a currently approved information collection in support of the Regulations—Financing Commercial Sales of Agricultural Commodities under Title I, Public Law 480; Request for Vessel Approval, Form CCC–105 and Request for Vessel Approval Form CCC–105 (cotton); and Declaration of Sale, Form FAS–359.

DATES: Comments on this notice must be received by June 9, 2003, to be assured of consideration.

FOR FURTHER INFORMATION OR COMMENTS CONTACT: William Hawkins, Director, Program Administration Division, Foreign Agricultural Service, U.S. Department of Agriculture, Stop 1031, Washington, DC 20250–1031, telephone (202) 720–3241.

SUPPLEMENTARY INFORMATION:

Title: Regulations—Financing Commercial Sales of Agricultural Commodities under Title I, Pub. L. 480 (0551–0005); Request for Vessel Approval, Form CCC–105 (0551–0008); and Request for Vessel Approval Form CCC–105 (cotton) and Declaration of Sale, Form FAS–359 (0551–0009).

OMB Numbers: 0551–0005 (Records and Rule Keeping) and 0551–0008 (Request for Vessel Approval Form) and

0551–0009 (Declaration of Sale Form). These will be combined into OMB Number 0551–0005 if this request is approved.

Expiration Date of Approval: August 31, 2003.

Type of Request: Extension and revision of currently approved information collections, with change to combine 0551–0005 (Records and Rule Keeping); 0551–0008 (Request for Vessel Approval) and 0551–0009 (Declaration of Sale Form).

Abstract: Title I of The Agricultural Trade Development and Assistance Act of 1954, as amended, (Pub. L. 83–480) authorizes the CCC to finance the sale and exportation of agricultural commodities on concessional credit terms. Suppliers of commodities and ocean transportation must retain records for 3 years. Prospective commodity suppliers must provide information for the Department to determine eligibility. Commodity suppliers must report details of sales for price approval and submit to USDA, for approval, information on any amendments to the sales. Shipping agents nominated by importing countries must submit information to allow identification of possible conflicts of interest. Shipping agents or embassies submit pertinent shipping information on Form CCC–105 to facilitate approval by CCC of shipping arrangements. This approval is necessary to assure compliance with cargo preference requirements at the lowest cost to CCC. Agents submit this document in order that USDA can generate the CCC–106, a necessary payment document. Ocean carriers then receive payment for ocean freight. Commodity suppliers must report details of sales for price approval. Form FAS–359, ''Declaration of Sale,'' is the written record, signed by the commodity supplier, of the terms of sale as reported by telephone. When signed by the General Sales Manager, it provides evidence of the USDA price approval required for CCC financing.

The information collected is used by CCC to manage, plan, evaluate and account for government resources. The reports and records are required to ensure the proper and judicious use of public funds.

Estimate of Burden: The public reporting burden for these collections is estimated to average 8 hours per Record Keeping, 5 hours per Vessel Approval and 2 hours per Declaration of Sale response.

Respondents: Suppliers of commodities and ocean transportation; prospective commodity suppliers; shipping agents; and business or other-for-profit.

Estimated Number of Respondents: 45 per annum.

Estimated Total Annual Burden of Respondents: 565.00 hours.

Copies of this information collection can be obtained from Kimberly Chisley, the Agency Information Collection Coordinator, at (202) 720–2568.

Requests for Comments: Send comments regarding (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to William Hawkins, Director, Program Administration Division, Foreign Agricultural Service, U.S. Department of Agriculture, Stop 1031, Washington, DC 20250–1031, or to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Persons with disabilities who require an alternative means for communication of information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TDD). All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Signed at Washington, DC, on March 27, 2003.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service.

[FR Doc. 03–8598 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Commodity Credit Corporation Information Collection; Payment Eligibility and Payment Limitation Determinations Under the Noninsured Crop Disaster Assistance Program

AGENCIES: Farm Service Agency and the Commodity Credit Corporation, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Farm Service Agency (FSA) and the Commodity Credit Corporation (CCC), is seeking comments from all interested individuals and organizations on a currently approved information collection with revision. This information collection is used to support payment eligibility and payment limitation determinations for a multiple programs including the Conservation Reserve Program, the Price Support Programs, and the Direct and Counter-Cyclical Program authorized by the Farm Security and Rural Investment Act of 2002, and the Noninsured Crop Disaster Assistance Program.

DATES: Comments on this notice must be received on or before June 9, 2003, to be assured consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Farm Service Agency, Attn: James Baxa, Agricultural Program Specialist, Production, Emergencies, and Compliance Division, Farms Service Agency, United States Department of Agriculture, STOP 0517, Room 4752, South Building, 1400 Independence Avenue, SW., Washington, DC 20250–0517. Comments also may be submitted via facsimile to (202) 720–4941 or by e-mail to *james.baxa@wdc.usda.gov*.

FOR FURTHER INFORMATION CONTACT: James Baxa, Agricultural Program Specialist at (202) 720–4189, or Diane Sharp, Director of Production, Emergencies, and Compliance Division at (202) 720–7641.

SUPPLEMENTARY INFORMATION:

Description of Information Collection

Title: Payment Eligibility and Payment Limitation Determinations under the Noninsured Crop Disaster Assistance Program.

OMB Control Number: 0560–0096.

Expiration Date of Approval: March 31, 2003.

Type of Request: Extension of a currently approved information collection with revision.

Abstract: The collection of the information is necessary to determine the eligibility of individuals and entities as defined at 7 CFR part 1400 for payment eligibility and payment limitation in a multiple programs including, but not limited to, the Conservation Reserve Program, the Price Support Programs, the Direct and Counter-Cyclical Program and the Noninsured Corp Disaster Assistance Program. The regulations at 7 CFR part 1400, as amended, provide for an ''actively engaged in farming'' and ''person'' determinations to be made for

individuals or entities, with respect to a particular farming operation, in order to determine their payment eligibility and payment limitations under the multiple programs. Forms CCC–502A, CCC–502B, CCC–502C, CCC–502D, CCC–502EZ, CCC–501A and CCC–501B are still used by the respondents. The common elements to collect information from individuals or entities in the forms are names, as well as farming interest members, addresses, social security/employee identification numbers, location of the lands, percentage of leased or owned equipments, citizenship types, estimated farming labor hours, estimated percentage of farming management, and designated names in receiving payments. The respondents are allowed to complete and submit the forms electronically to the appropriate FSA County-based office that receives and makes the payment eligibility determinations. Information collection under Titles I and II of the Farm Security and Rural Investment Act of 2002 are exempted from the Paperwork Reduction Act of 1995, including the Conservation Reserve Program, the Price Support Programs, and the Direct and Counter-Cyclical Program. Only the Noninsured Crop Disaster Assistance Program is not exempt from the requirement of Paperwork Reduction Act, so it is necessary to describe the information collection in this Notice. If the information is not collected from the respondents, the FSA would not able to administer the payment programs properly to comply with the regulations.

Estimate of Burden: Average 56 minutes per response.

Type of Respondents: Producers who, as owner, landlord, tenant, or sharecropper, are involved in the farming operations and who would seek benefits under the Noninsured Corp Disaster Assistance Program.

Estimated Annual Number of Respondents: 123,000.

Estimated Number of Responses per Respondent: One per respondent.

Estimated Total Burden Hours: 114,870.

Comment is invited on: (1) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; (4) ways to minimize the burden of collection on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in responses to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

Signed in Washington, DC, on April 3, 2003.

James R. Little,

Administrator, Farms Service Agency, and Executive Vice President, Commodity Credit Corporation.

[FR Doc. 03–8722 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers Used for Publication of Legal Notices by the Intermountain Region; Utah, Idaho, Nevada, and Wyoming

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that will be used by the ranger districts, forests and regional office of the Intermountain Region to publish legal notices required under 36 CFR parts 215 and 217. The intended effect of this action is to inform interested members of the public which newspapers the Forest Service will use to publish notices of proposed actions and notices of decision. This will provide the public with constructive notice of Forest Service proposals and decisions, provide information on the procedures to comment or appeal, and establish the date that the Forest Service will use to determine if comments or appeals were timely.

DATES: Publication of legal notices in the listed newspapers will begin on or after April 1, 2003. The list of newspapers will remain in effect until October 1, 2003, when another notice will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Priscilla McLain, Regional Appeals Coordinator, Intermountain Region, 324 25th Street, Ogden, UT 84401, and phone (801) 625–5146.

SUPPLEMENTARY INFORMATION: The administrative procedures at 36 CFR parts 215 and 217 require the Forest Service to publish notices in a newspaper of general circulation. The content of the notices is specified in 36 CFR parts 215 and 217. In general, the notices will identify: the decision or project, by title or subject matter; the name and title of the official making the decision; how to obtain additional information; and where and how to file comments or appeals. The date the notice is published will be used to establish the official date for the beginning of the comment or appeal period. The newspapers to be used are as follows:

Regional Forester, Intermountain Region

For decisions made by the Regional Forester affecting National Forests in Idaho:
The Idaho Statesman, Boise, Idaho.

For decisions made by the Regional Forester affecting National Forests in Nevada:
The Reno Gazette-Journal, Reno, Nevada.

For decisions made by the Regional Forester affecting National Forests in Wyoming:
Casper Star-Tribune, Casper, Wyoming.

For decisions made by the Regional Forester affecting National Forests in Utah:
Salt Lake Tribune, Salt Lake City, Utah.

For the decisions made by the Regional Forester that affect all National Forests in the Intermountain Region.
Salt Lake Tribune, Salt Lake City, Utah.

Ashley National Forest

Ashley Forest Supervisor decisions:
Vernal Express, Vernal, Utah.

Duchesne District Ranger decisions:
Uinta Basin Standard, Roosevelt, Utah.

Flaming Gorge District Ranger for decisions affecting Wyoming:
Casper Star Tribune, Casper, Wyoming.

Flaming Gorge District Ranger for decisions affecting Utah:
Vernal Express, Vernal, Utah.

Roosevelt District Ranger decisions:
Uinta Basin Standard, Roosevelt, Utah.

Vernal District Ranger decisions:
Vernal Express, Vernal, Utah.

Boise National Forest

Boise Forest Supervisor decisions:
The Idaho Statesman, Boise, Idaho.

Cascade District Ranger decisions:
The Long Valley Advocate, Cascade, Idaho.

Emmett District Ranger decisions:
The Messenger-Index, Emmett, Idaho.

Idaho City District Ranger decisions:
The Idaho Statesman, Boise, Idaho.

Lowman District Ranger decisions:
The Idaho World, Garden Valley, Idaho.
Mountain Home District Ranger decisions:
The Idaho Statesman, Boise, Idaho.

Bridger-Teton National Forest

Bridger-Teton Forest Supervisor decisions:
Casper Star-Tribune, Casper, Wyoming.
Big Piney District Ranger decisions:
Casper Star-Tribune, Casper, Wyoming.
Buffalo District Ranger decisions:
Casper Star-Tribune, Casper, Wyoming.
Greys River District Ranger decisions:
Casper Star-Tribune, Casper, Wyoming.
Jackson District Ranger decisions:
Casper Star-Tribune, Casper, Wyoming.
Kemmerer District Ranger decisions:
Casper Star-Tribune, Casper, Wyoming.
Pinedale District Ranger decisions:
Casper Star-Tribune, Casper, Wyoming.

Caribou-Targhee National Forest

Caribou-Targhee Forest Supervisor decisions for the Caribou portion:
Idaho State Journal, Pocatello, Idaho.
Caribou-Targhee Forest Supervisor decisions for the Targhee portion:
The Post Register, Idaho Falls, Idaho.
Ashton District Ranger decisions:
The Post Register, Idaho Falls, Idaho.
Dubois District Ranger decisions:
The Post Register, Idaho Falls, Idaho.
Island Park District Ranger decisions:
The Post Register, Idaho Falls, Idaho.
Montpelier District Ranger decisions:
Idaho State Journal, Pocatello, Idaho.
Palisades District Ranger decisions:
The Post Register, Idaho Falls, Idaho.
Soda Springs District Ranger decisions:
Idaho State Journal, Pocatello, Idaho.
Teton Basin District Ranger decisions:
The Post Register, Idaho Falls, Idaho.
Westside District Ranger decisions:
Idaho State Journal, Pocatello, Idaho.

Dixie National Forest

Dixie Forest Supervisor decisions:
The Daily Spectrum, St. George, Utah.
Cedar City District Ranger decisions:
The Daily Spectrum, St. George, Utah.
Escalante District Ranger decisions:
The Daily Spectrum, St. George, Utah.
Pine Valley District Ranger decisions:
The Daily Spectrum, St. George, Utah.
Powell District Ranger decisions:
The Daily Spectrum, St. George, Utah.
Teasdale District Ranger decisions:
The Daily Spectrum, St. George, Utah.

Fishlake National Forest

Fishlake Forest Supervisor decisions:
Richard Reaper, Richfield, Utah.
Beaver District Ranger decisions:
Richfield Reaper, Richfield, Utah.
Fillmore District Ranger decisions:
Richfield Reaper, Richfield, Utah.
Loa District Ranger decisions:
Richfield Reaper, Richfield, Utah.
Richfield District Ranger decisions:
Richfield Reaper, Richfield, Utah.

Humboldt-Toiyabe National Forests

Humboldt-Toiyabe Forest Supervisor decisions for the Humboldt portion:
Elko Daily Free Press, Elko, Nevada.
Humboldt-Toiyabe Forest Supervisor decisions for the Toiyabe portion:
Reno Gazette-Journal, Reno, Nevada.
Austin District Ranger decisions:
Reno Gazette-Journal, Reno, Nevada.
Bridgeport District Ranger decisions:
The Review-Herald, Mammoth Lakes, California.
Carson District Ranger decisions:
Reno Gazette-Journal, Reno, Nevada.
Ely District Ranger decisions:
Ely Daily Times, Ely, Nevada.
Jarbidge District Ranger decisions:
Elko Daily Free Press, Elko, Nevada.
Mountain City District Ranger decisions:
Elko Daily Free Press, Elko, Nevada.
Ruby Mountains District Ranger decisions:
Elko Daily Free Press, Elko, Nevada.
Santa Rosa District Ranger decisions:
Humboldt Sun, Winnemucca, Nevada.
Spring Mountains National Recreation Area District Ranger decisions:
Las Vegas Review Journal, Las Vegas, Nevada.
Tonopah District Ranger decisions:
Tonopah Times Bonanza-Goldfield News, Tonopah, Nevada.

Manti-Lasal National Forest

Manti-LaSal Forest Supervisor decisions:
Sun Advocate, Price, Utah.
Ferron District Ranger decisions:
Emery County Progress, Castle Dale, Utah.
Moab District Ranger decisions:
The Times Independent, Moab, Utah.
Monticello District Ranger decisions:
The San Juan Record, Monticello, Utah.
Price District Ranger decisions:
Sun Advocate, Price, Utah.
Sanpete District Ranger decisions:
The Pyramid, Mt. Pleasant, Utah.

Payette National Forest

Payette Forest Supervisor decisions:
Idaho Statesman, Boise, Idaho.
Council District Ranger decisions:
Adam County Record, Council, Idaho.
Krassel District Ranger decisions:
Star News, McCall, Idaho.
McCall District Ranger decisions:
Star News, McCall, Idaho.
New Meadows, District Ranger decisions:
Star News, McCall, Idaho.
Weiser District Ranger decisions:
Signal American, Weiser, Idaho.

Salmon-Challis National Forests

Salmon-Challis Forest Supervisor decisions for the Salmon portion:
The Recorder-Herald, Salmon, Idaho.
Salmon-Challis Forest Supervisor decisions for the Challis portion:
The Challis Messenger, Challis, Idaho.
Challis District Ranger decisions:
The Challis Messenger, Challis, Idaho.
Leadore District Ranger decisions:
The Recorder-Herald, Salmon, Idaho.
Lost River District Ranger decisions:
The Challis Messenger, Challis, Idaho.
Middle Fork District Ranger decisions:
The Challis Messenger, Challis, Idaho.
North Fork District Ranger decisions:
The Recorder-Herald, Salmon, Idaho.
Salmon/Cobalt District Ranger decisions:
The Recorder-Herald, Salmon, Idaho.
Yankee Fork District Ranger decisions:
The Challis Messenger, Challis, Idaho.

Sawtooth National Forest

Sawtooth Forest Supervisor decisions:
The Times News, Twin Falls, Idaho.
Fairfield District Ranger decisions:
The Times News, Twin Falls, Idaho.
Ketchum District Ranger decisions:
Idaho Mountain Express, Ketchum, Idaho.
Minidoka District Ranger decisions:
The Times News, Twin Falls, Idaho.
Sawtooth National Recreation Area:
Challis Messenger, Challis, Idaho.

Uinta National Forest

Uinta Forest Supervisor decisions:
The Daily Herald, Provo, Utah.
Heber District Ranger decisions:
The Daily Herald, Provo, Utah.
Pleasant Grove District Ranger decisions:
The Daily Herald, Provo, Utah.
Spanish Fork District Ranger decisions:
The Daily Herald, Provo, Utah.

Wasatch-Cache National Forest

Wasatch-Cache Forest Supervisor decisions:
Salt Lake Tribune, Salt Lake City, Utah.
Evanston District Ranger decisions:
Uinta County Herald, Evanston, Wyoming.
Kamas District Ranger decisions:
Salt Lake Tribune, Salt Lake City, Utah.
Logan District Ranger decisions:
Logan Herald Journal, Logan, Utah.
Mountain View District Ranger decisions:
Uinta County Herald, Evanston,

Wyoming.
Ogden District Ranger decisions:
Ogden Standard Examiner, Ogden, Utah.
Salt Lake District Ranger decisions:
Salt Lake Tribune, Salt Lake City, Utah.

Dated: April 3, 2003.

Jack G. Troyer,

Regional Forester.

[FR Doc. 03–8617 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Bridger-Teton National Forest—Wyoming—Big Piney, Grey River and Jackson Ranger Districts; Sublette and Lincoln Counties, WY; Environmental Impact Statement for Wyoming Range Allotment Complex

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Wyoming Range Allotment Complex (composed of the Corral Creek, Mule Creek, Grizzly Creek, Pickle Pass, Upper Grayback/Phosphate, North Horse, and Prospect Peak domestic sheep allotments) is located in Townships 34, 35, 36 and 37 North, Ranges 114, 115 and 116 West; Sixth Principal Meridian. The majority of the area (65%) is located within Sublette County, with the remainder being in Lincoln County. The complex is located on three districts—Greys River, Jackson, and Big Piney. Big Piney Ranger District administers all the allotments except Pickle Pass, which is administered by the Greys River District.

DATES: Comments concerning the scope of the analysis must be received by May 11, 2003. The draft environmental impact statement is expected July 2003 and the final environmental impact statement is expected September 2003.

ADDRESSES: Send written comments to: District Ranger, Big Piney Ranger District, Box 218, Big Piney, Wyoming 83113. For further information, mail correspondence to *mailroom_r4_bridger_teton@fs.fed.us* and on the subject line put only ''Wyoming Range Complex.''

FOR FURTHER INFORMATION CONTACT: District Ranger, Big Piney Ranger District, Box 218, Big Piney, Wyoming 83113 or phone (307) 276–3710.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The Purpose and Need is to make recommendations on interpretation and site specific application of Forest Plan standards and guidelines to determine whether or not to allow domestic livestock grazing on the allotment complex.

To date, the Forest Service has identified four alternatives:

Alternative 1—Proposed Action

The Forest Service proposes to determine on the allotment complex if livestock grazing of 5 sheep bands will continue to be authorized on the allotment complex. All vacant allotment and allotment boundary changes have been incorporated into the complex through the administrative process as defined in FSH 2209.13—Grazing Permit Administration Handbook, Chapter 90—Rangeland Management Decision Making, Interim Directive No.: 2209.13–2002–4 Section 96—Delineation of Grazing Allotments and Section 98—Allotment Management Changes.

Possible Alternative

Alternative 2—No Action—Continue With the Current Livestock Management

The current management provides for grazing 5 bands of sheep on the allotment complex. All vacant allotment and allotment boundary changes have been incorporated into the complex through the administrative process as defined in FSH 2209.13—grazing permit administration handbook, chapter 90—rangeland management decision making, Interim Directive No.: 2209.13–2002–4 Sections 96—Delineation of Grazing Allotments and section 98—Allotment Management Changes.

Alternative 3—Separation Between Domestic Sheep Grazing Area and the Bighorn Sheep Core Area Boundary—Close Upper Grayback/Phosphate, Pickle Pass, Grizzly Creek and a Portion of Corral Creek Allotments to Domestic Sheep Grazing

This alternative would close the Upper Grayback/Phosphate, Pickle Pass, Grizzly Creek and approximately ⅔ of the Corral Creek allotments to domestic sheep grazing. The remaining area of Corral Creek allotment would be combined with the North Horse Creek Allotment and would remain open to domestic sheep grazing. This alternative provides separation from the bighorn sheep core native herd boundary and would include all the management actions described in the proposed action.

Alternative 4—No Livestock Grazing

No domestic livestock would be allowed to graze on the allotment complex. We are required in 40 CFR 1502.14(d) and Forest Service Handbook 1909.15, 23.1 to consider the No Livestock Grazing alternative in detail and to use it as a ''baseline'' for comparing the effects of the other alternatives.

Responsible Officials

Greg Clark, District Forest Ranger, Big Piney Ranger District, P.O. Box 218, Big Piney, Wyoming 83113. District Forest Ranger, Greys River Ranger District, P.O. Box 339, Afton, Wyoming 83110 Nancy Hall, District Forest Ranger, Jackson Ranger District, P.O. Box 1689, Jackson, Wyoming 83001.

Nature of Decision To Be Made

The decision, which is based on this analysis, will be decide if livestock will be allowed to graze on the allotment complex, either through the implementation of the proposed action, or an alternative to the proposed action. The decision would include any mitigation measures needed in addition to those prescribed in the Forest Plan.

Scoping Process

The Forest Service is seeking information, comments, and assistance from individuals, organizations, tribal governments, and federal, state, and local agencies interested in or affected by this project. Comments submitted on the 1999 scoping effort, comments on the Environmental Assessment released in December of 2002, previous field trips, and any new comments will be used to prepare the Draft Environmental Impact Statement (DEIS). Public participation will be solicited by notifying in person and/or by mail known interested and affected publics. News releases will be used to give the public general notice. Public participation activities would include requests for written comments. The first formal opportunity to comment is to respond to this notice of intent, which initiates the scoping process (40 CFR 1501.7). Scoping includes: (1) Identifying potential issues, (2) narrowing the potential issues and identifying significant issues of those that have been covered by prior environmental review, (3) exploring alternatives in addition to No Action, and (4) identifying potential environmental effects of the proposed action and alternatives.

Preliminary Issues

The Forest Service has identified the following potential issues. In addition, through the April 1999 scoping effort and comments received on the Environmental Assessment released in December 2002, issues have been

refined. Your input is especially valuable here. It will help us determine which of these merit detailed analysis. It will also help identify additional issues related to the proposed action that may not be listed here.

Issue 1—Effects of grazing on vegetation.

Issue 2—Effects of grazing on watershed condition and function.

Issues 3—Effects of livestock on big horn sheep.

Issue 3—Effects of grazing on the Colorado cutthroat trout habitat.

Comment Requested

This notice of intent initiates the scoping process that guides the development of the environmental impact statement.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

The Draft EIS (DEIS) is proposed to be filed with the Environmental Protection Agency (EPA) and to be available for public comment in the Spring of 2003. At that time, the EPA will publish a notice of availability for the DEIS in the **Federal Register.** The comment period on the DEIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register.** The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions (*Vermont Yankee Nuclear Power Corp* v. *NRDC,* 435 U.S. 519, 553 (1978)). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts (*City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980)). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement. To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points. Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: April 3, 2003.

Greg Clark,

District Forest Ranger.

[FR Doc. 03–8630 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Olympic Peninsula Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Olympic Peninsula Resource Advisory Committee will hold its next meeting on May 7, 2003. The meeting will be held at Washington State University Extension Learning Center, 201 W Pattison, Port Hadlock, Washington. The meeting will begin at 9:30 a.m. and end at approximately 3:30 p.m. Agenda topics are: Introductions; Approval of minutes of previous meeting; Update on Title II and III Projects; Presentation of project proposals; Selection of recommended projects and priorities; Public comments; and Identify next meeting date and location.

All Olympic Peninsula Resource Advisory Committee Meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Ken Eldredge, RAC Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor and Designated Federal Official, at (306) 956–2301.

Dated: April 3, 2003.

Dale Hom,

Forest Supervisor, Olympic National Forest.

[FR Doc. 03–8615 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Grays Harbor Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Grays Harbor Resource Advisory Committee will hold its next meeting on May 8, 2003. The meeting will be held at the Aberdeen Timberland Library, 121 E Market Street, Aberdeen, Washington. The meeting will begin at 6:30 p.m. and end at 8:30 p.m. Agenda topics are: Approval of minutes of previous meeting; Update on Title II Projects; Presentation of FY 2003 Title II project proposals; Selection of recommended projects and priorities; Public comments; and Identify next meeting date and location.

All Grays Harbor Resource Advisory Committee Meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Ken Eldredge, RAC Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor and Designated Federal Official, at (306) 956–2301.

Dated: April 3, 2003.

Dale Hom,

Forest Supervisor, Olympic National Forest.

[FR Doc. 03–8616 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Appointment to the Advisory Committee on Agriculture Statistics

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notification of appointment to the Advisory Committee on Agriculture Statistics.

SUMMARY: The Office of the Secretary of Agriculture announces members appointed to the Advisory Committee on Agriculture Statistics, in accordance with the Federal Advisory Committee Act, 5 U.S.C. App.

FOR FURTHER INFORMATION CONTACT: Carol House, Executive Director, Advisory Committee on Agriculture Statistics, U.S. Department of Agriculture, National Agricultural Statistics Service, 1400 Independence Avenue SW., Room 4117 South Building, Washington, DC 20250–2000. Telephone: 202–720–4333, Fax: 202–720–9013, or e-mail: *chouse@nass.usda.gov.*

SUPPLEMENTARY INFORMATION: The appointment for the twenty-five member committee, which has representation across seven categories which covers a broad range of agricultural disciplines and interests, was signed on February 13, 2003. Appointed members, by their associated category are: *Consumer and Information Organizations*—Robert W. Spear, Nobleboro, ME; Ross Ronald Racine, Billings, MT; James Dennis Rieck, Winfield, IL. *Educational Organizations*—Ling-Jung (Kelvin) Koong, Corvallis, OR; Bobby Ray Phills, Tallahassee, FL; Edmund R. Gomez, Alcalde, NM. *Farm Services Organizations*—Jacklyn M. Folsom, Cabot, VT; John Irving Gifford, Rock Island, IL; Jack Charles Mitenbuler, Indianapolis, IN; Ranvir Singh, Marysville, CA; Mark Edward Whalon, East Lansing, MI. *Government Agencies*—Robert Dale Epperson, Fresno, CA. *National Farm Organizations*— Carol Ann Gregg, Grove City, PA; Mark W. Jenner, Mt. Prospect, IL; Sheila Kay Massey, Animas, NM; Ivan W. Wyatt, Cedar Point, KS. *Producer and Marketing Organizations*—Mark Dale Lange, Cordova, TN; Andrew William LaVigne, Lakeland, FL; Roger M. Cryan, Fairfax, VA; Ira Silvergleit, Alexandria, VA; Lucy C. Meyring, Walden, CO.; William George Lapp, Omaha, NE.; Hugh Anslum Warren, Greenwood, MS. *Professional Organizations*—Walter J. Armbruster, Darien, IL; Ronald C. Wimberley, Raleigh, NC.

The duties of the Committee are solely advisory. The Committee will make recommendations to the Secretary of Agriculture with regards to the agricultural statistics program of the National Agricultural Statistics Service (NASS) and such other matters as it may deem advisable, or which the Secretary of Agriculture, Under Secretary for Research, Education, and Economics, or the Administrator of NASS may request. The Advisory Committee meeting was held on February 24–25, 2003. All meetings are open to the public. Committee members will be reimbursed for official travel expenses only.

Signed at Washington, DC, March 27, 2003.

R. Ronald Bosecker,

Administrator, National Agricultural Statistics Service.

[FR Doc. 03–8647 Filed 4–8–03; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Census Advisory Committees

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Title 5, United States Code, Appendix 2, section 10(a)(b), the Bureau of the Census (Census Bureau) is giving notice of a joint meeting, followed by separate and concurrently held meetings of the Census Advisory Committees (CACs) on the African American Population, the American Indian and Alaska Native Populations, the Asian Population, the Hispanic Population, and the Native Hawaiian and Other Pacific Islander Populations. The Committees will address issues related to the 2010 reengineered decennial census, including the American Community Survey and other related decennial programs. The five Census Advisory Committees on Race and Ethnicity will meet in plenary and concurrent sessions on May 6 and 7. Last-minute changes to the schedule are possible, which could prevent us from giving advance notification.

DATES: May 6–7, 2003. On May 6, the meeting will begin at approximately 8 a.m. and end at approximately 5:30 p.m. On May 7, the meeting will begin at approximately 8 a.m. and end at approximately 12:15 p.m.

ADDRESSES: The meeting will be held at the Sheraton Reston Hotel, 11810 Sunrise Valley Drive, Reston, Virginia 20191.

FOR FURTHER INFORMATION CONTACT: Jeri Green, Committee Liaison Officer, Department of Commerce, U.S. Census Bureau, Room 3627, Federal Office Building 3, Washington, DC 20233, telephone (301) 763–2070, TTY (301) 457–2540.

SUPPLEMENTARY INFORMATION: The CACs on the African American Population, the American Indian and Alaska Native Populations, the Asian Population, the Hispanic Population, and the Native Hawaiian and Other Pacific Islander Populations are comprised of nine members each. The Committees provide an organized and continuing channel of communication between the representative race and ethnic populations and the U.S. Census Bureau. The Committees provide an outside-user perspective about how research and design plans for the 2010 reengineered decennial census, the American Community Survey, and other related programs realize goals and satisfy needs associated with these communities. They also assist the Census Bureau on ways that census data can best be disseminated to diverse race and ethnic populations and other users.

All meetings are open to the public. A brief period will be set aside at the meeting for public comment. However, individuals with extensive questions or statements must submit them in writing to the Committee Liaison Officer, named above, at least three days before the meeting. Seating is available to the public on a first-come, first-served basis.

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Committee Liaison Officer as soon as known and preferably two weeks prior to the meeting.

Dated: April 2, 2003.

Hermann Habermann,

Deputy Director, Bureau of the Census.

[FR Doc. 03–8631 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket No. 54–2002]

Foreign-Trade Zone 202: Application for Expansion and Reorganization Amendment of Application

Notice is hereby given that the application of the Board of Harbor Commissioners of the City of Los Angeles, grantee of FTZ 202, for authority to expand and reorganize FTZ 202 in the Los Angeles, California, area (Doc. 54–2002, 67 FR 72643, 12/6/02), has been amended to include a parcel (42 acres) within Proposed Site 20 at the Park Mira Loma West, which was inadvertently omitted. This increases the total acreage at this site from 531 acres to 573 acres. The application otherwise remains unchanged.

Comments on the change may be submitted to the Foreign-Trade Zones Board, U.S. Department of Commerce, FCB-Suite 4100W, 1401 Constitution Avenue, NW., Washington, DC 20230, by April 25, 2003.

Dated: April 2, 2003.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 03–8671 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–853]

Bulk Aspirin from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce is currently conducting an administrative review of the antidumping duty order on bulk aspirin from the People's Republic of China. The period of review is July 1, 2001, through June 30, 2002. This review covers imports of subject merchandise from two producer/exporters.

We preliminarily find that sales have been made at not less than normal value. If these preliminary results are adopted in our final results of review, we will instruct the Customs Service to liquidate entries of bulk aspirin produced and exported by Shandong Xinhua Pharmaceutical Co., Ltd., and Jilin Henghe Pharmaceutical Company Ltd., without regard to antidumping duties.

We invite interested parties to comment on these preliminary results. We will issue the final results no later than 120 days from the date of publication of this notice.

EFFECTIVE DATE: April 9, 2003.

FOR FURTHER INFORMATION CONTACT: Julie Santoboni or Blanche Ziv, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4194, or(202) 482–4207, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 11, 2000, the Department of Commerce (''Department'') published an antidumping order on bulk aspirin from the People's Republic of China (''PRC''). *See Notice of Antidumping Duty Order: Bulk Aspirin from the People's Republic of China*, 65 FR 42673 (July 11, 2000). On July 1, 2002, the Department published in the **Federal Register** an *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 67 FR 77172 (July 1, 2002).

On July 10 and 30, 2002, in accordance with 19 CFR 351.213(b), two producer/exporters of the subject merchandise, Shandong Xinhua Pharmaceutical Co., Ltd. (''Shandong''), and Jilin Henghe Pharmaceutical Company Ltd. (''Jilin''), respectively, requested that the Department conduct an administrative review of this order. On July 31, 2002, Rhodia, Inc. (''petitioner'') also requested an administrative review for Jilin and Shandong.

On August 27, 2002, we published a notice of initiation of the administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 67 FR 55000 (August 27, 2002). The period of this review (''POR'') is July 1, 2001, through June 30, 2002.

We issued questionnaires to Jilin and Shandong on September 24, 2002. We received responses to the questionnaires from Shandong and Jilin on November 22 and December 4, 2002, respectively.

On December 18, 2002, the Department invited interested parties to comment on surrogate country selection and to provide publicly available information for valuing the factors of production. We received responses from the petitioner on January 22 and 27, 2003. Jilin provided surrogate value information to the Department on January 28 and March 13, 2003.

We issued supplemental questionnaires to Jilin and Shandong between December 2002, and March 2003. We received responses to the supplemental questionnaires from both respondents from January through March 2003.

Scope of the Order

The product covered by this review is bulk acetylsalicylic acid, commonly referred to as bulk aspirin, whether or not in pharmaceutical or compound form, not put up in dosage form (tablet, capsule, powders or similar form for direct human consumption). Bulk aspirin may be imported in two forms, as pure ortho-acetylsalicylic acid or as mixed ortho-acetylsalicylic acid. Pure ortho-acetylsalicylic acid can be either in crystal form or granulated into a fine powder (pharmaceutical form). This product has the chemical formula $C_9H_8O_4$. It is defined by the official monograph of the United States Pharmacopoeia 23 (''USP''). It is currently classifiable under the *Harmonized Tariff Schedule of the United States* (''HTSUS'') subheading 2918.22.1000.

Mixed ortho-acetylsalicylic acid consists of ortho-acetylsalicylic acid combined with other inactive substances such as starch, lactose, cellulose, or coloring materials and/or other active substances. The presence of other active substances must be in concentrations less than that specified for particular nonprescription drug combinations of aspirin and active substances as published in the *Handbook of Nonprescription Drugs*, eighth edition, American Pharmaceutical Association. This product is currently classifiable under HTSUS subheading 3003.90.0000.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under review is dispositive.

Separate Rates

It is the Department's standard policy to assign all exporters of the merchandise subject to review in nonmarket economy (''NME'') countries a single rate unless an exporter can demonstrate an absence of government control, both in law and in fact, with respect to exports. To establish whether an exporter is sufficiently independent of government control to be entitled to a separate rate, the Department analyzes the exporter in light of the criteria 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 in the *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*'').

Absence of *De Jure* Control

Evidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes: 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) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

Absence of *De Facto* Control

A *de facto* analysis of absence of government control over exports is based on four factors—whether the respondent: 1) sets its own export prices independently of the government and other exporters; 2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of

losses; 3) has the authority to negotiate and sign contracts and other agreements; and 4) has autonomy from the government regarding the selection of management. *See Silicon Carbide*, 59 FR at 22587; *see also Sparklers*, 56 FR at 20589.

In the *Notice of Final Determination of Sales at Less Than Fair Value: Bulk Aspirin from the People's Republic of China* 65 FR 33805 (May 25, 2000) (''*LTFV Investigation*''), we determined that there was an absence of both *de jure* and *de facto* government control of each investigated company's export activities and determined that each company warranted a company-specific dumping margin. For the POR, Jilin and Shandong (collectively, ''the respondents''), responded to the Department's request for information regarding separate rates. We find that the evidence on the record is consistent with the *LTFV Investigation* and the respondents continue to demonstrate an absence of government control, both in law and in fact, with respect to their exports, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide*.

Export Price and Constructed Export Price

For certain sales made by the respondents to the United States, we used constructed export price (''CEP'') in accordance with section 772(b) of the Tariff Act of 1930, as amended (''the Act''), because the first sale to an unaffiliated purchaser occurred after importation of the merchandise into the United States. For other sales made by Jilin, we used export price (''EP''), in accordance with section 772(a) of the Act, because the subject merchandise was sold outside the United States to unaffiliated purchasers in the United States prior to importation into the United States and constructed export price methodology was not otherwise indicated.

We calculated EP based on the FOB prices to unaffiliated purchasers. We calculated CEP based on FOB and delivered prices from the respondents' U.S. subsidiaries to unaffiliated customers. In accordance with section 772(c) of the Act, as appropriate, we deducted from the starting price foreign inland freight, international freight, marine insurance, brokerage and handling, U.S. inland freight, U.S. customs duties, and U.S. warehousing expenses. We valued the deductions for foreign inland freight using surrogate data based on Indian freight costs. We selected India as the surrogate country for the reasons explained in the ''*Normal Value*'' section of this notice, below. Where the respondent used a market-economy shipper for more than an insignificant portion of its sales and paid for the shipping in a market-economy currency, we used the average price paid by that producer/exporter to value international freight for all of its sales. *See Tapered Roller Bearings from the People's Republic of China; Notice of Preliminary Results of 2000–2001 Review, Partial Rescission of Review, and Notice of Intent to Revoke Order, in Part*, 67 FR 45451 (July 9, 2002). Where the respondent used a market-economy marine insurance provider for more than an insignificant portion of its sales and paid for the insurance in a market-economy currency, we used the average price for marine insurance paid by that producer/exporter for all of its sales.

To value brokerage and handling, we used the public version of a U.S. sales listing reported in the questionnaire response submitted by Meltroll Engineering for *Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review*, 65 FR 48965 (August 10, 2000). *See* the ''Factors of Production Valuation Memorandum'' dated April 2, 2003 (''*FOP memo*''). Because this information is not contemporaneous with the POR, we adjusted the data to the POR by using the Indian wholesale price index.

In accordance with section 772(d)(1) of the Act, for CEP sales we made deductions for the following selling expenses that related to economic activity in the United States: credit expenses, indirect selling expenses, inventory carrying costs, and direct selling expenses. Since neither respondent had U.S. dollar denominated borrowings during the POR, we calculated credit expenses using the short-term interest rate during the POR, as stated by the Federal Reserve Board. In accordance with section 772(d)(3) of the Act, we deducted from the starting price an amount for profit.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the normal value (''NV'') using a factors-of-production methodology if: (1) the merchandise is exported from a NME country; and (2) the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value (''CV'') under section 773(a) of the Act.

The Department has treated the PRC as a NME country in all previous antidumping cases. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is a NME country shall remain in effect until revoked by the administering authority. The parties in this proceeding have not contested such treatment in this review. Therefore, we treated the PRC as a NME country for purposes of this review and calculated NV by valuing the factors of production in a surrogate country.

Section 773(c)(4) of the Act requires the Department to value the NME producer's factors of production, to the extent possible, in one or more market economy countries that: (1) are at a level of economic development comparable to that of the NME, and (2) are significant producers of comparable merchandise. The Department has determined that India, Pakistan, Indonesia, Sri Lanka, and the Philippines are countries comparable to the PRC in terms of overall economic development. For a further discussion of our surrogate selection, see the December 12, 2002, Memorandum to Susan Kuhbach from Jeffrey May, ''2nd Administrative Review of Bulk Aspirin from the People's Republic of China'' (''Surrogate Country Memo''), which is on file in the Department's Central Records Unit in Room B–099 of the main Department building. According to the available information on the record, we determined that India is a significant producer of comparable merchandise. None of the interested parties contested the selection of India as the surrogate country. Accordingly, we calculated NV using Indian values for the PRC producers' factors of production.

We obtained and relied upon publicly available information wherever possible. In many instances, we used the *Monthly Statistics of the Foreign Trade of India; Volume II Imports* (''*MSFTI*'') to value factors of production, energy inputs and packing materials. Consistent with the *Final Determination of Sales at Less than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China*, 67 FR 6482 (February 12, 2002) and accompanying Issues and Decision Memorandum, we excluded import data reported in the *MSFTI* for Korea, Thailand and Indonesia in our surrogate value calculations. In addition to the *MSFTI* data, we used Indian domestic prices from *Indian Chemical Weekly* (''*ICW*'') to value certain chemical inputs. *See FOP memo*.

Factors of Production

In accordance with section 773(c) of the Act, we calculated NV based on factors of production reported by the respondents. To calculate NV, the

reported unit factor quantities were multiplied by publicly available Indian surrogate values.

In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices to make them delivered prices. For the distances reported, we added to Indian CIF surrogate values a surrogate freight cost using the reported distances from the PRC port to the PRC factory, or from the domestic supplier to the factory. This adjustment is in accordance with the United States Court of Appeals for the Federal Circuit's decision in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1807–1908 (Fed.Cir. 1997). For those values not contemporaneous with the POR, we adjusted for inflation using the appropriate wholesale or producer price index published in the International Monetary Fund's *International Financial Statistics*.

Certain inputs in the production of bulk aspirin are considered business proprietary information by the respondents and cannot be discussed in this preliminary results notice. For a complete analysis of surrogate values, *see* the *FOP memo*.

Labor: We valued labor using the method described in 19 CFR 351.408(c)(3).

Electricity, Coal and Oil: Consistent with our approach in *Manganese Metal from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 66 FR 15076 (March 15, 2001), we calculated our surrogate value for electricity based on electricity rate data reported by the International Energy Agency (''IEA''), 4th quarter 2001. For coal, we used import values from the *MSFTI*. We based the value of fuel oil on prices reported by the IEA, 4th quarter 2001.

Factory Overhead, SG&A, and Profit: We based our calculation of factory overhead and SG&A on the 2001–2002 financial data of Alta Laboratories Ltd. (''Alta''), an Indian producer of identical merchandise. Because Alta did not realize a profit during the financial period, we relied on the 2001–2002 financial data of two other Indian producers of comparable merchandise, Andhra Sugars Ltd. (''Andhra''), and Gujarat Organics Ltd. (''Gujarat'').

Packing Materials: For packing materials we used import values from the MSFTI.

Inland Freight Rates: To value truck freight rates, we used an average of trucking rates quoted in *ICW*. For rail freight, we based our calculation on 1999 price quotes from Indian rail freight transporters.

Preliminary Results of the Review

We preliminary find that the following dumping margins exist for the period July 1, 2001, through June 30, 2002:

Exporter/Manufacturer	Weighted-average margin percentage
Shandong Xinhua Pharmaceutical Co., Ltd.	0.00
Jilin Henghe Pharmaceutical Company Ltd.	0.00

Assessment Rates and Cash Deposit Requirements

Pursuant to 19 CFR 351.212(b), the Department calculates an assessment rate for each importer of the subject merchandise. Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.*, at or above 0.5 percent), the Department will issue appraisement instructions directly to the Customs Service to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. For assessment purposes, we calculate importer-specific assessment rates for the subject merchandise by aggregating the dumping duties due for all U.S. sales to each importer and dividing the amount by the total entered value of the sales to that importer.

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of bulk aspirin entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(1) of the Act: (1) for the companies named above, the cash deposit rates for exports to the United States by these companies will be the rates for these firms shown above, except that, for exporters with *de minimis* rates (*i.e.*, less than 0.5 percent) no deposit will be required; (2) for exporters previously found to be entitled to a separate rate in a prior segment of the proceeding, and for which no review has been requested, the cash deposit rate will continue to be the rate established for that exporter in the most recent segment of the proceeding; (3) for all other PRC exporters the cash deposit rate will be 144.02 percent, the PRC country-wide ad-valorem rate; and (4) for all other non-PRC exporters of subject merchandise from the PRC to the United States, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Public Comment

Any interested party may request a hearing within 30 days of publication of this notice. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held approximately 44 days after the date of publication of this notice, or the first working day thereafter. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, which must be limited to issues raised in such briefs or comments, may be filed not later than 37 days after the date of publication. Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.

The Department will issue a notice of final results of this administrative review, including the results of its analysis of issues raised in any such written comments, within 120 days of publication of these preliminary results.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 2, 2003.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 03–8670 Filed 4–8–03; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–819]

Certain Pasta from Italy: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review.

SUMMARY: The Department of Commerce is conducting an administrative review of the countervailing duty order on certain pasta from Italy for the period January 1, 2001, through December 31, 2001. We preliminarily find that certain producers/exporters have received countervailable subsidies during the period of review. If the final results remain the same as these preliminary results, we will instruct the U.S. Customs Service to assess countervailing duties as detailed in the ''Preliminary Results of Review'' section of this notice.

As certain requests for review were withdrawn, we are rescinding this review for the following companies: Labor S.r.L., F. Divella, S.p.A., and Delverde, S.p.A.

Interested parties are invited to comment on these preliminary results (*see* the ''Public Comment'' section of this notice).

EFFECTIVE DATE: April 9, 2003.

FOR FURTHER INFORMATION CONTACT: Craig Matney or Stephen Cho, AD/CVD Enforcement, Group I, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–1778 or 482–3798, respectively.

SUPPLEMENTARY INFORMATION:

Case History

The Department of Commerce (the ''Department'') published the countervailing duty order on certain pasta from Italy on July 24, 1996 (*Notice of Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination: Certain Pasta From Italy*, 61 FR 38544). On July 1, 2002, the Department published a notice of ''Opportunity to Request Administrative Review'' of this countervailing duty order for calendar year 2001 (*Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 67 FR 44172). We received review requests for five producers/exporters of Italian pasta. We initiated our review on August 27 and September 25, 2002 (*Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 67 FR 55000 and Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part and Deferral of Administrative Reviews*, 67 FR 60210, respectively).[1]

On October 2, 2002, F. Divella, S.p.A. and Labor S.r.L. withdrew their requests for review, and on October 11, 2002, Delverde, S.p.A. withdrew its request for review. We are rescinding this administrative review for these three companies (*see* the ''Partial Rescission'' section, below).

Thus, this administrative review of the order covers the following producers/exporters of the subject merchandise: F.lli De Cecco di Filippo Fara S. Martino S.p.A. (''De Cecco'') and Italian American Pasta Company, S.r.L. (''IAPC'').

On September 10, 2002, we issued countervailing duty questionnaires to the Commission of the European Union (''EC''), the Government of Italy (''GOI''), and the producers/exporters which requested a review.[2] We received responses to our questionnaires in October and November 2002, and issued a supplemental questionnaire to De Cecco in December 2002. The response to the supplemental questionnaire was received in December 2002.

Partial Rescission

As noted above, F. Divella, S.p.A., Labor S.r.L. and Delverde, S.p.A. withdrew their requests for review. Because these withdrawals were timely filed, we are rescinding this review with respect to these companies (*see* 19 CFR 351.213(d)(1)). We will instruct the U.S. Customs Service to liquidate any entries from these companies during the period of review and to assess countervailing duties at the rate that was applied at the time of entry.

Scope of the Review

Imports covered by this review are shipments of certain non-egg dry pasta in packages of five pounds (2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, vitamins, coloring and flavorings, and up to two percent egg white (''subject merchandise''). The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags, of varying dimensions.

Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Istituto Mediterraneo di Certificazione, Bioagricoop S.c.r.l., QC&I International Services, Ecocert Italia, the Consorzio per il Controllo dei Prodotti Biologici, Associazione Italiana per l'Agricoltura Biologica, or Codex S.r.L.

The merchandise subject to review is currently classifiable under item 1902.19.20 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 subject to the order is dispositive.

Scope Rulings

The Department has issued the following scope rulings to date:

(1) On August 25, 1997, the Department issued a scope ruling that multicolored pasta, imported in kitchen display bottles of decorative glass that are sealed with cork or paraffin and bound with raffia, is excluded from the scope of the countervailing duty order. (*See* August 25, 1997 memorandum from Edward Easton to Richard Moreland, which is on file in CRU in Room B–099 of the main Commerce building.)

(2) On July 30, 1998, the Department issued a scope ruling, finding that multipacks consisting of six one-pound packages of pasta that are shrink-wrapped into a single package are within the scope of the countervailing duty order. (*See* July 30, 1998 letter from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Import

[1] Italian American Pasta Company, S.r.L. was inadvertently omitted from the August 27, 2002 initiation notice.

[2] On October 25, 2002, we issued a second courtesy copy of the countervailing duty questionnaire to IAPC because it did not receive the first copy.

Administration, to Barbara P. Sidari, Vice President, Joseph A. Sidari Company, Inc., which is on file in the CRU.)

(3) On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances may be within the scope of the countervailing duty order. On May 24, 1999, we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the countervailing duty order. (*See* May 24, 1999 memorandum from John Brinkmann to Richard Moreland, which is on file in the CRU.)

Period of Review

The period of review (''POR'') for which we are measuring subsidies is from January 1, 2001, through December 31, 2001.

Attribution of Subsidies

De Cecco: De Cecco has responded on behalf of two members of the De Cecco Group: F.lli De Cecco di Filippo Fara San Martino S.p.A. (''Pastificio'') and Molino e Pastificio F.lli De Cecco S.p.A. (''Pescara''). Pastificio and Pescara manufacture pasta for sale in Italy and the United States. Pastificio and Pescara are directly or indirectly 100 percent-owned by members of the De Cecco family. Effective January 1, 1999, Molino F.lli De Cecco di Filippo S.p.A. (''Molino'') a third member of the De Cecco Group on whose behalf De Cecco responded in the fourth administrative review, was merged with Pastifico and ceased to be a separate entity. The Department will continue to consider countervailable any benefits received by Molino in past administrative review periods and allocated over a period that extends into or beyond the current POR. In accordance with section 351.525(b)(6)(i) and (ii) of the Department's regulations, we are attributing subsidies received by Pastificio and Pescara to the combined sales of both.

IAPC: IAPC has no affiliated companies located in Italy, and has therefore responded only on its own behalf.

Subsidies Valuation Information

Benchmarks for Long-term Loans and Discount Rates: In accordance with sections 351.505(a)(1) and 351.524(d)(3) of the Department's regulations, we have used the company actually paid on comparable commercial loans as the benchmark/discount rate, when the company had commercial loans in the same year as the government loan or grant. However, there were several instances where a company did not take out any loans which could be used as benchmarks/discount rates in the years in which the government grants or loans under review were received. In these instances, consistent with section 351.505(a)(3)(ii) of the Department's regulations, we used a national average interest rate for a comparable commercial loan. Specifically, for years prior to 1995, we used the Bank of Italy reference rate, adjusted upward to reflect the mark-up an Italian commercial bank would charge a corporate customer, as the benchmark interest rate for long-term loans and as the discount rate. For subsidies received in 1995 and later, we used the Italian Bankers' Association (''ABI'') interest rate, increased by the average spread charged by banks on loans to commercial customers plus an amount for bank charges.

Allocation Period: In the *Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy*, 61 FR 30288, June 14, 1996, (''*Pasta Investigation*''), the Department used as the allocation period for non-recurring subsidies the average useful life (''AUL'') of renewable physical assets in the food-processing industry as recorded in the Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (''the IRS tables''), *i.e.*, 12 years. However, the U.S. Court of International Trade (''CIT'') ruled against this allocation methodology for non-recurring subsidies (*see British Steel plc v. United States*, 879 F.Supp. 1254, 1289 (CIT 1995) (''*British Steel I*'')). In accordance with the CIT's remand order, the Department determined that the most reasonable method of deriving the allocation period for non-recurring subsidies was a company-specific AUL of renewable physical assets. This remand determination was affirmed by the CIT on June 4, 1996 (*see British Steel plc v. United States*, 929 F.Supp. 426, 439 (CIT 1996) (''*British Steel II*'')).

Consistent with the ruling in *British Steel II*, we developed company-specific AULs in the first and second administrative reviews of this order (*see Certain Pasta from Italy: Final Results of Countervailing Duty Administrative Review*, 63 FR 43905, 43906, August 17, 1998 (''*First Review—Final Results*'') and *Certain Pasta from Italy: Final Results of the Second Countervailing Duty Administrative Review*, 64 FR 44489, 44490–91, August 16, 1999 (''*Second Review—Final Results*''). We used these company-specific AULs to allocate any non-recurring subsidies that were not countervailed in the investigation. However, for non-recurring subsidies which had already been countervailed in the investigation, the Department used the original allocation period, *i.e.*, 12 years, because it was deemed neither reasonable nor practicable to reallocate those subsidies over a different time period. This methodology was consistent with our approach in *Certain Carbon Steel Products from Sweden; Final Results of Countervailing Duty Administrative Review*, 62 FR 16549 (April 7, 1997).

The third review of this order was subject to section 351.524(d)(2) of the Department's regulations. Under this regulation, the Department will use the AUL in the IRS tables as the allocation period, unless a party can show that the IRS tables do not reasonably reflect the company-specific AUL or the country-wide AUL for the industry. If a party can show that either of these time periods differs from the AUL in the IRS tables by one year or more, the Department will use the company-specific AUL or the country-wide AUL for the industry as the allocation period. In *Certain Pasta from Italy: Final Results of Third Administrative Review*, 66 FR 11269, February 23, 2001 (''*Third Review—Final Results*''), all subsidies received in the POR were assigned a 12-year allocation period, consistent with the IRS tables.

In the fifth review, no respondent has contested the 12-year AUL in the IRS tables. Therefore, we are assigning a 12-year allocation period to non-recurring subsidies received in the POR, as well as any non-recurring subsidies received in prior years by companies that were not included in previous reviews.

Analysis of Programs

I. Programs Preliminarily Determined to Confer Subsidies

1. Law 64/86 Industrial Development Grants

Law 64/86 provided assistance to promote development in the Mezzogiorno (the south of Italy). Grants were awarded to companies constructing new plants or expanding or modernizing existing plants. Pasta companies were eligible for grants to expand existing plants but not to establish new plants because the market for pasta was deemed to be close to saturated. Grants were made only after a private credit institution, chosen by the applicant, made a positive assessment of the project. (Loans were also provided under Law 64/86; *see* below.) In 1992, the Italian Parliament

abrogated Law 64/86 and replaced it with Law 488/92 (*see* below). This decision became effective in 1993. However, companies whose projects had been approved prior to 1993 were authorized to continue receiving grants under Law 64/86 after 1993.

De Cecco received grants under Law 64/86 which conferred a benefit during the POR. IAPC did not receive any grants under this program.

In *Pasta Investigation*, the Department determined that these grants confer a countervailable subsidy within the meaning of section 771(5) of the Tariff Act of 1930, as amended (''the Act''). They are a direct transfer of funds from the GOI bestowing a benefit in the amount of the grant. Also, these grants were found to be regionally specific within the meaning of section 771(5A)(D)(iv) of the Act. In this review, neither the GOI nor the responding companies have provided new information which would warrant reconsideration of our determination that these grants are countervailable subsidies.

In *Pasta Investigation*, the Department treated the industrial development grants as non-recurring. No new information has been placed on the record of this review that would cause us to depart from this treatment. Also, consistent with our treatment of these grants in the *Third Review—Final Results*, for companies which previously have been investigated or reviewed, we have continued to expense or allocate grants disbursed prior to 1998 (the POR in the third review) according to the practice in place at the time of the investigation or review. (*See Countervailing Duties* (Proposed Rules), 54 FR 23366, 23384 (19 CFR 355.49(a)(3)) (May 31, 1989).) For grants disbursed in 1998, 1999, 2000, and this POR, 2001, we have followed the methodology described in section 351.524(b)(2) of our new countervailing duty regulations, which directs us to allocate over time those non-recurring grants whose total authorized amount exceeds 0.5 percent of the recipient's sales in the year of authorization. Where the total amount authorized is less than 0.5 percent of the recipient's sales in the year of authorization, the benefit is countervailed in full (*i.e.*, ''expensed'') in the year of receipt. We have also applied the methodology described in section 351.524(b)(2) of the Department's regulations to grants approved prior to 1998 for companies that were not previously investigated or reviewed.

We used the grant methodology described in section 351.524(d) of the Department's regulations to calculate the countervailable subsidy from those grants that were allocated over time. We divided the benefit received by De Cecco in the POR by its total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the Law 64/86 industrial development grants to be 0.97 percent *ad valorem* for De Cecco.

2. Law 488/92 Industrial Development Grants

In 1986, the European Union (''EU'') initiated an investigation of the GOI's regional subsidy practices. As a result of this investigation, the GOI changed the regions eligible for regional subsidies to include depressed areas in central and northern Italy in addition to the Mezzogiorno. After this change, the areas eligible for regional subsidies are the same as those classified as Objective 1, Objective 2, and Objective 5(b) areas by the EU.[3] The new policy was given legislative form in Law 488/92 under which Italian companies in the eligible sectors (manufacturing, mining, and certain business services) may apply for industrial development grants. (Loans are not provided under Law 488/92.)

Law 488/92 grants are made only after a preliminary examination by a bank authorized by the Ministry of Industry. On the basis of the findings of this preliminary examination, the Ministry of Industry ranks the companies applying for grants. The ranking is based on indicators such as the amount of capital the company will contribute from its own funds, the number of jobs created, regional priorities, etc. Grants are then made based on this ranking.

De Cecco received grants under Law 488/92 which conferred a benefit during the POR. IAPC did not receive any grants under this program.

Industrial development grants under Law 488/92 were found countervailable in *Second Review—Final Results*. The grants are a direct transfer of funds from the GOI bestowing a benefit in the amount of the grant. Also, these grants were found to be regionally specific within the meaning of section 771(5A)(D)(iv) of the Act. In this review, neither the GOI nor the responding companies have provided new information which would warrant reconsideration of our determination that these grants are countervailable subsidies.

In *Second Review—Final Results*, the Department treated industrial development grants under Law 488/92 as non-recurring. No new information has been placed on the record of this review that would cause us to depart from this treatment. We expensed or allocated these grants according to the methodology applied to the Law 64/86 industrial development grants discussed above.

We used the grant methodology as described in section 351.524(d) of the Department's regulations to calculate the subsidy for those grants that were allocated over time. We divided the benefits received by De Cecco in the POR by its total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the Law 488/92 industrial development grants to be 0.40 percent *ad valorem* for De Cecco.

3. Law 64/86 Industrial Development Loans

In addition to the industrial development grants discussed above, Law 64/86 also provided reduced rate industrial development loans with interest contributions paid by the GOI on loans taken by companies constructing new plants or expanding or modernizing existing plants in the Mezzogiorno. For the reasons discussed above, pasta companies were eligible for interest contributions to expand existing plants, but not to establish new plants. The interest rates on these loans were set at the reference rate with the GOI's interest contributions serving to reduce this rate. Although Law 64/86 was abrogated in 1992 (effective 1993), projects approved prior to 1993, were authorized to receive interest subsidies after 1993.

De Cecco had Law 64/86 industrial development loans outstanding during the POR. IAPC did not have any loans under this program.

In *Pasta Investigation*, the Department determined that the Law 64/86 loans confer a countervailable subsidy within the meaning of section 771(5) of the Act. They are a direct transfer of funds from the GOI providing a benefit in the amount of the difference between the benchmark interest rate and the interest rate paid by the companies after accounting for the GOI's interest contributions. Also, these loans were found to be regionally specific within the meaning of section 771(5A)(D)(iv) of the Act. In this review, neither the GOI nor the responding companies have provided new information which would warrant reconsideration of our determination that these loans are a countervailable subsidy.

In accordance with section 351.505(c)(2) of the Department's

[3] Objective 1 covers projects located in underdeveloped regions; Objective 2 addresses areas in industrial decline; and Objective 5 pertains to agricultural areas.

regulations, we calculated the benefit for the POR by computing the difference between the payments De Cecco made on their Law 64/86 loans during the POR and the payments De Cecco would have made on a comparable commercial loan. We divided the benefit received by De Cecco by its total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the Law 64/86 industrial development loans to be 0.41 percent *ad valorem* for De Cecco.

4. Law 341/95 Interest Contributions on Debt Consolidation Loans

Law 85/95 created the *Fondo di Garanzia* aimed at improving the financial structure of small- and medium-sized companies located in EU Objective 1 areas (*see* Footnote 3 above). Under Article 2 of Law 341/95, monies from the *Fondo di Garanzia* are used to make interest contributions on debt consolidation loans obtained by eligible companies. The company first enters into a loan contract with a commercial bank. Then, the contract is submitted to the approving authority. After approval, the loan is made.

De Cecco had a Law 341/95 debt consolidation loan outstanding during the POR. IAPC did not have any loans under this program.

We preliminarily determine that the interest contributions on this loan confer a countervailable subsidy within the meaning of section 771(5) of the Act. They are a direct transfer of funds from the GOI providing a benefit in the amount of the interest contributions. Also, these interest contributions are regionally specific within the meaning of section 771(5A)(D)(iv) of the Act.

Because De Cecco anticipated receiving the interest contributions when it applied for the debt consolidation loan, we are calculating the amount of the subsidy as if this were a reduced interest loan (*see*, section 351.508(c)(2) of the Department's regulations). Thus, we have divided the interest contributions received by De Cecco in the POR by De Cecco's total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from interest contributions under Law 341/95 to be 0.01 percent *ad valorem* for De Cecco.

5. Social Security Reductions and Exemptions—Sgravi

Italian law allows companies, particularly those located in the Mezzogiorno, to use a variety of exemptions and reductions (''*sgravi*'') of the payroll contributions that employers make to the Italian social security system for health care benefits, pensions, etc. The *sgravi* benefits are regulated by a complex set of laws and regulations, and are sometimes linked to conditions such as creating more jobs. The benefits under some of these laws (*e.g.*, Laws 183/76 and 449/97) are available only to companies located in the Mezzogiorno and other disadvantaged regions. Other laws (*e.g.*, Laws 407/90 and 863/84) provide benefits to companies all over Italy, but the level of benefits is higher for companies in the south than for companies in other parts of the country.

The various laws identified as having provided sgravi benefits during the POR are: Law 183/76, Law 407/90, Law 863/84, Law 449/97, and Law 448/98. (Laws 449/97 and 448/98 are related and sometimes referred to jointly as ''*Sgravi Capitario*.'') In this review, De Cecco received some form of *sgravi* benefits during the POR. IAPC is not located in the Mezzogiorno and, thus, did not receive any countervailable subsidies under this program.

In *Pasta Investigation* and subsequent reviews, the Department determined that the various forms of social security reductions and exemptions confer countervailable subsidies within the meaning of section 771(5) of the Act. They represent revenue foregone by the GOI bestowing a benefit in the amount of the savings received by the companies. Also, they were found to be regionally specific within the meaning of section 771(5A)(D)(iv) of the Act because they were limited to companies in the Mezzogiorno or because the higher levels of benefits were limited to companies in the Mezzogiorno. In this review, neither the GOI nor the responding companies provided new information which would warrant reconsideration of our determination that these tax savings are a countervailable subsidy.

In accordance with section 351.524(c) of the Department's regulations and consistent with our methodology in *Pasta Investigation* and in reviews subsequent to *Pasta Investigation*, we have treated social security reductions and exemptions as recurring benefits. To calculate the countervailable subsidy, we divided De Cecco's savings in social security contributions during the POR by its total sales in the POR. In those instances where the applicable law provided a higher level of benefits to companies based on their location, we divided the amount of the *sgravi* benefits that exceeded the amount available to companies in other parts of Italy by the recipient company's total sales in the POR (*see* section 351.503(d)(1) of the Department's regulations).

On this basis, we preliminarily determine the countervailable subsidy from the *sgravi* program to be 0.18 percent *ad valorem* for De Cecco.

6. IRAP Exemptions

On January 1, 1998, the local income tax (ILOR) was replaced with a new regional tax, the IRAP, as a result of Legislative Decree 446 (December 15, 1997). Existing exemptions from the ILOR continued under IRAP. In particular, income from production facilities located in the Mezzogiorno was exempt from tax for ten years.

De Cecco claimed the IRAP tax exemption on its tax returns filed during the POR. IAPC did not claim any exemption under this program.

In *Pasta Investigation*, the Department determined that the ILOR tax exemption confers a countervailable subsidy within the meaning of section 771(5) of the Act. The exemption represents revenue foregone by the taxing authority and confers a benefit in the amount of the tax savings to the recipient companies, and the exemption was regionally specific within the meaning of section 771(5A)(D)(iv) of the Act. In this review, neither the GOI nor the responding companies have provided any information to indicate that the substitution of the IRAP for the ILOR would warrant reconsideration of our determination that this tax exemption is a countervailable subsidy.

In accordance with sections 351.509(b) of the Department's regulations and our treatment of the ILOR tax exemption in *Pasta Investigation*, we are calculating the countervailable subsidy by dividing De Cecco's tax savings in the POR by its total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the IRAP tax exemption to be 0.08 percent *ad valorem* for De Cecco.

7. Export Restitution Payments

The EU provides restitution payments to EU pasta exporters based on the durum wheat content of their exported pasta products. The program is designed to compensate pasta producers for the difference between EU prices and world market prices for durum wheat. Generally, under this program, a restitution payment is available to any EU exporter of pasta products, regardless of whether the pasta was made with imported wheat or wheat grown within the EU.

De Cecco received export restitution payments during the POR for shipments of pasta to the United States. IAPC did

not receive any payments under this program.

In *Pasta Investigation*, the Department determined that export restitution payments confer a countervailable subsidy within the meaning of section 771(5) of the Act. These payments are a direct transfer of funds from the EU bestowing a benefit in the amount of the payment. The restitution payments were found to be specific because their receipt is contingent upon export performance. In this review, the GOI, the EU, and the responding companies have not provided new information which would warrant reconsideration of our determination that export restitution payments are countervailable subsidies.

In *Pasta Investigation*, we treated the export restitution payments as recurring benefits. We have found no reason to depart from this treatment in the current review. Therefore, to calculate the countervailable subsidy, we divided the export restitution payments received by De Cecco in the POR for pasta shipments to the United States by the value of De Cecco's pasta exports to the United States in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the export restitution program to be 0.01 percent *ad valorem* for De Cecco.

II. Programs Preliminarily Determined to Be Not Used

We examined the following programs and preliminarily determine that the producers and/or exporters of the subject merchandise under review did not apply for or receive benefits under these programs during the POR:

1. Law 64/86 VAT Reductions
2. Export Credits under Law 227/77
3. Capital Grants under Law 675/77
4. Retraining Grants under Law 675/77
5. Interest Contributions on Bank Loans under Law 675/77
6. Interest Grants Financed by IRI Bonds
7. Preferential Financing for Export Promotion under Law 394/81
8. Urban Redevelopment under Law 181
9. Grant Received Pursuant to the Community Initiative Concerning the Preparation of Enterprises for the Single Market (''PRISMA'')
10. Law 183/76 Industrial Development Grants
11. Law 598/94 Interest Subsidies
12. Law 236/93 Training Grants
13. European Regional Development Fund (ERDF)
14. Duty-Free Import Rights
15. Remission of Taxes on Export Credit Insurance Under Article 33 of Law 227/77
16. Law 1329/65 Interest Contributions (Sabatini Law)
17. European Social Fund (ESF)
18. Corporate Income Tax (IRPEG) Exemptions
19. Export Marketing Grants under Law 304/90

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for each producer/exporter covered by this administrative review. For the period January 1, 2001 through December 31, 2001, we preliminarily determine the net subsidy rates for producers/exporters under review to be those specified in the chart shown below. If the final results of this review remain the same as these preliminary results, the Department intends to instruct the U.S. Customs Service (''Customs'') to assess countervailing duties at these net subsidy rates. The Department will issue appropriate assessment instructions directly to Customs within 15 days of publication of the final results of this review. The Department also intends to instruct Customs to collect cash deposits of estimated countervailing duties at these rates on the f.o.b. value of all shipments of the subject merchandise from the producers/exporters under review that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Company	*Ad valorem* rate
F.lli De Cecco di Filippo Fara San Martino S.p.A.	2.06 percent
Italian American Pasta Company, S.r.L.	0.00 percent

The calculations will be disclosed to the interested parties in accordance with section 351.224(b) of the Department's regulations.

For companies that were not named in our notice initiating this administrative review (except Barilla G. e R. F.lli S.p.A. and Gruppo Agricoltura Sana S.r.L. which were excluded from the order in *Pasta Investigation*), the Department has directed Customs to assess countervailing duties on all entries between January 1, 2001 and December 31, 2001, at the rates in effect at the time of entry.

For all non-reviewed firms, we will instruct Customs to collect cash deposits of estimated countervailing duties at the most recent company-specific or all others rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order are those established in the *Notice of Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy*, 61 FR 38544 (July 24, 1996) or the company-specific rate published in the most recent final results of an administrative review in which a company participated. These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested.

Public Comment

Interested parties may submit written arguments in case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, limited to issues raised in case briefs, may be filed not later than five days after the date of filing the case briefs. Parties who submit briefs in this proceeding should provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f).

Interested parties may request a hearing within 30 days after the date of publication of this notice. Any hearing, if requested, will be held two days after the scheduled date for submission of rebuttal briefs.

The Department will publish a notice of the final results of this administrative review within 120 days from the publication of these preliminary results.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: April 2, 2003.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 031203A]

Small Takes of Marine Mammals Incidental to Specified Activities; Harbor Activities at Vandenberg Air Force Base, CA

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

ACTION: Notice of receipt of application and proposed authorization for incidental harassment of marine mammals; request for comments.

SUMMARY: NMFS has received a request from The Boeing Company (Boeing) for an authorization to take small numbers of marine mammals by harassment incidental to harbor activities related to the Delta IV/Evolved Expendable Launch Vehicle (EELV) at south Vandenberg Air Force Base, CA (VAFB). Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to authorize Boeing to take, by harassment, small numbers of several species of pinnipeds at south VAFB beginning in May 2003.

DATES: Comments and information must be received no later than May 9, 2003.

ADDRESSES: Comments on the application should be addressed to Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3225. Comments will not be accepted if submitted via e-mail or the Internet. A copy of the application (which includes the list of references used in this document) may be obtained by writing to this address or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Kimberly Skrupky, (301) 713–2322, ext. 163 or Christina Fahy, (562) 980–4023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Permission for incidental takings may be granted if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. The MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which(i) has the potential to injure a marine mammal or marine mammal stock in the wild [''Level A harassment'']; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [''Level B harassment''].

Subsection 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On January 28, 2003, NMFS received an application from Boeing requesting an authorization for the harassment of small numbers of Pacific harbor seals (*Phoca vitulina richardsi*) and California sea lions (*Zalophus californianus*) incidental to harbor activities related to the Delta IV/EELV, including: transport vessel operations, cargo movement activities, harbor maintenance dredging, and kelp habitat mitigation operations. In addition, northern fur seals (*Callorhinus ursinus*) and northern elephant seals (*Mirounga angustirostris*) may also be incidentally harassed but in smaller numbers. An Incidental Harassment Authorization (IHA) was issued to Boeing on May 20, 2002 and remains in effect until May 20, 2003 (*see* FR 36151, May 23, 2002). The harbor where activities will take place is on south VAFB approximately 2.5 mi (4.02 km) south of Point Arguello, CA, and approximately 1 mi (1.61 km) north of the nearest marine mammal pupping site (i.e., Rocky Point).

Specified Activities

Delta Mariner off-loading operations and associated cargo movements will occur a maximum of 3 times per year, beginning December, 2003. The *Delta Mariner* is a 95.1–m (312–ft) long, 25.6–m (84–ft) wide steel hull ocean-going vessel capable of operating at a 2.4–m (8–ft) draft. For the first few visits to the south VAFB harbor, tug boats will accompany the *Delta Mariner*. Sources of noise from the *Delta Mariner* include ventilating propellers used for maneuvering into position and the cargo bay door when it becomes disengaged. Removal of the CBC from the *Delta Mariner* requires use of an elevating platform transporter. An additional source of noise with sound levels measured at a maximum of 82 dB A-weighted (re 20 microPascals at 1–m) 6.1 m (20 ft) from the engine exhaust (Acentech, 1998). Procedures require 2 short (approximately 1/3 second) beeps of the horn prior to starting the ignition. At 60.9 m (200 ft) away, the sound level of the EPT horn ranged from 62–70 dB A-weighted. Containers containing flight hardware items will be towed off the Delta Mariner by a tractor tug that generates a sound level of approximately 87 dB A-weighted at 15.2 m (50 ft) while in operational mode. Total time of *Delta Mariner* docking and cargo movement activities is estimated at between 14 and 18 hours in good weather.

To accommodate the *Delta Mariner*, the harbor will need to be dredged, removing approximately 3,000 to 5,000 cubic yards of sediment per dredging. Dredging will involve the use of heavy equipment, including a clamshell dredge, dredging crane, a small tug, dredging barge, dump trucks, and a skip loader. Measured sound levels from this equipment are roughly equivalent to those estimated for the wharf modification equipment: 61–81 dB A-weighted at 76.2 m (250 ft). Dredge operations, from set-up to tear-down, would continue 24–hours a day for 3–5 weeks. Sedimentation surveys have shown that initial dredging indicates that maintenance dredging should be required annually or twice per year, depending on the hardware delivery schedule.

A more detailed description of the work proposed for 2003 is contained in the application which is available upon request (*see* **ADDRESSES**) and in the Final US Air Force Environmental Assessment for Harbor Activities Associated with the Delta IV Program at

Vandenberg Air Force Base (ENSR International, 2001).

Habitat and Marine Mammals Affected by the Activity

The marine mammal species likely to be harassed incidental to harbor activities at south VAFB are the Pacific harbor seal and the California sea lion. The most recent estimate of the Pacific harbor seal population in California is 30,293 seals (Forney et al., 2000). From 1979 to 1995, the California population increased at an estimated annual rate of 5.6 percent. The total population of harbor seals on VAFB is now estimated to be 1,040 (775 on south VAFB) based on sighting surveys and telemetry data (SRS Technologies, 2001).

The daily haul-out behavior of harbor seals along the south VAFB coastline is dependent on time of day rather than tide height. The highest number of seals haul-out at south VAFB between 1100 through 1700 hours. In addition, haul-out behavior at all sites seems to be influenced by environmental factors such as high swell, tide height, and wind. The combination of all three may prevent seals from hauling out at most sites. The number of seals hauled out at any site can vary greatly from day to day based on environmental conditions. Harbor seals occasionally haul out at a beach 76.2 m (250 ft) west of the south VAFB harbor and on rocks outside the harbor breakwater where Boeing will be conducting Delta Mariner operations, cargo loading, dredging activities, and reef enhancement activities. The maximum number of seals present during past dredging of the harbor was 43, with an average of 21 seals sighted per day. The harbor seal pupping site closest to south VAFB harbor is at Rocky Point, approximately 1.6 km (1 mi) north.

Several factors affect the seasonal haul-out behavior of harbor seals including environmental conditions, reproduction, and molting. Harbor seal numbers at VAFB begin to increase in March during the pupping season (March to June) as females spend more time on shore nursing pups. The number of hauled-out seals is at its highest during the molt which occurs from May through July. During the molting season, tagged harbor seals at VAFB increased their time spent on shore by 22.4 percent; however, all seals continued to make daily trips to sea to forage. Molting harbor seals entering the water because of a disturbance are not adversely affected in their ability to molt and do not endure thermoregulatory stress. During pupping and molting season, harbor seals at the south VAFB sites expand into haul-out areas that are not used the rest of the year. The number of seals hauled out begins to decrease in August after the molt is complete and reaches the lowest number in late fall and early winter.

During the wharf modification activity in June–July 2002, California sea lions were observed hauling out in small numbers. Although this is considered to be an unusual occurrence and is possibly related to fish schooling in the area, Boeing included sea lions in their request.

California sea lions range from British Columbia to Mexico. The minimum U.S. population estimate for California sea lions is 109,854 individuals. Since 1983, the population has grown at a rate of 5.0–6.2 percent annually. A 1985–1987 population survey indicated that most individuals on the Northern Channel Islands were on San Miguel Island, with the population ranging from 2,235 to over 17,000. The largest numbers of California sea lions in the VAFB vicinity occur at Lion Rock, 0.4 mi (0.64 km) southeast of Point Sal. This area is approximately 1.5 mi (2.41 km) north of the VAFB boundary. At least 100 sea lions can be observed during any season at this site. The Point Arguello beaches and the rocky ledges of South Rocky Point on south VAFB are haulout areas that may be used by California sea lions. The maximum number of sea lions seen hauling out during the recent wharf modification was six, daily counts ranging from 1 to 6 animals.

During the breeding season, most of California sea lions inhabit southern California and Mexico. Rookery sites in southern California are limited to San Miguel Island and to the southerly Channel Islands of San Nicolas, Santa Barbara, and San Clemente. Breeding season begins in mid-May, occurring within 10 days of arrival at the rookeries. Molting occurs gradually over several months in the late summer and fall. Because the molt is not catastrophic, the sea lions can enter the water to feed.

Male California sea lions migrate annually. In the spring they migrate southward to breeding rookeries in the Channel Islands and Mexico, then migrate northward in the late summer following breeding season. Females appear to remain near the breeding rookeries. The greatest population on land occurs in September and October during the post-breeding dispersal and although many of the sea lions, particularly juveniles and sub-adult and adult males, may move north away from the Channel Islands.

Small groups of sea lions have been observed heading south along the VAFB coastline each year in April and May. In August, large groups of 25 to over 300 sea lions can be seen migrating north. Hauled out juvenile sea lions, as well as harbor seals, can be observed along the South Base sites in July, August, and September. Starving and exhausted subadult sea lions are also fairly common on the central California beaches during July and August.

Other marine mammal species are known to occur infrequently along the south VAFB coast during certain times of the year and are unlikely to be harassed by Boeing's activities. These four species are: the northern elephant seal, the northern fur seal, Guadalupe fur seal (*Arctocephalus townsendi*), and Steller sea lions (*Eumetopias jubatus*). Northern elephant seals may occur on VAFB but do not haul out in the harbor area. Northern fur seals, Guadalupe fur seals, and Steller sea lions occur along the California coast and Northern Channel Islands but are not likely to be found on VAFB. Descriptions of the biology and local distribution of these species can be found in the application as well as other sources such as Stewart and Yochem (1994, 1984), Forney *et al.* (2000), Koski *et al.* (1998), Barlow *et al.* (1993), Stewart and DeLong (1995), and Lowry *et al.* (1992). NMFS Stock Assessments can be viewed at: *http://www.NMFS.noaa.gov/pr/PR2/*

Stock_Assessment_Program/sars.html. Please refer to those documents for information on these species.

Potential Effects of Activities on Marine Mammals

Acoustic and visual stimuli generated by the use of heavy equipment during the *Delta Mariner* and off-loading operations, dredging, and kelp habitat mitigation, as well as the increased presence of personnel, may cause short-term disturbance to harbor seals and California sea lions hauled out along the beach and rocks in the vicinity of the south VAFB harbor. This disturbance from acoustic and visual stimuli is the principal means of marine mammal taking associated with these activities. Based on the measured sounds of construction equipment, such as might be used during Boeing's activities, sound levels from all equipment drop to a maximum level of 95 dB A-weighted within 50 ft (15.2 m) of the sources. In contrast, the ambient background noise measured approximately 76.2 m (250 ft) from the beach was estimated to be 35–48 dB A-weighted (Acentech, 1998; EPA, 1971).

Pinnipeds sometimes show startle reactions when exposed to sudden brief sounds. An acoustic stimulus with sudden onset (such as a sonic boom)

may be analogous to a ''looming'' visual stimulus (Hayes and Saif, 1967), which may elicit flight away from the source (Berrens *et al.*, 1988). The onset of operations by a loud sound source, such as the elevating platform transporter during CBC off-loading procedures, may elicit such a reaction. In addition, the movements of cranes and dredges may represent a ''looming'' visual stimulus to seals hauled out in close proximity. Seals and sea lions exposed to such acoustic and visual stimuli may either exhibit a startle response and/or leave the haul-out site.

According to the MMPA, if harbor activities disrupt the behavioral patterns of harbor seals, these activities would take marine mammals by Level B harassment. In general, if the received level of the noise stimulus exceeds both the background (ambient) noise level and the auditory threshold of the animals, and especially if the stimulus is novel to them, there may be a behavioral response. The probability and degree of response will also depend on the season, the group composition of the pinnipeds, and the type of activity in which they are engaged. Minor and brief responses, such as short-duration startle or alert reactions, are not likely to result in disruption of behavioral patterns, such as migration, nursing, breeding, feeding, or sheltering (i.e., Level B harassment) and would not cause serious injury or mortality to marine mammals.

On the other hand, startle and alert reactions accompanied by large-scale movements, such as stampedes into the water, could resul in injury of individuals and would be considered a take by harassment. In addition, such large-scale movements by dense aggregations of marine mammals or on pupping sites could potentially lead to takes by serious injury or death. However, there is no potential for large-scale movements leading to serious injury or mortality near the south VAFB harbor, because on average the number of harbor seals hauled out near the site on average is less than 30 and there is no pupping at nearby sites. The effects of the harbor activities are expected to be limited to short-term startle responses and localized behavioral changes.

For a further discussion of the anticipated effects of the planned activities on harbor seals in the area, please refer to the application and ENSR International's 2001 Final Environmental Assessment. Information in the application and referenced sources is preliminarily adopted by NMFS as the best information available on this subject.

Numbers of Marine Mammals Expected to Be Harassed

Boeing estimates that a maximum of 43 harbor seals per day may be hauled out near the south VAFB harbor, with a daily average of 21 seals sighted when tidal conditions were favorable during previous dredging operations in the harbor. Considering the maximum and average number of seals hauled out per day, assuming that the seals may be seen more than once, and using a maximum total of 83 operating days in 2003–2004, NMFS estimates that 145 to 623 Pacific harbor seals may be subject to Level B harassment, as defined in 50 CFR 216.3.

During wharf modification activities, a maximum of six California sea lions were seen hauling out in a single day, averaging between one and six sea lions each day. Based on its own calculations, NMFS believes that a total of 100 California sea lions, 10 northern elephant seals, and 5 northern fur seals may be subject to Level B harassment, as defined in 50 CFR 216.3, because they may be in nearby waters.

Possible Effects of Activities on Marine Mammal Habitat

Boeing anticipates no loss or modification to the habitat used by Pacific harbor seals or California sea lions that haul out near the south VAFB harbor. The harbor seal and sea lion haul-out sites near south VAFB harbor are not used as breeding, molting, or mating sites; therefore, it is not expected that the activities in the harbor will have any impact on the ability of Pacific harbor seals or California sea lions in the area to reproduce.

Boeing does anticipate unavoidable kelp removal during dredging. This habitat modification will not affect the marine mammal habitat. However, Boeing will mitigate for the removal of kelp habitat by placing 150 tons of rocky substrate in a sandy area between the breakwater and the mooring dolphins to enhance an existing artificial reef. This type of mitigation was implemented by the Army Corps of Engineers following the 1984 and 1989 dredging. A lush kelp bed adjacent to the sandy area has developed from the efforts. The substrate will consist of approximately 150 sharp-faced boulders, each with a diameter of about 2 ft (0.61 m) and each weighing about one ton. The boulders will be brought in by truck from an off-site quarry and loaded by crane onto a small barge at the wharf. The barge is towed by a tugboat to a location along the mooring dolphins from which a small barge-mounted crane can place them into the sandy area. Boeing plans to perform the reef enhancement in conjunction with the next maintenance dredging event in order to minimize cost and disturbances to animals. Noise will be generated by the trucks delivering the boulders to the harbor and during the operation of unloading the boulders onto the barges and into the water.

Possible Effects of Activities on Subsistence Needs

There are no subsistence uses for Pacific harbor seals in California waters, and, thus, there are no anticipated effects on subsistence needs.

Mitigation

To reduce the potential for disturbance from visual and acoustic stimuli associated with the activities Boeing will undertake the following marine mammal mitigating measures:

(1) If activities occur during nighttime hours, lighting will be turned on before dusk and left on the entire night to avoid startling harbor seals at night.

(2) Activities should be initiated before dusk.

(3) Construction noises must be kept constant (i.e., not interrupted by periods of quiet in excess of 30 minutes) while harbor seals are present.

(4) If activities cease for longer than 30 minutes and harbor seals are in the area, start-up of activities will include a gradual increase in noise levels.

(5) A qualified marine mammal observer will visually monitor the harbor seals on the beach adjacent to the harbor and on rocks for any flushing or other behaviors as a result of Boeing's activities. If flushing results, then the activities suspected of causing the seals to enter the water will be delayed until the seals leave the area.

(6) The *Delta Mariner* and accompanying vessels will enter the harbor only when the tide is too high for harbor seals to haul-out on the rocks and the vessel will reduce speed 1.5 to 2 knots once the vessel is within 3 mi (4.83 km) of the harbor. The vessel will enter the harbor stern first, approaching the wharf and dolphins at less than 0.75 knot.

(7) As alternate dredge methods are explored, the dredge contractor may introduce quieter techniques and equipment.

Monitoring

As part of its 2002 application, Boeing provided a proposed monitoring plan for assessing impacts to harbor seals from the activities at south VAFB harbor and for determining when mitigation measures should be employed.

A NMFS-approved and VAFB-designated biologically trained observer will monitor the area for pinnipeds during all harbor activities. During nighttime activities, the harbor area will be illuminated, and the monitor will use a night vision scope. Monitoring activities will consist of:

(1) Conducting baseline observation of pinnipeds in the project area prior to initiating project activities.

(2) Conducting and recording observations on pinnipeds in the vicinity of the harbor for the duration of the activity occurring when tides are low enough for pinnipeds to haul out (2 ft, 0.61 m, or less).

(3) Conducting post-construction observations of pinniped haul-outs in the project area to determine whether animals disturbed by the project activities return to the haul-out.

Reporting

Boeing will notify NMFS 2 weeks prior to initiation of each activity. After each activity is completed, Boeing will provide a report to NMFS within 90 days. This report will provide dates and locations of specific activities, details of seal behavioral observations, and estimates of the amount and nature of all takes of seals by harassment or in other ways. In addition, the report will include information on the weather, the tidal state, the horizontal visibility, and the composition (species, gender, and age class) and locations of haul-out group(s). In the unanticipated event that any cases of pinniped injury or mortality are judged to result from these activities, this will be reported to NMFS immediately.

Consultation

Under section 7 of the Endangered Species Act, NMFS has begun consultation on the proposed issuance of an IHA. Consultation will be concluded prior to the issuance of an IHA.

Although sea otters are not within the jurisdiction of NMFS, VAFB formally consulted with U.S. Fish and Wildlife Service (FWS) in 1998 on the possible take of southern sea otters during Boeing's harbor activities at south VAFB. A Biological Opinion was issued in August 2001. Southern sea otters were discussed in these documents and FWS recognized that Boeing will restore sea otter habitat (i.e., kelp beds) in the vicinity of the harbor to replace kelp destroyed during dredging. In addition, the FWS noting that VAFB has committed to a southern sea otter monitoring program designed to detect the presence and possible disturbance at the VAFB harbor area during dredging activities.

NEPA

In accordance with section 6.01 of the National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS has determined based on the content and analysis of Boeing's request for an IHA, and the Final EA for Harbor Activities Associated with the Delta IV Program at VAFB (ENSRI, 2001) that the proposed issuance of this IHA to Boeing by NMFS will not individually or cumulatively result in a significant impact on the quality of the human environment as defined in 40 CFR 1508.27. Impacts are not expected to be outside the scope of that EA. Therefore, this action meets the definition of a ''Categorical Exclusion'' as defined under NOAA Administrative Order 216–6 and is exempted from further environmental review.

Preliminary Conclusions

NMFS proposes to issue an IHA to Boeing for harbor activities related to the Delta IV/EELV to take place at south VAFB over a 1–year period. The proposal to issue this IHA is contingent upon adherence upon the previously mentioned mitigation, monitoring, and reporting requirements. NMFS has preliminarily determined that the impact of harbor activities related to the Delta IV/EELV at VAFB, including: transport vessel operations, cargo movement activities, harbor maintenance dredging, and kelp habitat mitigation will result in the harassment of only small numbers of Pacific harbor seals and California sea lions; would have no more negligible impact on these marine mammal stocks,; and would not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence uses. While behavioral modifications may be made by these species to avoid the resultant acoustic and visual stimuli, there is no potential for large-scale movements, such as stampedes, since harbor seals and sea lions haul out in such small numbers near the site (maximum number of harbor seals hauled out in one day estimated at 43 seals, averaging at 21 seals per day, maximum number of sea lions hauled out in one day is estimated at six sea lions). The effects of the harbor activities are expected to be limited to short-term and localized behavioral changes. Therefore, NMFS preliminarily concludes that the effects of the planned demolition activities will have no more than a negligible impact on pinnipeds.

Due to the localized nature of these activities, the number of marine mammals potentially taken by harassment are estimated to be small. In addition, no take by injury and/or death is anticipated, and the potential for temporary or permanent hearing impairment is unlikely given the low noise levels and will be entirely avoided through the incorporation of appropriate mitigation measures. No rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals occur within or near south VAFB harbor.

Information Solicited

NMFS requests interested persons to submit comments and information concerning this request (*see* **ADDRESSES**). Prior to submitting comments, NMFS recommends readers review NMFS' responses to those comments on this activity submitted previously (*see* 67 FR 63151, May 23, 2002).

Dated: April 2, 2003.

Thomas C. Eagle,

Acting Director, Office of Protected Resources,National Marine Fisheries Service.

[FR Doc. 03–8686 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 001215353–3068–03]

RIN 0660–ZA14

PEACESAT Closing Date

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Notice of closing date for solicitation of PEACESAT applications.

SUMMARY: The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, announces the solicitation of applications for a grant for the Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT) Program. Projects funded pursuant to this Notice are intended to support the PEACESAT Program's acquisition of satellite communications to service Pacific Basin communities and to manage the operations of this network. Applications for the PEACESAT Program grant will compete for funds from the Public Broadcasting, Facilities, Planning and Construction Funds account. The

deadline for receipt of television applications for the Public Telecommunications Facilities Program (PTFP), which is also funded from this account, was November 19, 2002. The PTFP deadline was published in the **Federal Register** on October 17, 2002 (67 FR 64297). NTIA also published in the March 5, 2003 **Federal Register** (68 FR 10610) that the deadline for receipt of radio and nonbroadcast applications for the PTFP, which are also funded from this account, will be April 4, 2003.

DATE: Applications for the PEACESAT Program grant must be received on or before 5 p.m. EDT on May 9, 2003. Applicants sending applications by the United States Postal Service or commercial delivery services must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. NTIA will not accept mail delivery of applications posted on the closing date or later and received after the above deadline. However, if an application is received after the closing date due to carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date, NTIA will, upon receipt of proper documentation, consider the application as having been received by the deadline.

ADDRESSES: To submit completed applications, or send any other correspondence, write to: NTIA/PTFP, Room H–4625, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230. Applicants submitting applications by hand delivery are notified that, due to security procedures in the Department of Commerce, all packages must be cleared by the Department's security office. The security office is located in Room 1874, located at Entrance No. 10 on the 15th St. NW. side of the building.

FOR FURTHER INFORMATION CONTACT: William Cooperman, Director, Public Broadcasting Division, telephone: (202) 482–5802; fax: (202) 482–2156.

SUPPLEMENTARY INFORMATION:

I. Application Forms and Requirements

Funding for the PEACESAT Program is provided pursuant to Public Law 108–7, ''The Consolidated Appropriations Resolution, 2003,'' and Public Law 106–113, ''The Consolidated Appropriations Act, Fiscal Year 2000.'' Public Law 106–113 provides ''That, hereafter, notwithstanding any other provision of law, the Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT) Program is eligible to compete for Public Broadcasting Facilities, Planning and Construction funds.'' The PEACESAT Program was authorized under Pub. L. 100–584 (102 Stat. 2970) and also Pub. L. 101–555 (104 Stat. 2758) to acquire satellite communications services to provide educational, medical, and cultural needs of Pacific Basin communities. The PEACESAT Program has been operational since 1971 and has received funding from NTIA for support of the project since 1988.

Public Law 108–7 appropriated $43.5 million for this account to be awarded for Public Telecommunications Facilities Program (PTFP) grants and for PEACESAT Program grants. Solicitation notices for the PTFP Program were published in the **Federal Register** on October 17, 2002 (67 FR 64297) for television applications and on March 5, 2003 (68 FR 10610) for radio and nonbroadcast applications. Applications submitted in response to this solicitation for PEACESAT applications are not subject to the requirements of the October 17, 2002 or March 5, 2003 Notices and are exempt from the PTFP regulations at 15 CFR part 2301. NTIA anticipates making a single award for approximately $500,000 for the PEACESAT Program in FY2003.

NTIA requests that each applicant for a PEACESAT Program grant supply one (1) original signed application and five (5) copies, unless doing so would present a financial hardship, in which case the applicant may submit one(1) original and two (2) copies of the application. The application form consists of the Standard Form 424 Application for Federal Assistance; Standard Form 424A Budget Information-Non-Construction Programs; Standard Form 424 B, Assurances; Standard Form CD–511 Certification; and Standard Form LLL, Disclosure of Lobbying Activities (if applicable). These requirements are subject to the Paperwork Reduction Act and have been approved by the Office of Management and Budget under control numbers 0348–0043, 0348–0044, 0348–0040 and 0348–0046.

Eligible applicants will include any for-profit or non-profit organization, public or private entity, other than an agency or division of the Federal government. Individuals are not eligible to apply for the PEACESAT Program funds.

Grant recipients under this program will not be required to provide matching funds toward the total project cost.

The costs allowable under this Notice are not subject to the limitation on costs contained in the October 17, 2002 or March 5, 2003 Notices regarding the PTFP Program.

II. Catalog of Federal Domestic Assistance Number

11.550 Public Telecommunications Facilities Program.

III. Administrative Requirements; Scope of Project and Eligible Costs; Evaluation and Selection Process

Public Law Number 108–7 was enacted February 20, 2003. Public Law No. 108–7 appropriated funds to the Public Broadcasting, Facilities, Planning and Construction Funds account. Pursuant to Public Law 106–113 the Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT) Program can compete for funds from the Public Broadcasting, Facilities, Planning and Construction Funds account. Funds appropriated to the Public Broadcasting, Facilities, Planning and Construction Funds account do not carry fiscal year limitations. A notice published on March 16, 1999 set forth the scope of the project and eligible costs, and a description of the evaluation and selection process for applications for the PEACESAT Program. Since funds for the Public Broadcasting, Facilities, Planning and Construction Funds account are available without fiscal year limitations, the administrative requirements; scope of project and eligible costs criteria; and evaluation and selection process criteria set forth in the March 16, 1999 notice apply to the 1999 PEACESAT program and to all subsequent years. A copy of the March 16,1999 Notice is available to potential applicants from NTIA at the address listed in the Address section and is also available on the Internet at *http://www.ntia.doc.gov/otiahome/peacesat.html*. If, in the future, NTIA changes the administrative requirements; the scope of project and eligible costs criteria; or the evaluation and selection process criteria, a new notice will be published containing the new criteria and requirements. Unsuccessful applications will be destroyed.

Applicants for grants for the PEACESAT Program must file their applications on or before May 9, 2003. NTIA anticipates making the grant award by September 30, 2003. NTIA shall not be liable for any proposal preparation costs.

IV. Project Period

Any project awarded pursuant to this notice will be for a one-year period.

V. Other Requirements

The Department of Commerce Pre-Award Notification of Requirements for Grants and Cooperative Agreements

contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), is applicable to this solicitation.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA),unless that collection displays a currently valid Office of Management and Budget control number.

VI. Executive Order 12866

It has been determined that this notice is ''not significant'' for the purpose of Executive Order 12866.

VII. Executive Order 13132

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in EO 13132.

VIII. Regulatory Flexibility Analysis

Because notice and comment are not required under 5 U.S.C. 553, or any other law, for this notice related to public property, loans, grants, benefits or contracts, 5 U.S.C. 553(a), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice. 5 U.S.C. 601 *et seq.*

Authority: Pub. L. 108–7, ''The Consolidated Appropriations Resolution, 2003,'' and Public Law 106–113, ''The Consolidated Appropriations Act, Fiscal Year 2000.''

Dr. Bernadette McGuire-Rivera,

Associate Administrator, Office of Telecommunications and Information Applications.

[FR Doc. 03–8678 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–60–P

PATENT AND TRADEMARK OFFICE

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

AGENCY: United States Patent and Trademark Office (USPTO).

Title: Admittance to Practice and Roster of Registered Patent Attorneys and Agents Admitted to Practice Before the United States Patent and Trademark Office (USPTO).

Form Number(s): PTO–158, PTO–158A, PTO–275, PTO–107A, PTO–1209, PTO–2126.

Agency Approval Number: 0651–0012.

Type of Request: Revision of a currently approved collection.

Burden: 58,745 hours annually.

Number of Respondents: 64,142 responses per year.

Avg. Hours Per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.5 hours) to complete either an application or registration to practice before the USPTO, or an application for a foreign resident to practice before the USPTO and, depending upon the complexity of the situation, to gather, prepare and submit the application. It is estimated to take 20 minutes (0.33 hours) to complete undertakings under 37 CFR 10.10(b); 10 minutes (0.17 hours) to complete data sheets; 5 minutes (0.08 hours) to complete the oath or affirmation, and the request for a paper copy of the continuing training program and furnished narrative; 45 minutes (0.75 hours) to complete the petition for waiver of regulations; and 90 minutes (1.5 hours) to complete the written request for reconsideration of disapproval notice of application and the petition for reinstatement to practice. It is estimated to take 2 hours and 10 minutes (2.17 hours) for the annual practitioner registration/continuing training program—ten minutes (0.17 hours) to fill out the form and an average of 2 hours (2.0 hours) to complete the continuing training examination online. It is estimated to take 2 hours and 5 minutes (2.08 hours) for the paper-based version of the annual practitioner registration/continuing training program-five minutes (0.08 hours) to request the materials and an average of 2 hours (2.0 hours) to complete the continuing training examination on paper. These times include time to gather the necessary information, prepare, and submit the forms and requirements in this collection.

Needs and Uses: This information is required by 35 U.S.C. 2(b)(2)(d), administered by the USPTO through 37 CFR 10.5–10.19. The information is used by the Director of the Office of Enrollment and Discipline (OED) to determine if the applicant for registration is of good moral character and repute; has the necessary legal, scientific, and technical qualifications; and is otherwise competent to advise and assist applicants in the presentation and prosecution of applications for patent grants.

Affected Public: Individuals or households; business or other for-profit; the Federal Government; and State, Local or Tribal Governments.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Susan K. Brown, Records Officer, Office of Data Architecture and Services, Data Administration Division, (703) 308–7400, USPTO, Suite 310, 2231 Crystal Drive, Washington, DC 20231, or by e-mail at *susan.brown@uspto.gov*.

Written comments and recommendations for the proposed information collection should be sent on or before May 9, 2003 to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: April 1, 2003.

Susan K. Brown,

Records Officer, USPTO, Office of Data Architecture and Services, Data Administration Division.

[FR Doc. 03–8602 Filed 4–8–03; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by May 9, 2003.

Title, Form Number, and OMB Number: International Military Student Information; DD Form 2339; OMB Number 0702–0064.

Type of Request: Reinstatement.

Number of Respondents: 3,000.

Responses Per Respondent: 1.

Annual Responses: 3000.

Average Burden Per Resonse: 15 minutes (average).

Annual Burden Hours: 750 hours.

Needs and Uses: The DD Form 2399 is required in support of international military students who are attending training in the United States with the Military Departments as part of the security assistance training program. The DD Form 2399 is utilized in

gathering information on the international student prior to his/her arrival in the United States in order that civilian and military sponsors can be assigned to assist the student during his/her training.

Affected Public: Individuals or Households.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: April 3, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer Department of Defense.

[FR Doc. 03–8620 Filed 4–8–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by May 9, 2003.

Title, Form Number, and OMB Number: Application and Agreement for Establishment of a National Defense Cadet Corps Unit; DA Form 3126–1; OMB Number 0702–0110.

Type of Request: Reinstatement.

Number of Respondents: 35.

Responses Per Respondent: 1.

Annual Responses: 35.

Average Burden Per Response: 60 minutes (average).

Annual burden Hours: 35 hours.

Needs and Uses: Educational Institutions desiring to host a National Defense Cadet Corps Unit (NDCC) may apply by using a DA Form 3126–1. The DA Form 3126–1 documents the agreement and becomes a contract signed by both the secondary institution and the U.S. Government. This form provides information on the schools's facilities and states specific conditions if a NDCC unit is placed at the institution. The data provided on the application is used to determine which school(s) will be selected.

Affected Public: State, Local, or Tribal Government; Not-For-Profit Institutions.

Frequency: On Occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: April 2, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–8621 Filed 4–8–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

DoD Health Information Privacy Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: Under 45 CFR part 164, ''Standards for Privacy of Individually Identifiable Health Information'' and DoD 6025.18–R, ''DoD Health Information Privacy Regulation'' provisions are made to allow appropriate uses and disclosures of protected health information concerning members of the armed forces to assure the proper execution of the military mission, provided that the Department of Defense publishes in the **Federal Register** a notice describing implementation of these provisions. This notice implements those provisions.

EFFECTIVE DATES: This notice is effective April 14, 2003.

FOR FURTHER INFORMATION CONTACT: CDR Sam Jenkins, Health Information Privacy Officer, TRICARE Management Activity, Skyline 5, Suite 810, 5111 Leesburg Pike, Falls Church, Virginia 22041–3206, (703) 681–5611, extension 6824.

SUPPLEMENTARY INFORMATION: In accordance with 45 CFR 164.512(K)(1)(i), the Department of Defense has established in DoD 6025.18–R, paragraph C7.11.1, the following provisions.

1. *General Rule.* A covered entity (including a covered entity not part of or affiliated with the Department of Defense) may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission.

2. *Appropriate Military Command Authorities.* For purposes of paragraph 1, appropriate Military Command authorities are the following:

2.1. All Commanders who exercise authority over an individual who is a member of the Armed Forces, or other person designated by such a Commander to receive protected health information in order to carry out an activity under the authority of the Commander.

2.2 The Secretary of Defense, the Secretary of the Military Department responsible for the Armed Force for which the individual is a member, or the Secretary of Homeland Security when a member of the Coast Guard when it is not operating as a service in the Department of the Navy.

2.3. Any official delegated authority by a Secretary listed in subparagraph 2.2 to take an action designed to ensure the proper execution of the military mission.

3. *Purposes for Which the Protected Health Information May Be Uses or Disclosed.* For purposes of paragraph 1, the purposes for which any and all of the protection health information of an individual who is a member of the Armed Forces may be used or disclosed are the following:

3.1. To determine the member's fitness for duty, including but not limited to the member's compliance with standards and all activities carried out under the authority of DoD Directive 1308.1, ''DoD Physical Fitness and Body Fat Program,'' July 20, 1995, DoD Instruction 1332.38, ''Physical Disability Evaluation,'' November 14, 1996, DoD Directive 5210.42, ''Nuclear Weapons Personnel Reliability Program (PRP),'' January 8, 2001, and similar requirements.

3.2. To determine the member's fitness to perform any particular

mission, assignment, order, or duty, including compliance with any actions required as a precondition to performance of such mission, assignment, order, or duty.

3.3. To carry our activities under the authority of DoD Directive 6490.2, ''Joint Medical Surveillance,'' August 30, 1997.

3.4. To report on casualties in any military operation or activity in accordance with applicable military regulations or procedures.

3.5. To carry out any other activity necessary to the proper execution of the mission of the Armed Forces.

Dated: April 2, 2003.

Linda Bynum,

Alternate Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–8624 Filed 4–8–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to Add Systems of Records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on May 9, 2003 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to OSD Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mr. Dan Cragg at (703) 601–4722.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on April 1, 2003, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: April 2, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DWHS 48

SYSTEM NAME:

Biographies of OSD Officials.

SYSTEM LOCATION:

Office of the Secretary of Defense, Chief Information Office, ATTN: Biographies of OSD Officials, 1950 Defense Pentagon, Room BG849, Washington, DC 203301–1950.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Military and civilian personnel currently occupying professional positions within the offices of the Office of the Secretary of Defense (OSD). A professional position is one occupied by a civilian in the grade of GS 13 and above or a military officer in the grade of major/lieutenant commander and above; employees in developmental programs such as Presidential Management Interns and Defense Fellows; and employees from other organizations serving as detailees and serving under intergovernmental personnel act agreements who are integrated within the OSD workforce.

CATEGORIES OF RECORDS IN THE SYSTEM:

Basic biographical information on individual OSD staff to include full name of the individual; rank/grade; title; organization/office; current assignments within OSD (starting with present and working backwards to cover all periods of assignment within OSD); past experiences (a brief history of other related past experiences); and education (optional). A photograph of the individual is optional.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 131, Office of the Secretary of Defense.

PURPOSE(S):

To provide the Secretary and Deputy Secretary of Defense, as well as the OSD Principal Staff Assistants (PSA), with immediate access to biographical information on the OSD staff personnel. PSAs will only have access to those biographies for personnel who are employed, assigned, or detailed to their respective offices.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of OSD's compilation of systems of records notices applies to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored on electronic media.

RETRIEVABILITY:

Retrieved alphabetically by the individual's full name.

SAFEGUARDS:

Records are maintained in a secure, limited access or monitored area. Physical entry by unauthorized persons is restricted by the use of locks, guards, or administrative procedures. Access to personal information is limited to those who require the records to perform their official duties. All personnel whose official duties require access to the information are trained in the proper safeguarding and use of the information.

RETENTION AND DISPOSAL:

Records are deleted when the individual concerned departs the OSD staff.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Personnel Systems and Evaluation Division, Washington Headquarters Services, Personnel and Security Directorate, ATTN: Biographies of OSD Officials, 5001 Eisenhower Avenue, Room 2N36, Alexandria, VA 22333–0001.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Chief, Personnel Systems and Evaluation Division, Washington Headquarters Services, Personnel and Security Directorate, ATTN: Biographies of OSD Officials, 5001 Eisenhower Avenue, Room 2N36, Alexandria, VA 22333–0001.

Requests for information should contain individual's full name.

RECORDS ACCESS PROCEDURES:

Individuals seeking to access information about them selves

contained in this system of records should address written inquiries to the Chief, Personnel Systems and Evaluation Division, Washington Headquarters Services, Personnel and Security Directorate, ATTN: Biographies of OSD Officials, 5001 Eisenhower Avenue, Room 2N36, Alexandria, VA 22333–0001.

Requests for information should contain individual's full name.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

The source of record is from the individuals concerned.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 03–8623 Filed 4–8–03; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy. Patent application 10/342,649: HAZMAT Platform; a portable, re-usable, elevated platform that provides a large, non-slip, grated surface on which an individual wearing a fully-encapsulated hazardous materials suit may stand to ensure thorough on-site decontamination. The elevated design with a top grate and two folding/pivoting support leg assemblies allows for the collection of the hazardous material runoff in a containment vessel deployed underneath. It is made of impervious, strong, lightweight material to prevent absorption of any hazardous chemicals and to provide sufficient structural strength while keeping its overall weight reasonable. The design is simple and straightforward and can be economically manufactured. Patent application 10/314,484: Hexagonal Ball Socket Driver Bit; a ball socket driver bit that includes a ball portion and a shank portion. The ball portion cross section perpendicular to the bit axis is hexagonal. The shank portion has a cross section smaller than the ball portion. The first portion end is adapted to axially enter a socket head screw. The ball portion is adapted to enter a socket such that when turning the socket the socket head screw can be turned when the socket axis is not axially aligned with the screw axis.

ADDRESSES: Requests for copies of the invention cited should be directed to the Naval Surface Warfare Center, Crane Div, Code OCF, Bldg 64, 300 Highway 361, Crane, IN 47522–5001.

FOR FURTHER INFORMATION CONTACT: Mr. Darrell Boggess, Naval Surface Warfare Center, Crane Div, Code OCF, Bldg 64, 300 Highway 361, Crane, IN 47522–5001, telephone (812) 854–1130. To download an application for license, see: *www.crane.navy.mil/foia_pa/CranePatents.asp*.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: March 28, 2003.

R.E. Vincent II,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 03–8673 Filed 4–8–03; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before May 9, 2003.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Lauren Wittenberg, Acting Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Lauren_Wittenberg@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

Dated: April 3, 2003.

John D. Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Reinstatement.

Title: Application Package for the Jacob K. Javits Fellowship Program.

Frequency: Annually.

Affected Public: Businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 2,000.

Burden Hours: 10,000.

Abstract: These instructions and forms provide the U.S. Department of Education the information needed to select fellows for the Javits Program.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grants Information Collections (1890–0001). Therefore, this 30-day public comment notice will be the only public comment notice published for this information collection.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2246. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivan.reese@ed.gov*. Requests may also

be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. *Please specify the complete title of the information collection when making your request.*

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at (202) 708–9266 or via his e-mail address *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 03–8604 Filed 4–8–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 9, 2003.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: April 3, 2003.

John D. Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: New.

Title: Field Test of Agency Capacity to Implement Reporting Requirements Associated with Draft Evaluation Standard 3.

Frequency: One-time.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 80;

Burden Hours: 4,880.

Abstract: The field test will assess Designated State Unit (VR agency) capacity to obtain and use unemployment insurance wage record data maintained by State Employment Security Agencies (SESAs) needed to implement a proposed evaluation standard and associated performance indicators mandated by the 1992 amendments to the Rehabilitation Act, as amended by the Workforce Investment Act of 1998.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2252. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov*. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. *Please specify the complete title of the information collection when making your request.*

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at (202) 708–6287 or via her e-mail address Sheila.Carey@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 03–8605 Filed 4–8–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 9, 2003.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this

collection on the respondents, including through the use of information technology.

Dated: April 3, 2003.

John D. Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Revison.

Title: Performance Report for the Jacob K. Javits Fellowship Program.

Frequency: Annually.

Affected Public: Not-for-profit institutions; businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 115.

Burden Hours: 690.

Abstract: This information collection provides the U.S. Department of Education with information needed to determine if grantees have made substantial progress toward meeting the Program's objectives and allow program staff to monitor and evaluate the Program. The Congress has mandated (through the Government's Performance and Results Act of 1993) that the U.S. Department of Educaton provide documentation about the progress being made by the Program.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2256. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address vivian_reese@ed.gov. Requests may also be electronically mailed to the Internet address OCIO_RIMG@ed.gov or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at (202) 708–9266. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 03–8606 Filed 4–8–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. EA–278]

Application To Export Electric Energy; Direct Commodities Trading Inc.

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: Direct Commodities Trading Inc. (DCT) has applied for authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before May 9, 2003.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On March 26, 2003, the Office of Fossil Energy (FE) of the Department of Energy (DOE) received an application from DCT to transmit electric energy from the United States to Canada. DCT, a Canadian corporation, does not own or control any electric power generation or transmission facilities and does not have a franchised electric power service area.

DCT will purchase the power to be exported from the New York Independent System Operator and transmit it on its own behalf to Canada over the existing international transmission facilities currently owned by the New York Power Authority and Niagara Mohawk Power Corporation. The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by DCT, as more fully described in the application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Procedural Matters: Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's rules of practice and procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the date listed above.

Comments on the DCT application to export electric energy to Canada should be clearly marked with Docket EA–278. Additional copies are to be filed directly with Jean-Jacques Taza, DCT Inc., 4821 Park Avenue, Suite 6, Montreal, Quebec, Canada H2V 4E7.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy home page at *http://www.fe.doe.gov.* Upon reaching the Fossil Energy Home page, select ''Regulatory'' Programs,'' then ''Electricity Regulation,'' and then ''Pending Proceedings'' from the options menus.

Issued in Washington, DC, on April 2, 2003.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 03–8635 Filed 4–8–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Energy Conservation Program for Consumer Products; Representative Average Unit Costs of Energy

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

ACTION: Notice.

SUMMARY: In this notice, the Department of Energy (DOE or Department) is forecasting the representative average unit costs of five residential energy sources for the year 2003 persuant to the Energy Policy and Conservation Act. The five sources are electricity, natural gas, No. 2 heating oil, propane, and kerosene.

EFFECTIVE DATE: The representative average unit costs of energy contained

in this notice will become effective May 9, 2003, and will remain in effect until further notice.

FOR FURTHER INFORMATION CONTACT: Brian Card, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. (202) 586–9228.

Francine Pinto, Esq., U.S. Department of Energy, Office of General Counsel, Forrestal Building, Mail Station GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0103. (202) 586–9507.

SUPPLEMENTARY INFORMATION: Section 323 of the Energy Policy and Conservation Act (Act) (42 U.S.C. 6291—6309) requires that DOE prescribe test procedures for the determination of the estimated annual operating costs or other measures of energy consumption for certain consumer products specified in the Act (42 U.S.C. 6293). These test procedures are found in 10 CFR part 430, subpart B.

Section 323(b) of the Act requires that the estimated annual operating costs of a covered product be calculated from measurements of energy use in a representative average use cycle or period of use and from representative average unit costs of the energy needed to operate such product during such cycle (42 U.S.C. 6293(b)). The section further requires that DOE provide information to manufacturers regarding the representative average unit costs of energy (42 U.S.C. 6293(b)(4)). This cost information should be used by manufacturers to meet their obligations under section 323(c) of the Act. Most notably, these costs are used to comply with Federal Trade Commission (FTC) requirements for labeling. Manufacturers are required to use the revised DOE representative average unit costs when the FTC publishes new ranges of comparability for specific covered products, 16 CFR part 305. Interested parties can also find information covering the FTC labeling requirements at *www.ftc.gov/appliances.*

The Department last published representative average unit costs of residential energy for use in the Energy Conservation Program for Consumer Products Other Than Automobiles on April 24, 2002 (67 FR 20104). Effective May 9, 2003, the cost figures published on April 24, 2002, will be superseded by the cost figures set forth in this notice.

The Department's Energy Information Administration (EIA) has developed the 2003 representative average unit after-tax costs found in this notice. The representative average unit after-tax costs for electricity, natural gas, No. 2 heating oil, and propane are based on simulations used to produce the November, 2002, EIA *Short-Term Energy Outlook,* DOE/EIA–0226 (02/11), and reflect the mid-price scenario. The representative average unit after-tax costs for kerosene are derived from their relative prices to that of heating oil, based on 1997–2001 averages for these two fuels. The source for these price data is the October, 2002, *Monthly Energy Review* DOE/EIA–0035(2002/10). The *Short-Term Energy Outlook* and the *Monthly Energy Review* are available at the National Energy Information Center, Forrestal Building, Room 1F–048, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–8800. These publications can also be found on the EIA Web site: *www.eia.doe.gov.*

The 2003 representative average unit costs pursuant to section 323(b)(4) of the Act are set forth in Table 1, and will become effective May 9, 2003. They will remain in effect until further notice.

Issued in Washington, DC, on April 4, 2003.

David K. Garman,

Assistant Secretary for Energy Efficiency and Renewable Energy.

TABLE 1.—REPRESENTATIVE AVERAGE UNIT COSTS OF ENERGY FOR FIVE RESIDENTIAL ENERGY SOURCES—(2003)

Type of energy	Per million Btu [1]	In commonly used terms	As required by test procedure
Electricity	$24.65	8.41¢/kWh [2,3]	$.0841/kWh.
Natural gas	8.16	81.6¢/therm [4] or $8.37/MCF [5,6]	.00000816/Btu.
No. 2 Heating Oil	8.80	$1.22/gallon [7]	.00000880/Btu.
Propane	13.25	$1.21/gallon [8]	.00001325/Btu.
Kerosene	10.59	$1.43/gallon [9]	.00001059/Btu.

[1] Btu stands for British thermal units.
[2] kWh stands for kilowatt hour.
[3] 1 kWh = 3,412 Btu.
[4] 1 therm = 100,000 Btu. Natural gas prices include taxes.
[5] MCF stands for 1,000 cubic feet.
[6] For the purposes of this table, one cubic foot of natural gas has an energy equivalence of 1,026 Btu.
[7] For the purposes of this table, one gallon of No. 2 heating oil has an energy equivalence of 138,690 Btu.
[8] For the purposes of this table, one gallon of liquid propane has an energy equivalence of 91,333 Btu.
[9] For the purposes of this table, one gallon of kerosene has an energy equivalence of 135,000 Btu.

[FR Doc. 03–8634 Filed 4–8–03; 8:45 am]
BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0090; FRL–7297–4]

EPA's Office of Water and its Contractor, ICF and its Subcontractors RTI, Sci Comm, Inc., and Appl, Inc.; Transfer of Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be tranferred to EPA's Office of Water and its contractor, ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., in accordance with 40 CFR 2.307(h)(3), and 2.308(h)(2). ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., have been awarded a contract to perform work for EPA's Office of Water. Access to this information will enable ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., to fulfill the obligations of the contract.

DATES: EPA's Office of Water and its contractor, ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., will be given access to this information on or before April 21, 2003.

FOR FURTHER INFORMATION CONTACT: Erik R. Johnson, FIFRA Security Officer, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7248; e-mail address: *johnson.erik@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action applies to the public in general. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *EPA Docket.* EPA has established an official public docket for this action under docket ID number OPP–2003–0090. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although, a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA dockets. You may use EPA dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. Contractor Requirements

Under Contract No. 68–C0–2009, ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., will perform the following tasks:

1. *Human health.* The contractor shall prepare summaries of peer-reviewed literature on toxic and clinical endpoints, as specified in a work assignment; screening analyses that display and compare all available data for a pollutant, and build on the summaries; analyses for the purpose of supporting findings; and evaluate, and revise health effects documents.

2. *Sewage sludge.* The contractor shall provide technical support in the preparation, evaluation, and revision of procedures for selecting pollutants-of-concern in sewage sludge that is used or disposed of, and shall provide technical support during the evaluation of those pollutants.

3. *Laboratory analyses and laboratory/field studies.* The contractor shall analyze samples (e.g., water waste, surface water, drinking water, or sewage sludge) for pollutants to support development of water quality criteria, maximum contaminate level goals, sewage sludge pollutant limits, and other program requirements, as specified in a work assignment.

OPP has determined that access by ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., to information on all pesticide chemicals is necessary for the performance of this contract.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR, 2.307(h)(3), this contract with ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., prohibits use of the information for any purpose not specified in the contract; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the subcontractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the FIFRA Information Security Manual. In addition, ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., are required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., until the requirements in this document have been fully satisfied. Records of information provided under this contract will be maintained by EPA Project Officers for this contract. All information supplied to, ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., by EPA for use in connection with this contract will be returned to EPA when ICF and its subcontractors RTI, Sci Comm, Inc., and Appl, Inc., have completed their work.

List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: March 27, 2003.

Linda Vlier Moos,

Acting Director, Information Resources and Services Division, Office of Pesticide Programs.

[FR Doc. 03–8373 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0095; FRL–7301–8]

Dynamac Corporation; Transfer of Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be tranferred to Dynamac Corporation in accordance with 40 CFR 2.307(h)(3) and 2.308(i)(2). Dynamac Corporation has been awarded multiple contracts to perform work for OPP, and access to this information will enable Dynamac Corporation to fulfill the obligations of the contracts.

DATES: Dynamac Corporation will be given access to this information on or before April 14, 2003.

FOR FURTHER INFORMATION CONTACT: Erik R. Johnson, FIFRA Security Officer, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7248; e-mail address: *johnson.erik@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action applies to the public in general. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0095. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. Contractor Requirements

1. Under Contract No. 68–W0–0070, the contract shall require the contractor to research, evaluate, and analyze data and information pertaining to the ecotoxicity of pesticides and concentrations of pesticides in the environment—including soil, water, wildlife food items such as foliage and insects, and to complete ecological risk assessments as specified in the Statement of Work. Assessments completed by the contractor shall analyze all valid and adequate data, including data studies retrieved from the open literature, as well as any ecological toxicity documents provided by registrants or other governmental bodies and present in detailed summary of the results.

2. Under Contract No. 68–W0–0171, this contract will provide support primarily in the area of review and evaluation of available data pertaining to the chemistry and fate of pesticides in the environment (including the evaluation of environmental monitoring data), and, secondarily, the assessment of pesticide fate and transport in the environment. It may require the contractor, on occasion, to conduct research to understand science issues, support scientific workshops, conduct analyses of issues and provide science policy options. EPA's Environmental Fate and Evaluation Division (EFED) will make available to the contractor the data, studies, and information which is to be reviewed.

These contracts involve no subcontractors.

OPP has determined that the contracts described in this document involve work that is being conducted in connection with FIFRA, in that pesticide chemicals will be the subject of certain evaluations to be made under the contracts. These evaluations may be used in subsequent regulatory decisions under FIFRA.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(3), the contracts with Dynamac Corporation, prohibits use of the information for any purpose not specified in these contracts; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the FIFRA Information Security Manual. In addition, Dynamac Corporation is required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Dynamac Corporation until the requirements in this document have been fully satisfied. Records of information provided to Dynamac Corporation will be maintained by EPA Project Officers for these contracts. All information supplied to Dynamac Corporation by EPA for use in connection with these contracts will be returned to EPA when Dynamac Corporation has completed its work.

List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: April 1, 2003.

Linda Vlier Moos,

Acting Director, Information Resources and Services Division, Office of Pesticide Programs.

[FR Doc. 03–8655 Filed 4–8–03; 8:45 am]

[BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7479–6]

Peer-Review Workshop on the Environmental Effects of Ozone and Related Photochemical Oxidants

AGENCY: Environmental Protection Agency.

ACTION: Notice of peer-review workshop and public meeting.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing a peer review workshop to facilitate preparation of the Environmental Effects Chapter to be included in a revised version of the EPA document Air Quality Criteria for Ozone and Related Photochemical Oxidants (Ozone Criteria Document, EPA 600/P–93/004aF–cF). Draft sections for this chapter, prepared (with the assistance of qualified scientists under contract) by the EPA's National Center for Environmental Assessment-Research Triangle Park Division (NCEA–RTP) within EPA's Office of Research and Development, will be reviewed at the Workshop. NCEA will then consider the peer-review advice in revising the sections and incorporating them into the overall Environmental Effects Chapter of the First External Review Draft Ozone Criteria Document to be released later for public comment.

DATES: The peer-review workshop will begin on Tuesday, April 22, 2003, at 9 a.m., and end on Wednesday, April 23, 2003, at 5 p.m. Members of the public are invited to attend as observers.

ADDRESSES: The peer-review workshop will be held at the Sheraton Imperial Hotel, 4700 Emperor Boulevard, Durham, North Carolina 27703. Sleeping room reservations may be made at 919–541–5050. Logistics for the workshop are being arranged by Science Applications International Corporation (SAIC), an EPA contractor. To attend the workshop, register by Monday, April 21, 2003, by calling SAIC at 703–318–4678 or by sending a facsimile to 703–736–0826. You can also register in advance via e-mail at *tcs-events@saic.com*. Space is limited, and reservations will be accepted on a first-come, first-served basis. On-site registration on April 22 and 23 will also be available, as space allows.

FOR FURTHER INFORMATION CONTACT: For workshop information and logistics, contact SAIC at: telephone: 703–318–4678; facsimile: 703–736–0826. For technical information, contact Dr. Robert W. Elias, U.S. EPA, NCEA–RTP, B243–01, Research Triangle Park, NC 27711; telephone: 919–541–4167; facsimile: 919–541–1818; or e-mail: *elias.robert@epa.gov*.

SUPPLEMENTARY INFORMATION: As discussed in a previous call for information (65 FR 57810, September 26, 2000), EPA is undertaking to review and, where appropriate, update and revise the Ozone Criteria Document last issued in July 1996. Pursuant to section 109 of the Clean Air Act, 42 U.S.C. 740, EPA periodically reviews, and when appropriate, updates and revises, the air quality criteria for ozone published under Section 108 of the Act, 42 U.S.C. 7408. EPA then considers these air quality criteria when it periodically reviews the National Ambient Air Quality Standards (''NAAQS'') for ozone. *See* 42 U.S.C. 7409(d). As part of the review of the air quality criteria for ozone, a series of peer-review workshops will be convened to discuss draft sections and chapters for the revised Ozone Criteria Document. Preliminary outlines for the proposed chapters were presented in the draft Project Work Plan released for public comment (66 FR 67524, December 31, 2001) and for review by the Clean Air Scientific Advisory Committee (CASAC) of EPA's Science Advisory Board (68 FR 3527, January 24, 2003). The first workshop (to be held April 22–23, 2003) will cover draft sections on the environmental effects of ozone, followed at a later date by workshops on tropospheric ozone formation, concentrations, exposure aspects, and health effects. Copies of the draft materials will be made available to the public at the workshops. Peer-review comments and workshop discussions will be taken into account in revising the draft sections and chapters in preparation for release to the public as part of the First External Review Draft of the Ozone Criteria Document. Ample opportunity will be provided at that time for public review and submission of written comments.

Interested parties are invited to assist the EPA in further developing and refining the scientific information base by identifying and submitting pertinent new information on potential health and environmental effects of ozone. In order to be considered for possible inclusion in the criteria document, submitted information should be published or be accepted for publication in a peer-reviewed scientific journal. Such information should be provided to Dr. Robert W. Elias via the above-noted contact information.

Dated: April 3, 2003.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

[FR Doc. 03–8660 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7478–8]

Meeting of the National Drinking Water Advisory Council; Notice of Public Meeting

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Under section 10(a)(2) of Public Law 92–423, ''The Federal Advisory Committee Act,'' notice is hereby given of a meeting of the National Drinking Water Advisory Council (NDWAC), established under the Safe Drinking Water Act, as amended (42 U.S.C. 300f *et seq.*). The Council will hear presentations and have discussions on topics important to the Environmental Protection Agency's (EPA's) national drinking water program, including, but not limited to: status reports from the NDWAC's work groups on Affordability and the Contaminant Candidate List, and upates on regulatory activity, source water protection initiatives, and the development of EPA's new strategic plan.

DATES: The Council meeting will be held on May 14, 2003, from 8:30 a.m. until 5:30 p.m. and May 15, 2003, from 8:30 a.m. until 1 p.m., Eastern Standard Time.

ADDRESSES: The meeting will be held at The Washington Terrace Hotel located at 1515 Rhode Island Ave., NW., Washington, DC and is open to the public.

FOR FURTHER INFORMATION CONTACT: Members of the public that would like to attend the meeting, present an oral statement, or submit a written statement, should contact Brenda Johnson, Designated Federal Officer, National Drinking Water Advisory Council, by phone at (202) 564–3791, by e-mail to *johnson.brendap@epa.gov,* or by regular mail to the U.S. Environmental Protection Agency,

Office of Ground Water and Drinking Water (M/C 4601M), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: The Council encourages the public's input and will allocate one hour during the meeting for this purpose. Oral statements will be limited to five minutes, and it is preferred that only one person present the statement on behalf of a group or organization. To ensure adequate time for public involvement, individuals or organizations interested in presenting an oral statement should notify the Council's Designated Federal Officer by telephone at (202) 564–3791, no later than May 2, 2003. Any person who wishes to file a written statement can do so before or after a Council meeting. Written statements received no later than May 2, 2003 will be distributed to all members of the Council before any final discussion or vote is completed. Any statements received after the meeting will become part of the permanent meeting file and will be forwarded to the Council members for their information.

Any person needing special accommodations at this meeting, including wheelchair access, please contact Brenda Johnson (see **FOR FURTHER INFORMATION CONTACT** section). Arrangements need to be made at least five business days before the meeting so that appropriate special accommodations can be made.

Dated: April 2, 2003.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 03–8669 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0104; FRL–7301–2]

Response to Requests to Cancel Certain Chromated Copper Arsenate (CCA) Wood Preservative Products and Amendments to Terminate Certain Uses of other CCA Products

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of a Cancellation Order.

SUMMARY: This notice announces that a cancellation order was signed on March 17, 2003, in response to the use terminations and cancellations voluntarily requested by the registrants of wood preservative pesticide products containing Chromated Copper Arsenate (CCA) pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. In addition to stating the Agency's response to the requests for cancellation of certain CCA products and amendments to terminate certain uses of other CCA products, this notice also addresses the considerable number of comments received in response to the Agency's requests for public comments on the above stated requests. In the cancellation order, the Agency granted certain of the aforementioned requests and did not take any action regarding certain other elements of the requests. Any sale, distribution, or use of affected products listed in this notice will only be permitted if such distribution, sale, or use is consistent with terms and conditions set forth in the cancellation order.

DATES: The effective dates of cancellation are as follows:(1) For affected product registrations—March 17, 2003 (2) For affected product registrations amended to delete terminated uses—May 16, 2003.

FOR FURTHER INFORMATION CONTACT: By mail: Bonaventure Akinlosotu, Office of Pesticide Programs (7510C), Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460. Office location for commercial courier delivery, telephone number and e-mail address: Rm. 308, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703) 605–0653; e-mail: *akinlosotu.bonaventure@epa.gov*.

SUPPLEMENTARY INFORMATION: This announcement consists of five parts. The first part contains general information. The second part provides background, and summarizes the use terminations and product cancellations requested by the CCA product registrants. The third part summarizes the comments received in response to the Agency's request for public comments on the aforementioned registrants' requests, and provides the Agency's response to the comments. The fourth part provides a summary of the Agency's decision on the voluntary cancellation and use termination requests. The fifth part sets forth the existing stocks provisions that the Agency authorized in the cancellation order.

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. You may be potentially affected by this action if you manufacture, sell, distribute, or use CCA products. The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at *http://www.epa.gov/*. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules'' and then look up the entry for this document under the ''**Federal Register**—Environmental Documents.'' You can also go directly to the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–2003–0104. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Background and Summary of Registrants' Request to Cancel Products and Delete Uses

On February 22, 2002, the Agency announced the receipt of requests from the registrants of wood preservative

pesticide products containing Chromated Copper Arsenate (CCA) to cancel certain CCA products and to amend the registrations to terminate certain uses of other CCA products (67 FR 8244)(FRL–6826–8). Another notice was issued (67 FR 13328, March 22, 2002)(FRL–6831–6) to extend the comment period until April 9, 2002. The requests proposed that only certain uses of CCA be allowed as of December 31, 2003. The registrants stated in their requests that their requests were being made as a result of current and projected market demand for CCA products and the availability of new generation wood treatment products. The Agency considers these voluntary moves toward arsenic-free wood treatment products as a positive step, particularly for our nation's children. The Agency believes that reducing the potential residential exposure to a known human carcinogen is desirable. This transition affects all future residential uses of wood treated with CCA, including wood used in playground structures, decks, picnic tables, landscaping timbers, residential fencing, patios, walkways and boardwalks.

EPA received requests from four registrants (Table 1 of this unit) to cancel 2 products (Table 2 of this unit), and to amend 17 other affected end-use and manufacturing-use registrations to terminate all uses of such products (Table 3 of this unit) with the exception of the treatment of wood products that fall under the American Wood-Preservers' Association (AWPA) standards (based on the 2001 edition of the AWPA Standards) listed in the text of the requested label amendment stated below.

TABLE 1.—REGISTRANTS REQUESTING VOLUNTARY TERMINATION OF CERTAIN USES AND/OR CANCELLATION OF PRODUCTS LISTED IN TABLES 2 AND 3

EPA Company Number	Company Name and Address
003008	Osmose, Inc., 980 Ellicott Street, Buffalo, NY 14209
010465	Chemical Specialties. Inc.,One Woodlawn Green, Suite 250, 200 E. Woodlawn Road, Charlotte, NC 28217
035896	Phibro-Tech, Inc., Fort Lee, NJ 07024
062190	Arch Wood Protection, Inc., 1955 Lake Park Drive, Suite 250, Smyrna, GA 30080

TABLE 2.—REGISTRATIONS WITH REQUESTS FOR CANCELLATION OF PRODUCTS

Registration Number	Product Name
62190–5	WolmanacR Concentrate 70%
62190–11	CCA Type C 50% Chromated Copper Arsenate

TABLE 3.—REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO TERMINATE CERTAIN USES

Registration Number	Product Name
End Use Products	
3008–17	K–33–C (72%) Wood Preservative
3008–21	Special K–33 Preservative
3008–34	K–33 (60%) Wood Preservative
3008–35	K–33 (40%) Type-B Wood Preservative
3008–36	K–33–C (50%) Wood Preservative
3008–42	K–33–A (50%) Wood Preservative
3008–72	Osmose Arsenic Acid 75%
10465–26	CCA Type-C Wood Preservative 50%
10465–28	CCA Type-C Wood Preservative 60%
10465–32	CSI Arsenic Acid 75%
35896–2	Wood-Last Conc. Wood Preservation AQ 50% Solution CCA-Type A
62190–2	Wolmanac Concentrate 50%
62190–8	Wolmanac Concentrate 72%
62190–14	Wolmanac Concentrate 60%

TABLE 3.—REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO TERMINATE CERTAIN USES—Continued

Registration Number	Product Name
Manufacturing Use Products	
3008–66	Arsenic Acid 75%
10465–32	CSI Arsenic Acid 75%
62190–7	Arsenic Acid 75%

For affected manufacturing-use products, the label amendments were proposed to read as follows:

Effective December 31, 2003, this product may only be used (1) for formulation of the following end-use wood preservative products: ammoniacal copper zinc arsenate (ACZA) or chromated copper arsenate (CCA) labeled in accordance with the Directions for Use shown below, or (2) by persons other than the registrant, in combination with one or more other products to make: ACZA wood preservative; or CCA wood preservative that is used in accordance with the Directions for Use shown below.

Effective December 31, 2003, this product may only be used for preservative treatment of the following categories of forest products and in accordance with the respective cited standard (noted parenthetically) of the 2001 edition of the American Wood-Preservers Association Standards: Lumber and Timber for Salt Water Use Only (C2), Piles (C3), Poles (C4), Plywood (C9), Wood for Highway Construction (C14), Poles, Piles and Posts Used as Structural Members on Farms, and Plywood Used on Farms (C16), Wood for Marine Construction (C18), Round Poles and Posts Used in Building Construction (C23), Sawn Timber Used To Support Residential and Commercial Structures (C24), Sawn Crossarms (C25), Structural Glued Laminated Members and Laminations Before Gluing (C28), Structural Composite Lumber (C33), and Shakes and Shingles (C34). Forest products treated with this product may only be sold or distributed for uses within the AWPA Commodity Standards under which the treatment occurred.

For affected end-use products, the label amendments were proposed to read as follows:

Effective December 31, 2003, this product may only be used for preservative treatment of the following categories of forest products and in accordance with the respective cited standard (noted parenthetically) of the 2001 edition of the American Wood-Preservers Association Standards: Lumber and Timber for Salt Water Use Only (C2), Piles (C3), Poles (C4), Plywood (C9), Wood for Highway Construction (C14), Poles, Piles and Posts Used as Structural Members on Farms, and Plywood Used on Farms (C16), Wood for Marine Construction (C18), Round Poles and Posts Used in Building Construction (C23), Sawn Timber Used To Support Residential and Commercial Structures (C24), Sawn Crossarms (C25), Structural Glued Laminated Members and Laminations Before Gluing (C28), Structural Composite Lumber (C33), and Shakes and Shingles (C34). Forest products treated with this product may only be sold or distributed for uses within the AWPA Commodity Standards under which the treatment occurred.

In addition, the registrants requested that EPA allow use of the previous (unamended) labels for a period of 60 calendar days from the date on which the particular affected registrant receives EPA's approval of the amendment(s) to terminate use(s), and that EPA allow a further amendment by notification on or before December 1, 2003, to (1) delete the use directions in effect prior to these amendments, and (2) to delete the preface phrase ''Effective December 31, 2003,'' from the amended labels such that the statement begins by reading, ''This product may only be used for preservative treatment of the following categories of forest products and in accordance with the respective cited standard (noted parenthetically) of the 2001 edition of the American Wood-Preservers' Association Standards* * *.'' Furthermore, the registrants stated in their letters that they would neither amend nor withdraw their requests for cancellation/use terminations before EPA acts on them. Additionally, the registrants will notify their customers of the amended labels by certified mail after EPA acts on the requests.

III. Summary of Public Comments Received and Agency Response to Comments

The Agency issued a notice of receipt of the aforementioned requests along with a solicitation for public comments (February 22, 2002), followed by another notice to extend the comment period until April 9, 2002 (March 22, 2002). Approximately 6,700 comments were submitted by the wood preservative industry, the chromium industry, the lumber industry, the agricultural industry, Kentucky and Texas State government officials, federal government officials, environmental groups, businesses and private citizens of Corpus Christi, Texas, as well as from others. Based on the nature of the concern(s) expressed, the comments were grouped into four major categories: (1) business and economic concerns from the Agricultural Community and Wood Treatment Industry, (2) concerns with the possible adverse economic impact on the Chromium Industry and Corpus Christi, Texas, (3) concerns raised by Environmental Groups, and (4) other significant, pertinent comments.

Generally, the purpose of soliciting comments pursuant to Section 6(f) of FIFRA is to give an opportunity to comment to those individuals or businesses that would be affected by a registrant's requested action and to those who may want to apply for a registration for a pesticide for which there is a request to cancel the registration or to terminate use(s). This process helps to ensure that EPA is basing its regulatory decisions on the most up-to-date and complete information. The Agency did not specifically solicit comments for the purpose of determining if the voluntary cancellation/use termination requests were comprehensive enough or fast enough. Because these are voluntary cancellation/use termination requests, the registrants have proposed their own terms of cancellation/use termination. This type of public comment opportunity under Section 6(f) differs from the current reregistration public process in that during the reregistration public process the Agency solicits comments on a draft preliminary risk assessment and on draft risk mitigation proposals in anticipation of actions that may not be voluntary. Therefore, the scope of the public comment opportunity in the reregistration process is much broader than the scope of the opportunity in this voluntary cancellation/use termination.

Below is the summary of the comments received in response to EPA's request for public comments, along with the corresponding Agency response.

A. Business and Economic Concerns from the Agricultural Community and Wood Treating Industry

Comments. The majority of the comments received within this category specifically requested that the Agency not accept the request to cancel the use of CCA-treated lumber for agricultural

fence posts based on the lack of exposure to children and the higher cost of the alternative products. These comments were received from the wood preservative, chromium, lumber, and agricultural industries, as well as private citizens, businesses, and town officials of Corpus Christi. With respect to exposure to children, the commenters stated their belief that there is little exposure to children from agricultural fencing (as compared to a deck or playground constructed of CCA treated wood) because agricultural fences are generally far away from residences and because children typically do not play on a fence as they would a deck or playground. In addition, the commenters stated that the exclusion of CCA-treated wood for agricultural fence posts from the label would cause an adverse economical impact on the agricultural, lumber, and wood treatment industries due to the higher cost of the alternative treatment products. The commenters stated that the wood treatment plants, the agricultural industry, and the chromium industry may suffer considerable financial and market damage due to the cost of converting wood preserving plants currently treating with CCA to an alternative chemical (estimated cost ranges from $75,000 to $125,000), and the costs of the alternative treatment products (estimated to be 10–15% higher than CCA products at the retail level and 30% higher than CCA products for the agricultural industry). The commenters stated their belief that as a result of the above stated concerns, there will be loss of employment within the industries concerned. The Agency also received a number of comments regarding the use of CCA to treat wood used for permanent wood foundations. The comments received indicated a need to retain this important use and that it posed little opportunity for residential exposure.

Agency's response. The Agency is currently separately from this voluntary cancellation/use termination action, reviewing the exposure and risk (as well as the benefits) of all uses of CCA through its reregistration process. In light of the issues raised by commenters with regard to agricultural fence post and permanent wood foundation uses, EPA believes it is appropriate to evaluate the commenters' concerns during that review. For example, fence posts treated according to AWPA Standard C16 are for agricultural purposes only. This particular type of fence post is used by many farmers and ranchers for barbed and other wire fencing. The distribution channels, aesthetics, size, round shape, and random diameter of that type of fence post effectively limit its use for specific agricultural purposes, and make it inappropriate for residential applications. The Agency has determined, based on available information and field investigations, that agricultural fence posts are not sold into the residential market. On the other hand, wood treated for fence posts according to AWPA Standard C5 is sold at the retail level for residential fencing and can be used for other residential applications as well.

Rather than delay acceptance of other portions of the voluntary cancellation/use termination requests until the reregistration review is complete, EPA has decided to accept the requests for voluntary cancellation/use termination for the other uses and defer any action with respect to requests to terminate agricultural fence post and permanent wood foundation uses until the Agency has evaluated those uses through the reregistration process. If at any time during the reregistration review the Agency determines it has sufficient information to take an action, that is, to either accept or refuse the requests for use termination of those uses, the Agency will take appropriate action. EPA believes this temporary deferral of action is consistent with the principle to phase out CCA for residential uses.

B. Concerns With the Possible Adverse Economic Impact on the Chromium Industry and Corpus Christi, Texas

Comments. Approximately 430 comments were received regarding the potential adverse economic effect from the proposed cancellation or termination of CCA products or treated wood uses on the chromic acid manufacturing plant in Corpus Christi, Texas. The residents of Corpus Christi have within their city limits a plant owned by Elementis Chromium L.P. (Elementis), the only major manufacturer of chromic acid in the United States. This chromic acid plant employs more than 100 residents of the Corpus Christi area and by its supply purchases and salaries, inputs about $40 million per year into the economy of Corpus Christi. Elementis believes the projected 70% decrease in total sales of CCA-treated products 2 years after the amendment is accepted will have adverse economic consequences on the status of the plant operations and the city of Corpus Christi.

Also, the chromium industry and wood treatment industry requested EPA limit its action regarding the phase-out to only CCA-treated playground structures and decks at this time, pending the outcome of the risk assessment being currently conducted by the Agency. It was requested that certain uses of CCA-treated wood, which were proposed for termination be allowed to continue. Specifically, the commenters requested that CCA-treated wood continue to be permitted for the following uses under the AWPA Commodity Standards C2 (Lumber, Timber, Bridge Ties, Mine Ties for above-ground, soil and freshwater use), C5 (Fence Posts), C15 (Wood for Commercial-Residential Construction-Preservative Treatment by Pressure Processes), C16 (Agricultural Fence Posts and certain Wood used on Farms), and C22 (Permanent Wood Foundation Material).

Agency's response. By way of background, under FIFRA, a registration or ''license'' is issued to an applicant for a pesticide product once all necessary data requirements in support of the registration have been satisfied and the application has been found to be acceptable. In order to obtain a registration for a pesticide under FIFRA, an applicant for registration must demonstrate that the pesticide satisfies the statutory standard for registration. The standard requires, among other things, that the pesticide perform its intended function without causing unreasonable adverse effects on the environment. The term ''unreasonable adverse effects on the environment'' is defined, among other things, as ''any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.''

Under the statute, a registrant may at any time voluntarily request cancellation of a particular pesticide registration or termination of certain uses for the registration. Upon receipt of such requests, the Agency acts upon the requests pursuant to section 6(f) of FIFRA by notifying the public and soliciting comments from the public on the requests received. The Agency reviews the comments and may, based upon the comments received and/or any information or knowledge it may have concerning the pesticide and its uses in the environment, accept or deny the request either in whole or part.

With regard to the comments received from the chromium industry and on behalf of residents of Corpus Christi, Texas, as stated earlier, at this time, the Agency is not acting upon certain use terminations proposed by the registrants. Specifically, the Agency is deferring action on two use terminations addressed in the comments, agricultural fence posts and permanent wood

foundations. The Agency will examine such uses as part of its reregistration assessment of CCA products. However, the remaining voluntary cancellation requests were finalized on March 17, 2003, and the use terminations are effective as of May 16, 2003.

C. Concerns Raised by Environmental Groups

Comments. In their comments, the environmental groups (Clean Water Action, Healthy Building Network, and others) expressed concerns with the estimated 75 billion board feet (estimated by the American Wood Preservers Institute) of CCA-treated wood currently in use in residential settings. This proposed voluntary cancellation request affects future residential uses of CCA products but does not address existing CCA-treated wood decks and play structures. The environmental groups urged EPA to complete the CCA risk assessments to determine the dangers posed by CCA-treated wood currently in use. Concerns were also expressed over the safety of building contractors who come into contact with CCA-treated wood used during building construction and with utility workers working with utility poles. As a result, there were requests to extend use restrictions to include all uses, residential and industrial.

The environmental groups also believe that the time frame for the phase-out of CCA-treated wood from residential uses is too lengthy, and that the phase-out is not comprehensive enough. They appeared to assume that CCA-treated plywood would continue to be sold in retail stores indefinitely. The commenters also expressed concerns that the Agency doesn't address proper disposal of CCA-treated wood, and treated wood could be burned or dumped in landfills where it can contaminate soil and groundwater. They suggested that the registration be amended to include proper handling, use and disposal of CCA-treated wood.

Agency's response. The Agency acknowledges the concerns expressed by environmental groups regarding the potential risks of CCA to human health and the environment, and the need to proceed as quickly as possible given the potential risks. The Agency intends to address the commenters' concerns in two ongoing Agency processes in which the risk of the non-cancelled or terminated uses of CCA are currently being assessed. The Agency is currently conducting two risk assessments, one that focuses on children's exposure to CCA from play structures and decks constructed of CCA treated wood (uses of which are terminated pursuant to the cancellation order), and one that focuses on the remaining industrial and marine uses. The result of the children's exposure assessment will serve as the basis for determining if further action is needed concerning existing play structures and decks.

The Agency is also currently examining the use of CCA-treated wood in light of the latest science and safety standards, under EPA's reregistration process. Upon the completion of the overall risk assessment, which will address the remaining uses of CCA and any occupational hazards that may exist from exposure to CCA, and the benefits assessment, the Agency will announce its proposed approach and the public will be afforded an opportunity to provide comments. The Agency will then consider any comments received and make a final determination as to the reregistration eligibility of the remaining uses of CCA.

With respect to the disposal of CCA-treated wood, CCA-treated wood is classified as non-hazardous waste under the Federal Resource Conservation and Recovery Act (RCRA). Disposal of CCA-treated wood is addressed via the Consumer Awareness Program (CAP). The CAP is a voluntary program established in 1986 (and later updated in 2001) by the registrants of CCA products, to protect consumers by providing them with information on the proper handling, use and disposal of CCA-treated wood. Under this program, instructions on the proper handling, use and disposal of CCA-treated wood are disseminated to consumers upon purchasing CCA-treated wood products via the Consumer Safety Information Sheets (CSIS) and/or end tag labeling applied to the wood product itself. EPA also disseminates guidance to consumers to advise against burning CCA-treated wood. Additional information regarding the CAP, handling, use and disposal of CCA-treated wood can be obtained from the Agency's Web site at: *http://www.epa.gov/pesticides/citizens/1file.htm*.

D. Other Significant Pertinent comments

1. *Clarification regarding AWPA Standard C5—comment*. An inquiry was made as to the potential decision to allow wood to be treated with CCA for agricultural purposes (fence posts) under AWPA Standard C16 yet questioning why it would be a prohibited use under the AWPA Standard C5.

Agency response. As discussed earlier, the Agency is not taking any action on the requests to delete the agricultural fence post use of wood treated with CCA. Fence posts treated according to AWPA Standard C16 are for agricultural purposes only. This particular type of fence post is used by many farmers and ranchers for barbed and other wire fencing. The distribution channels, aesthetics, size, round shape, and random diameter of that type of fence post effectively limit its use for specific agricultural purposes, and make it inappropriate for residential applications. The Agency has determined, based on available information and field investigations, that agricultural fence posts are not sold into the residential market. Fence posts treated according to AWPA Standard C5, however, are for residential purposes. Prior to the voluntary cancellation/use terminations, the labels permitted wood treated for fence posts according to AWPA standard C5 to be used for residential fencing, and it could also possibly be used for other residential applications as well.

2. *CCA–treated wood export restrictions*— i. *Comment*. Comments sought clarification on whether wood treated with CCA can be exported to other countries for use in residential settings.

Agency response. As stated in this notice, under the Cancellation Order, effective December 31, 2003, wood treatment facilities are only allowed to treat wood products with CCA that are intended to be used only for those remaining uses approved on the CCA product label. Wood intended for use in prohibited residential settings may not be treated with CCA after December 30, 2003, unless the product being used is a pre-existing product and such use is permitted by that product label. (See Unit V: ''Provisions for Disposition of Existing Stocks'') Because of the method of product manufacture and distribution used in the wood preservation industry, the Agency does not expect any more than de minimus stocks to exist as of December 31, 2003, that do not bear the more restrictive label language. Hence, beginning December 31, 2003, unless the label on the affected product provides otherwise, it would be illegal to treat wood with CCA for any prohibited residential use, regardless of whether the treated wood is to be used in the United States or exported for use in other countries.

3. *Request received from American Wood-Preservers Institute (AWPI)—comment*. The American Wood-Preservers Institute, which provided comments on behalf of the companies that treat wood, requested that the proposed cancellation date of December 31, 2003, be extended an additional 3–6 months to allow further time for

treating plants' transition/conversion to alternative chemicals.

Agency response. The Agency recognizes that the transition to alternative chemicals may pose significant challenges to some stakeholders including wood treaters. However, in their request for voluntary cancellation/use termination, the registrants stated that a 22–month phase-in period was practicable based on the amount of time they believed is required to convert and retrofit the treating plants. The commenters did not present any substantial information that would render the requested time period inappropriate, and therefore EPA is not extending the requested time period.

IV. Summary of Agency's Decision Regarding the Voluntary Cancellation/Use Termination Requests

The Agency has accepted portions of the proposed voluntary cancellation/use termination requests and is deferring action on other portions. As stated earlier, in light of the issues raised by commenters with regard to the agricultural fence post and permanent wood foundation uses, the Agency has decided to defer its decision and action on the registrants' request to terminate these uses until the Agency has evaluated these uses through the reregistration process. If at any time during the reregistration review the Agency determines it has sufficient information to take any action, that is, to either accept or refuse the requests for termination of those uses, the Agency will take appropriate action at that time. EPA's decision on the other portions of the requests for voluntary cancellation/use termination is as follows:

1. The following product registrations were cancelled as of March 17, 2003:

62190–5	WolmanacR Concentrate 70%
62190–11	CCA Type C 50% Chromated Copper Arsenate

2. The following manufacturing product registrations were amended to delete certain terminated uses as of May 16, 2003:

3008–66	Arsenic Acid 75%
10465–32	CSI Arsenic Acid 75%
62190–7	Arsenic Acid 75%

For the above identified manufacturing-use products, the accepted amended labeling reads as follows:

Effective December 31, 2003, this product may only be used (1) for formulation of the following end-use wood preservative products: ammoniacal copper zinc arsenate (ACZA) or chromated copper arsenate (CCA) labeled in accordance with the Directions for Use shown below, or (2) by persons other than the registrant, in combination with one or more other products to make: ACZA wood preservative; or CCA wood preservative that is used in accordance with the Directions for Use shown below.

Effective December 31, 2003, this product may only be used for preservative treatment of the following categories of forest products and in accordance with the respective cited standard (noted parenthetically) of the 2001 edition of the American Wood-Preservers Association Standards: Lumber and Timber for Salt Water Use Only (C2), Piles (C3), Poles (C4), Plywood (C9), Wood for Highway Construction (C14), Round, Half Round and Quarter Round Fence Posts (C16), Poles, Piles and Posts Used as Structural Members on Farms, and Plywood Used on Farms (C16), Wood for Marine Construction (C18), Lumber and Plywood for Permanent Wood Foundations (C22), Round Poles and Posts Used in Building Construction (C23), Sawn Timber Used To Support Residential and Commercial Structures (C24), Sawn Crossarms (C25), Structural Glued Laminated Members and Laminations Before Gluing (C28), Structural Composite Lumber (C33), and Shakes and Shingles (C34). Forest products treated with this product may only be sold or distributed for uses within the AWPA Commodity Standards under which the treatment occurred.

3. The following end use product registrations were amended to delete certain terminated uses as of May 16, 2003:

3008–17	K–33–C (72%) Wood Preservative
3008–21	Special K–33 Preservative
3008–34	K–33 (60%) Wood Preservative
3008–35	K–33 (40%) Type-B Wood Preservative
3008–36	K–33–C (50%) Wood Preservative
3008–42	K–33–A (50%) Wood Preservative
3008–72	Osmose Arsenic Acid 75%
10465–26	CCA Type-C Wood Preservative 50%
10465–28	CCA Type-C Wood Preservative 60%
10465–32	CSI Arsenic Acid 75%
35896–2	Wood-Last Conc. Wood Preservation AQ 50% Solution CCA-Type A
62190–2	Wolmanac Concentrate 50%

62190–8	Wolmanac Concentrate 72%
62190–14	Wolmanac Concentrate 60%

For the above identified end-use products, the accepted amended label is to read as follows:

Effective December 31, 2003, this product may only be used for preservative treatment of the following categories of forest products and in accordance with the respective cited standard (noted parenthetically) of the 2001 edition of the American Wood-Preservers Association Standards: Lumber and Timber for Salt Water Use Only (C2), Piles (C3), Poles (C4), Plywood (C9), Wood for Highway Construction (C14), Round, Half Round and Quarter Round Fence Posts (C16), Poles, Piles and Posts Used as Structural Members on Farms, and Plywood Used on Farms (C16), Wood for Marine Construction (C18), Lumber and Plywood for Permanent Wood Foundations (C22), Round Poles and Posts Used in Building Construction (C23), Sawn Timber Used To Support Residential and Commercial Structures (C24), Sawn Crossarms (C25), Structural Glued Laminated Members and Laminations Before Gluing (C28), Structural Composite Lumber (C33), and Shakes and Shingles (C34). Forest products treated with this product may only be sold or distributed for uses within the AWPA Commodity Standards under which the treatment occurred.

4. Further amendments to the product label will be made by the registrants of the above identified amended registrations via notification to the Agency on or before December 1, 2003, to: (1) Delete the use directions in effect prior to these amendments, and (2) delete the preface phrase ''Effective December 31, 2003,'' from the amended labels such that the statement begins by reading, ''This product may only be used for preservative treatment of the following categories of forest products and in accordance with the respective cited standard (noted parenthetically) of the 2001 edition of the American Wood-Preservers' Association Standards...'' These specific changes may be done via notification.

5. The registrants of the above identified products will notify their customers of the amended registrations/labels by certified mail. This is to ensure that those who are affected by the cancellation order are aware of the labeling changes.

6. The cancellation order included existing stocks provisions as described in Unit V below.

7. The text in 40 CFR 152.132 provides that a distributor (or supplemental registrant) is considered an agent of the registrant for intents and purposes under the act, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product.

V. Provisions for Disposition of Existing Stocks

For purposes of this Order, the term ''existing stocks'' is defined, pursuant to EPA's existing stocks policy (56 FR 29362, June 26, 1991), as those stocks of a registered pesticide product which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation or amendment. Any distribution, sale or use of existing stocks in a manner inconsistent with the terms of the cancellation order or the existing stocks provisions contained in the order will be considered a violation of section 12(a)(2)(K) and/or section 12(a)(1)(A) of FIFRA. The following summarizes the effective dates of cancellation as well as the existing stocks provisions for each product subject to the cancellation order.

1. *Cancelled registrations (Table 2 in Unit II).* The effective date of cancellation was March 17, 2003, the date upon which the cancellation order was signed. Registrants have 60 calendar days following the signing of the cancellation order (until May 16, 2003) in which to sell or distribute products listed in Table 2. Registrants were notified of the signing of the cancellation order and of the required changes to labels on the date the order was signed by telephone and facsimile transmission. Any sale, distribution, or use by the registrants of these affected products on or after that date is prohibited. Sale, distribution, or use by persons other than the registrants may continue until supplies are exhausted. Additionally, sale, distribution or use of the stocks by persons other than the registrant in the channels of trade may continue until depleted, provided any sale, distribution, or use is in accordance with the existing label of that product.

2. *Registrations amended to delete terminated uses (Table 3).* The effective date of the cancellation effectuating the use terminations is May 16, 2003. The registrants' voluntary requests for termination of uses had requested that EPA allow use of the previous (unamended) labels for a period of 60 calendar days from the date on which the particular affected registrant receives EPA's approval of the amendments. The Agency is granting this request by making the effective date of cancellation 60 calendar days following the signing of the cancellation order. Registrants were notified of the signing of the cancellation order and of the required changes to labels on the date the order was signed by telephone and facsimile transmission. This 60-day period is intended to allow a sufficient period of time for an orderly transition to the amended labels without disrupting supply and availability of product. On or after May 16, 2003, any sale, distribution, or use of existing stocks by the registrants of the subject registrations is prohibited. Sale, distribution, or use by persons other than the registrants may continue until supplies are exhausted. Additionally, sale, distribution or use of the stocks in the channels of trade by persons other than the registrant may continue until depleted, provided any sale, distribution or use is in accordance with the existing label of that product.

List of Subjects

Environmental protection, Chromated Copper Arsenate, Pesticides and pests.

Dated: March 27, 2003.

Jack E. Housenger,

Acting Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 03–8372 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0074; FRL–7298–2]

Pesticide Product Registrations; Conditional Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of applications submitted by Plant Products Co. Ltd., Brampton, ON L6T 1G1, Canada, to conditionally register the pesticide products *Pseudozyma flocculosa* strain PF–A22 UL (TGAI) technical grade of the active ingredient and SPORODEX L an end-use product (EP) containing a new active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Sharlene R. Matten, Biopesticides and

Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0514; e-mail address: *matten.sharlene@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you produce crops or animals or manufacture food or pesticides. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0074. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, Crystal Mall #2, Arlington, VA (703) 305–5805. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. Did EPA Conditionally Approve the Application?

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest. The Agency has considered the available data on the risks associated with the proposed use of *Pseudozyma flocculosa* strain PF–A22 UL, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of *Pseudozyma flocculosa* strain PF–A22 UL during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is in the public interest.

Consistent with section 3(c)(7)(C) of FIFRA, the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

III. Conditionally Approved Registrations

EPA issued a notice, published in the **Federal Register** of October 4, 2000 (65 FR 59185) (FRL–6742–1) (OPP–30500), which announced that Jellinek, Schwartz and Connolly, Inc., 1525 Wilson Blvd., Suite 600, Arlington, VA for Plant Products Co. Ltd., 314 Orenda Road, Brampton, Ontario, Canada, had submitted applications for (EPA file symbols 69697–R and 69697–G) to register pesticide products containing *Pseudozyma flocculosa*.

The following products were approved on September 20, 2002 to control powdery mildew disease on greenhouse-grown cut roses and English seedless cucumbers:

1. *Pseudozyma flocculosa* strain PF–A22 UL (TGAI) (EPA Registration Number 69697–1).

2. Sporodex L Biological Fungicide (EPA Registration Number 69697–3).

Both conditional registrations were signed on September 20, 2002 and will expire on September 30, 2004. EPA is requiring the registrant to provide data by October 31, 2003 showing detailed analysis of microbial contaminants in production batches, and reporting any incidents of hypersensitivity or other adverse health incidents to workers, applicators, or bystanders. In addition, EPA is requiring storage stability data for Sporodex L Biological Fungicide, and an acute pulmonary infectivity/toxicity study for *Pseudozyma flocculosa* strain PF–A22 UL (TGAI) by October 31, 2003. After analyzing the submitted data, EPA will decide whether to approve these products for a full registration.

List of Subjects

Environmental protection, Chemicals, Microbes, Pesticides and pests.

Dated: March 31, 2003.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 03–8656 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0080; FRL–7300–3]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 75437–EUP–R from Great Lakes Fishery Commission (GLFC) requesting an experimental use permit (EUP) for the sea lamprey migratory pheromone, petromyzonol sulfate. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket ID number OPP–2003–0080, must be received on or before May 9, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Andrew Bryceland, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6928; e-mail address: *bryceland.andrew@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0080. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any

cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2003–0080. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2003–0080. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0080.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0080. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

The GLFC has submitted an application for an EUP to determine if the sea lamprey migratory pheromone, petromyzonol sulfate can be used to attract sea lamprey into traps located in rivers. The study is to be conducted in the following creeks/rivers, states, and counties: Green Creek, Michigan, Cheboygan; Mulligan Creek, Michigan, Presque Isle; Black Mallard River, Michigan, Presque Isle; Ocqueoc River, Michigan, Presque Isle; Trout River, Michigan, Presque Isle; Poultney River/Hubbarton Brook, Vermont and New York, Rutland (VT) and Washington (NY); Winooski River/Sunderland Brook, Vermont, Chittendon; Great Chazy River/Corbeau Creek, New York, Clinton; and Mallets Bay/Allen Brook, Vermont, Chittendon. The total acreage to be treated is 16.7 acres.

III. What Action is the Agency Taking?

Following the review of the GLFC application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

IV. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: March 31, 2003.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 03–8658 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0081; FRL–7300–4]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 75437–EUP–E from Great Lakes Fishery Commission (GLFC) requesting an experimental use permit (EUP) for the male sea lamprey sex pheromone 3-ketopetromyzonol sulfate. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket ID number OPP–2003–0081, must be received on or before May 9, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Andrew Bryceland, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6928; e-mail address: *bryceland.andrew@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0081. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2003–0081. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2003–0081. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0081.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0081. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

The GLFC has submitted an application for an EUP to determine if the male sea lamprey sex pheromone, 3-ketopetromyzonol sulfate is as effective as spermiating male sea lamprey washings in attracting ovulated female sea lampreys. The study is to be conducted in the Ocqueoc River, Presque County, Michigan with a total treated acreage of 0.15 acre.

III. What Action is the Agency Taking?

Following the review of the GLFC application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

IV. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: April 1, 2003.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 03–8659 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7478–4]

Notice of Proposed Lessee Agreement Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as Amended by the Superfund Amendments and Reauthorization Act and the Solid Waste Disposal Act, Commonly Referred to as the Resource Conservation and Recovery Act of 1976, as Amended by the Hazardous and Solid Waste Amendments of 1984 (''RCRA'')

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (''CERCLA''), 42 U.S.C. 9601–9675, and the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (''RCRA''), 42 U.S.C. 6901–6992k, notice is hereby given that a proposed Prospective Lessee Agreement (''Lessee Agreement'') associated with a 27-acre parcel of property formerly owned and operated by Allied-Signal located in Baltimore, Maryland (the ''Property''), was executed by the Environmental Protection Agency, the Maryland

Department of the Environment and the Department of Justice and is now subject to public comment, after which the United States and the State of Maryland may modify or withdraw their consent if comments received disclose facts or considerations which indicate that the Lessee Agreement is inappropriate, improper, or inadequate. The Lessee Agreement will resolve certain potential EPA claims under sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a); sections 3008(h) and 7003 of RCRA, 42 U.S.C. 6928(h) and 6973 and MDE claims under Title 7, Subtitle 2 of the Environment Article of the Annotated Code of Maryland against SBER Harbor Point, LLC and Harbor Point Development, LLC (the ''Lessees'').

During its operation and ownership of the Property, Allied-Signal used the Property for chromium processing activities which contributed to chromium contamination in the soil and the groundwater at the Property. In June 1989, Region III, the MDE and Allied-Signal entered into a Consent Decree under RCRA under which Allied-Signal agreed to conduct an on-site and off-site investigation. As a result of those investigations, EPA and MDE chose a remedy for the Site which required Allied-Signal to, among other things, construct a hydraulic barrier to contain the contaminated groundwater and conduct perpetual monitoring.

EPA and MDE have determined that Honeywell, the current owner of the Property, is successfully completing the requirements under the Consent Decree. Upon entering a lease with the Lessees, Honeywell will still be required to complete and maintain the remedy as provided for under the Consent Decree.

For fifteen (15) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed Lessee Agreement. The Agency's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103.

DATES: Comments must be submitted on or before April 24, 2003.

Availability: The proposed Lessee Agreement and additional background information relating to the proposed Lessee Agreement are available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. A copy of the proposed Lessee Agreement may be obtained from Suzanne Canning, U.S. Environmental Protection Agency, Legal Program Coordinator (3RC00), 1650 Arch Street, Philadelphia, PA 19103. Comments should reference the ''Allied-Signal Prospective Lessee Agreement'' and ''RCRA–03–2003–0088TH,'' and should be forwarded to Suzanne Canning at the above address.

FOR FURTHER INFORMATION CONTACT: Sheila Briggs-Steuteville (3RC43), Senior Assistant Regional Counsel, U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103, Phone: (215) 814–2468.

Dated: April 2, 2003.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 03–8653 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2002–0080; FRL–7299–7]

Lead-Based Paint Activities; State of North Dakota Lead-Based Paint Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; final approval of the State of North Dakota Lead-Based Paint Activities Program.

SUMMARY: On October 4, 2002, EPA received an application from the State of North Dakota requesting authorization to administer a Program in accordance with section 402 of the Toxic Substances Control Act (TSCA). Included in the application was a letter signed September 26, 2002, by the Governor of North Dakota, stating that the State's Lead-Based Paint Abatement Program is at least as protective of human health and the environment as the Federal program under TSCA section 402. Also, included was a letter from the Attorney General of North Dakota, certifying that the laws and regulations of the State provided adequate legal authority to administer and enforce TSCA section 402. North Dakota certifies that its program meets the requirements for approval of a State program under section 404 of TSCA and that North Dakota has the legal authority and ability to implement the appropriate elements necessary to enforce the program. Therefore, pursuant to section 404, the program is deemed authorized as of the date of submission. Today's notice announces the authorization of the State of North Dakota Lead-Based Paint Activities Program to apply in the State of North Dakota effective September 26, 2002.

DATES: The Lead-Based Paint Activities Program authorization was granted to the State of North Dakota on September 26, 2002.

FOR FURTHER INFORMATION CONTACT: Amanda Hasty, Lead Coordinator, Environmental Protection Agency, Region VIII, 8P–P3T, 999 18th St., Suite 300, Denver, CO 80202–2466; telephone: (303) 312–6966; e-mail address: *hasty.amanda@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General

A. Does this Notice Apply to Me?

This notice is directed to the public in general. This notice may, however, be of interest to firms and individuals engaged in lead-based paint activities in North Dakota. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by the notice. If you have any questions regarding the applicability of this notice to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. Summary

On October 28, 1992, the Housing and Community Development Act of 1992, Public Law 102–550, became law. Title X of that statute was the Residential Lead-Based Paint Hazard Reduction Act of 1992. The Act amended TSCA (15 U.S.C. 2601 *et seq.*) by adding Title IV (15 U.S.C. 2681–92), titled ''Lead Exposure Reduction.''

Section 402 of TSCA (15 U.S.C. 2682) authorizes and directs EPA to promulgate final regulations governing lead-based paint activities in target housing, public and commercial buildings, bridges and other structures. On August 29, 1996 (61 FR 45777) (FRL–5389–9), EPA promulgated final TSCA section 402/404 regulations governing lead-based paint activities in target housing and child-occupied facilities (a subset of public buildings). These regulations are to ensure that individuals engaged in such activities are properly trained, that training programs are accredited, and that individuals engaged in these activities are certified and follow documented work practice standards. Under section 404 (15 U.S.C. 2684), a State or Indian Tribe may seek authorization from EPA to administer and enforce its own lead-based paint activities program.

States and Tribes that choose to apply for program authorization must submit a complete application to the appropriate Regional EPA Office for review. EPA will review those applications within 180 days of receipt

of the complete application. To receive EPA approval, a State or Tribe must demonstrate that its program is at least as protective of human health and the environment as the Federal program, and provides for adequate enforcement (section 404(b) of TSCA, 15 U.S.C. 2684 (b)). EPA's regulations (40 CFR part 745, subpart Q) provide the detailed requirements a State or Tribal program must meet in order to obtain EPA authorization.

A State may choose to certify that its lead-based paint activities program meets the requirements for EPA authorization, by submitting a letter signed by the Governor or the Attorney General stating that the program meets the requirements of section 404(b) of TSCA. Upon submission of such certification letter, the program is deemed authorized until such time as EPA disapproves the program application or withdrawals the program authorization.

In accordance with 40 CFR 745.324(d), ''Program Certification,'' the Governor of North Dakota submitted a self-certification letter to the EPA Administrator on September 26, 2002, certifying that the State program meets the requirements contained in 40 CFR 745.324(e)(2)(i) and (e)(2)(ii). Included in the application was a letter from the Attorney General of North Dakota, certifying that the laws and regulations of the State provided adequate legal authority to administer and enforce TSCA section 402.

Notice of North Dakota's application, a solicitation for public comment regarding the application was published in the **Federal Register** of January 8, 2003 (68 FR 1059) (FRL–7282–8). As determined by EPA's review and assessment, North Dakota's application successfully demonstrated that the State's Lead-Based Paint Activities Program achieves the protectiveness and enforcement criteria, as required for Federal authorization. Furthermore, no public comments were received regarding North Dakota's application. Therefore, as of September 26, 2002, the State of North Dakota is authorized to administer and enforce the lead-based paint program under TSCA section 402.

II. Federal Overfiling

TSCA section 404(b) (15 U.S.C. 2684(b)) makes it unlawful for any person to violate, or fail or refuse to comply with, any requirement of an approved State or Tribal program. Therefore, EPA reserves the right to exercise its enforcement authority under TSCA against a violation of, or a failure or refusal to comply with, any requirement of an authorized State or Tribal program.

III. Withdrawal of Authorization

Pursuant to TSCA section 404(c), the Administrator may withdraw a State or Tribal lead-based paint activities program authorization, after notice and opportunity for corrective action, if the program is not being administered or enforced in compliance with standards, regulations, and other requirements established under the authorization. The procedures EPA will follow for the withdrawal of an authorization are found at 40 CFR 745.324(i).

IV. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this document in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

Environmental protection, Hazardous substances, Lead, Reporting and recordkeeping requirements.

Dated: March 28, 2003.

Robert E. Roberts,

Regional Administrator, Region VIII.

[FR Doc. 03–8657 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL –7478–7]

Standards for the Use or Disposal of Sewage Sludge; Agency Response to the National Research Council Report on Biosolids Applied to Land and the Results of EPA's Review of Existing Sewage Sludge Regulations

AGENCY: Environmental Protection Agency.

ACTION: Notice, with request for comment.

SUMMARY: The Environmental Protection Agency is providing notice and requesting public comment on the Agency's preliminary review of regulations under the Clean Water Act governing the use and disposal of sewage sludge. As part of this review, EPA commissioned the National Research Council (NRC) of the National Academy of Sciences to independently review the technical basis of the chemical and pathogen regulations applicable to sewage sludge that is applied to land. In July 2002, the NRC published a report entitled ''Biosolids Applied to Land: Advancing Standards and Practices'' in response to the EPA's request.

Today, the Agency is also announcing a strategy explaining how EPA plans to respond to the recommendations in the NRC report. Today's notice explains the rationale for the strategy and solicits public comments on the strategy.

In addition, EPA is announcing the preliminary results of its review of existing sewage sludge regulations under the Clean Water Act. At this time, EPA has not identified any additional toxic pollutants that warrant regulation in sewage sludge. The next step in identifying chemicals that may warrant regulation is to conduct a screening analysis of those chemicals for which adequate data and analytical methods are available and for which there is evidence that they may occur in sewage sludge. EPA plans to complete this screening analysis by January 2004. The terms ''sewage sludge'' and ''biosolids'' are used interchangeably in this notice.

DATES: EPA requests comments on all aspects of this notice. If you wish to submit comments on this action, you must do so by July 8, 2003.

ADDRESSES: Send your comments to: Water Docket, Environmental Protection Agency, Mailcode: 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2003–0006. Comments may also be submitted electronically or through hand delivery/courier. Follow the detailed instructions for providing comments in section B of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Arleen Plunkett, U.S. Environmental Protection Agency, Office of Water, Health and Ecological Criteria Division (4304T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. (202) 566–1119. *plunkett.arleen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Additional Docket Information

A. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action

under Docket ID No. OW–2003–0006. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that are available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section A.1.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider late comments.

1. Electronically

If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also, include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. EPA Dockets

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in Docket ID No. OW–2003–0006. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. E-mail

Comments may be sent by electronic mail (e-mail) to *ow-docket@epa.gov*, Attention Docket ID No. OW–2003–0006. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. Disk or CD ROM

You may submit comments on a disk or CD ROM that you mail to the mailing address identified in section B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: Water Docket, Environmental Protection Agency, Mailcode: 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2003–0006.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2003–0006. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section A.1.

C. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate a potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Abbreviations and Acronyms Used

AMSA—Association of Metropolitan Sewerage Agencies
BDMS—Biosolids Data Management System
CAFO—Concentrated Animal Feeding Operations
CDC—Centers for Disease Control and Prevention
CFR—Code of Federal Regulations
CWA—Clean Water Act
EC—European Community
EMS—Environmental Management System
EPA—U.S. Environmental Protection Agency
EQ—Exceptional Quality
EU—European Union
FTIR—Fourier Transform Infrared
GC/MS—Gas Chromatography/Mass Spectrometry
IAC—EPA Intra-Agency Committee for Biosolids
ICMA—International City/County Management Association
IRIS—Integrated Risk Information System
ISG—Information Sharing Group
LGEAN—Local Government Environmental Assistance Network
NBP—National Biosolids Partnership
NEBRA—New England Biosolids and Residuals Association
NPDES—National Pollutant Discharge Elimination System
NODA—Notice of Data Availability
NRC—National Research Council
NSSS—National Sewage Sludge Survey
ORD—Office of Research and Development
OW—Office of Water
PA—State of Pennsylvania
PCBs—Polychlorinated biphenyls
PCDDs/Fs—Polychlorinated dibenzo-p-dioxins/dibenzofurans
PCS—Permit Compliance System
PEC—EPA's Pathogen Equivalency Committee
POTW-Publicly Owned Treatment Works
PFRP—Processes to Further Reduce Pathogens
PSRP—Processes to Significantly Reduce Pathogens
QA/QC—Quality Assurance/Quality Control
QMRA—Quantitative Microbial Risk Assessment
RME—Reasonable Maximum Exposure
SSI—Sewage Sludge Incinerator
UA—University of Arizona, Water Quality Center
UCAL—University of California
UPA—University of Pennsylvania
USDA—United States Department of Agriculture
WEF—Water Environment Federation
WERF—Water Environmental Research Foundation

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I. What Is the Legal Background of the Standards for the Use or Disposal of Sewage Sludge?

EPA promulgated Standards for the Use or Disposal of Sewage Sludge (40 CFR part 503) under section 405(d) and (e) of the Clean Water Act (CWA), 33 U.S.C. section 1345(d), (e), as amended by the Water Quality Act of 1987. In these amendments to section 405 of the CWA, Congress, for the first time, set forth a comprehensive program for reducing the potential environmental risks and maximizing the beneficial use of sewage sludge. As amended, section 405(d) of the CWA requires EPA to establish numerical limits and management practices that protect public health and the environment from the reasonably anticipated adverse effects of toxic pollutants in sewage sludge. Section 405(e) prohibits any person from disposing of sewage sludge from publicly owned treatment works (POTW) or other treatment works treating domestic sewage for any use except in compliance with regulations promulgated under section 405.

Section 405(d) calls for two rounds of sewage sludge regulations and sets deadlines for promulgation. In the first round, EPA was to establish numerical limits and management practices for those toxic pollutants which, based on ''available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations that may adversely affect public health or the environment.'' CWA section 405(d)(2)(A). The second round is to address toxic pollutants not regulated in the first round ''which may adversely affect public health or the environment.'' CWA section 405(d)(2)(B).

EPA did not meet the timetable in section 405(d) for promulgating the first round of regulations, and a citizen's suit was filed to require EPA to fulfill this mandate, (Gearhart v. Reilly, Civ. No. 89–6266–HO (D. Ore.)). A consent decree was entered by the court in this case, establishing schedules for both rounds of sewage sludge rules. EPA promulgated the first rule in 1993, 40 CFR part 503. 58 FR 9248 (Feb. 19, 1993) (''Round One''). For the second round (''Round Two''), EPA identified 31 pollutants and pollutant categories not regulated in Round One that EPA was considering for regulation. In November 1995, EPA narrowed the original list of 31 pollutants to two pollutant groups for the second round rulemaking: polychlorinated dibenzo-p-dioxins/dibenzofurans (PCDDs/Fs) and dioxin-like coplanar polychlorinated biphenyls (PCBs) (USEPA, 1996). The consent decree required the Administrator to sign a notice for publication proposing Round Two regulations no later than December 15, 1999, and to sign a notice taking final action on the proposal no later than December 15, 2001. (*Gearhart* v. *Whitman*, Civ. No. 89–6266–HO (D. Ore.)).

On December 15, 1999, the Administrator signed a proposal to establish numerical limits for dioxins, dibenzofurans, and co-planar PCBs (''dioxins'') in sewage sludge that is applied to the land and proposed not to regulate dioxins in sewage sludge that is disposed of in a surface disposal unit or fired in a sewage sludge incinerator. 64 FR 72045 (December 23, 1999). On December 21, 2001, the Administrator gave final notice of EPA's determination

that numerical standards or management practices are not warranted for dioxins in sewage sludge that are disposed of at a surface disposal unit or incinerated in a sewage sludge incinerator. 66 FR 66228 (December 21, 2001). In that notice, EPA also announced that a final action on the proposal to amend the Standards for the Use or Disposal of Sewage Sludge for sewage sludge that is applied to the land would be published at a later date. The consent decree in *Gearhart* v. *Whitman* was amended to extend the deadline for final action on the land application Round Two rulemaking from the original date of December 15, 2001, to a new date of October 17, 2003.

On June 12, 2002 at 67 FR 40554, EPA published a Notice of Data Availability (NODA) containing new information relating to dioxins in land-applied sewage sludge and requested public comments. Currently, EPA is evaluating the public comments received on the NODA and will consider these comments in formulating a final action on dioxins in land-applied Sewage sludge by October 17, 2003.

II. What Requirements Are Included in the Standards for the Use or Disposal of Sewage Sludge (40 CFR Part 503)?

As noted above, CWA Section 405(d)(2)(A) required the first round of regulation to be based on ''available information on [the] toxicity, persistence, concentration, mobility, or potential for exposure'' of toxic pollutants in sewage sludge. EPA published the Round One standards (40 CFR Part 503) on February 19, 1993. These regulations established requirements for the final use and disposal of sewage sludge when it is: (1) Applied to the land for a beneficial purpose, including in home gardens, (2) placed in a surface disposal site, including biosolids-only landfills, and (3) incinerated.

For land application, Part 503 set numerical limits for nine heavy metals in sewage sludge, established operational standards (described below) to reduce or eliminate pathogens in sewage sludge and to reduce vector attraction, and required management practices to restrict the application rate and placement of sewage sludge on the land. Regarding surface disposal, Part 503 set numerical limits for three metals in sewage sludge, established requirements for the placement and management of a surface disposal site, and established operational standards to reduce or eliminate pathogens in sewage sludge and to reduce vector attraction. For incineration in a sewage sludge incinerator (SSI), Part 503 establishes limits for five metallic pollutants in sewage sludge fired in a SSI and adopted standards under the Clean Air Act for two additional metallic pollutants. The Agency has also established performance standards for SSIs through an operational standard for total hydrocarbons or carbon monoxide emissions that controls numerous organic compounds found in the emissions of sewage sludge incinerators. Part 503 also allows disposal of sewage sludge in a municipal solid waste landfill in accordance with 40 CFR part 258. In addition, the final rule requires monitoring, record keeping, and reporting. Standards apply to publicly and privately-owned treatment works that generate or treat domestic sewage sludge and to anyone who uses or disposes of sewage sludge.

The part 503 Standards consist of six elements designed to work together to protect human health and the environment. These elements are (1) numerical limits for certain pollutants, (2) management practices, (3) operational standards, (4) monitoring, (5) record keeping, and (6) reporting.

As an example, the land application provisions require a sewage sludge preparer to gather information on the nutrient content of the sewage sludge and pass this information along to the land applier in order for the land applier to be able to apply the sewage sludge at a suitable agronomic rate. Numerical limitations for land-applied sludge are pollutant concentrations in sewage sludge or cumulative or annual loading rates, based on multi-pathway exposure analyses and risk assessments to protect public health. Management practices include requirements, such as how the sewage sludge is to be placed on the land or otherwise managed in the environment. An example is the prohibition against applying sewage sludge to land closer than 10 meters from waters of the United States. Operational standards are technology requirements such as process descriptions and performance requirements to reduce or eliminate pathogens from sewage sludge and reduce vector attraction. These, together with required crop harvesting restrictions and site controls, constitute the approach for the control of pathogens in sewage sludge.

Monitoring of chemicals and pathogens in sewage sludge and certification of certain actions by the preparer or land applier must be performed at a frequency commensurate with the annual amount of land-applied sewage sludge. Records must be kept of these monitoring and certification activities at the locations where the monitoring/certifications have occurred. Finally, the larger sewage sludge preparers and land appliers must report this information to the permitting authority at least annually.

EPA has amended part 503 several times since its initial publication in February 1993. Following promulgation of the Round One rule, several petitions for review were filed challenging various aspects of the rule. In one petition, several mining and chemical concerns challenged the land application molybdenum limits. EPA amended the part 503 numerical standards for molybdenum to delete the cumulative loading rate, annual loading rate, and the pollutant concentration for molybdenum in sewage sludge to be land-applied. 59 FR 9095 (February 25, 1994). The ceiling concentration value for molybdenum was retained. Also, in that **Federal Register** notice, EPA added continuous monitoring of carbon monoxide as an alternative to continuous monitoring of total hydrocarbons in the sewage sludge incinerator requirements. In another case, *Leather Industries of America* v. EPA, 40 F.3d 392 (D.C. Cir. 1994), the court remanded several of the land application requirements. As a result of that decision, EPA deleted all numerical standards for chromium in sewage sludge to be land-applied and adjusted the Table 3 limit for selenium. 60 FR 54764 (October 25, 1995). EPA is considering further amendments to address the issues remaining from the partial remand, as well as other issues. EPA most recently amended Part 503 to make a number of technical amendments, provide regulatory flexibility, and make the sewage sludge incinerator standards self-implementing. 64 FR 42552 (August 4, 1999).

For a detailed discussion of the Part 503 Rule, see A Plain English Guide to the EPA Part 503 Biosolids Rule (1994), which is available as stated in the **ADDRESSES** section of the preamble. A copy of the Plain English Guide is available at the website address *http://www.epa.gov/owm/mtb/biosolids/503pe/index.htm*.

III. What Is the Purpose of Today's Notice?

Section 405(d)(2)(C) of the CWA calls on EPA to review the existing sewage sludge regulations in part 503 at least every two years for the purpose of identifying additional toxic pollutants in sewage sludge and promulgating regulations for such pollutants consistent with the requirements of section 405(d). Over the past decade, questions have been raised over the

adequacy of the chemical and pathogen standards for protecting human health. To help address the human health concerns and the requirement for periodical reassessment of the Standards for Use or Disposal of Sewage Sludge, the Agency commissioned the NRC to independently review the technical basis of the chemical and pathogen regulations. The NRC study took place between January 2001 and June 2002. In July 2002, the NRC published a report entitled, ''Biosolids Applied to Land: Advancing Standards and Practices'' in response to EPA's request. For a copy of the full NRC report, visit our Web site at *http://www.epa.gov/ost/biosolids/nas/complete.pdf*. The NRC identified a need to update the scientific basis of Part 503 and provided approximately 60 recommendations.

In an agreement with the parties in Gearhart v. Whitman, EPA agreed to publish a notice in the **Federal Register** stating how it will respond to the NRC report recommendations and to seek public comments on its planned response. EPA also agreed to review publicly available information for the purpose of identifying additional toxic pollutants in biosolids and to publish a notice providing the results of the review and seek public comment. Today's notice fulfills this agreement.

IV. What Was EPA's Charge to the National Research Council?

EPA asked the NRC to conduct an independent evaluation of the regulations and standards for chemical pollutants and pathogens in biosolids that are land-applied. Specifically, the NRC was asked to focus on the adequacy and appropriateness of the risk assessment methods and data used by the Agency in setting regulatory requirements to protect human health. The NRC convened the Committee on Toxicants and Pathogens in Biosolids Applied to Land (''the committee''), which conducted and prepared a final report. The Statement of Tasks included the following:

1. Review the risk assessment methods and data used to establish concentration limits for chemical pollutants in biosolids to determine whether they are the most appropriate approaches. Consider the NRC's previous (1996) review and determine whether that report's recommendations have been appropriately addressed. Consider (a) how the relevant chemical pollutants were identified, (b) whether all relevant exposure pathways were identified, (c) whether exposure analyses, particularly from indirect exposures, are realistic, (d) whether the default assumptions used in the risk assessments are appropriate, and (e) whether the calculations used to set pollutant limits are appropriate.

2. Review the current standards for pathogen reduction or elimination in biosolids and their adequacy for protecting public health. Consider (a) whether all appropriate pathogens were considered in establishing the standards, (b) whether enough information on infectious dose and environmental persistence exists to support current control approaches for pathogens, (c) risks from exposure to pathogens found in biosolids, and (d) new approaches for assessing risks to human health from pathogens in biosolids.

3. Explore whether approaches for conducting pathogen risk assessment can be integrated with those for chemical risk assessment. If appropriate, recommend approaches for integrating pathogen and chemical risk assessments.

The NRC report, ''Biosolids Applied to Land: Advancing Standards and Practices,'' described the work of the committee, stating that ''the committee searched for evidence on human health effects related to biosolids exposure'' in its review of the risk assessments and technical data used by EPA to establish the chemical and pathogen standards and the management practices contained in part 503. The report noted that ''the committee did not attempt to determine whether the approaches used by EPA to set the 1993 biosolids standards were appropriate at the time of their development, and the committee's findings and recommendations should not be construed as either criticism or approval of the standards issued at that time.''

V. What Were the National Research Council's Major Findings and Recommendations Concerning Land Application of Biosolids?

The NRC committee concluded that ''there is no documented scientific evidence to indicate that the part 503 rule has failed to protect human health,'' but additional scientific work is needed to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids. The committee recognized that land application of biosolids is a widely used, practical option for managing the large volume of biosolids generated at waste water treatment plants that otherwise would need to be disposed of at landfills or by incineration. The committee also identified a need to update the scientific basis of part 503 to (1) ensure that the chemical and pathogen standards are supported by current scientific data and risk assessment methods, (2) demonstrate effective enforcement of part 503, and (3) validate the effectiveness of biosolids management practices. The NRC report focused on identifying how current risk assessment practices and knowledge regarding chemical pollutants and pathogens in biosolids can be used to update and strengthen the scientific basis and credibility of EPA's biosolids regulations.

The NRC report contains four overarching recommendations: (1) Use improved risk assessment methods to better establish standards for chemicals and pathogens, (2) conduct a new national survey of chemicals and pathogens in biosolids, (3) establish an approach to human health investigations, and (4) increase the resources devoted to EPA's biosolids program. These four overarching recommendations are discussed in detail and supplemented by 53 individual recommendations contained in Chapters 2–6 of the NRC report.

VI. What Process Did EPA Use To Address the NRC Recommendations?

Upon the release of the report, EPA established an Intra-Agency Committee (IAC) to respond to the recommendations in the NRC report and begin review of the existing Part 503 regulations to identify additional toxic pollutants that may warrant future regulation, pursuant to section 405(d)(2)(C). The IAC is comprised of EPA representatives from a cross-section of environmental program offices that are involved or interested in the biosolids program.

The IAC first developed an approach for responding to the NRC report and conducting the section 405(d)(2)(C) review of existing regulations. Activities for responding to the NRC report included developing a matrix to identify and track each recommendation, grouping the recommendations into eight categories based on subject area, evaluating the recommendations individually and establishing priorities, drafting initial responses by category, and developing a strategy to carry out the activities identified in response to the NRC recommendations. The approach for reviewing existing regulations to identify additional toxic pollutants that may warrant regulation, pursuant to section 405(d)(2)(C), is described in Section IX of this notice.

As stated above, the IAC first prepared a matrix (Compilation of National Research Council (NRC) Recommendations on Biosolids and

EPA Responses and Activities, USEPA 2002a) of all of the recommendations contained in the NRC report (NRC 2002). The matrix ensured that all recommendations were identified. Once in the matrix, recommendations that were found to be similar in subject matter and intent were placed in a framework to facilitate evaluation.

The Agency categorized the 57 recommendations (four overarching and 53 specific) into eight categories: (1) Survey, (2) Exposure, (3) Risk Assessments, (4) Methods Development, (5) Pathogens, (6) Human Health Studies, (7) Regulatory Activities, and (8) Biosolids Management. EPA's response and planned activities are presented on a category-by-category basis.

VII. EPA's Strategy for Responding to the NRC Recommendations?

EPA has identified three main objectives for attaining a better understanding of biosolids and reducing the potential for, or reducing the uncertainty related to, human health impact: (1) Update the scientific basis of Part 503 by conducting research in priority areas, (2) strengthen the biosolids program by evaluating results of completed, ongoing, or planned studies both within and outside EPA, and (3) continue ongoing activities for enhancing communication with outside associations and with the public.

Major Short-Term Goals and Priority Actions During FY03 and FY04

Over the next two years, subject to available resources, the Agency proposes to pursue biosolids activities in the following priority areas:

1. Continue program implementation (regulatory, compliance, and enforcement).
2. Evaluate the state-of-the-science and revise risk assessment methodologies, as appropriate.
3. Review available data, track ongoing studies by researchers outside of EPA, and identify information gaps. Initiate further field studies as needed.
4. Continue ongoing/planned activities relative to exposure, risk assessment, biosolids management, and analytical methods development.
5. Determine what pollutants, if any, warrant further regulation under the CWA.
6. Design and begin conducting a targeted survey that uses information obtained from published pollutant occurrence and effects data, State occurrence data bases, and input received during the public comment period.
7. Conduct a dialogue with other health-based Federal agencies, such as CDC, on the possibility of cooperatively tracking incident reports and investigating whether adverse human health outcomes can be associated with biosolids exposure. The results could help the Agency identify research gaps and, if appropriate, the need for a more comprehensive research plan.

These activities would be aimed at implementing NRC recommendations for reducing the potential for public health impact and updating the scientific basis of Part 503.

Major Longer-Term Goals and Future Priorities (FY05 and Beyond)

The Agency's proposed long-term biosolids activities depend on results of activities conducted in FY03/FY04 and available resources. The following priority areas are aimed at implementing recommendations for reducing the potential for public health impact:

1. Continue program implementation (regulatory, compliance, and enforcement).
2. Update the scientific basis of Part 503 by using FY03/04 research or by conducting research in priority areas.
3. Strengthen the biosolids program by incorporating results of completed, ongoing, or planned research activities both within and outside EPA to possibly include:
   - Quantitative microbial risk assessment.
   - Improved understanding of exposure pathways/scenarios.
   - Molecular tracking study.
4. Continue activities to establish partnerships and communicate more effectively with other public health-based agencies, outside associations and the public.

There is considerable relevant work being conducted by others outside of EPA that may help inform and respond to the NRC recommendations. Much of the external work that relates directly to certain NRC recommendations is discussed in this notice and is being used to improve the Agency's biosolids program.

The Agency's approach also includes promoting policy and procedural guidance for ensuring and maximizing the quality of the information disseminated. Completed studies and ongoing research, once compiled, will be reviewed and evaluated for their contribution to EPA's biosolids program in accordance with Information Quality Guidelines (expressed in ''Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency'' USEPA 2002b). These guidelines stress that information disseminated by EPA should adhere to a basic standard of quality, including objectivity, utility, and integrity.

EPA has developed this notice using its best estimate of FY 2003 resources, which are not finalized, and based on the President's FY 2004 budget. The Agency has assumed the same level of funding for future years, as is typically done.

VIII. EPA Responses to the NRC Recommendations by Category

A. Survey

1. Summary of Survey-Related NRC Report Recommendations

The NRC recommended that the Agency conduct a new national survey of chemicals and pathogens in biosolids. A survey may provide feedback for updating the science and technology of biosolids applied to land. These data would then be used to identify pathogens and additional chemicals for potential regulation and possibly deregulate those that are not, or no longer, found. The NRC recommended several components in designing a new national survey, including collecting data from State program databases, determining the adequacy of analytical detection methods and limits to support risk assessment, evaluating chemicals eliminated previously due to lack of data (*e.g.*, toxicity or exposure) and new chemical categories (*e.g.*, odorants, surfactants and pharmaceuticals) not previously evaluated.

Further, the NRC recommended monitoring environmental media, surveying for pathogens in both raw sewage sludge and treated sewage sludge managed through the various processes recommended in Part 503, assessing multiple species of certain metals (*e.g.*, mercury and arsenic) that have different toxicity profiles for human health, including infants and children, and analyzing a broad spectrum of pathogens in biosolids or environmental media adjacent to final use or disposal sites.

In addition, the NRC recommended that the Agency verify the adequacy of treatment and management practices. For example, to verify that Class A and B (as described in Part 503) treatment processes perform as assumed by engineering and design principles, EPA could determine pathogen density and elimination across treatment processes in biosolids and environmental media over time and examine management practices to ensure that risk-assessment

principles are effectively translated into practice.

2. The Agency's Response to the Survey Category

How EPA Plans To Address NRC Survey Recommendations

The Agency believes that a comprehensive survey of pollutants in biosolids may provide useful information, but it is not likely the most pragmatic survey option available at this time. EPA has developed a proposed survey approach based on experience gained from the 1988 National Sewage Sludge Survey (NSSS), limitations of available analytic methods, knowledge of effects and routes of exposure, and suggestions by the NRC, among other factors (see Planned Strategy for the Survey Category below). The 1988 NSSS was ultimately limited in utility by shortcomings in available analytical methods and limited information of pollutant effects and/or means of exposure. While some advances in these areas have been made since 1988, these same limitations still exist for many pollutants, especially for pathogens and many of the new or emerging chemicals identified by the NRC. Therefore, EPA has concluded that a less comprehensive, more targeted, survey, to help fill data gaps and inform decisions regarding further studies, may be more useful to address uncertainties highlighted by the NRC. Information developed by national and international experts on pathogens and toxic chemicals may help produce a better informed survey design. The Agency believes that using such information may produce more valuable results than conducting a comprehensive national survey at this time. EPA is first planning to develop and initiate a targeted survey after considering the following sources of information:

Available data: The Agency has conducted a biosolids literature search and is reviewing the information for relevant data on chemicals and pathogens in biosolids. The literature search includes topics related to a survey of chemicals and pathogens in biosolids, management practices, and treatment efficacy. This information obtained may also assist EPA in responding to other NRC recommendations. For example, the Agency plans to use available information to prioritize future research and, if necessary, modify biosolids management practices to reduce risk.

Other sources of data include studies conducted by EPA regional offices, States, and universities. For example, EPA Region 8 is conducting a long-term study of biosolids addition to soil and the potential effects on soil microbiology. The University of Arizona is conducting research on airborne pathogen exposure at various times and distance from biosolids application sites. Within the next six to nine months, the Agency plans to review and assess such studies for their contribution in determining the potential for exposure and adverse human health impact from land-applied biosolids.

Studies: Ongoing EPA studies address many technical uncertainties related to pollutants in biosolids. For example, the adequacy of current analytical methods for selected priority pathogens and the development and/or validation of new methods are also being studied. In addition, field studies are being used to provide site-specific occurrence data.

While study emphasis is being placed on pathogens to address areas of uncertainty and public interest, selected chemicals are also being addressed to help determine significant issues and identify information gaps that remain to be addressed in these areas.

Planned Strategy for Designing a Targeted Survey

During the next fiscal year the Agency plans to initiate or continue Studies devoted to:

1. Methods development and/or validation studies for enteric viruses and helminth ova (see Methods Development).

2. Continuation and/or expansion of field studies to determine environmental contaminant occurrence at selected sites (see Methods Development and Pathogens Categories).

In addition, during the next 18 to 24 months, EPA is proposing to design a targeted approach for a survey of pollutants that occur in sewage sludge. New and existing information from sources such as relevant published pollutant occurrence and effects data, State occurrence databases, and input received during the public comment period will be used to help in the development of the proposed survey.

To ensure the survey provides meaningful results and the effective use of limited resources, EPA is considering restudying some of the pollutants that were studied in the 1988–1989 NSSS. EPA is also considering including some new and emerging chemicals, taking into account the availability of adequate analytical methods and their associated analytical costs. As a result, the Agency may only be able to measure a limited number of pollutants.

B. Exposure

1. Summary of Exposure NRC Recommendations

The NRC made recommendations on how current exposure information and updated conceptual exposure models can be used to update and strengthen the scientific basis of the chemical and technology-based pathogen standards. This category also includes recommendations to evaluate exposure for the reasonable maximum exposure (RME) individual, updating fate and transport models that might affect exposure estimates, and conducting pre-planned exposure studies under certain situations for specific exposure groups.

2. The Agency's Response to the Exposure Category

How EPA Plans To Address NRC Exposure Recommendations

Understanding human exposure to chemicals and pathogens, including the concentrations and fate and transport through important exposure pathways, is key for risk assessments supporting the Part 503 rule. As discussed below in the Risk Assessment category, the Agency plans to use a risk assessment framework to evaluate the priorities for reassessing or updating underlying components (including exposure assumptions) of previously conducted risk assessments. The Agency plans to use this information to determine if new exposure and risk calculations may be warranted for pollutants not previously assessed. Such an evaluation would include a review of the exposure information used in the Round 1 and Round 2 rules in light of new exposure information.

To conduct this activity, the Agency plans to first collect and review currently available exposure information from published literature, Federal and State databases, the NRC report, and other relevant sources. The Agency anticipates that some of the NRC recommendations regarding exposure may be addressed in newly available information, while others may require completion of ongoing studies. The Agency plans to review currently available exposure information to help identify data gaps and to inform decisions about future risk assessments and the need for additional exposure studies.

In the mid-1990's, EPA conducted research on the land application of biosolids to disturbed and contaminated sites requiring reclamation or remediation. These studies, which focused on the ability of biosolids to help improve soil properties and

establish sustainable vegetation cover on disturbed and highly contaminated sites, also included identification and determination of metals bioavailability in biosolids. The research was conducted to strengthen our understanding of the potential health impacts of metals, a particular focus during the development of the 1993 regulations. Results of this work showed that assumptions regarding metals availability used in earlier metals risk assessments were conservative. The Agency plans to reevaluate these findings in context with current practices and policies regarding exposure to metals in biosolids.

Exposure research: As part of a broader set of field studies, EPA recently initiated, in partnership with USDA and the State of Pennsylvania (PA), the planning of exposure-related research at five biosolids production and/or application sites. These studies are intended to gather site-specific information on current practices in biosolids production and application, and to identify and evaluate the fate of pollutants following biosolids application. Other objectives for this research, depending on the site, include (1) characterization of treated and untreated sludge (biological, physical, and chemical characterization), along with sampling and analysis during land application, (2) assessing the presence of pathogens, nitrogen, sulfur, volatile organic compounds and particulates in air, (3) determining how well the sewage sludge is disinfected as it moves through the different stages of processing, and (4) determining pathogen content in Class B sludge, once applied and following a period of natural attenuation. Other related work is being conducted by the University of Arizona's Water Quality Center.

Planned work is expected to begin in mid 2003. The plan is for facility operations for these sites to be documented, including the operation and performance of treatment process used to process sewage sludge and produce Class A and Class B biosolids. Pathogen and chemical occurrence data will also be collected at these sites. Proposed measurements over time for the production and land application processes may include total and volatile solids, pH, temperature, odor, appearance (*e.g.*, color, paste, liquid, powder), fecal coliforms, Salmonella spp., Staphylococcus aureus, enteric viruses, and helminth ova.

Because of concern over bioaerosols, air samples will be taken prior to, during, and following land application at the point of application and the fence line, for up to thirty days. Air sampling will be conducted in collaboration with USDA to address pathogens, chemicals, endotoxins, and particulates occurrence. Chemical and pathogen concentrations in air represent an initial step towards understanding the potential exposure of nearby communities. A description of the proposed studies can be found in the Pathogens category.

CAFO research: EPA is also conducting research on microorganisms and chemicals at animal manure land application sites, composting sites, and concentrated animal feeding operations (CAFOs). These include studies on the concentrations of airborne pathogens, toxic organic compounds, odorants, and particulates. The CAFO studies are important, because pathogen and chemical air transport and fate for animal manures resemble those for biosolids. The ongoing and proposed studies are described in the Methods Development category in this notice.

Planned Exposure Activities

EPA plans to continue its research partnership with USDA and the State of PA and to study an additional five field application sites.

The Agency is exploring a plan to conduct a molecular pathogen tracking exposure study as a follow-up to the PA/USDA/EPA study. This study would focus on individuals who have received medical attention and who suspect that they have been affected by biosolids application practices. This study would analyze human biological monitoring samples (*e.g.,* feces, blood, or swabs from skin, ears, eyes, or throat) to isolate potential causative agents, and genetic characterization would be used to identify the potential source(s).

C. Risk Assessment

1. Summary of Risk Assessment NRC Recommendations

The NRC recommended that the Agency use improved risk assessment methods to better assess risks and establish standards for chemicals and pathogens under Part 503, since methods for conducting risk assessments have evolved substantially since the 1993 regulations were established. The recommendations also include reassessing standards for chemicals currently in the Part 503 regulation using the latest science. The NRC suggested that future risk assessments incorporate new information on exposure, dose-response relationships, pathogen survival, quantitative microbial risk assessment techniques, and consideration of site-specific factors that may affect risk management practices (*e.g.,* odor). Recommendations were also made to involve stakeholders in the risk assessment process and to examine biosolids management practices to ensure that the underlying risk assessment principles are effectively translated into practice.

2. The Agency's Response for the Risk Assessment Category

How EPA Plans To Address NRC Risk Assessment Recommendations Current and Planned Risk Assessment Activities

For this notice, risk assessment is defined as the process of identifying the potential adverse health effects associated with environmental exposures to pollutants in biosolids, their severity, and likelihood. Previously, EPA used a risk based approach for estimating risks to human health and developing management practices to reduce risks and set protective standards. When they were conducted, EPA's assessments were based on state-of-the-science methods, information and management practices. The NRC recommended areas where new or updated health and exposure information, models, and risk assessment methods may strengthen the Agency's assessments for land-applied biosolids.

Consistent with the recommendations of the NRC, EPA plans to address the potential health hazards and exposures associated with land application of biosolids using state-of-the-science risk approaches. Specifically, EPA plans to reassess methods and data used for previously evaluated pollutants, and apply these methods to new pollutants. For example, risks from pollutants not previously assessed due to a lack of toxicity, environmental fate, or exposure information, will be reevaluated if new information is available. This effort is expected to take place in FY03 and FY04. The Agency has assessed risks to children and sensitive populations, and will continue that approach in future assessments and reassessments.

The NRC also recommended that representative stakeholders could be included in the risk assessment process to help identify exposure pathways, local conditions that could influence exposure, and possible adverse health outcomes. The Agency's policy is to involve stakeholders at various stages of policy development. The Agency intends to consider how consultation with stakeholders should be included in developing future sewage sludge risk assessments.

EPA, in conjunction with States and other Federal agencies, has already been addressing local biosolids issues in a

few areas, and has used these opportunities to include stakeholders in the process to further evaluate and improve the assessment and management of biosolids. For example, stakeholders were involved in the scenario development and regulatory processes of a recent study in Pennsylvania. As part of this study, an informal information sharing group was formed that included concerned citizens, local officials, and contractors to assist the Agency in identifying stakeholder concerns and ensuring transparency in the field study process.

For the ongoing Round Two land application rulemaking, EPA conducted a revised risk assessment in response to public and peer review comments on the 1999 Round Two proposal. This revised assessment used a probabilistic approach instead of a deterministic approach to yield information on the sources of variability and uncertainty in the final risk estimates. The probabilistic approach used estimated values for certain input variables over the range of observed data to estimate the risks for the highly exposed population. This revised risk assessment also used new inputs, which included a redefined ''highly exposed individual,'' new pathways and mechanisms of exposure, new exposure factors adopted from the latest EPA Exposure Factors Handbook, a sensitivity analysis to determine the relative importance of the input variables, and updated scientific information on the chemicals of concern, dioxins. EPA redefined the ''highly exposed individual'' as a member of a farm family that consumes 50 percent of his/her diet from home-produced crops and animal products grown on his/her own biosolids-amended land. EPA plans to use the Round Two risk assessment approach as a starting point for evaluating the NRC's recommendations, including the use of the reasonable maximum exposed (RME) individual for improving future risk assessments.

EPA is currently funding and conducting research related to risk assessment of biosolids. EPA is sponsoring research or has awarded grants to the Water Environment Research Foundation (WERF) and others to develop quantitative pathogen risk assessment methods and approaches. EPA plans to conduct a comprehensive evaluation and peer review of these results and, if deemed appropriate for use in assessing risk from pathogens found in biosolids, the Agency would incorporate these new risk assessment methods into any new or updated risk assessment and update the part 503 rule as necessary.

Other studies and related activities that EPA is conducting or sponsoring include the development of dose-response models for quantitative risk assessment of selected pathogens and the development of transmission models of pathogens and disease. These models are currently being developed for drinking water and, EPA plans to evaluate and, if appropriate, modify applicable models to be used in analyzing pathogens in biosolids. In addition, research is being conducted with USDA and various States on the extent of airborne concentrations of pathogens, toxic compounds, odorants, particulates and bioaerosols. EPA plans to evaluate the results of these studies for use in refining and improving future biosolids exposure and risk assessments. Further descriptions of these studies are provided in the pathogen section and the action plan.

To further the state of the knowledge surrounding all aspects of sewage sludge use and disposal, including improved risk assessments, EPA is supporting a workshop scheduled for January of 2004 on the ''state of the science'' on land application of municipal and industrial wastewater effluents, sewage sludge, and animal manures. This workshop is being coordinated by the University of Florida and will have numerous contributors from the Agricultural Research Service of USDA, and academia, among other groups. New and additional information on biosolids toxicities and environmental properties may emerge from this workshop; once evaluated, this information may be used in future risk assessment updates of the Part 503 Rule. The Web site *http://www.conference.ifas.ufl.edu/landapp/* contains information concerning the upcoming workshop, as well as other relevant information.

As discussed previously, EPA may use the risk assessment paradigm to provide both a focused reassessment of certain previously addressed pollutant risks, exposure pathways and risk assessment approaches, as well as assessing pollutants which have not been previously evaluated to effectively address the NRC risk assessment related recommendations and the review required by Section 405(d)(2)(C) of the CWA. These risk assessment activities will be initiated this year. This effort will be developed and outlined by an interdisciplinary workgroup within EPA and include external review of the analysis plan.

For this risk analysis, EPA is planning to focus on an evaluation of those key pollutants and pathways which are likely to be of greatest concern or where the new scientific developments may have the greatest impacts. This may result in later updating the Round One risk assessment models and re-evaluating selected pollutants, pathways and endpoints and/or new pathways and endpoints not previously addressed.

EPA is planning a two-step process for addressing the NRC recommendations with respect to risk assessments for pollutants in sewage sludge. The first step would be to conduct a problem formulation which would re-evaluate or assess methods, approaches and pollutants considered in the Round One determinations, and any new qualitative information for future pollutants. This problem formulation step would include the development of exposure/risk assessment scenarios that would be used to identify critical/key stressors, routes of exposure, model application and data gaps. The primary focus of this effort will be on areas having the greatest potential risks and uncertainties (*e.g.* pathogens). The problem formulation will serve to eliminate those stressors, scenarios, routes of exposure, and endpoints that need not be evaluated further. It would retain those areas which are potentially significant or require more study. The problem formulation would also result in a research analysis plan that would not only identify risk assessment activities but also prioritize research to address exposure and risk management.

The second step would be to conduct quantitative risk assessments and risk characterizations for key pollutants identified and prioritized by the scenario/conceptual models, as appropriate. These assessments would initially be screening level risk assessments. More refined assessments would be conducted only on those pollutants and pathways for which the screening-level assessment indicate significant potential for risk. In conducting any risk assessments, screening or comprehensive, EPA will, as appropriate, apply the most up-to-date scientific information and risk assessment methodologies. In addition, EPA proposes to continue its efforts to evaluate and develop new methods for pathogen risk assessments and improved models for exposure assessments.

EPA's proposed activities are to continue to track development of methods for QMRAs and develop guidelines for assessing risk from pathogens. In addition, EPA also plans to continue work on the evaluation of data and models for improving exposure assessments. EPA may also evaluate and

assess data and information related to multiple exposures, potential contaminant interactions, and potential effects on sensitive sub-populations, to the extent the state-of-the-science is available.

D. Methods Development

1. Summary of Methods Development NRC Recommendations

The NRC recommended that the Agency develop and standardize methods for measuring pathogens and emerging chemicals in biosolids and bioaerosols. Standardized methods could be used to provide measures of performance and to verify that the Agency's management practices and standards are reliable.

Specifically, the NRC recommended developing, standardizing, and validating methods for pathogens in biosolids and bioaerosols (*e.g.,* airborne pathogens). In addition, research that uses improved pathogen detection technology, round-robin laboratory testing to establish method accuracies and precision for pathogen concentrations in raw and treated biosolids, mechanisms for incorporating new methodologies into the verification process, and measures of performance that can be monitored (*e.g.,* concentrations of selected chemicals in exposure media and human biological monitoring such as blood or urine of workers and residents) could be considered useful in conducting and interpreting future risk assessments and used to develop applicable risk-assessment technologies.

2. The Agency's Response to Methods Development

How EPA Plans To Address NRC Methods Development Recommendations

For the methods development category, the Agency plans to focus its resources on pathogens and chemicals associated with biosolids. Validated analytical methods are necessary to support exposure assessments for toxic pollutants and pathogens. Methods are needed for determining the reliability of treatment processes, assaying pathogens and chemicals in raw and treated biosolids, incident follow-up, sampling environmental media, and human biological monitoring. Ongoing or planned methods development activities in the Agency that address the NRC recommendations follow.

Method Development Activities

Recently initiated EPA methods development work includes field studies at five biosolids production and application sites. Currently available analytical methods are being identified or in some cases adapted for this study. A description of these field studies has been provided in the preceding Exposure subsection of this notice. Additionally, EPA is conducting field studies at animal manure land application sites, composting sites, and concentrated animal feeding operations (CAFOs). This research includes measurements of pathogens, toxic organic compounds, odorants and particulates in the air near CAFOs. Both the biosolids and CAFO studies include evaluation and adaptation of analytical methods for selected pathogens and chemicals. Results of these studies should assist the Agency in determining the need for additional methods development research.

Open-path Fourier Transform Infrared (FTIR) spectrometry will be used to measure volatile organic compounds from land application sites. EPA is validating analytical methods for microorganisms cited in 40 CFR Part 503. Fecal coliform methods have been validated, whereas Salmonella methods are being validated. Methods and validation studies for these two agents are expected to be published in 2004.

Planned Method Development Activities

As part of its field study programs, EPA plans to work with USDA to investigate methods for measuring bacteria and viruses in air upwind and downwind of biosolids land application sites. EPA is considering developing and validating analytical methods for enteric viruses and helminth ova, as well as chemical analytical methods for emerging chemicals of potential concern in biosolids (*e.g.* pharmaceuticals).

E. Pathogens

1. Summary of Pathogen NRC Recommendations

The NRC recommended that the Agency review approaches for developing microbial analytical methods and conducting microbial risk assessments (Quantitative Microbial Risk Assessments) to analyze sensitivity and to ascertain what critical information is needed to reduce uncertainty about the risks from exposure to pathogens in biosolids. According to the NRC, research activities that might improve EPA's pathogen standards and reduce risk, or uncertainties concerning risk, from pathogens following exposure to biosolids include development, standardization and validation of detection and quantification methods for pathogens and indicator organisms, conducting research on vectors carrying pathogens and bioaerosols, and conducting studies to determine whether site restrictions for Class B achieve intended effects for pathogen levels. The NRC also recommended that EPA not allow provisions for distributing Class A biosolids in bags or other containers (weighing less than one metric ton) when they do not meet pollutant concentration limits (*i.e.,* all biosolids sold or given away should be exceptional quality).

Other NRC recommendations include considering additional indicator organisms (*e.g.,* Clostridium perfringens) for use in regulations, as well as funding, supporting and officially sanctioning the Pathogen Equivalency Committee (PEC) as part of the Federal program. National field and laboratory surveys to verify that Class A and Class B treatment processes for pathogens perform as assumed by their engineering and design principles could also be conducted. Determinations could be made of pathogen density and elimination across the various accepted treatment processes and in the biosolids or environmental media over time, applying geographic and site-specific conditions that affect pathogen fate and transport to determine the effectiveness of site restrictions, buffer zones, and holding periods for Class B biosolids. EPA may also consider further refining, and directly correlating, stabilization controls to outcomes using metabolic techniques (*e.g.,* sour test, carbon dioxide metabolic release, methane metabolic release).

2. The Agency's Response to the Pathogen Category

How EPA Plans To Address NRC Pathogen Recommendations

EPA currently uses a technology and management practices based approach to minimize pathogen exposure. The Agency is considering studies to better understand the measurement, control, and fate of pathogens during the production and land application of sewage sludge. Such studies include improved analytical methods, evaluation of treatment and application processes, site-specific pathogen occurrence studies, potential human health impacts, exposure assessment, and risk assessment.

Certain pathogen studies are discussed in the Methods Development subsection of this notice. Where other studies address several pathogen issues (*e.g.,* field studies, management, treatment, site restrictions), they are briefly described below.

Research: EPA has an ongoing biosolids research program focused on selected pathogens, and is expanding this program during this fiscal year. Future pathogen research will be determined by the results of ongoing studies that will inform the Agency about significant issues and information gaps that require additional work. Presently, the Agency is considering research in at least three general areas: (1) Development of improved pathogen analytical techniques; (2) assessment of exposure and risk for critical pathways and pollutants, and (3) evaluation of sewage sludge processing and land application methods and site restrictions. Results of such research will assist the Agency in determining where improvements may be needed.

Pathogen Activities

In June 2001, EPA and USDA sponsored a workshop on ''Emerging Pathogen Issues in Biosolids, Animal Manures, and Other Similar By-Products'' (USEPA 2003 in press). The workshop assembled experts in biosolids and animal waste management to review the state-of-the-science, resolve persistent and complex issues, and provide suggestions for research. The workshop considered: viruses, bacteria, protozoa, prions, fungi, and helminth ova; migration of pathogens to groundwater and air from recycling and treatment operations; qualitative identification and detection methods for pathogens; the fate of antibiotics in animal and human wastes; pathogen resistance to antibiotics; and susceptibility of people with immuno-suppressed conditions to pathogens.

A discussion of recently initiated EPA work concerning pathogens at five biosolids and three animal manure production and/or application sites is provided in the previous Exposure category.

The Agency has completed and is conducting additional studies on exposure and occurrence of disease which are described in the Risk Assessment and Human Health subsections of this Section VII. In a collaboration with Duke University, EPA has also published a report on the relationship between odor from animal and waste water residuals processing facilities and land application sites and potential health effects (Journal of Agromedicine, Volume 7(1), 2000, ISSN: 1059–924X). The report summarizes the state of knowledge on ambient odor health effects with emphasis on animal manure and biosolids odor emissions. Potential mechanisms for health symptoms, methods for validating health symptoms, presence of odor, and efficacy of odor management are discussed. The importance of health effects was found to be dependent upon a number of factors, and health impacts may be minimized using odor remediation methods.

The University of Arizona's, National Science Foundation, Water Quality Center (*http://www.wqc.arizona.edu*) has conducted, and is planning to conduct, pathogen studies in biosolids including: (1) Air transmission of pathogens from land application, (2) potential occurrence of Staphylococcus aureus, (3) fate and transport of pathogens, and (4) risk assessments for pathogens in land applied biosolids. These studies will evaluate various application sites, terrain, climate, and potentially affected nearby populations. The researchers involved in this study plan to model the transmission of pathogens to estimate exposure for nearby human populations, which may ultimately allow the development of predictive risk assessment protocols. EPA will monitor these studies as they develop over at least the next two years to determine their relevance to the National biosolids program.

EPA's Pathogen Equivalency Committee (PEC): The Agency formed and has supported the PEC since 1985. PEC members provide guidance to applicants, permitting authorities and members of the regulated community on sampling and analysis issues related to meeting the subpart D requirements of part 503 (pathogen and vector attraction reduction). The PEC currently consists of representatives from EPA and the Centers for Disease Control and Prevention (CDC). The members have expertise in bacteriology, virology, parasitology, wastewater engineering, medical and veterinarian sciences, statistics, and sludge regulations. The PEC evaluates and supports development of alternative treatment technologies by consulting with local communities, States, industry and others stakeholders. The PEC provides information on biosolids processes, contaminant occurrences, and exposure, and assists EPA regions, States, and the regulated industry with questions about equivalency for Processes to Significantly Reduce Pathogens (PSRP) and Processes to Further Reduce Pathogens (PFRP) under 40 CFR part 257 and part 503. If the PEC recommends that a process is equivalent to PSRP or PFRP, the operating parameters and any other conditions critical to adequate pathogen reduction are specified.

The Water Environment Research Foundation (WERF), with contributions from EPA, is funding a diverse research program to support the wastewater treatment industry. An important part of their program has been supporting research on biosolids that has been aimed at reducing uncertainties and hence is significant with respect to the NRC recommendations. Treatment plant residuals and biosolids, including pathogen issues, have consistently ranked among the top five priorities for WERF subscribers over the past decade. WERF biosolids research entails more than 40 basic and applied projects to reduce uncertainties, better manage biosolids, assess public perception of risks, and develop strategies for biosolids treatment and management. Much of WERF's research is focused on the beneficial uses of biosolids. The Research of particular interest includes methods for rapidly detecting pathogens. EPA plans to continue to review and evaluate such research projects as they are completed to determine their relevancy to the national biosolids program.

Other studies supported by WERF are intended to determine biosolids land application rates. Phosphorus overload in animal manure and biosolids is a particular concern. These studies are evaluating phosphorus bioavailability and Class A and Class B pathogens to determine potential impact on groundwater and other environmental media. WERF is convening a biosolids research summit in the summer of 2003. A WERF pre-summit will provide training about mutual gains activities and joint fact finding, and will develop a protocol for guiding the assistance of an information sharing group (comprised of the concerned citizens, as well as stakeholders) in recommending WERF-sponsored research and oversight needs. EPA plans to collaborate with WERF and the USDA to sponsor an international conference on sustainable land application for municipal and industrial effluents, manures, biosolids and other non-hazardous wastes. The conference, scheduled for January 2004, will provide information and perspectives on research gaps and needs. Detailed information on the WERF biosolids research program may be accessed at *http://www.werf.org.*

Planned Pathogen Activities

Quantitative Microbial Risk Assessment (QMRA): EPA and WERF are funding research termed ''QMRA'', as described in ''A Dynamic Model to Assess Microbial Health Risks Associated with Beneficial Uses of Biosolids'' (WERF 2003, Cooperative Agreement No. CR–825237). The organizations involved in this research include WERF, the University of

California at Berkeley, and Eisenberg, Olevieri and Associates. The document describing this research also presents a methodology for assessing exposure and risks to human health from pathogens in biosolids. The present methodology provides initial screening for a given scenario, identifies broad conditions for high and low risk situations, and estimates where more data are needed. Future work (beyond 2004) may focus on applying this methodology to more refined scenarios. Such validation activities will assist EPA in developing microbial risk assessment guidelines, subject to available resources.

Potential future pathogens activities will include analytical methods development, exposure and risk assessment. The Agency is also considering continuing site-specific evaluations of current treatment and land application processes, studies of wastewater treatment sludge stabilization during biosolids production to reduce odors and vectors, and the use of pilot-scale treatment units to optimize sludge treatment techniques for pathogen and chemical control.

F. Human Health Studies

1. Summary of Human Health NRC Recommendations

The NRC recommended that the Agency conduct response incident investigations, targeted exposure surveillance, and well-designed epidemiological investigations of exposed populations. Data from these studies would be used to provide a means of documenting whether health effects exist that can be linked to biosolids exposure.

The NRC also recommended that preplanned exposure assessment studies characterize exposure of workers and the general public who come into contact with biosolids either directly or indirectly. Such studies could include the identification of microorganisms and chemicals, the selection of measurement methods for field samples, and the collection of adequate samples in appropriate scenarios.

Further, the NRC recommended that epidemiological studies of biosolids use be designed to provide evidence of a causal association, or lack thereof, between biosolids exposure and adverse human health effects. These studies could include an assessment of the occurrence of disease and an assessment of potential exposures. Because large scale and comprehensive epidemiological studies are expensive and require extensive data analysis, priority could be given to studies that can help reduce uncertainty.

2. The Agency's Response to the Human Health Studies Category

How EPA Plans To Address NRC Human Health Studies Recommendations

At this time, the Agency does not plan to conduct an epidemiological study, as discussed in the NRC report. As noted by the NRC, comprehensive epidemiological studies are complex, time consuming, and require substantial additional funding. The Agency may assess the future need for epidemiological studies, but believes targeted human health studies (*e.g.*, those of focused scope, such as exposure to pollutants via aerial transport and incident investigations) over the short-term might better address potential human health impact and persistent uncertainties surrounding exposed populations. These studies could help assess the potential airborne exposure to pollutants and could help determine whether incidents are occurring following biosolids exposure. Targeted exposure and human health studies could also help inform the design of any future epidemiological studies, should they prove necessary. Results from targeted studies would also allow the Agency to communicate with other public health-based federal agencies regarding human health exposure and epidemiological studies.

Planned Human Health Activities

Targeted Human Health Investigations: The Agency's primary objective is to characterize pollutants and microbial agents present in biosolids, as well as any associated human exposure pathways, that may have the greatest potential to adversely impact human health. Specifically, the NRC sees an immediate need for a systematic approach for investigating claims of disease or illness following biosolids exposure. Regulators, sewage sludge processors, and land appliers must be capable of responding rapidly to such reports. The Agency is investigating the possibility of developing a process for timely notification, recording, and tracking incident reports in collaboration with the Centers for Disease Control and Prevention (CDC). The Agency has initiated preliminary discussions with the CDC to discuss possible mechanisms for recording and tracking biosolids related disease incidents.

The University of Arizona's National Science Foundation, Water Quality Center, may also join cooperatively in the USDA/EPA/State of PA study to evaluate risk from exposure to pathogens, particulates, endotoxins, and odors from farm fields and other agricultural and silvicultural settings upon which biosolids, animal manures, and other organic amendments have been applied. These cooperative studies will evaluate various application sites, terrain, climate, placements of receptor populations and downwind ambient air concentrations of pathogens and volatile organic chemicals near residents. The Agency plans to evaluate if the collected data can be used to develop models for estimating exposure of human populations downwind of these sites, which might then be used in predictive risk assessment applications.

G. Regulatory Activities

1. Summary of Regulatory NRC Recommendations

The NRC recommended that EPA revise or develop regulatory criteria for biosolids in a timely fashion and identify additional regulatory mechanisms to better protect human health and the environment from the exposure to land-applied biosolids. This recommendation includes the following components: a review of biosolids protocols used by other nations, adoption of national standard treatment design criteria, a refinement of stabilization controls correlated to outcomes using metabolic techniques, development of molybdenum standards, development of a quantitative microbial risk assessment (QMRA) to establish regulatory criteria for pathogens, studies to determine whether the management practices specified in the Part 503 rule achieve their intended effect, provisions for the distribution of Class A biosolids weighing less than 1 metric ton (*i.e.*, the NRC recommends that all biosolids sold should be exceptional quality (EQ)), and the elimination of exemptions for nutrient management and site restrictions for land-applied EQ biosolids.

The NRC also recommended that EPA consider additional risk-management practices when revising the part 503 rule. Considerations should include limitations on holding or storage practices, slope restrictions, soil permeability and depth to groundwater, and setbacks to residences or businesses, surface water, and drinking water supplies.

2. The Agency's Response to the Regulatory Category

How EPA Plans To Address NRC Regulatory Recommendations

Ongoing Regulatory Activities

New Standards: As previously mentioned in Section II above, EPA vacated the numeric standards for molybdenum in sewage sludge as a result of litigation. EPA has conducted a literature search of new environmental properties information for molybdenum in land-applied biosolids. Following review of this new information, EPA will determine its applicability as the basis for re-proposing molybdenum standards for land-applied sewage sludge. EPA is planning to complete this review in 2003.

EPA also has information indicating that virtually no biosolids products are sold or given away in bags or other containers unless they comply with the pollutant concentrations for the nine metals currently regulated and the pathogen and vector attraction reduction requirements, which allows these products to be classified as exceptional quality (EQ) as described in the EPA guidance (USEPA, 1994). EPA plans to evaluate the data during the current year to determine whether to amend part 503 to eliminate the non-EQ Table 4 alternative for selling and distributing biosolids products that are sold or given away in bags or other containers weighing less than one metric ton.

Standardized Management Practices: Part 503 is designed to protect public health through compliance not only with numerical criteria for pollutants found in biosolids, but also with operational standards for pathogen and vector attraction reduction. These operational standards are performance based, based on operational goals for specified reduction, to enable elimination of pathogens and vector attraction reductions in sewage sludge through various engineering designs, processes and equipment. EPA believes that such means are appropriate for achieving environmental performance while encouraging efficient, cost-effective, and innovative systems and approaches.

The establishment of national standard treatment design criteria may not result in application of the most efficient site-specific practices for protecting public health. The additional management practices recommended by the NRC are linked to site-specific, or local-level, conditions. Examples include topography, soil characteristics, climate, population density, land-use, depth to groundwater, and proximity to surface waters. States and local jurisdictions will have better knowledge of local conditions, and are in a better position to establish additional management practices to augment the protectiveness of the part 503 Standards. However, EPA also plans to evaluate such practices to determine if additional requirements or improvements in the Part 503 Rule are warranted.

Regulations from Other Nations: EPA generally considers relevant and available information and protocols from other nations to augment and inform its decisions. When standards are available, such as the Canadian standards for sewage sludge, these have provided the Agency with valuable new perspectives and insights into the scientific, technical, and societal basis for the development and implementation of sewage sludge regulations. However, there are fundamental scientific and programmatic differences between certain international sewage sludge standards and EPA's standards for the use or disposal of sewage sludge in 40 CFR part 503.

The Part 503 Standards are based on information for pollutants found in sewage sludge, and are risk-based as directed by section 405(d) of the Clean Water Act. As such, the Part 503 Standards consist of numerical limits with adequate margins of safety to protect public health and the environment. The Part 503 numerical standards are based on a conservative set of exposure pathway and risk assessment assumptions.

In contrast, international sewage sludge standards are based on differing legal frameworks. Therefore, sewage sludge regulation promulgated by some other countries may not be comparable to EPA's authority or standards under section 405 of the CWA. However, numerous other countries have supported the quantitative risk assessment approach and have often adopted Part 503 limits for regulating biosolids.

Planned Regulatory Activities

Studies: As part of its field studies in 2004, EPA is planning to evaluate certain Class B disinfection processes including the natural attenuation of pathogens that occurs while the sludge is on or in the soil for the site restriction periods stated in the current regulations (40 CFR 503.32(b)(5)). Treatment processes that are expected to be evaluated include anaerobic digestion and lime addition. Site restrictions to be studied include limitations on how soon agricultural activities can occur after biosolids application. In determining the efficacy of current management practices, ways to improve them may also be identified. This research will be initiated in 2003.

H. Biosolids Management

4. Summary of Biosolids Management NRC Recommendations

The NRC recommended that the Agency increase the resources devoted to its biosolids program and expand biosolids management activities. Specific recommendations were made to increase funding to States to implement programs, fund, support, and officially sanction EPA's Pathogen Equivalency Committee (PEC) as part of the EPA biosolids program, and strike a balance between expending resources on new site-specific data collection and expending resources to model and assess risk using existing information.

The NRC also recommended biosolids management activities in the following areas: expand and strengthen the oversight program, track allegations and sentinel events of adverse health effects from exposure to land-applied biosolids, and conduct studies to determine whether the management practices specified in Part 503 achieve their intended effect.

Furthermore, the NRC recommended that the Agency develop a procedural framework to implement human health investigations and to verify that (1) treatment technologies for pathogen control are effective (quality control), (2) chemical standards are met (compliance audits), and (3) unanticipated hazards are identified.

2. The Agency's Response to the Biosolids Management Category

How EPA Plans To Address NRC Biosolids Management Recommendations

Biosolids Management Activities

Overview: At EPA Headquarters, the biosolids regulatory staff within the Office of Water has been increased recently. The new staff positions will be devoted to regulatory development, Part 503 updates, and implementation activities. There is also an enforcement or compliance presence in each of the EPA Regional Offices for following up on phone calls and complaints received from the public, and initiating Agency enforcement actions, as appropriate.

States have their own oversight programs, some of which are quite comprehensive. There are a total of about 150 full time equivalent State employees assigned to their respective biosolids programs. Five States have

been authorized by EPA to administer the part 503 program, and 15 additional States are at various points in the authorization process. National coordination of State, regional and Headquarters biosolids programs are achieved via an annual national meeting.

EPA continues to meet its statutory obligations under the Clean Water Act (CWA) pertaining to sewage sludge. The Agency continues to believe that land application of biosolids is an appropriate choice for communities, when conducted in compliance with EPA regulations. Given present scientific knowledge, EPA has based the allocation of resources to biosolids compliance and enforcement on its assessment of the relative risks to public health and the environment that are posed by biosolids.

Regions and States have the flexibility and responsibility to address situations where compliance assistance and enforcement actions to address biosolids are appropriate and necessary. EPA has taken enforcement actions and/or appropriate administrative remedies to address biosolids violations of 40 CFR part 503 and will continue to take actions to address instances where biosolids pose an imminent and substantial endangerment to human health or the environment. EPA will reconsider resources devoted to biosolids if additional research and science demonstrate greater risk.

To assist the States and Regions in their oversight of the biosolids program, EPA has, either in place or in development, tools to assist and promote compliance with biosolids regulatory requirements. The National Pollutant Discharge Elimination System (NPDES) Compliance Inspection Manual, which is used by EPA and State inspectors to perform inspections in the field, includes a ''Sludge (Biosolids)'' chapter (Chapter 10). This manual has just undergone major revisions and updating by a Headquarters and regional workgroup; the Manual is being distributed as a final draft for regional and program office review. Electronic training modules, including a module for biosolids inspections, are planned to be available shortly after the release of the revised manual, in Summer 2003.

Additionally, there are two compliance assistance web sites, which are available for biosolids compliance studies, information and tools, and for links to other sites with pertinent biosolids compliance information. One is the National Environmental Compliance Assistance Clearinghouse at: *http://cfpub.epa.gov/clearinghouse/.* This site is a searchable clearinghouse of compliance assistance materials. The second Web site is the Local Government Environmental Assistance Network (LGEAN) at *http://www.lgean.net.* This on-line compliance assistance center, which focuses on local government environmental requirements, is operated by the International City/County Management Association (ICMA), and has six other partners representing local government.

In the area of data systems, EPA is continuing to work with States as it modernizes the Permit Compliance System (PCS) to allow for more effective program oversight. While PCS is the national data system for the NPDES permit program, it currently requires only limited biosolids data. As part of the PCS modernization, a separate workgroup (including States and EPA) was devoted to the data needed to manage the biosolids program. This workgroup examined data in State systems, Biosolids Data Management System (BDMS) and PCS, and considered incorporating BDMS into PCS. The recommendations of this workgroup, endorsed by the PCS Executive Council, was not to incorporate or link BDMS, but rather to add data elements to PCS to improve tracking and oversight of the biosolids program.

The BDMS is another source of biosolids data. It was developed in the late 1990s by Region VIII to track biosolids quantity, quality, use, and disposal practices in the Region VIII states. While not the national system of record for biosolids, BDMS is a tool for municipalities in which they can enter data themselves and use the BDMS to develop reports for states, EPA and for citizen review. The BDMS is also a valuable management tool and can be used to record information about reported incidences associated with biosolids land application. The BDMS is available at: *http://www.treeo.uf/.edu/water/bdmsQuestionnaire.asp.* Current BDMS users include some EPA Regional offices, States, users of biosolids, contract land appliers, and POTWs throughout the U.S. and Canada. EPA is continuing to assess the potential of upgrading BDMS as a management tool that can link with established states and the Federal PCS system.

Research by the Water Environment Research Foundation (WERF) is described in the Pathogen and the Human Health Studies categories. WERF also supported a study by the New England Biosolids and Residuals Association (NEBRA) looking at the importance of establishing relationships among researchers, federal government and concerned citizens. This research included a survey on public perceptions and what people know about biosolids, what their concerns are and whether their concerns are being addressed adequately. The study's aim is to suggest ways that regulators and people can work together. A report is due out by mid 2003.

This and other projects will help the Agency gain a better understanding of public perception issues, values, and expectations. EPA can then identify the most effective communication approaches to ensure understanding of the importance of, and need for, proper biosolids management

Science and Public Outreach: Because of varying resources and diverse local circumstances, risk communication practices vary widely throughout the United States. The Agency's risk communication programs are aimed at improving public awareness of the issues and to achieve exposure reductions where needed. Embodied in all of the priorities for action described in this biosolids strategy is a need to foster public awareness of the issues surrounding biosolids use and exposure. Through the activities and organizations mentioned below, EPA is committed to improving the effectiveness of risk communication methods at national, regional, and local levels.

An Information-Sharing Group (ISG) has been established based upon the concepts developed in WERF studies concerning joint fact-finding research. The ISG is comprised of concerned citizens, health scientists, municipal operators, a farmer, biosolids managers, and input from State and Federal regulatory agencies. The ISG has been established to work jointly with about 25 scientific experts in a large cooperative study of odor, particulates, pathogens, and endotoxins in the air around biosolids and animal manure land application sites. Currently the researchers are from EPA, USDA, the State of PA, and several other organizations. WERF has efforts underway to expand the use of such information-sharing in other research projects.

The National Biosolids Partnership (NBP) is a 48 member alliance formed in 1997 with AMSA (Association of Metropolitan Sewerage Agencies), WEF (Water Environment Federation, and EPA (U.S. Environmental Protection Agency). Through partnering with producers, service contractors, users, regulatory agencies, universities, the farming community, and environmental organization, the goal of the NBP is to advance environmentally sound and accepted biosolids management practices.

Through a voluntary Environmental Management System (EMS), being developed for biosolids by the National Biosolids Partnership (NBP), EPA continues to provide the public with educational information, based on the best science, about the recycling and disposal of biosolids. EPA strongly supports the ongoing efforts of the NBP to develop the EMS and to provide correct and timely information and community-friendly practices that could be followed via its new communications system. The EMS program supports local agencies to find ways to meet and go beyond what is required in state and federal regulations. About 45 municipalities are now pilot-testing their biosolids EMS programs based upon a blueprint developed by the NBP. Several of these municipalities will be ready to undergo an independent third party audit of the EMS program later this year (2003). Municipalities involved in the voluntary EMS program are reporting benefits they have achieved. They report that their participation in the EMS program has resulted in more efficient operation, reduced odors in biosolids, less intrusive transport of the biosolids to land application sites, better communication, and meaningful involvement of the public. The Agency plans to continue supporting NBP activities and working with municipalities on expanding the use of EMS programs in biosolids management. Two NBP Web site address that present relevant biosolids information are *http://www.biosolids.org* and *http://biosolids.policy.net/emsguide/manual/goodpractmanual.vtml.*

The EPA's Pathogen Equivalency Committee was discussed in the Pathogens subsection. The PEC is instrumental in the development and evaluation of regulatory-related initiatives. EPA will continue to support and evaluate the activities of the PEC.

State Regulations: 40 CFR part 503 sets minimum standards for the use or disposal of sewage sludge. State requirements may be more restrictive or administered in a manner different from the Federal regulation. In all cases, users and disposers of biosolids must comply with the most restrictive portions of both the Federal and State rules. In most cases, the part 503 rule is self-implementing; users must comply with part 503 rule, even if they have not been issued a permit covering sewage sludge use or disposal. EPA or States can take enforcement actions directly against persons who violate part 503 requirements. In situations where States and others are addressing such issues, EPA plans to use those opportunities to further evaluate and develop the tools to improve the assessment and management of sewage sludge.

Planned Biosolids Management Activities

The priority activities for biosolids presented in this response were evaluated in the larger context of other Agency priorities. The purpose of listing planned activities is to illustrate the Agency's future direction based on current information. Given the activities spelled out in this response, EPA's goal over the next two years is to complete studies and other activities, follow external research, and review available information. The Agency's longer-term goal is to assess results from completed and ongoing activities to determine further research needs. Implementation of various activities will be considered by the relevant EPA Offices and Regions in future priority setting activities.

IX. How Did EPA Conduct the Review of Part 503 Regulations Under the CWA Section 405(d)(2)(C)?

Section 405(d)(2)(C) of the Clean Water Act requires that EPA review the sewage sludge regulations ''for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements'' of section 405(d). EPA has promulgated regulations in 40 CFR part 503 setting numeric standards for certain toxic pollutants in sludge, requirements for pathogen and vector attraction reduction, and operational standards for emissions from sewage sludge incinerators.

As explained in section IV above, EPA commissioned the NRC study of existing sewage sludge land application regulations for the purpose of strengthening the scientific basis of its review under section 405(d)(2)(C). In an agreement with the parties in *Gearhardt* v. *Whitman*, EPA agreed to publish a notice seeking public comment on its proposed response to the NRC recommendations and the results of its 405(d)(2)(C) review. In conducting this review, EPA committed to review and evaluate publicly available information, such as sampling data, scientific studies, and other analysis and information taken from a wide range of national and international public and private sources.

In fulfilling this commitment, EPA has performed a comprehensive assessment of the availability of data on chemicals that have been detected in or in some way linked to sewage sludge. EPA reviewed Rounds One and Two screening histories; collected and conducted a preliminary review of publicly available information on chemical toxicity, environmental properties such as mobility and persistence, and concentration; identified chemical pollutants for which appropriate analytical methods and human health benchmarks are available; and made preliminary determinations regarding sufficiency of information for risk-based screening analyses. The results of this review are available in the docket (USEPA, 2003e).

At this time, EPA has not identified any additional toxic pollutants that warrant regulation in sewage sludge. The next step in identifying toxic pollutants that may warrant regulation is to conduct a screening analysis of those chemicals for which adequate data and analytical methods are available and for which there is evidence that they may occur in sewage sludge. EPA plans to complete this screening analysis by January 2004. In addition, EPA is continuing to seek additional information to fill data gaps for those chemicals for which adequate data for the screening analysis is not yet available and would welcome any relevant data from commenters.

The Agency began its review under section 405(d)(2)(C) by first reviewing the complete list of pollutants that were considered in developing the Round One rule and Round Two proposal. For Round One, EPA conducted a National Sewage Sludge Survey (NSSS) in 1988–1989, which included an analysis of 411 pollutants. These 411 pollutants included, among others, every organic chemical including pesticide, dibenzofuran, dioxin and PCB analytes for which EPA had gas chromatography and mass spectrometry (GC/MS) standards (58 FR 9268–9269). Of the original 411 pollutants, EPA promulgated numeric standards in Round One for 10 pollutants (metals) in land-applied sewage sludge, three pollutants (metals) in sewage sludge placed in surface disposal units, seven pollutants in sewage sludge fired in sewage sludge incinerators (SSIs), and an operational standard for total hydrocarbons (or alternatively carbon monoxide) emitted from SSIs.

These same 411 pollutants were the starting point in 1995 for identifying pollutants for developing a Round Two regulation. EPA conducted a preliminary screening analysis which resulted in an identification of 31 pollutants for potential regulation in Round Two. These 31 pollutants were the subject of a comprehensive hazard identification study, which narrowed the list to dioxin, dibenzofurans and

coplanar polychorinated biphenyls (PCBs).

Many of the original 411 pollutants were eventually eliminated for consideration in Round One or Round Two rulemakings; 254 were eliminated because they were not detected in any or in fewer than one percent of the sewage sludge samples surveyed in the NSSS, and others were dropped because of a lack of sufficient information on their toxicity and environmental properties. In particular, 44 of the 411 pollutants, though detected at a frequency of greater than one percent, were dropped from further consideration because of lack of data on human health benchmarks and/or environmental properties. For a more detailed description of the process for Round One and Two, see USEPA, 2002c.

For the current review, EPA again started with the 411 pollutants initially identified for Round One consideration; As mentioned above, 254 of these pollutants were detected at a frequency rate of less than one percent in the 1988–89 NSSS and therefore were dropped from further consideration in both the Round One and Round Two rulemakings. Because the low detection rates for these 254 pollutants could have been due to the limits of the analytical and sampling methodology employed in 1988–89, EPA included these pollutants in the current review for potential addition to the Part 503 Standards. A literature search was performed on these pollutants to identify (1) human health benchmarks, (2) environmental properties, and (3) their presence or concentrations in sewage sludge.

As previously mentioned, 44 of the 411 pollutants considered in the Round One and Round Two rulemaking processes were detected at a frequency of greater than one percent, but were dropped from further consideration because of lack of data on human toxicity and/or environmental properties. EPA has preliminarily determined that 23 of the 44 are either non-toxic or non-persistent in the environment, but is continuing to evaluate them.

Next, EPA conducted a literature search of publicly available information to identify information on pollutants in sewage sludge since 1990, including information on pollutants that were not among the 411 originally identified pollutants. EPA has collected 459 scientific papers from national and international government entities, universities, non-profit and other private entities for the time period of 1990–2002, the date of the last NSSS to the present (USEPA, 2002d). Of these 459 papers, 216 papers concern either the Round One or Round Two pollutants only. The balance of these papers, 243, concern or potentially concern pollutants that were not the subjects of Rounds One or Two. Subsequently, these 243 papers were reviewed to verify which of the papers do in fact concern pollutants which were not the subjects of Rounds One and Two. In addition, these papers were reviewed for human health benchmarks, environmental properties, and presence or concentrations of these pollutants in sewage sludge.

EPA also collected information from EPA databases and several other existing databases with respect to human health benchmarks, and found 170 pollutants with some human health benchmarks among these databases (USEPA, 2002e). These databases include: EPA's Integrated Risk Information System, EPA's Superfund Technical Support Center Provisional Toxicity Values, EPA Health Assessment Documents, California Environmental Protection Agency Chronic Inhalation Reference Exposure Levels and Cancer Potency Factors, Agency for Toxic Substances and Disease Registry Minimal Risk Levels, and Health Effects Assessment Summary Tables.

The next step in this process was to ascertain whether analytical methods exist for detecting and quantifying each of these pollutants in sewage sludge (USEPA, 2002f, USEPA, 2002g, USEPA, 2002h). Although the accuracy, precision, and limits of detection of analytical methodologies for chemical pollutants in the sewage sludge matrix have significantly improved since the 1988–89 NSSS, there are still many pollutants for which no validated analytical methods exist.

In summary, EPA evaluated publicly available information with respect to presence in sewage sludge, toxicity (including human health benchmarks), persistence, mobility and potential for exposure for the pollutants contained in each of the four groups of pollutants described above: (1) The 254 pollutants with a low frequency of detection in the 1988–89 NSSS, (2) the 44 toxic pollutants that were detected at a frequency of greater than one percent in the 1988–1989 NSSS, but that had insufficient information to be able to perform subsequent evaluation, (3) the pollutants that were not the subject of Rounds One or Two but are covered in the 243 papers that turned up in the literature search, and (4) the 170 pollutants for which some health benchmark exists in the literature. These four groups of pollutants as described above were compared to eliminate any duplicates. Finally, EPA evaluated all of these pollutants to determine whether there are sufficiently accurate and precise analytical methodologies with adequate detection limits for these pollutants in the sewage sludge matrix. These results are available in detail in the docket for this notice (USEPA, 2003b).

These preliminary results will be further analyzed, leading to a risk-based screening analysis. The criteria for determining whether to proceed to a screening analysis for any pollutant are whether there are: (1) Adequate and reliable data regarding concentration of the pollutant in sewage sludge, (2) a current human health benchmark, (3) adequate information on environmental properties, such as persistence and mobility, and (4) an appropriate analytical method for the pollutant. In evaluating item 2 above, EPA will focus initially on chemicals for which there is a current peer-reviewed human health benchmark developed by EPA. EPA will next determine the adequacy of the available environmental properties data for use in the risk-based screening analysis.

The results of this screening analysis will serve as a basis for determining whether additional toxic pollutants should be considered for regulation in sewage sludge under section 405(d) of the Clean Water Act. As noted above, EPA has not yet identified any additional pollutants for regulation. Inclusion in the results presented today does not mean that a pollutant has been determined to be present in sewage sludge in concentrations that may adversely affect human health or the environment. Some, or even all, of these chemicals that have been detected in sewage sludge may only be present infrequently or in trace amounts, and may not present a risk of adverse effects to human health or the environment. Also, the properties or degree of toxicity of such chemicals may make their presence, even in higher amounts, of little risk to human health or the environment. As noted above, the NRC concluded that while there are significant data gaps, there is currently no documented scientific evidence that the existing Part 503 regulations have failed to protect public health. These results, however, are an important step forward in that they identify chemicals for which sufficient new information exists to proceed to a risk-based screening analysis, as well as data gaps that must be filled for other chemicals before such a screening analysis can be conducted.

EPA expects to complete its risk-based screening analysis of chemicals for which adequate information is currently available by January 2004. At that time EPA will identify those pollutants, if any, for which EPA plans to initiate a rulemaking under section 405(d). EPA requests comment on the methodology and results to date of its review under section 405(d)(2)(C) of the CWA. EPA also requests information that may help to fill data gaps for those chemicals for which sufficient information is not yet available to conduct a risk-based screening analysis.

X. What Are the Primary Issues for Public Comment?

While the EPA is requesting comments on all of the information discussed in this Notice, the Agency hopes that the public comment will also focus specifically on the following aspects of this Notice:

1. The Agency's preliminary strategy for responding to the NRC Recommendations, given that the Agency's biosolids program does not have sufficient resources to implement all of the recommendations.
2. EPA requests comment on its review under section 405(d)(2)(C) of the CWA. EPA also requests information that may help to fill data gaps for those chemicals for which sufficient information is not yet available to conduct a risk-based screening analysis.
3. EPA's plan to investigate the possibility of developing a process for timely notification, recording, and tracking incident reports in collaboration with other health-based Federal agencies, such as the Centers for Disease Control and Prevention.
4. The Agency's plan to begin designing a survey using information obtained from published pollutant occurrence and effects data, State occurrence data bases, and input received during the public comment period.

XI. References

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USEPA, 2002b. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency. EPA 260R–02–008. Office of Environmental Information. Washington, DC. October 2002. Available online at *Http://www.epa.gov/oei/qualityguidelines.*

USEPA, 2002c. Screening History for the Part 503 Rounds One and Two Proposal. 4 pages. Office of Water, Office of Science and Technology. Washington, DC.

USEPA, 2002d. Literature Search of Publicly Available Information to Identify Information on Pollutants in Sewage Sludge Since 1990. 48 pages. Office of Water, Office of Science and Technology. Washington, DC.

USEPA, 2002e. Human Health Benchmarks for Potential Constituents in Biosolids. 11 pages. Office of Water, Office of Science and Technology. Washington, DC.

USEPA, 2002f. List of Analytes from the 1989 National Sewage Sludge Survey Found in Less than 1% of the Samples. 7 pages. Office of Water, Office of Science and Technology. Washington, DC.

USEPA, 2002g. Summary of Analytes from the 1989 National Sewage Sludge Survey. 12 pages. Office of Water, Office of Science and Technology. Washington, DC.

USEPA, 2002h. Potential Analytes. 5 pages. Office of Water, Office of Science and Technology. Washington, DC.

USEPA, 2003a. In press. Contemporary Perspectives on Infectious Disease Agents In Sewage Sludge and Manure. Compost Science & Utilization/The JG Press, Inc.

USEPA, 2003b. Candidate Pollutants for Ongoing Sewage Sludge Evaluation. 15 pages. Office of Water, Office of Science and Technology. Washington, DC.

WERF, 2003. Dynamic Model to Assess Microbial Health Risks Associated with Beneficial Uses of Biosolids. Cooperative Agreement No. CR–825237. Alexandria, VA.

Dated: April 2, 2003.

G. Tracy Mehan III,

Assistant Administrator, Office of Water.

[FR Doc. 03–8654 Filed 4–8–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[MM Docket No. 98–204; DA 03–1046]

Interim Policy Concerning Placement of Equal Employment Opportunity Public File Report in a Broadcaster's Public File

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission gives notice of its interim policy concerning the deadline for placement of Equal Employment Opportunity public file reports in stations' public files. This document also gives notice of groups that have filed petitions for reconsideration in this matter regarding requirement modifications.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Lewis Pulley (202) 418–1456, or Roy Boyce (202) 418–1438, Policy Division, Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, MM Docketa No. 98–204, adopted and released March 31, 2003. The complete text of this Public Notice is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC and may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street SW., Room CY–B–402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via email *qualexint@aol.com.*

Synopsis of Public Notice

1. By this Public Notice the Media Bureau establishes an interim policy concerning the enforcement of the requirement of the Equal Employment Opportunity (''EEO'') rule—§ 73.2080—that a broadcaster that is part of an employment unit with five or more full-

time employees place information concerning its EEO efforts in its public file and on its Web site, if it has one. *See* § 73.2080(c)(6). Pursuant to that provision, the information is required to be placed in the station's public file on the anniversary of the date the station is due to file its renewal application. The information relates to specified EEO activities engaged in during the preceding year.

2. Petitions for reconsideration have been filed by two groups of State Broadcasters Associations urging, among other matters, that the requirement should be modified to allow a ten day grace period for the specified information to be placed in the public file because broadcasters may not have sufficient time to collect and review data concerning activities that occur shortly before the renewal filing anniversary. The Commission will address the merits of these requests in due course. We will adopt an interim enforcement policy of allowing a ten day grace period with respect to EEO public file reports due April 1, 2003. Thus, licensees that must place an EEO report in their public files on April 1, 2003, will comply with the deadline so long as the reports are placed in the public file by April 11, 2003.

3. Thereafter, until such time as the Commission acts on the petitions for reconsideration, licensees should place EEO public file reports in their public files by the due date. They may, however, base their public file reports on activity that concludes up to 10 days prior to the due date. Licensees who choose to conclude their reports prior to the day before the due date should include any reportable information occurring between their cutoff date and the due date in next year's public file report.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–8579 Filed 4–8–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2603]

Petition for Reconsideration of Action in Rulemaking Proceeding

April 3, 2003.

Petition for Reconsideration has been filed in the Commission's rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR section 1.429(e). The full text of this document is available for viewing and copying in Room CY–A257, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, Qualex International (202) 863–2893. Oppositions to this petition must be filed by April 24, 2003. *See* section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of the FM Table of Allotments (Eagle, Fort Morgan, and Hudson, Colorado, Bayard and Bridgeport, Nebraska, and Douglas and Fort Laramie, Wyoming).

Number of Petitions Filed: 1.

Subject: In the matter of the Federal-State Joint Board on Universal Service (CC Docket No. 96—45).

1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms (CC Docket No. 98–171).

Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990 (CC Docket No. 90–571).

Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size (CC Docket No. 92–237).

Number Resource Optimization (CC Docket No. 99–200).

Telephone Number Portability (CC Docket No. 95–116).

Truth-in-Billing and Billing Format (CC Docket No. 98–170).

Number of Petitions Filed: 1.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–8618 Filed 4–8?–03; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 940. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011689–004.

Title: ZIM/CSCL Space Charter Agreement.

Parties: Zim Israel Navigation Co., Ltd., China Shipping Container Lines Co. Ltd.

Synopsis: The amendment discontinues the chartering of space on several strings and changes the space allocations on the remaining strings.

Agreement No.: 011841–001.

Title: Lykes/Libra Slot Charter Agreement.

Parties: Companhia Libra de Navegacao, Lykes Lines Limited, LLC.

Synopsis: The subject agreement modification deletes from Article 5.1(a)(ii) the restrictions on the use of space by Libra to move cargo to/from ports in the Dominican Republic and Venezuela. Consequently, these countries are being added to the geographic scope. The modification also clarifies that the agreement is intended to cover the trade between the U.S. and Mexico. The parties request expedited review.

Agreement No.: 011848.

Title: WWL/K-Line Transatlantic Space Charter Agreement.

Parties: Wallenius Wilhelmsen Lines AS (''WWL''), Kawasaki Kisen Kaisha, Ltd. (''K-Line'').

Synopsis: The proposed agreement would authorize WWL to take space on K-Line's roll-on, roll-off vessels operating between the Atlantic Coast of the United States and ports in Europe (including the United Kingdom and Scandinavia). The agreement also allows for a limited range of cooperative activities between the parties related to the space chartering.

Agreement No.: 200940–001.

Title: Broward County Tecmarine Marine Terminal Agreement.

Parties: Broward County, Tecmarine Lines, Inc.

Synopsis: The agreement amendment terminates the agreement effective April 3, 2003.

By Order of the Federal Maritime Commission.

Dated: April 4, 2003.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–8681 Filed 4–8–03; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an

application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants

Pacific Atlantic Lines, Inc., 530 Main Street, Fort Lee, NJ 07024, *Officer:* Netanel Gonen President (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

United Aline Services Inc., 111 Great Neck Road, Suite 312, Great Neck, NY 11021, *Officer:* Gao, Yunyan, President (Qualifying Individual).

Merco International, Inc., 7372 N.W. 35 Terrace, Miami, FL 33122, *Officers:* Ricardo Olascoaga, Director (Qualifying Individual), Jorge Santiago Artaza, President.

Leonardi & Co. USA, Inc., One Cross Island Plaza, Suite 312, Rosedale, NY 11422, *Officers:* Ralph Di Rado, Secretary (Qualifying Individual), Italo Leonardi, President.

Chicago Int'l Forwarders Inc., 423E. Irving Park Road, Wood Dale, IL 60191, *Officers:* Janette Nham, President (Qualifying Individual), Luis Spina, Vice President.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants:

MBC Brokers Inc., 13823 Judah Avenue, Hawthorne, CA 90250, *Officers:* John Hanson, President (Qualifying Individual), Ann Hanson, Secretary.

One Bin.Com, Inc., 3406 SW 26 Terrace, Unit C–10, Fort Lauderdale, FL 33312, *Officers:* Leon Williams, Vice President (Qualifying Individual). Michael Singh, CEO.

Deans International Shipping Co., Inc., 217–21 Merrick Blvd., Laurelton, NY 11413, *Officer:* Sharon Deans, President (Qualifying Individual).

Dated: April 4, 2003.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–8682 Filed 4–8–03; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System

SUMMARY: *Background.* On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board–approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83–I's and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for Comment on Information Collection Proposal

The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility;

b. the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. ways to enhance the quality, utility, and clarity of the information to be collected; and

d. ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before June 9, 2003.

ADDRESSES: Comments may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551. However, because paper mail in the Washington area and at the Board of Governors is subject to delay, please consider submitting your comments by e-mail to *regs.comments@federalreserve.gov*, or faxing them to the Office of the Secretary at 202–452–3819 or 202–452–3102. Comments addressed to Ms. Johnson may also be delivered to the Board's mail facility in the West Courtyard between 8:45 a.m. and 5:15 p.m., located on 21st Street between Constitution Avenue and C Street, N.W. Members of the public may inspect comments in Room MP–500 between 9:00 a.m. and 5:00 p.m. on weekdays pursuant to 261.12, except as provided in 261.14, of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

A copy of the comments may also be submitted to the OMB desk officer for the Board: Joseph Lackey, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the Paperwork Reduction Act Submission (OMB 83–I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Cindy Ayouch, Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202–263–4869), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, Without Revision, of the Following Report

Report title: Reporting and Disclosure Requirements Associated with Regulation P

Agency form number: unnum Reg P

OMB control number: 7100-0294

Frequency: Reporting, on–occasion; and disclosure, annually.

Reporters: State member banks, subsidiaries of state member banks, bank holding companies and it's subsidiaries or affiliates, branches and

agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, corporations operating under section 25 or 25A of the Federal Reserve Act, and customers of these financial institutions.

Annual reporting hours: 427,500 hours

Estimated average hours per response: Financial institution disclosure requirements: Initial notice, 40 hours; annual notice, 1 hour; opt–out notice to consumers, 1 hour; and notice of change in terms, 1 hour. Consumer reporting requirements: opt–out notice, 1 hour; and continuing right to opt–out, 1 hour.

Number of respondents: 9,500

Small businesses are affected.

General description of report: This information collection is mandatory (12 U.S.C. 248) and the Gramm–Leach–Bliley Act (Pub. L. 106–102, Sec. 504). Since the Federal Reserve does not collect any information, no issue of confidentiality normally arises.

Abstract: The information collection pursuant to Regulation P is triggered by the establishment of a relationship between a customer and a financial institution. The regulation ensures that financial institutions provide customers notice of the privacy policies and practices of financial institutions and a means to prevent the disclosure of nonpublic personal information, in certain circumstances. Where applicable, financial institutions are required to provide an initial notice and an annual notice of their privacy policies and practices, opt–out notices, and revised notices containing changes in policies and procedures.

In 2000, the Federal Reserve, along with the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), National Credit Union Administration (NCUA), Federal Trade Commission (FTC), and Securities and Exchange Commission (SEC) (≥the agencies≥) jointly agreed on burden estimates when they promulgated the privacy regulations.

In early 2003, an inter–agency working group[1] agreed to jointly re–estimate the paperwork burden of their privacy regulations. To avoid expiration of the authority for the information collections while the review is being completed, the group agreed to separately publish for comment estimates based on the 2000 assumptions. The OCC, FDIC, and OTS published initial Federal Register notices using the 2000 estimates; the comment periods have closed. Each of these agencies have received comments. After the Federal Reserve's public comment period has closed, the agencies will jointly review all of the comments received. Then the agencies will publish a joint final notice with revised final estimates in the Federal Register.

Board of Governors of the Federal Reserve System, April 3, 2003.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 03–8614 Filed 4–8–03; 8:45 am]

BILLING CODE 6210–01–S

[1] The working group consists of staff from the Federal Reserve, FDIC, OCC, and OTS.

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 24, 2003.

A. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Jerry L. Clark, De Leon, Texas; to acquire voting shares of F&M Bancshares, Inc., De Leon, Texas, and thereby indirectly acquire voting shares of Farmers and Merchants Bank, De Leon, Texas.

Board of Governors of the Federal Reserve System, April 4, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03–8675 Filed 4–8–03; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site 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 May 5, 2003.

A. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Southwest Bancorporation of Texas, Inc., Houston, Texas, to acquire 100 percent of the voting shares of Maxim Financial Holdings of Delaware, Inc., Wilmington, Delaware; and Maxim Financial Holdings, Inc., Dickinson, Texas, and thereby indirectly acquire voting shares of MaximBank, Dickinson, Texas.

B. Federal Reserve Bank of San Francisco (Maria Villanueva, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. Western Alliance Bancorporation, Las Vegas, Nevada; to acquire 100 percent of the voting shares of Torrey Pines Bank, San Diego, California (in organization).

Board of Governors of the Federal Reserve System, April 4, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03–8676 Filed 4–8–03; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later thanof Governors not later than April 23, 2003.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. Commerzbank Aktiengesellschaft, Frankfurt, Germany; through its subsidiary, Commerzbank Capital Markets Corporation, New York, New York, to engage in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y; acting as investment or financial advisor, pursuant to section 225.28(b)(6) of Regulation Y; providing securities brokerage services, pursuant to section 225.28(b)(7)(i) of Regulation Y; engaging in riskless principal transactions, pursuant to section 225.28(b)(7)(ii) of Regulation Y; providing private placement services, pursuant to section 225.28(b)(7)(iii) of Regulation Y; engaging in other transactional services, pursuant to section 225.28(b)(7)(v) of Regulation Y; underwriting and dealing in government obligations and money market instruments, pursuant to section 225.28(b)(8)(i) of Regulation Y; and in permissible investing and trading activities, pursuant to section 225.28(b)(8)(ii)(a) of Regulation Y.

Board of Governors of the Federal Reserve System, April 3, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.03–8613 Filed 4–8–03; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[FPMR Bulletin 2003–B1]

Federal Management Regulation; Redesignation of a Federal Building

AGENCY: Public Buildings Service (P), GSA.

ACTION: Notice of a bulletin.

SUMMARY: The attached bulletin announces the redesignation of a Federal Building.

Expiration Date: This bulletin expires September 3, 2003. However, the building redesignation announced by this bulletin will remain in effect until canceled or superseded.

FOR FURTHER INFORMATION CONTACT: Paul Chistolini, General Services Administration, Public Buildings Service (P), Washington, DC 20405; at (202) 501–1100, or by e-mail at *paul.chistolini@gsa.gov.*

Dated: March 31, 2003.

Stephen A. Perry,

Administrator of General Services.

GENERAL SERVICES ADMINISTRATION

[FPMR Bulletin 2003-B1]

Federal Management Regulation; Redesignation of a Federal Building

To: Heads of Federal Agencies.

Subject: Redesignation of a Federal Building.

1. *What is the purpose of this bulletin?* The attached bulletin announces the redesignation of a Federal Building.

2. *When does this bulletin expire?* This bulletin expires September 3, 2003. However, the building redesignation announced by this bulletin will remain in effect until canceled or superseded.

3. *Redesignation.* The former and new name of the building being redesignated are as follows:

Former name	New name
Battle Creek Federal Center, 50 N. Washington Avenue, Battle Creek, MI 49017.	Hart-Dole-Inouye Federal Center, 50 N. Washington Avenue, Battle Creek, MI 49017.

4. *Who should we contact for further information regarding redesignation of this Federal Building?*

General Services Administration, Public Buildings Service, Office of the Commissioner, Attn: Paul Chistolini, 1800 F Street, NW., Washington, DC 20405, Telephone Number: (202) 501–1100, E-mail Address: *paul.chistolini@gsa.gov.*

[FR Doc. 03–8661 Filed 4–8–03; 8:45 am]

BILLING CODE 6820–23–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–490]

In the Matter of Certain Power Amplifier Chips, Broadband Tuner Chips, Transceiver Chips, and Products Containing Same; Notice of Correction

AGENCY: International Trade Commission.

ACTION: Correction of notice of investigation.

SUMMARY: Due to a typographical error, the Commission's notice published in the **Federal Register** on April 4, 2003 (68 F.R.16551) incorrectly stated that the complaint was filed on March 3, 2002. The corrected date is March 3, 2003.

By order of the Commission.

Issued: April 4, 2003.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 03–8652 Filed 4–8–03; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Oil Pollution Act (OPA)

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States of America* v. *BD Oil Gathering, Inc.,* Civil Action No. 2:03–0253, was lodged with the United States District Court for the Southern District of West Virginia on March 24, 2003.

In this action, the United States sought assessment of civil penalties for

Defendant's violation of section 311(b)(3) of the Clean Water Act, 33 U.S.C. 1321(b)(3) and the implementing regulations at 40 CFR part 100. On or about December 23, 1998, BD Oil, by and through its employee or agent, operated a truck in Roane County, West Virginia, that ruptured and discharged approximately 92 barrels of oil into the Big Sandy Creek. Within ten days of entry of the Consent Decree, BD Oil will pay a civil penalty of $11,000.00 to the Oil Spill Liability Trust Fund. In addition to the civil penalty, BD Oil agrees to create and maintain a Spill Response Unit (SRU) to respond to oil spills and oil discharges within a designated portion of eastern Ohio and western West Virginia.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *BD Oil Gathering, Inc.,* D.J. Ref. 90–5–1–1–06959.

The Consent Decree may be examined at the Office of the United States Attorney, Southern District of West Virginia, 3000 Virginia Street, Suite 4000, Charleston, West Virginia 25301; and at U.S. Environmental Protection Agency, Region III Office, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the proposed Consent Decree may also be obtained by (1) mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611; or by (2) faxing or e-mailing a request to Tonia Fleetwood (e-mail: *tonia.fleetwood@usdoj.gov*; fax no: (202) 514–0097; phone confirmation (202) 514–1547). In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $8.75 (25 cents per page reproduction cost), made payable to the U.S. Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–8644 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Under 28 CFR 50.7, notice is hereby given that on April 1, 2003, a proposed consent decree (''decree'') in *United States* v. *Colonial Pipeline Company,* Civil Action No. 1:00–CV–3142 JTC, was lodged with the United States District Court for the Northern District of Georgia.

In this action, the United States sought civil penalties for seven recent and significant spills from Colonial Pipeline Company's (''Colonial'') 5,500 mile pipeline. The United States also sought injunctive relief to prevent future spills. Under the decree, Colonial will pay a $34 million civil penalty for seven spills that spilled 1.45 million gallons of oil from its pipeline into waters in five states. The $34 million civil penalty will go to the United States' Oil Pollution Liability Trust Fund, which underwrites cleanups nationwide.

Colonial will also require Colonial to designate its entire pipeline as potentially affecting ''high consequence areas.'' This will subject the entire pipeline to the pipeline integrity regulations of the U.S. Department of Transportation's Office of Pipeline Safety (''OPS''). Under the terms of the settlement, Colonial is also required to (1) inspect its corrosion protection system along the entire pipeline system every five years; (2) repair problems detected in the corrosion protection system to meet the standards developed by the National Association of Corrosion Engineers (NACE); (3) maintain its right-of-ways, including mowing and removing debris; (4) have personnel on site when utility or other excavation is occurring within five feet of the pipeline; and (5) survey and inspect the pipeline where it crosses water, and address areas of the pipeline that are exposed or insufficiently buried.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Colonial Pipeline Company,* D.J. Ref. 90–5–1–1–4367.

The decree may be examined at the Office of the United States Attorney, U.S. Courthouse, Suite 1800, 75 Spring Street, SW., Atlanta, Georgia 30303, and at U.S. the U.S. Environmental Protection Agency—Region IV, Atlanta Federal Center, 61 Forsythe Street, Atlanta, Georgia 30303. During the public comment period, the decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the decree may also be obtained by mail from the Consent Decree Library, PO 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 Consent Decree Library, please enclose a check in the amount of $11.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen Mahan,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–8642 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Under 28 CFR § 50.7, notice is hereby given that on March 13, 2003, a proposed Consent Decree in *United States* v. *Puerto Rico Aqueduct and Sewer Authority, et al.,* Civil Action No. 01–1709 (JAF), was lodged with the United States District Court for the District of Puerto Rico.

In this action the United States sought civil penalties and injunctive relief for the defendants' alleged discharges of untreated sewage from 471 pump stations throughout the Commonwealth of Puerto Rico and for the alleged failure to report certain discharges in violation of section 301(a) and 402 of the Clean Water Act, 33 U.S.C. 1311(a) and 1342. The proposed Consent Decree provides for the payment of a $1 million civil penalty by PRASA and Compañia de Agusa de Puerto Rico, its former operator by contact, as well as the performance of a Supplemental Environmental Project (''SEP'') by PRASA. The SEP is valued at $1 million and is designed to improve drinking water quality for certain communities which are not presently hooked up to PRASA water filtration systems. The proposed Consent Decree also requires PRASA and its current operator by contract, ONDEO de Puerto Rico, to develop and implement an EPA-approved system-wide operation and maintenance and spill response and cleanup plan for all pump stations owned by PRASA, as well as to perform

specific remedial actions at designated pump stations.

The Department of Justice will receive for a period of thirty (30) days from the date of this publciaton comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Puerto Rico Aqueduct and Sewer Authority, et al.,* Civil Action No. 01–1709 (JAF), D.J. Ref. 90–5–1–1–06475/1.

The Consent Decree may be examined at the Office of the United States Attorney for the District of Puerto Rico, Federal Office Building, Room101, Carlos E. Chardon Avenue, Hato Rey, Puerto Rico 00918, and at U.S EPA Region II, Caribbean Environmental Protection Division, 1492 Ponce de Leon Avenue, Suite 207, San Juan, Puerto Rico 00907. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, PO 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 (2020 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.25 (for a copy without appendices) or $18.25 (for a copy with appendices) (25 cents per page reproduction cost), payable to the U.S. Treasury.

Catherine R. McCabe,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–8643 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

[AAG/A Order No. 011–2003]

Privacy Act of 1974; System of Records

Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), notice is hereby given that the Civil Division, Department of Justice, is establishing a new system of records entitled ''Annuity Brokers List System'' Civil Division (CIV), JUSTICE/CIV–005.

The Annuity Brokers List System is established to support the production and maintenance of a list of annuity brokers as required by the ''21st Century Department of Justice Appropriations Authorization Act''. Section 11015(a) of the statute provides ''Not later than 6 months after the date of enactment of this Act, the Attorney General shall establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. This list shall be updated upon request by any annuity broker that meets the minimum qualifications for inclusion on the list. The Attorney General shall transmit such list, and any updates to such list, to all United States Attorneys.'' This notice is published in accordance with that statutory requirement.

The Department is providing a report to OMB and the Congress.

Dated: April 2, 2003.

Paul R. Corts,

Assistant Attorney General for Administration.

JUSTICE/CIV–005

SYSTEM NAME:

Annuity Brokers List System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Civil Division, U.S. Department of Justice, 950 Pennsylvania Avenue, NW., Washington, DC 20530; Department of Justice—Records Management Unit, 2711 Prosperity Avenue, Fairfax, VA 22031; and Federal Records Center, Suitland, MD 20409.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are seeking to be included in the list of annuity brokers mandated by section 11015 of the ''21st Century Department of Justice Appropriations Authorization Act.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system include: declarations filed by annuity brokers and associated correspondence.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 107–273, 21st Century Department of Justice Appropriations Authorization Act, Section 11015(a).

PURPOSE:

These records are collected and maintained for the purpose of establishing a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

None.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM: STORAGE:

Paper records are maintained in filing cabinets. Automated data, including records that have been transformed into electronic form, are stored on computer discs or magnetic tapes, which are also stored in cabinets.

RETRIEVABILITY:

Files and automated data are retrieved by name of an individual.

SAFEGUARDS:

Files and automated data are maintained under supervision of Civil Division personnel or their contractors. During working hours—only authorized personnel, with the appropriate authority may handle, retrieve, or disclose any information contained therein. Access to electronic records is controlled by password or other user identification code.

RETENTION AND DISPOSAL:

A request for authority to maintain and dispose of annuity broker list records has been submitted to the National Archives and Records Administration and is pending. In the interim, all records received will be retained and no records will be destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Office of the Assistant Attorney General, Civil Division, 950 Pennsylvania Avenue, NW., Washington, DC 20530.

NOTIFICATION PROCEDURES:

Address inquiries to: Office of the Assistant Attorney General, Civil Division, 950 Pennsylvania Avenue, NW., Washington, DC 20530.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about their records may write to the Office of the Assistant Attorney General, Civil Division, 950 Pennsylvania Avenue, NW., Washington, DC 20530. The request should state what records are sought and must include the requester's full name and current address. The request must be signed before a notary or signed, dated and submitted under penalty of perjury.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should direct their request to the Office of the Assistant Attorney General, Civil Division, 950 Pennsylvania Avenue, NW., Washington, DC 20530. The request should clearly and concisely state what information is being contested, the reason(s) for contesting it, and the proposed amendment to the record.

RECORD SOURCE CATEGORIES:

Individuals submitting information who are seeking to be included in the Department of Justice list of annuity brokers.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 03–8641 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated August 28, 2002, and published in the **Federal Register** on October 18, 2002, (67 FR 64417), AccuStandard, Inc., 125 Market Street, New Haven, Connecticut 06513, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
N=Ethylamphetamine (1475)	I
N,N=Dimthylamphetamine (1480)	I
Fenethylline (1503)	I
Mecloqualone (2572)	I
Alpha-Ethyltryptamine (7249)	I
3,4,5-Trimethoxyamphetamine (7390).	I
2,5-Dimethoxy-4-ethylamphetamine (7399).	I
5-Methoxy-3,4-methylenedioxyamphetamine (7401).	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N-Ethyl-1-phenylcyclohexylamine (7455).	I
1-(1-Phenylcyclohexyl) pyrrolidine (PCPY) (7458).	I
1-[1-(2-Thienyl)cyclohexyl] pyrrolidine (TCPY) (7473).	I
N-Ethyl-3-piperidyl benzilate (7482).	I
N-Methyl-3-piperidyl benzilate (7484).	I
Acetyldihydrocodeine (9051)	I
Benzylmorphine (9052)	I
Desomorphine (9055)	I
Codeine methylbromide (9070)	I
Difenoxin (9168)	I
Hydromorphinol (9301)	I
Methyldihydromorphine (9304)	I
Morphine methylbromide (9305)	I
Morphine methylsulfonate (9306)	I
Nicomorphine (9312)	I
Drotebanol (9335)	I
Allylprodine (9602)	I
Alphamethadol (9605)	I
Betaprodine (9611)	I
Clonitazene (9612)	I
Dextromoramide (9613)	I
Diampromide (9615)	I
Diethylthiambutene (9616)	I
Dimenoxadol (9617)	I
Dimepheptanol (9618)	I
Dimethylthiambutene (9619)	I
Dixoaphetyl butyrate (9621)	I
Dipipanone (9622)	I
Ethylmethylthiambutene (9623)	I
Furethidine (9626)	I
Hydroxypethidine (9627)	I
Ketobemidone (9628)	I
Morpheridine (9632)	I
Noracymethadol (9633)	I
Normethadone (9635)	I
Norpipanone (9636)	I
Phenadoxone (9637)	I
Phenampromide (9638)	I
Phenoperidine (9641)	I
Piritramide (9642)	I
Proheptazine (9643)	I
Properidine (9644)	I
Propiram (9649)	I
1-Methyl-4-phenyl-4-propionoxypiperidine (9661).	I
1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine (9663).	I
Tilidine (9750)	I
Para-Fluorofentanyl (9812)	I
3-Methylfentanyl (9813)	I
Alpha-Methylfentanyl (9814)	I
Acetyl-alpha-methylfentanyl (9815).	I
Beta-Hydroxyfentanyl (9830)	I
Beta-Hydroxy-3-methylfentanyl (9831).	I
Alpha-Methylthiofentanyl (9832)	I
3-Methylthiofentanyl (9833)	I
Thiofentanyl (9835)	I
Nabilone (7379)	II
1-Phenylcylohexylamine (7460)	II
Phenylacetone (8501)	II
1-Piperidinocyclohexanecarbonitrile (8603).	II
Isomethadone (9226)	II
Metopon (9260)	II
Piminodine (9730)	II
Racemorphan (9733)	II
Bezitramide (9800)	II

The firm plans to manufacture small quantities of the listed controlled substances to make reference standards.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, section 823(a) and determined that the registration of AccuStandard, Inc. to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated AccuStandard, Inc. to ensure that the company's registration is consistent with the public interest. This investigation 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 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed is granted.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8588 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on February 14, 2003, Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal, and on November 27, 2002, made application by renewal, and on November 27, 2002, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Amphetamine (1100)	II
Methadone (9250)	II
Methadone-intermediate (9254)	II
Methylphenidate (1724)	II
Levo-aphacetylmethadol (9648)	II
Fentanyl (9801)	II
Dextropropoxphene (9273)	II

The firm plans to manufacture the listed controlled substances for formulation into finished pharmaceuticals.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537; Attention: Drug Operations Section, Domestic Drug Unit (ODOD) and must be filed no later than June 9, 2003.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8583 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substances in Schedule I or II and prior to issuing a registration under section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with § 1301.34 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on February 14, 2003, Boehringer Ingelheim Chemicals, Inc. 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in Schedule II.

The firm plans to import Phenylacetone for the bulk manufacture of amphetamine.

Any manufacturer holding, or apply for, registration as a bulk manufacturer of this basic class of controlled substance may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Drug Operations Section, Domestic Drug Unit (ODOD), and must be filed no later than May 9, 2003.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e), (f). As noted as a previous notice at 40 FR 43745–46 (Sepember 23, 1975), all applicants for registration to import basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.452(a), (b), (c), (d), (e), and (f) are satisfied.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8585 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated October 5, 2001, and published in the **Federal Register** on October 17, 2001, (66 FR 52780), Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, VA 23805, made application by renewal to the Drug Enforcement Administration to be registered as a bulk manufacturer of the basic class of controlled substances listed below:

Drug	Schedule
Methylphenidate (1724)	II

The firm plans to manufacture the listed controlled substance for formulation into finished pharmaceuticals.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, Section 823(a) and determined that the registration of, Boehringer Ingelheim Chemicals, Inc., to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. to ensure that the company's registration is consistent with the public interest. This 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 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8587 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 01–1]

The Church of the Living Tree; Denial of Application

On November 4, 1999, and pursuant to 21 U.S.C. 823(a), the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to the Church of the Living Tree (Respondent) of Leggett, California, proposing to deny its application for DEA Certificate of Registration as a manufacturer of marijuana, a Schedule I controlled substance. The Order to Show Cause alleged that the pending application should be denied because the Respondent's proposed manufacture and distribution of marijuana for human consumption was a purpose not in conformity with the provisions of the Controlled Substances Act, under 21 U.S.C., section 2 812(b)(1), 822(b), 823(f)(4), and 841(a)(1).

By letter dated November 26, 1999, the Respondent, through its trustee John Stahl (Mr. Stahl), timely filed a request for a hearing on the issues raised by the Order to Show Cause, stating, in part, that Respondent sought "* * * to cultivate cannabis sativa for purposes which are allowable under California Law, and to process the remaining stalk into pulp for our paper mill." Through inadvertence, this request was not docketed for a possible hearing. As a result, the then-Deputy Administrator of the DEA issued a final order finding that Respondent had not responded to the Order to Show Cause and denying

Respondent's application. 65 FR 50,567 (August 3, 2000). However, by error, and the agency subsequently rescinded the prior final order by order dated November 21, 2000. 65 FR 75958 (2000). The matter was then docketed before Administrative Law Judge Mary Ellen Bittner (Judge Bittner).

On October 23, 2000, the Government filed a Motion for Summary Disposition, reiterating the allegations contained in the Order to Show Cause and further alleging, in part, that the manufacture of marijuana for human consumption is a purpose not in conformity with the Controlled Substance Act. The Government further argued that DEA rejected a previous petition to reschedule marijuana when it found that the drug has no currently accepted medical use. Marijuana Scheduling Petition; Denial of Petition; Remand, 59 FR 10,499, 10,507 (1992). The Government added that because the Respondent's previous DEA application for registration as a marijuana manufacturer was denied, the Respondent is now precluded from re-litigating the matter in its renewed effort to obtain a similar registration under the doctrine of res judicata. Robert A. Leslie, M.D., 64 FR 25,908 (1999); Robert M. Golden, M.D., 63 FR 38,669 (1998).

On November 1, and December 1, 2000, the Respondent filed its Response to Motion for Summary Disposition and Further Response to Motion for Summary Disposition respectively. In its submissions, the Respondent argued in essence that it ''* * * intended to cultivate medical marijuana as a cooperative farm of * * * patients qualifying under the terms of the Compassionate Use Act of 1996 (the Compassionate Use Act).'' As noted in a previous DEA final order, effective November 6, 1996, voters in California adopted the Compassionate Use Act, which provides that persons may grow or posses marijuana ''upon the written or oral recommendation or approval of a physician.'' Cal. Health & Safety Code section 11362.5 Marion ''Molly'' Fry, M.D., 67 FR 78015, 78017 (2002). The Respondent further argued in relevant part that California's marijuana law should be given deference by the Federal Government, and the Government's motion for summary disposition rejected, since there remained a fundamental question for resolution by the instant proceedings: whether Respondent's application should denied despite its engaging in activities that are now sanctioned under California state law (*i.e.,* cultivation of marijuana for human consumption).

On April 17, 2001, Judge Bittner issued her Opinion and Recommended Decision, granting the Government's Motion for Summary Disposition and recommending that Respondent's application for DEA registration be denied. Neither party filed exceptions to Judge Bittner's recommended ruling, and on June 12, 2001, the record was transmitted to the Deputy Administrator for his final decision. The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts the Opinion and Recommended Decision of the Administrative Law Judge, and finds as follows:

On January 21, 1997, the Respondent submitted a prior application to DEA as a manufacturer of marijuana for human consumption. The Respondent proposed to rent space on its property to individuals qualifying under California State law as medical marijuana patients, who would then cultivate marijuana for personal consumption, leaving the mature stalks for Respondent to process into paper. On April 17, 1998, DEA issued an Order to Show Cause seeking to deny the application on grounds that the Respondent was not authorized by the State of California to cultivate marijuana. The Respondent filed a timely request for hearing, and the matter was docketed before Judge Bittner as Church of the Living Tree, DEA Docket No. 98–26 (Church of the Living Tree 1). On May 21, 1998, the Government filed a motion summary disposition, alleging inter alia, that California law did not permit cultivation or harvesting of marijuana, and as a result of Respondent's lack of state authorization to manufacture marijuana for non-human consumption, DEA could not grant its application for registration as a matter of law.

In response to the Government's motion, and with arguments similar in scope to its present request for registration, the Respondent asserted in relevant part that the purpose of its application as a bulk manufacturer of medical marijuana was decidedly ''for Human Consumption'' and in compliance with California law. On July 31, 1998, Judge Bittner issued a recommended decision, in which she granted the Government's motion for summary disposition and recommended that the Respondent's application be denied.

In his final order published as Church of the Living Tree, 63 FR 69,674 (1998), the then-Deputy Administrator found that from a reading of the Respondent's marijuana manufacturing proposal, ''* * * it is clear that Respondent will be renting space on its property to others, but [Respondent] will not be the one manufacturing marijuana. Therefore * * * since Respondent will not be manufacturing marijuana nor is it proposing to manufacture marijuana, its application to be a manufacturer of marijuana must be denied.'' 21 U.S.C. 822(a) and 823(a). The then-Deputy Administrator added, ''* * * if Respondent's application is for registration to manufacture marijuana for non-human consumption, then it would have to be denied because California does not allow the cultivation of marijuana for non-human consumption.''

As noted above, on June 18, 1998, the Respondent submitted its most recent application for DEA registration as a manufacturer of marijuana in the category of bulk synthesizer-extractor. In support of the application, the Respondent asserted that its intentions are to cultivate medical marijuana as a cooperative farm of California patients qualifying under the terms of the Compassionate Use Act of 1996. The Respondent further contends that Art.I, sec. 8 and the Tenth Amendment to the United States Constitution provides the right to States to regulate their internal affairs. Therefore Respondent argues, since the proposes uses for its registration complies with California law, Respondent's pending application should be granted.

In the April 17, 2001, Opinion and Recommended Decision, Judge Bittner found that while Respondent seeks registration as a bulk synthesizer-extractor of marijuana, and although the Respondent is apparently willing to modify its application to the ''non-human consumption'' category, the Respondent's application cannot be granted under either category. The Deputy Administrator concurs with this finding. DEA concluded in Church of the Living Tree I that if Respondent rents out space to medical marijuana patients to cultivate marijuana, Respondent will be the entity doing the cultivation and therefore cannot be registered as a bulk synthesizer-extractor of marijuana. With respect to its instant application, the Respondent has not indicated that it seeks registration for purposes of growing marijuana for non-human consumption. In any event, there remains a lack of evidence before the Deputy Administrator that California law provides for the cultivation of marijuana for non-human consumption.

The Respondent has once again submitted an application for registration

as a manufacture of marijuana for human consumption. Such use of a DEA registration is not in conformity with provisions of the Controlled Substances Act. As noted above marijuana is listed in Schedule I of the Controlled Substances Act (CSA). 21 U.S.C. 812(c); 21 CFR 1303.11. The CSA defines Schedule I controlled substances as those drugs or other substances that have ''a high potential for abuse,'' ''no current accepted medical use in treatment in the United States,'' and ''a lack of accepted safety for use * * * under medical supervision.'' Also, every drug listed in Schedule I of the CSA lacks approval for marketing under the Federal Food Drug and Cosmetic Act (FDCA). Therefore, the Food and Drug Administration (FDA) has not approved marijuana for marketing as a drug.

The deleterious effects of marijuana use have been outlined extensively in previous DEA final orders and will not be repeated at length here. Marion ''Molly'' Fry, M.D. at 79015. *See also,* 66 FR 20038 (2001) 57 FR 10499 (1992). However, it bears mentioning again that the numerous significant short-term side effects and long term risks linked to smoking marijuana, include damage to brain cells; lung problems such as bronchitis and emphysema; a weakening of the body's antibacterial defenses in the lungs; the lowering of blood pressure; trouble with thinking and concentration; fatigue; sleepiness and the impairment of motors skills. *Id.*

Marijuana was placed in Schedule I for the same fundamental reason that it has never been approved for sale by the FDA; there have never been any sound scientific studies which demonstrate that marijuana can be used safely and effectively as medicine. See 66 FR 20038 (April 18, 2001) (DEA final order denying petition to initiate proceedings to reschedule marijuana). The Supreme Court recently explained the legal significance of marijuana's placement in Schedule I of the CSA:

> Whereas some other drugs (those in Schedules II through V) can be dispensed and prescribed for medical use, *see* 21 U.S.C. 829, the same is not true for marijuana. Indeed, the purposes of the Controlled Substances Act, marijuana has ''no currently accepted medical use'' at all.

United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 482, 491 (2001).

Federal law prohibits human consumption of marijuana outside of FDS-approved, DEA registered research. *Id.* at 490 (''For marijuana (and other drugs that have been classified as 'schedule I' controlled substances), there is but one express exception, and it is available only for Government approved research projects, section 823(f).''). *Id.* at 495 n.7.

In light of the Respondent's pending DEA application which by law cannot be granted, the Deputy Administrator concurs with Judge Bittner that there are no material disputed facts in this matter. Accordingly, the Government's motion for summary disposition was properly entertained and granted. It is well settled that when no question of material fact is involved, or when the material facts are agreed upon, a plenary, adversary administrative proceeding involving evidence and cross-examination of witnesses is not obligatory. The rationale is that Congress does not intend administrative agencies to perform meaningless tasks. See Gilbert Ross, M.D., 61 FR 8664 (1996); Philip E. Kirk, M.D., 48 FR 32,887 (1983), *aff'd sub nom Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984); *NLRB* v. *International Association of Bridge, Structural and Ornamental Ironworkers,* AFL–CIO, 549 F.2d 634 (9th Cir. 1977). For the above-stated reasons, the application of Respondent must be denied.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the application for a DEA Certificate of Registration submitted by the Church of the Living Tree, be, and it hereby is, denied. This order is effective April 9, 2003.

Dated: March 26, 2003.

John B. Brown, III,

Deputy Administrator.

[FR Doc. 03–8590 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on November 13, 2002, Dade Behring Inc., Route 896 Corporate Boulevard, Building 100, Attn: RA/QA, P.O. Box 6101, Newark, Delaware, 19714, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Ecogonine (9180)	II
Morphine (9300)	II

The firm plans to produce bulk products used for the manufacture or reagents and drug calibrator/controls, DEA exempt products.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Drug Operations Section, Domestic Drug Unit (ODOD) and must be filed no later than 60 days from publication.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8581 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 20, 2002, Syva Company, Dade Behring Inc., Regulatory Affairs Department E1–310, 20400 Mariana Avenue, Cupertino, California, 95014, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Ecogonine (9180)	II
Morphine (9300)	II

The firm plans to produce bulk products used for the manufacture of reagents and drug calibrator/controls, DEA exempt products.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug

Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Drug Operations Section, Domestic Drug Unit (ODOD) and must be filed no later than 60 days from publication.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8584 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

James E. Harris, P.A.; Revocation of Registration

On November 19, 2002, the Deputy Assistant Administrator, office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to James Harris, P.A. (Mr. Harris) of Henderson, Nevada, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, MH0604846, as a physician's assistant under 21 U.S.C. 824(a)(3), and deny any pending applications for renewal of that registration, pursuant to 21 U.S.C. 823(f) for reason that Mr. Harris is not authorized to handle controlled substances in the State of Nevada. The order also notified Mr. Harris that should no request for a hearing be filed within 30 days, his hearing right would be deemed waived.

The Order to Show Cause was sent by certified mail to Mr. Harris at a residential location in Henderson, Nevada and DEA received a signed receipt indicating that it was received on December 5, 2002. DEA has not received a request for hearing or any other reply from Mr. Harris or anyone purporting to represent him in this matter.

Therefore, the Deputy Administrator, finding that (1) 30 days have passed since the receipt of the Order to Show Cause, and (2) no request for a hearing having been received, concludes that Mr. Harris is deemed to have waived his hearing right. After considering material from the investigative file in this matter, the Deputy Administrator new enters his final order without a hearing pursuant to 21 CFR 1301.43(d) and (e) and 1301.46.

The Deputy Administrator finds that on March 13, 2002, the Nevada State Board of Medical Examiners (the Board) issued Findings of Fact, Conclusions of Law and Order in response to a complaint filed against the physician assistant license of Mr. Harris. The Board found *inter alia,* that Mr. Harris while working as a physician assistant at his place of work was tested, with a positive result for controlled substances. The Board also found that Mr. Harris' use of controlled substances impaired his ability to practice medicine and endangered the health, safety and welfare of his patients. As a result of its findings, the Board ordered the revocation of Mr. Harris' physician assistant license to practice medicine in the State of Nevada.

There is no evidence in this investigative file that the Board's revocation order has been stayed or lifted, nor is there evidence that Mr. Harris' physician assistant license to practice medicine in the State of Nevada has been reinstated. Therefore, the Deputy Administrator finds that since Mr. Harris is not currently authorized to practice medicine in Nevada, it is reasonable to infer that he is not authorized to handle controlled substances in that state.

DEA does not have statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances in the state in which he conducts business. *See* 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. *See* Joseph Thomas Allevi, M.D., 67 FR 35581 (2002); Dominick A. Ricci, M.D., 58 FR 51104 (1993); Bobby Watts, M.D., 53 FR 11919 (1988).

Here, it is clear that Mr. Harris is not licensed to handle controlled substances in Nevada, where he is registered with DEA. Therefore, he is not entitled to maintain that registration.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration, MH0604846, issued to James E. Harris, P.A., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal of such registration be, and they hereby are, denied. This order is effective May 9, 2003.

Dated: March 26, 2003.

John B. Brown III,

Deputy Administrator.

[FR Doc. 03–8589 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 02–27]

Island Wholesale, Inc., Denial of Application

On October 5, 2001, the Deputy Assistant Administrator, Office of Division Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Island Wholesale, Incorporated (Respondent), proposing to deny its application, executed on March 31, 2000, for DEA Certificate of Registration as a distributor of the list I chemicals ephedrine and pseudoephedrine. The Order to Show Cause alleged that granting the Respondent's application would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(h).

The Order to Show Cause was delivered to the Respondent by certified mail, and the Respondent timely requested a hearing. However, after the matter was docketed before Administrative Law Judge Gail A. Randall (Judge Randall), and the Government submitted its Prehearing Statement, the Respondent, through its legal counsel, withdrew its opposition to the denial of its DEA application for registration. In response to the Respondent's request, Judge Randall also found that the Respondent had likewise withdrawn its request for hearing. Accordingly, on April 18, 2002, Judge Randall issued a Termination Order terminating all matters before her and the matter was subsequently transmitted to the Deputy Administrator for Final Agency Decision.

In light of the withdrawal of its request for hearing, the Deputy Administrator finds that the Respondent has waived its hearing right. Aqui Enterprises, 67 FR 12576 (2002). After considering relevant material from the investigative file in this matter, the Deputy Administrator now enters his final order without a hearing pursuant to 21 CFR 1301.43(d) and (e) and 1301.46. The Deputy Administrator finds as follows:

List I chemicals are those that may be used in the manufacture of a controlled substance in violation of the Controlled Substances Act. 21 U.S.C. 802(34); 21 CFR 1310.02(a). Pseudoephedrine and ephedrine are list I chemicals that are commonly used to illegally manufacture methamphetamine, a Schedule II controlled substance. Methamphetamine is an extremely potent central nervous system stimulant, and its abuse is a growing problem in the United States.

The Deputy Administrator's review of the investigative file reveals that the Respondent is a small candy distributor located in Brooklyn, New York. The Respondent is owned by Fouad Twaiti, and his brother, Ali Twaiti serves as its manager. As part of a pre-registration investigation, DEA Division Investigators met with Fouad and Ali Twaiti on May 12, 2000. Fouad Twaiti informed investigators that his firm had been in operation since early 2000, and further added that his firm had been approached by some of its customers who ask for list I chemical products. Upon request, Fouad Twaiti furnished DEA investigators with a customer list consisting of four business establishments.

DEA investigators subsequently interviewed each of the owners and/or managers comprising the customer list provided by Fouad Twaiti. Each of the listed establishments denied requesting list I chemical products from Fouad Twaiti, and three of the establishments denied engaging in the sale of any pseudoephedrine products.

The investigative file further reveals that as part of its ongoing investigation of the Respondent, DEA investigators obtained bank records of an individual hereinafter referred to as ''M.A.'' In or around March 2000, M.A. was criminally charged in Newark, New Jersey, with unlawful distribution of a listed chemical, and in January 2001, M.A. purportedly signed a plea agreement on the charge. According to DEA's review of bank records, Ali Twaiti engaged in a transaction with MA for $54,000 on December 20, 1999. When M.A. was asked by law enforcement officials about the above transaction with Ali Twaiti, M.A. replied, ''that was for a candy deal.''

Pursuant to 21 U.S.C. 823(h), the Deputy Administrator may deny an application for DEA Certificate of Registration if he determines that granting the registration would be inconsistent with the public interest as determined under that section. Section 823(h) requires the following factors be considered in determining the public interest:

(1) Maintenance of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) Compliance with applicable Federal, State, and local law;

(3) Any prior conviction record under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) Any past experience in the manufacture and distribution of chemicals; and

(5) Such other factors as are relevant to and consistent with the public health and safety.

As with the public interest analysis for practitioners and pharmacies pursuant to subsection (f) of section 823, these factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or combination of factors of factors, and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. *See, e.g.* Energy Outlet, 64 FR 14269 (1999). *See also* Henry J. Schwartz, Jr., M.D. 54 FR 16422 (1989).

The Deputy Administrator finds factors one, four, and five relevant to the Respondent's pending application.

With respect to factor one, maintenance of effective controls against diversion, the Deputy Administrator finds evidence in the investigative file that the Respondent provided customer information to DEA investigators that later proved to be false. With the ever-present problem of listed chemical diversion, it is incumbent upon a potential registrant to provide reliable and accurate information regarding the immediate destination of these products, and thereby, reduce the opportunity for diversion. The Deputy Administrator finds the uncertainty surrounding Respondent's customers is relevant under factor one and supports denial of Respondent's pending application for DEA registration.

Regarding factor four, past experience in the manufacture and distribution of chemicals, the Deputy Administrator can find no evidence in the investigative file that Respondent, a small candy distributor, has any previous experience related to handling or distributing listed chemicals. This factor also weighs against the granting of Respondent's pending application. *See,* CHM Wholesale Co., 67 FR 9985 (2002).

With respect to factor five, such other factors relevant to and consistent with the public safety, the Deputy Administrator finds relevant that Respondent provided false information to DEA investigators when it provided a list of its purported customers. The Deputy Administrator finds this lack of candor makes questionable the Respondent and its owners' commitment to the DEA statutory and regulatory requirements designed to protect the public from the diversion of listed chemicals. Seaside Pharmaceutical Co., 67 FR 12580 (2002); Aseel, Incorporated, Wholesale Division, 66 FR 35459 (2001); Terrence E. Murphy, M.D., 61 FR 2841 (1996).

On a related note, it is also unclear whether Fouad Twaiti provided a false statement to DEA investigators when he stated that the firm had been approached by customers requesting listed chemical products. Even if the statement regarding customer inquiries was true, there is insufficient information before the Deputy Administrator regarding the type of customers that requested these products, their identity and location, and whether they had a legitimate business interest in seeking the purchase of listed chemical products.

The Deputy Administrator also finds relevant under factor five, the fact that Ali Twaiti engaged in a significant financial transaction with a purported diverter of list I chemicals. The apparent business connection between Respondent's ownership and an individual purportedly convicted of unlawful distribution of list I chemicals is troubling when one considers that the Respondent seeks a DEA Certificate of Registration to distribute these same products.

The Deputy Administrator concludes that the Respondent cannot be entrusted with the responsibilities of a DEA registration. In light of the above, the Deputy Administrator further concludes that it would be inconsistent with the public interest to grant the application of the Respondent.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 28 CFR 0.100(b) and 0.104, hereby orders that the pending application for DEA Certificate of Registration, previously submitted by Island Wholesale, Incorporated be, and it hereby is, denied. This order is effective May 9, 2003.

Dated: March 26, 2003.

John B. Brown, III,

Deputy Administrator.

[FR Doc. 03–8591 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Correction—Penick Corp.

On March 13, 2003, a Notice of Registration was published in the **Federal Register** (68 FR 12104) for Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, which was wrongly entitled Importer of Controlled Substances. The Notice

should have been entitled Manufacturer of Controlled Substances. All other information contained therein was correctly stated.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8586 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on March 29, 2002, Siegfried (USA) Inc., made application by renewal to the Drug Enforcement Administration for registration as a bulk manufacturer of the basic classes of controlled substance listed below:

Drug	Schedule
Amphetamine (1100)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Glutethimide (2550)	II
Codeine (9050)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Oxycodone (9143)	II
Methadone (9250)	II
Methadone-intermediate (9254)	II
Dextropropoxyphene, bulk (non dosage forms) (9273).	II

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than 60 days from publication.

Dated: March 21, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–8582 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Emergency Notice of Information Collection Under Review: New Collection; Project Safe Neighborhoods Semi-Annual Researcher Reporting Form.

The Department of Justice; Office of Justice Programs, has submitted the following information request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by April 18, 2003. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulation Affairs, Attention: Department of Justice Desk Office (202) 395–6466, Washington, DC 20503.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Robyn Thiemann, Counsel, Domestic Security Section, Department of Justice, 601 D Street NW., Patrick Henry Building, Suite 6500, Washington, DC 20530, or facsimile (202) 305–4901.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

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

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

(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, e.g., permitting electronic submission of responses.

Overview of This Information

(1) *Type of information collection:* New Collection.

(2) *The title of the form/collection:* Project Safe Neighborhoods Semi-Annual Researcher Reporting Form.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection: Form number:* none. 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:* Individuals or Households. *Other:* Business or other for-profit; not-for-profit institutions; Federal Governments; and state, local, or tribal government. The data, which will be submitted via the Semi-Annual Researcher Reporting Form in a timely fashion by the research for each of the 94 judicial districts, is essential to understanding gun violence at a national level. By collecting both outcome and intervention measures, the Department can identify programs that demonstrate success in reducing targeted gun crime. This information is essential to evaluating the program and providing feedback at the national level that can inform management decisions. Additionally, this data will assist the Department in discharging its obligations under the Government Performance and Results Act (GPRA).

(5) *An estimate of the number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 93 respondents will complete the form in approximately one hour twice a year.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total public burden associated with this application is 186 hours.

If additional information is required, please contact Brenda Dyer, Department Deputy Clearance Officer, Information Management and Security Staff, Justice Management Division, United States Department of Justice, 601 D Street NW., Patrick Henry Building, Suite 1600, NW., Washington, DC 20530.

Dated: April 3, 2003.

Brenda Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 03–8607 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP(OVW)–1375]

Meeting of the National Advisory Committee on Violence Against Women

AGENCY: Office on Violence Against Women, Office of Justice Programs, Justice.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming public meeting of the National Advisory Committee on Violence Against Women (hereinafter ''the Committee'').

DATES: The meeting will take place on April 24 from 9 a.m. to 5 p.m., and on April 25 from 9:30 a.m. to 3 p.m.

ADDRESSES: The meeting will take place at the U.S. Department of Health and Human Services, Hubert Humphrey Building 200 Independence Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Omar A. Vargas, Special Assistant, The National Advisory Committee on Violence Against Women, 810 Seventh Street, NW., Washington, DC 20531. Telephone: (202) 307–6026. E-mail: *AskNAC@ojp.usdoj.gov.* Fax: (202) 307–3911. You may view the Committee's Web site at: *http://www.ojp.usdoj.gov/vawo/nac/welcome.html.*

SUPPLEMENTARY INFORMATION: The Committee is chartered by the Attorney General, and co-chaired by the Attorney General and the Secretary of Health and Human Services (the Secretary), to provide the Attorney General and the Secretary with practical and general policy advice concerning implementation of the Violence Against Women Act of 1994, the Violence Against Women Act of 2000, and related laws, and will assist in the efforts of the Department of Justice and the Department of Health and Human Services to combat violence against women, especially domestic violence, sexual assault, and stalking.

In addition, because violence is increasingly recognized as a public health problem of staggering human cost, the Committee will bring national attention to the problem of violence against women and increase public awareness of the need for prevention and enhanced victim services.

This meeting will primarily focus on the Committee's work; there will, however, be an opportunity for public comment on the Committee's role in providing general policy guidance on implementation of the Violence Against Women Act of 1994, the Violence Against Women Act of 2000, and related legislation.

Meeting Format

This meeting will be held according to the following schedule:

1. *Date:* Thursday, April 24, 2003.

Time: 9 a.m–12 p.m.; including breaks. 12 p.m.–5 p.m., the Committee will gather for lunch and subcommittee meetings in sessions not open to the public.

2. *Date:* Friday, April 25, 2003. *Time:* 9:30 a.m.–3 p.m., including breaks and a working lunch.

The meeting schedule for April 24, 2003 will begin with presentations from invited speakers and reports on the work of the Committee's subcommittees. Time will be reserved for comments from the public, beginning at 10:30 a.m. and ending at 11 a.m. *See* the section below on Reserving Time for Public Comment, for information on how to reserve time on the agenda.

The meeting scheduled for April 25, 2003, will consist of briefings on Violence Against Women initiatives at the Department of Justice and the Department of Health and Human Services, and subcommittees will report back on the previous day's work.

Attending the Meeting

The meeting on April 24, from 9 a.m. to 12 p.m., will be open to the public. (The Committee will convene for lunch and in closed subcommittee sessions from 12 p.m. to 5 p.m. pursuant to 41 CFR 102–3.160 of the Federal Advisory Committee Act.) Registrations for the public sessions will be accepted on a space-available basis. Members of the public who wish to attend must register at least six (6) days in advance of the meeting by contacting Omar A. Vargas, Special Assistant, at the e-mail address or fax number listed above. Access to the meeting will not be allowed without registration, and all attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the meeting.

Individuals who will need special accommodations for a disability in order to attend the meetings should notify Omar A. Vargas, Special Assistant, at the above e-mail address or by fax, no later than April 18, 2003. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

Submitting Written Comments

Interested parties are invited to submit written comments to the Committee, by September 30, 2003, using one of the following methods: by e-mail to *AskNAC@ojp.usdoj.gov;* by fax on (202) 307–3911; or by U.S. mail to The National Advisory Committee on Violence Against Women, 810 Seventh Street, NW., Washington, DC 20531. Due to delays in mail delivery caused by heightened security, please allow adequate time for the mail to be received (we recommend 3–4 weeks).

Reserving Time for Public Comment

If you are interested in participating during the public comment period of the meeting, on the implementation of the Violence Against Women Act of 1994, and the Violence Against Women Act of 2000, you are requested to reserve time on the agenda by contacting the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice, by e-mail or fax. Please include your name, the organization you represent, if appropriate, and a brief description of the issue you would like to present. Participants will be allowed approximately 3 to 5 minutes to present their comments, depending on the number of individuals who reserve time on the agenda. Participants are also encouraged to submit two written copies of their comments at the meeting.

Given the expected number of individuals interested in providing comments at the meetings, reservations for presenting comments should be made as soon as possible.

Persons who are unable to obtain reservations to speak during the meetings are encouraged to submit written comments, which will be accepted at the meeting site or may be mailed to the Committee at the address listed under the section on Submitting Written Comments.

Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

Dated: April 4, 2003.

Diane M. Stuart,

Acting Director, Office on Violence Against Women.

[FR Doc. 03–8629 Filed 4–8–03; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Collection; Comment Request

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation process to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This process helps to ensure that requested data can be provided in the desired format, reporting burdens are minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration (ETA) is soliciting comments concerning the proposed continuation of a reporting and performance standards system for Indian and Native American programs under title I, section 166 of the Workforce Investment Act (WIA). A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the address section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before June 9, 2003.

ADDRESSES: James C. DeLuca, Chief, Division of Indian and Native American Programs, Employment and Training Administration, U.S. Department of Labor, Room N–4641, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–3754 (VOICE) or (202) 693–3818 (FAX) (these are not toll-free numbers) or INTERNET: *DeLuca,James@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Employment and Training Administration of the Department of Labor is requesting continuation of the current reporting and performance standards system for Workforce Investment Act (WIA), title I, section 166, Indian and Native American grantees for one year (April 1, 2003 to March 31, 2004), in part to coincide with the expiration of the section 166 financial report (ETA–9080) which is currently approved through March 31, 2004 under OMB Control Number 1205–0423. In evaluating the last few years' reporting experience of the grantees who receive funding under WIA section 166, including those receiving Supplemental Youth Services (SYS) funds, and, in light of the continuing statutory requirements of WIA applicable to section 166 grantees, the Department has decided to extend the currently-approved reporting requirements which it believes supports the current statutory requirements under WIA as they relate to the Indian and Native American Program. The only anticipated change(s) would be to accommodate the information collection requirements of the Administration's proposed ''Common Measures'' for evaluating all Federally-funded employment and training programs. Further details of these possible changes are available on request. However, it should be noted that the Workforce Investment Act comes up for reauthorization during 2003, which could result in additional, statutorily-mandated reporting changes which would need to be covered in this data collection.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- 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 agency's burden estimate for 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. Current Action

This ICR will be used by approximately 145 Workforce Investment Act (WIA) section 166 grantees as the primary reporting and performance measurement vehicle for enrolled individuals, their characteristics, training and services provided, outcomes, including job placement and employability enhancements, as well as detailed financial data on program expenditures. Grantees participating in the demonstration under Public Law 102–477 will not be affected by this collection, and have not been included in the following burden estimates.

Type of Review: Extension.

Agency: Employment and Training Administration.

Title: Reporting and performance system for WIA, title I, section 166, Indian and Native American grantees.

OMB Number (current): 1205–0422.

Catalog of Federal Domestic Assistance Number: 17.265 (for PY 2002 and beyond).

Recordkeeping: Grantees shall retain supporting and other documents necessary for the compilation and submission of the subject reports for three years after submission of the final financial report for the grant in question [29 CFR 97.42 and/or 29 CFR 95.53]. It should be noted that the burden estimates for this collection as originally approved by OMB in April of 2001 were for 27,795 responses totaling some 78,615 hours.

Affected Public: Federally-recognized Indian tribes, bands, and groups; Alaskan Native entities; Hawaiian Native entities; private non-profit Indian-controlled organizations; State Indian Commissions or Councils (Native American-controlled); consortia of any and/or all of the above.

Cite/Reference/Form/etc.: ETA–9084 and ETA–9085.

Form No.	Respondents	Frequency	Total responses	Average time per response	Total burden hours
ETA–9084 (Comprehensive services)	145	semi-annual	290	9.67	2,804
ETA–9085 (Supplemental Youth Services)	105	semi-annual	210	9.67	2,031
Recordkeeping	145	(as needed)	27,295	9.67	73,780

Form No.	Respondents	Frequency	Total responses	Average time per response	Total burden hours
Total	250	semi-annual	27,795	9.67	78,615

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): Costs associated with this collection will vary widely among grantees, from nearly no additional cost to some higher figure, depending on the state of automation attained by each grantee and the wages paid to the staff actually completing the various forms. However, because all expenditures associated with the preparation of these reports will come from the Federal grant funds themselves, there will be no costs to the grantees. The grantees will not be obligated to expend their own (*i.e.*, non-DOL) resources to fulfill these reporting requirements. All costs associated with the submission of these forms are allowable grant expenses. Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 2nd day of April, 2003.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 03–8637 Filed 4–8–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c) (2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed reinstatement of the ''Current Population Survey (CPS) Volunteer Supplement.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before June 9, 2003.

ADDRESSES: Send comments to Amy A. Hobby, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212, telephone number 202–691–7628 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Amy A. Hobby, BLS Clearance Officer, telephone number 202–691–7628. (*See* **ADDRESSES** section).

SUPPLEMENTARY INFORMATION:

I. Background

The September 2003 CPS Volunteer Supplement will be conducted at the request of the USA Freedom Corps. The Volunteer Supplement will provide information on the total number of individuals in the U.S. involved in unpaid volunteer activities, factors that motivate volunteerism, measures of the frequency or intensity with which individuals volunteer, types of organizations that facilitate volunteerism, and activities in which volunteers participate.

Because the Volunteer Supplement is part of the CPS, the same detailed demographic information collected in the CPS will be available on respondents to the Supplement. Comparisons of volunteer activities will be possible across characteristics such as sex, race, age, and educational attainment of the respondent. It is intended that the Supplement will be conducted annually, if resources permit, in order to gauge changes in volunteerism.

II. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- 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 agency's 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 submissions of responses.

III. Current Action

Office of Management and Budget clearance is being sought for the CPS Volunteer Supplement.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Agency: Bureau of Labor Statistics.

Title: CPS Volunteer Supplement.

OMB Number: 1220–0176.

Affected Public: Households.

Total Respondents: 58,000.

Frequency: Annually.

Total Responses: 112,000

Average Time Per Response: 4 minutes.

Estimated Total Burden Hours: 7,467 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 1st day of April, 2003.

Jesús Salinas,

Acting Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 03–8638 Filed 4–8–03; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (03–838)]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of prospective patent license.

SUMMARY: NASA hereby gives notice that Automated Control Technologies, Inc. of 2009 Pleasant Valley Road, Fairmont, WV 26554, has applied for a Partially Exclusive license to practice the inventions described in NASA Case Number LAR–13845 1–CU entitled ''Reactivation Of A Tin Oxide-Containing Catalyst,'' NASA Case Number LAR–13741–1–SB entitled ''Process for Making a Noble Metal on Tin Oxide Catalyst,'' NASA Case Number LAR–14155–1–SB entitled ''Catalyst For Carbon Monoxide Oxidation,'' NASA Case Number LAR14155–2–SB entitled ''Catalyst For Carbon Monoxide Oxidation,'' NASA Case Number LAR–15351–1–CU entitled ''Catalytic Process For Formaldehyde Oxidation,'' NASA Case Number LAR–15652–1–CU entitled ''Catalyst For Oxidation Of Volatile Organic Compounds'' for which U.S. Patents were issued and assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration and NASA Case Number LAR15851–1–CU entitled ''Process For Coating Substrates With Catalyst Materials'' for which a U.S. Patent Application was filed and assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Langley Research Center.

DATES: Responses to this notice must be received by April 24, 2003.

FOR FURTHER INFORMATION CONTACT: Helen M. Galus, Patent Attorney, Langley Research Center, Mail Stop 212, Hampton, VA 23681–2199. Telephone 757–864–3227; Fax 757–864–9190.

Dated: April 3, 2003.

Robert M. Stephens,

Deputy General Counsel.

[FR Doc. 03–8636 Filed 4–8–03; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (03–037)]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Prospective Patent License.

SUMMARY: NASA hereby gives notice that the Bombardier Motor Corporation of America, of Delaware, has applied for an exclusive license to practice the inventions disclosed in NASA Case Nos. MFS–31294–2–CIP2 entitled ''Aluminum Alloy And Article Cast Therefrom,'' MFS–31294–7–CIP entitled ''Process For Producing A Cast Article From A Hypereutectic Aluminum-Silicon Alloy'' and MFS–31828–1 entitled ''High Strength Aluminum Alloy For High Temperature Applications,'' for which U.S. Patent Applications were filed and assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to James L. McGroary, Chief Patent Counsel/LS01, Marshall Space Flight Center, Huntsville, AL 35812. NASA has not yet made a determination to grant the requested license even if no objections are submitted within the comment period.

DATES: Responses to this notice must be received by April 24, 2003.

FOR FURTHER INFORMATION CONTACT: Sammy A. Nabors, Technology Transfer Department/CD30, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–5236.

Dated: January 3, 2003.

Robert M. Stephens,

Deputy General Counsel.

[FR Doc. 03–8639 Filed 4–8–03; 8:45 am]

BILLING CODE 7510–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–286]

Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit No. 3; Exemption

1.0 Background

Entergy Nuclear Operations, Inc., (ENO or the licensee) is the holder of Facility Operating License No. DPR–64 which authorizes operation of the Indian Point Nuclear Generating Unit No. 3 (IP3). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in Westchester County in the State of New York.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), part 50.44, ''Standards for combustible gas control system in light-water-cooled power reactors,'' requires that each pressurized light-water nuclear power reactor fueled with oxide pellets within cylindrical zircaloy or ZIRLO cladding must be provided with the capability for controlling the combustible gas concentrations in the containment following a postulated loss-of-coolant accident (LOCA). A combustible gas control system is defined by 10 CFR 50.44(h) as a system that operates after a LOCA to maintain the concentrations of combustible gases within the containment, such as hydrogen, below flammability limits. Combustible gas control systems are of two types:

(1) Systems that allow controlled release from containment such as a purge or vent system, and

(2) Systems that do not result in a significant release from containment such as hydrogen recombiners. The combustible gas control system at IP3 consists of a hydrogen recombiner system and a backup purge system.

When IP3 was initially licensed, the post accident containment ventilation (PACV) system was installed to meet the requirements of 10 CFR 50.44(f). Section 50.44(f) requires:

> For facilities with respect to which the notice of hearing on the application for a construction permit was published between December 22, 1968, and November 5, 1970, if the incremental radiation dose from purging (and repressurization if a repressurization system is provided) occurring at all points beyond the exclusion area boundary after a postulated LOCA calculated in accordance with § 100.11(a)(2) of this chapter is less than 2.5 rem to the whole body and less than 30 rem to the thyroid, and if the combined radiation dose at the low population zone outer boundary from purging and the postulated LOCA calculated in accordance with § 100.11(a)(2) of this chapter is less than 25 rem to the whole body and less than 300 rem to the thyroid, only a purging system is necessary, provided that the purging system and any filtration system associated with it are designed to conform with the general requirements of Criteria 41, 42, and 43 of appendix A to this part. Otherwise the facility shall be provided with another type of combustible gas control system (a

repressurization system is acceptable) designed to conform with the general requirements of Criteria 41, 42, and 43 of appendix A to this part. If a purge system is used as part of the repressurization system, the purge system shall be designed to conform with the general requirements of Criteria 41, 42, and 43 of appendix A to this part. The containment shall not be repressurized beyond 50 percent of the containment design pressure.

When the Commission issued what is now paragraph c(3)(ii) of 10 CFR 50.44 in 1981, a safety related hydrogen recombiner system was installed. Paragraph c(3)(ii) requires:

By the end of the first scheduled outage beginning after July 5, 1982 and of sufficient duration to permit required modifications, each light-water nuclear power reactor that relies upon a purge/repressurization system as the primary means for controlling combustible gases following a LOCA shall be provided with either an internal recombiner or the capability to install an external recombiner following the start of an accident. The internal or external recombiners must meet the combustible gas control requirements in paragraph (d) of this section. [* * *]

As a result, the recombiner system became the primary method of combustible gas control while the PACV system became a backup method.

The purpose of this exemption request for 10 CFR 50.44(f) is to remove requirements for the PACV system from the IP3 licensing basis. The licensee is not requesting an exemption from GDC 41, ''Containment Atmosphere Cleanup,'' or 10 CFR 50.44(c). The licensee is requesting this exemption in accordance with 10 CFR 50.12. Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. These circumstances include the special circumstances stated in 10 CFR 50.12(a)(2)(ii), ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' The PACV system also has a role in severe accident management. The Commission stated in Attachment 1 to SECY–02–0080, ''Proposed Rulemaking—Risk-Informed 10 CFR 50.44, Combustible Gas Control In Containment,'' their position concerning the ability to vent the containment as a severe accident strategy. Specifically, Attachment 1 to SECY–02–0080 states:

The Commission continues to view severe accident management guidelines as an important part of the severe accident closure process. Severe accident management guidelines are part of a voluntary industry initiative to address accidents beyond the design basis and emergency operating instructions. In November 1994, the U.S. nuclear industry committed to implement severe accident management at their plants by December 31, 1998, using the guidance contained in NEI 91–04, Revision 1, ''Severe Accident Issue Closure Guidelines.'' Generic severe accident management guidelines developed by each nuclear steam system supplier owners group includes either purging and venting or venting the containment to address combustible gas control. On the basis of the industry-wide commitment, the Commission is not proposing to require such capabilities, but continues to view purging and/or controlled venting of all containment types to be an important combustible gas control strategy that should be considered in a plant's severe accident management guidelines.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. These circumstances include the special circumstances that the PACV system is not needed to meet the underlying purpose of 10 CFR 50.44. As mentioned above, the underlying purpose of 10 CFR 50.44 is to show that following a LOCA, an uncontrolled hydrogen-oxygen recombination would not take place, or that the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function.

The staff examined the licensee's rationale to support the exemption request of eliminating the licensing basis requirements for the PACV system and concluded that retaining the licensing basis requirements for the PACV system is not necessary to achieve the underlying purpose of 10 CFR part 50.44. As mentioned above, the PACV system is the backup combustible gas control system. The primary system is the electric hydrogen recombiner system which meets the requirements of 10 CFR 50.44 c(3)(ii). Each of the recombiner subsystems is capable of maintaining the hydrogen concentration below the required limit following a design-basis LOCA. The PACV system is not necessary to meet the intent of the rule.

In their January 16, 2003, letter, the licensee stated that even with the retirement of the PACV system, they will be able to meet all their severe accident management commitments. Their current Severe Accident Management Guidelines (SAMGs) identify, in addition to the PACV system, three alternate methods of containment depressurization and combustible gas control. These methods are backflow to the steam ejector line, containment pressure relief line, and the containment purge system. The licensee stated that the decommissioning of the PACV system will include a revision to the SAMGs that will include the three alternative methods listed above. The staff concludes that the licensee continues to address the Commission's concerns regarding the use of purging and/or controlled venting of containment as an important combustible gas control strategy that should be considered in the licensee's severe accident management guidelines.

Based on the above, the staff determined that the requested exemption from the requirements of 10 CFR 50.44(f) meets the requirements of 10 CFR 50.12. The staff finds the requested exemption acceptable. Therefore, the staff concludes that pursuant to 10 CFR 50.12(a)(2) the licensee's requested exemption from the requirements of 10 CFR 50.44(f) for IP3 as specified in a letter dated October 3, 2002, and as supplemented by letters dated January 16 and March 11, 2003, is acceptable.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants ENO an exemption from the requirement to maintain a purge/repressurization system of 10 CFR 50.44(f) for IP3.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (68 FR 15487).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 2nd day of April, 2003.

For the Nuclear Regulatory Commission

John A. Zwolinski,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 03–8628 Filed 4–8–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7003]

Notice of Opportunity To Request a Hearing Regarding the U.S. Enrichment Corporation Inc.'s Application for a License for the Possession and Use of Special Nuclear Material and Byproduct Material in Its American Centrifuge Lead Cascade Facility in Piketon, OH

I. Introduction

The U.S. Nuclear Regulatory Commission is considering an application submitted by the U.S. Enrichment Corporation Inc. (USEC), dated February 11, 2003, for a license to possess and use, for five years, special nuclear, source, and by-product material in the American Centrifuge Lead Cascade Facility (Lead Cascade). The Lead Cascade, which is to be located at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio, will possess up to 250 kilograms of uranium hexafluoride and will consist of up to 240 operating, full-scale centrifuge machines.

By letter dated March 13, 2003, the NRC informed USEC that based on an administrative review of the Lead Cascade license application, the NRC had found the application acceptable for technical review. However, before approving the proposed license, NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC regulations. The NRC will document its technical reviews related to radiological safety and common defense and security in a Safety Evaluation Report and its environmental safety review in an Environmental Assessment (EA). In the March 13, 2003, letter, the NRC also stated that it anticipates completing its technical reviews and issuing its decision by February 2004.

II. Opportunity To Request a Hearing

The NRC hereby provides notice that this is a proceeding on an application for a license falling within the scope of subpart L, ''Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings'' of NRC's rules and practice for domestic licensing proceedings in 10 CFR part 2. Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing in accordance with § 2.1205(d). A request for a hearing must be filed within 30 days of the publication of this **Federal Register** notice.

The request for a hearing must be filed with the Office of the Secretary, either:

(1) By delivery to the Rulemaking and Adjudications Staff of the Office of the Secretary of the Commission at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 between 7:45 a.m. and 4:15 p.m. on Federal workdays; or

(2) By mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications Staff. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that requests for hearing also be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101, or by e-mail to *hearingdocket@nrc.gov*.

In accordance with 10 CFR 2.1205(f), each request for a hearing must also be served, by delivering it personally or by mail, to:

(1) The applicant, (U.S. Enrichment Corporation Inc., 6903 Rockledge Drive, Bethesda, MD 20817–1818); Attention Mr. Steven A. Toelle; and

(2) The NRC staff, by delivery to the General Counsel, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 between 7:45 a.m. and 4:15 p.m. on Federal workdays, or by mail addressed to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that requests for hearing be also transmitted to the Office of the General Counsel, either by means of facsimile transmission to 301–415–3725, or by e-mail to *OGCMailCenter@nrc.gov*.

In addition to meeting other applicable requirements of 10 CFR part 2 of the NRC's regulations, a request for a hearing filed by a person other than an applicant must describe in detail:

(1) The interest of the requestor;

(2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in § 2.1205(h);

(3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and

(4) The circumstances establishing that the request for a hearing is timely in accordance with § 2.1205(d).

III. Further Information

For further details, the unclassified and non-proprietary portions of USEC's License application may be examined and/or copied for a fee at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The references with ADAMS Accession Number ML030730232 may also be viewed in the NRC's Electronic Public Document Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. Any questions with respect to this action should be referred to Mr. Yawar Faraz, Project Manager, Special Projects and Inspection Branch, Division of Fuel Cycle Safety and Safeguards, U.S. Nuclear Regulatory Commission, Mail Stop T–8 A33, Washington, DC 20555–0001. Telephone (301)415–8113 or e-mail *yhf@nrc.gov*.

Dated at Rockville, Maryland, this 3rd day of April 2003.

For the Nuclear Regulatory Commission.

Eric J. Leeds,

Deputy Director, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 03–8627 Filed 4–8–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste; Notice of Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 141st meeting on April 22–23, 2003, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The schedule for this meeting is as follows:

Tuesday, April 22, 2003

10 a.m.–10:40 a.m.: Opening Statement (Open)—The Chairman will open the meeting with brief opening remarks, outline the topics to be discussed, and indicate several items of interest.

10:40 a.m.–12 Noon: One Step at a Time: The Staged Development of Geologic Repositories for High-Level Radioactive Waste (Open)—The Committee will hear presentations by and hold discussions with representatives of the National Academy of Sciences on their recent report on staged development of a proposed HLW repository at Yucca Mountain, NV.

1 p.m.–5:15 p.m.: Transportation Working Group Follow-On Session: State of Nevada Technical Concerns with the Transporation of Spent Fuel and High-Level Waste (Open)—The Committee will hear presentations by and hold discussions with representatives from the State of Nevada regarding the review of Yucca Mountain Systems Issues related to Transportation Safety and Fuel Scale Testing issues including an Assessment of NUREG–1768.

5:15 p.m.–5:30 p.m.: Committee Discussion (Open)—The Committee will further discuss today's topics.

5:45 p.m.–7 p.m.: Preparation of ACNW Reports (Open)—The Committee will discuss the report of March 2003 Working Group Meeting on NRC and DOE Performance Assessments: Assumptions and Differences, and the State of Nevada Technical Concerns with the Transporation of Spent Fuel and HLW.

Wednesday, April 23, 2003

8:30 a.m.–8:35 a.m.: Opening Statement (Open)—The Chairman will make opening remarks regarding the conduct of today's sessions.

8:35 a.m.–9:30 a.m.: Update on NRC Division of Waste Management Activities (Open)—The Committee will hear presentations by and hold discussions with the Director, Division of Waste Management on recent DWM activities of interest.

9:30 a.m.–12 Noon: DOE/NRC Key Technical Issue (KTI) Agreement Status (Open)—The Committee will hear presentations by and hold discussions with representatives of DOE and the NRC staff on the closure status of KTIs.

1 p.m.–2 p.m.: Discussion of Self-Assessment Survey Results (Open)—The Committee will discussion the results of the self-assessment survey.

2 p.m.–3 p.m.: ACNW Action Plan (Open)—The Committee members will discuss an update to the ACNW 2002–2003 Action Plan.

3:15 p.m.–6:30 p.m.: Preparation of ACNW Reports (Open)—The Committee will discuss proposed ACNW reports on matters considered during this meeting.

6:30 p.m.–6:45 p.m.: Miscellaneous (Open)—The Committee will discuss matters related to the conduct of Committee activities and matters and specific issues that were not completed during previous meetings, as time and availability of information permit.

Procedures for the conduct of and participation in ACNW meetings were published in the **Federal Register** on October 11, 2002 (67 FR 63459). In accordance with these procedures, oral or written statements may be presented by members of the public. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Persons desiring to make oral statements should notify Mr. Howard J. Larson, ACNW (Telephone 301/415–6805), between 7:30 a.m. and 4 p.m. ET, as far in advance as practicable so that appropriate arrangements can be made to schedule the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting will be limited to selected portions of the meeting as determined by the ACNW Chairman. Information regarding the time to be set aside for taking pictures may be obtained by contacting the ACNW office, prior to the meeting. In view of the possibility that the schedule for ACNW meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should notify Mr. Howard J. Larson as to their particular needs.

Further information regarding topics to be discussed, whether the meeting has been canceled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefore can be obtained by contacting Mr. Howard J. Larson.

ACNW meeting agenda, meeting transcripts, and letter reports are available through the NRC Public Document Room at *pdr@nrc.gov*, or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/(ACRS & ACNW Mtg schedules/agendas).*

Videoteleconferencing service is available for observing open sessions of ACNW meetings. Those wishing to use this service for observing ACNW meetings should contact Mr. Theron Brown, ACNW Audiovisual Technician (301/415–8066), between 7:30 a.m. and 3:45 p.m. ET, at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the videoteleconferencing link. The availability of videoteleconferencing services is not guaranteed.

Dated: April 3, 2003.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 03–8626 Filed 4–8–03; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Proposed Data Collection Available for Public Comment and Recommendations

SUMMARY: In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and Purpose of Information Collection

Repayment of Debt: OMB 3220–0169.

When the Railroad Retirement Board (RRB) determines that an overpayment of Railroad Retirement Act (RRA) or Railroad Unemployment Insurance Act (RUIA) benefits has occurred, it initiates prompt action to notify the annuitant of the overpayment and to recover the money owed the RRB. To effect payment of a debt by credit card, the RRB currently utilizes Form G–421f, Repayment by Credit Card.

The RRB is proposing the creation of four additional forms to assist the RRB in the debt collection process. Proposed Form G–421g, Response to Notice of Debt, will be released along with RRB notices of overpayment under the RUIA. Proposed Form G–421h, Response to Notice of Debt, will be released along with RRB notices of overpayment caused by a failure to return RRA payments released after an annuitant's death. Proposed Form G–421i, Response to Notice of Debt, will be released with RRB notices of overpayment of RRA annuities when the overpayment was not caused by the withdrawal of funds deposited to an annuitant's financial institution account after his death and

the debtor does not have current entitlement to an RRA annuity. Proposed Form, G–421j, Response to Notice of Debt, will be released with notices of delinquent debt under both the RRA and the RUIA.

All of the proposed forms will offer the repayment options of (1) direct payment by check or money order, (2) the use of a credit card, or (3) monthly installment payments. The G–421g will also offer the option of having a current benefit offset as a method of repayment.

One form is completed by each respondent. Completion is voluntary. RRB procedures pertaining to benefit overpayment determinations and the recovery of such benefits are prescribed in 20 CFR 255 and 340.

The estimate of annual respondent burden is as follows:

ESTIMATE OF ANNUAL RESPONDENT BURDEN

Forms Nos.	Annual responses	Estimated completion time (min)	Burden hours
G–421f	180	5	15
G–421g	14,000	10	2,333
G–421h	500	10	83
G–421i	1,700	10	283
G–421j	11,000	10	1,833
Total	27,380		4,547

I. Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363. Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2902. Written comments should be recieved within 60 days of this notice.

Chuck Mierzwa,

Clearance Officer.

[FR Doc. 03–8603 Filed 4–8–03; 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 Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549.

Extension:

Rule 489 and Form F–N; SEC File No. 270–361; OMB Control No. 3235–0411.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (''Act'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''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 489 Under the Securities Act of 1933, Filing of Form by Foreign Banks and Certain of Their Holding Companies and Finance Subsidiaries; and Form F–N, Appointment of Agent for Service of Process by Foreign Banks and Foreign Insurance Companies and Certain of Their Holding Companies and Finance Subsidiaries Making Public Offerings of Securities in the United States

Rule 489 under the Securities Act of 1933 (17 CFR 230.489) requires foreign banks and foreign insurance companies and holding companies and finance subsidiaries of foreign banks and foreign insurance companies that are excepted from the definition of ''investment company'' by virtue of rules 3a–1, 3a–5, and 3a–6 under the Investment Company Act of 1940 to file Form F–N to appoint an agent for service of process United States when making a public offering of securities. Approximately four entities are required by rule 489 to file Form F–N, which is estimated to require an average of one hour to complete. The estimated annual burden of complying with the rule's filing requirement is approximately five hours, as one of the entities has submitted multiple filings.

The estimates of average burden hours are made solely for the purposes of the Act and are not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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 Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC, 20549.

Dated: April 2, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–8633 Filed 4–8–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47622; File No. SR–Amex–2003–20]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC to Extend a Pilot Program Relating to Crossing Procedures on the Amex in Nasdaq National Market Securities

April 2, 2003.

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 March 26, 2003, the American Stock Exchange LLC

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II and III below, which items have been prepared by the Exchange. On March 31, 2003, the Amex amended the proposed rule change.[3] The Exchange filed the proposal pursuant to section 19(b)(3)(A) of the Act,[4] and rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to extend until September 30, 2003 its pilot program under Commentary .06 to Amex rule 126(g) relating to crossing procedures on the Amex in Nasdaq National Market securities. The Amex proposes no substantive changes to the pilot, other than extending its operation until September 30, 2003. The text of the proposed rule change is available at the Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in item IV below. The Amex 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 Amex has implemented crossing procedures under Amex rule 126(g), Commentary .06 on a pilot basis extending until March 31, 2003.[7] The Amex initially filed the pilot program in SR–Amex–2002–58.[8] The Exchange now proposes to extend the pilot for a six-month period until September 30, 2003. Proposed Amex Rule 126(g), Commentary .06 provides that a floor broker is permitted to effect cross transactions in Nasdaq National Market securities involving 5,000 shares or more without interference by the specialist or market makers if, prior to presenting the cross transaction, the floor broker first requests a quote for the subject security. These requests place the specialist and market makers on notice that the floor broker intends to cross within the bid-offer spread. This arrangement ensures that a specialist or market maker retains the opportunity to better the cross price by updating their quote, but precludes the specialist or market maker from breaking up a cross transaction after the cross transaction is presented. The floor broker retains the ability to present both sides of the order at the post if the customers so desire.

The Amex is making no changes to the pilot as filed with the Commission in SR–Amex–2002–58, other than to extend the pilot program until September 30, 2003.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act[9] in general, and furthers the objectives of section 6(b)(5)[10] 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, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[11] and rule 19b–4(f)(6) thereunder.[12] At any time within 60 days of the filing of the 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.

The Amex has requested that the Commission accelerate the operative date. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow the pilot to operate without interruption until September 30, 2003. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[13]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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

[3] *See* March 28, 2003 letter from Geraldine Brindisi, Vice President and Corporate Secretary, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission and attachments (''Amendment No. 1''). Amendment No. 1 completely replaces and supersedes the original filing.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

[6] The Exchange asked the Commission to waive the 30-day operative delay. See Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

[7] *See* Securities Exchange Act Release No. 46635 (October 10, 2002), 67 FR 64424 (October 18, 2003)(SR–Amex–2002–74).

[8] *See* Securities Exchange Act Release No. 46309 (August 5, 2002), 67 FR 51902 (August 9, 2002)(SR–Amex–2002–58)

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to file number SR–Amex–2003–20 and should be submitted by April 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–8609 Filed 4–8–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47621; File No. SR–NASD–2003–56]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Regarding Fees for the Reporting of SuperMontage Transactions Through the Automated Confirmation Transaction Service (''ACT'')

April 2, 2003.

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 March 24, 2003, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), submitted to 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 Nasdaq. On March 27, 2003, Nasdaq filed Amendment No. 1 to the proposed rule change.[3] Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under section 19(b)(3)(A)(ii) of the Act [4] and rule 19b–4(f)(2) thereunder.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to waive certain fees for the reporting of SuperMontage transactions associated with the use of the ACT.[6] Nasdaq proposes to implement the proposed rule change on April 1, 2003.

Below is the text of the proposed rule change, as amended.[7] Proposed new language is *italicized*; proposed deleted language is [bracketed].

* * * * *

7000. CHARGES FOR SERVICES AND EQUIPMENT

7010. System Services

(a)–(f) No change.

(g) Automated Confirmation Transaction Service

(1) The following charges shall be paid by the participant for use of the Automated Confirmation Transaction Service (ACT):

Transaction Related Charges:

Reporting of transactions through SuperMontage (or any other transaction execution system that makes use of SuperMontage's functionality to report transactions).	$0.029/side (*subject to waiver under paragraph (2) below*).
Reporting of all other transactions in Nasdaq National Market and SmallCap Market securities not subject to comparison through ACT (''Covered Transactions'')	
Average daily volume of media transaction reports for Covered Transactions during the month in which a participant is the reporting party:	Fee per side for reports of Covered Transactions to which such participant is a party:
0 to 10,000	$0.029.
10,001 to 50,000	$0.029 for a number of reports equal to 10,000 times the number of trading days in the month $0.015 for all remaining reports.
More than 50,000	$0.029 for a number of reports equal to 10,000 times the number of trading days in the month $0.015 for a number of reports equal to 40,000 times the number of trading days in the month $0.00 for all remaining reports.
Reporting of all other transactions not subject to comparison through ACT.	$0.029/side.
Comparison	$0.0144/side per 100 shares (minimum 400 shares; maximum 7,500 shares).
Late Report—T+N	$0.288/side.
Browse/query	$0.288/query*.
Terminal fee	$57.00/month (ACT only terminals).

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from John M. Yetter, Assistant General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated March 26, 2003 (''Amendment No. 1''). In Amendment No. 1, Nasdaq amended its proposal to state that, for purposes of determining eligibility for the fee waiver, if a market participant has more than one market participant identifier (''MPID'') associated with the same Central Registration Depository (''CRD'') number, the activity associated with all of those MPIDs will be aggregated; however, activity associated with MPIDs assigned to subsidiaries or other affiliates of the market participant that have a different CRD number will not be aggregated. *See* SR–NASD–2003–17 (permitting market makers and ECNs to receive a second identifier). For purposes of determining the effective date of the filing and calculating the 60-day abrogation period, the Commission considers the period to commence on March 27, 2003, the date that Nasdaq filed Amendment No. 1.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

[6] Nasdaq represents that this filing applies to usage of ACT by NASD members. The usage of ACT by non-members is governed by NASD Rule 6120.

[7] The proposed rule text is marked to show changes from the language of the NASD Rule 7010 as amended by SR–NASD–2003–51 (filed March 24, 2003). That proposed rule change, which was effective immediately upon filing, introduced volume discounts for reporting most non-SuperMontage transactions in Nasdaq National Market and SmallCap Market securities.

CTCI fee	$575.00/month.
WebLink ACT	$300/month (full functionality) or $150/month (up to an average of twenty transactions per day each month) **.
Risk Management Charges	$0.035/side and $17.25/month per correspondent firm (maximum $10,000/month per correspondent firm).
Corrective Transaction Charge	$0.25/Cancel, Error, Inhibit, Kill, or ''No'' portion of No/Was transaction, paid by reporting side; $0.25/Break, Decline transaction, paid by each party.
ACT Workstation	$525/logon/month ***.

(2) The $0.029 fee for reporting of transactions executed through SuperMontage (and other transaction execution systems that make use of SuperMontage's functionality to report transactions) will be waived for an ACT participant during any month in which the participant: (i) executed an average daily volume of 10,000 or more transactions through SuperMontage or any other transaction execution system using SuperMontage's functionality to report transactions; (ii) reported to ACT at least 98% of the internalized transactions in Nasdaq National Market and SmallCap Market securities executed by the participant during the month; and (iii) posted in SuperMontage at least 70% of the bids, offers, and non-marketable limit orders in Nasdaq National Market and SmallCap Market securities communicated by the participant to any market center. Nasdaq may request that a participant provide data supporting the participant's certification that it is eligible for the foregoing waiver, and will deem a participant that fails to provide such data upon request to be ineligible for the waiver. If a participant has more than one market participant identifier (''MPID'') associated with the Central Registration Depository (''CRD'') number under which it conducts business, eligibility will be determined by aggregating activity associated with all of its MPIDs (but not activity associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number).

The term ''internalized transaction'' refers to a transaction in which a customer order received by the participant is executed against another customer order received by the participant, or against the account of the participant as principal, but that is not facilitated or executed using a Nasdaq system or the system of any market center other than the participant. The term ''market center'' refers to any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

* Each ACT query incurs the $0.288 fee; however, the first accept or decline processed for a transaction is free, to insure that no more than $0.288 is charged per comparison. Subsequent queries for more data on the same security will also be processed free. Any subsequent query on a different security will incur the $0.288 query charge.

** For the purposes of this service only, a transaction is defined as an original trade entry, either on trade date or as-of transactions per month.

*** A firm that uses ACT risk management through one or more NWII terminals when the ACT Workstation is introduced will be eligible to evaluate the ACT Workstation for a free, three-month trial period, provided that the firm continues to pay charges associated with its NWII terminal(s) during that period.

(h)–(s) 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, Nasdaq 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. Nasdaq 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

ACT is an automated trade reporting and reconciliation service that speeds the post-execution steps of price and volume reporting, comparison, and clearing of trades completed in Nasdaq, OTC Bulletin Board, and other over-the-counter securities. ACT handles transactions executed through Nasdaq's automated trading systems, as well as transactions negotiated over the telephone and internalized transactions. It also manages post-execution procedures for transactions in exchange-listed securities that are traded in the Nasdaq InterMarket.

Nasdaq represents that, as part of an ongoing effort to reduce the costs incurred by market participants to use Nasdaq services, it proposes to waive the ACT fees for transactions that are executed through SuperMontage (or any other transaction execution system, such as Liquidity Tracker, that uses SuperMontage's functionality to report transactions). Currently, Nasdaq assesses a fee of $0.029 per side for the reporting of such transactions, which are reported to ACT automatically. Under the proposed rule change, as amended, however, this fee would be waived for a participant during a month in which the participant: (i) Executed an average daily volume of 10,000 or more transactions through SuperMontage (or any other system that uses SuperMontage functionality to report trades); (ii) reported to ACT at least 98% of the internalized transactions [8] in Nasdaq National Market and SmallCap market securities executed by the participant during the month; and (iii) posted in SuperMontage at least 70% of the bids, offers, and non-marketable limit orders in Nasdaq National Market and SmallCap Market securities communicated by the participant to any market center.[9] A participant seeking to qualify for the fee waiver would certify its eligibility, and Nasdaq could request that the participant provide data to support its certification. If a participant has more than one MPID associated with the CRD number under which it conducts business, eligibility will be determined by aggregating activity associated with all of its MPIDs (but not activity associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number).

Nasdaq represents that it is currently facing competition from market centers that are willing to offer market participants free trade reporting services,[10] and from one market center

[8] The Nasdaq proposal defines ''internalized transactions'' as a transaction in which a customer order received by the participant is executed against another customer order received by the participant, or against the account of the participant as principal, but that is not facilitated or executed using a Nasdaq system or the system of any market center other than the participant.

[9] The Nasdaq proposal defines ''market center'' as any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

[10] *See, e.g.*, Securities Exchange Act Release No. 47331 (February 10, 2003), 68 FR 7635 (February 14, 2003) (File No. SR–NASD–2003–09)

Continued

that is effectively sharing market data revenue associated with transactions in Nasdaq-listed securities by ''mutualizing'' revenues with certain of its members,[11] notwithstanding the Commission's Order of Summary Abrogation (the ''Order'') regarding market data revenue sharing programs.[12] Because Nasdaq is not permitted to share market information revenues from Nasdaq-listed securities, and because it has too many market participants to effect a ''mutualization'' ploy, Nasdaq believes that it is placed in a fundamentally unfair competitive position. Nasdaq is proposing wide-ranging price reductions across multiple services,[13] but Nasdaq represents that it incurs substantial costs in order to operate ACT and to support its regulatory function. Nasdaq believes that the only way for it to compete with an exchange that can single out firms to ''mutualize'' with is to provide preferred pricing to its members that continue to support Nasdaq with their orders. Accordingly, Nasdaq believes that it is reasonable to offer free reporting of SuperMontage trades to a firm only if the firm's use of ACT and SuperMontage during a particular month is sufficiently consistent to allow Nasdaq to conclude that the lost revenue will be partially offset by other ACT revenue and transaction execution revenue.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Act,[14] in general and with section 15A(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. Nasdaq believes that the proposal, as amended, will allow a reduction in the overall level of ACT fees paid by market participants while ensuring that each participant pays an equitable share of the costs associated with ACT.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary and appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has become effective upon March 27, 2003, the date of filing of Amendment No. 1 to the proposed rule change, pursuant to section 19(b)(3)(A)(ii) of the Act[16] and subparagraph (f)(2) of rule 19b–4 thereunder,[17] because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of the 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.[18]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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. Copies of such filing will also be available for inspection and copying at the principal office of Nasdaq. All submissions should refer to File No. SR–NASD–2003–56 and should be submitted by April 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–8632 Filed 4–8–03; 8:45 am]

BILLING CODE 8010–01–P

(eliminating trade reporting fees associated with the NASD's Alternative Display Facility).

[11] Securities Exchange Act Release No. 46688 (October 18, 2002), 67 FR 65816 (October 28, 2002) (SR–CSE–2002–14) (describing the Cincinnati Stock Exchange's market data revenue sharing program for Nasdaq securities).

[12] Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (July 10, 2002).

[13] *See* File Nos. SR–NASD–2003–51 (filed March 24, 2003) (reporting of non-SuperMontage trades); SR–NASD–2003–53 (filed March 24, 2003) and SR–NASD–2003–54 (filed March 24, 2003) (Nasdaq Testing Facility); SR–NASD–2003–47 (filed March 21, 2003) and SR–NASD–2003–48 (filed March 21, 2003) (NWII logons); SR–NASD–2003–43 (filed March 20, 2003) and SR–NASD–2003–46 (filed March 20, 2003) (computer-to-computer interface pricing); see also Securities Exchange Act Release No. 47300 (January 31, 2003), 68 FR 6234 (February 6, 2003) (SR–NASD–2003–10) (quotation update fees).

[14] 15 U.S.C. 78*o*–3.

[15] 15 U.S.C. 78*o*–3(b)(5).

[16] 15 U.S.C. 78s(b)(3)(a)(ii).

[17] 17 CFR 240.19b–4(f)(2).

[18] For purposes of determining the effective date of the filing and calculating the 60-day abrogation period, the Commission considers the period to commence on March 27, 2003, the date that Nasdaq filed Amendment No. 1.

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47615; File No. SR–PCX–2002–54]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to a One Tick Step Up Requirement for Auto-Ex in Certain Option Issues

April 2, 2003.

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 August 27, 2002, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in items I, II and III below, which items have been prepared by the self-regulatory organization. On March 19, 2003, the Exchange submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its rules by adopting a one tick step up requirement for Market Makers who are participating on the Exchange's Automatic Execution System (''Auto-Ex'') in certain option issues. The text of the proposed rule change is below. Additions are in italics.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

5231 Automatic Execution System

Rule 6.87(a)–(d)—No change.

(e) Market Maker Requirements and Eligibility. Any Exchange Member who is registered as a Market Maker and who has obtained written authorization from a clearing member is eligible to participate on the Auto-Ex system, subject to the following conditions and requirements:

(1)–(7)—No change.

(8) Auto-Ex Tick Better Requirement in Certain Issues.

(A) *Except as provided in subsection (B), below, Lead Market Makers who are participating on Auto-Ex must assure that Exchange staff (i.e., the Order Book Official or Control Room staff) have set the Auto-Ex System either:*

(i) to execute incoming electronic orders at prices that are one trading increment better than the Exchange's disseminated bid or offering price when another options exchange is disseminating the national best bid or offer at a price that is one trading increment better than the price being disseminated by the Exchange. The order will default for manual representation in the trading crowd when another options exchange is disseminating a price that is more than one trading increment better than the price being disseminated by the Exchange, or

(ii) to execute incoming electronic orders at the NBBO pursuant to Rule 6.87(i).

(B) Applicability. The requirements of subsection (A), above, will apply only to non-broker-dealer orders for ten contracts or less in option issues that are ranked in the 120 most actively traded equity options based on the total number of contracts traded nationally for a specified month based on volume as reported by the Options Clearing Corporation. For each current month, the Exchange's determination of whether an equity option ranks in the top 120 most active issues will be based on volume statistics for the three calendar months of trading activity beginning four months prior to the current month. In addition, the requirements of Subsection (A), above, will only apply to orders in option series that are not designated as LEAPS pursuant to Rule 6.4(e).

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to adopt new PCX rule 6.87(e)(8) relating to the Exchange's Auto-Ex System for options trading. Currently, Options Market Makers who are logged on to Auto-Ex are obligated to meet certain requirements as set forth in PCX rule 6.87(e)(1)–(7). The Exchange is proposing to adopt a new rule requiring Lead Market Makers (''LMMs'') on Auto-Ex to ''step up'' and execute certain orders at better prices than the Exchange is disseminating, if another options exchange is disseminating that better price.

Current PCX rule 6.87(i) allows Auto-Ex to be set to execute inbound electronic orders at prices reflecting the national best bid or offer (''NBBO'') in selected issues, subject to the approval of the Options Floor Trading Committee (''OFTC''). Under the proposal, LMMs who are participating on Auto-Ex must assure that Exchange staff (*i.e.,* the Order Book Official or Control Room staff) sets the Auto-Ex System in either of two ways for the selected issues as defined in PCX Rule 6.87(e)(8)(B). First, when another options exchange is disseminating a price at the NBBO and that price is one trading increment better than the price being disseminated by the Exchange, the Exchange staff may set the Auto-Ex system may to execute incoming electronic orders at prices that are one trading increment better than the Exchange's disseminated bid or offering price. Where the Exchange is disseminating a price that is more than one trading increment inferior to the price being disseminated by another options exchange, the order will default for manual representation in the trading crowd.

Alternatively, an LMM may have the Exchange staff set the Auto-Ex system to execute incoming electronic orders at the NBBO pursuant to PCX rule 6.87(i). Pursuant to PCX rule 6.87(i), any order that is not executed at the NBBO will be manually presented in the trading crowd if it is more than one trading increment away from the PCX market price.

Proposed PCX rule 6.87(e)(8) will apply only to non-broker-dealer orders for ten contracts or less in option issues that are ranked in the 120 most actively traded equity options based on the total number of contracts traded nationally for a specified month based on volume as reported by the Options Clearing Corporation. In addition, the rule will only apply to orders in option series that are not designated as LEAPS pursuant to PCX rule 6.4(e).

The Exchange's determination of whether an equity option ranks in the top 120 most active, nationally-traded issues will be based on volume statistics reported by the Options Clearing Corporation. For each current month, the Exchange's determination of whether an equity option ranks in the top 120 most active issues will be based on volume statistics for the three calendar months of trading activity beginning four months prior to the current month. The Exchange intends to notify its Members of the issues that are designated to be in the top 120 via a regulatory bulletin that will be published at the beginning of each month.

2. Basis

The Exchange believes that the proposal is consistent with section 6(b)(5)[3] of the Act in that it designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, 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

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 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

[3] 15 U.S.C. 78s(b)(2).

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 such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–2002–54 and should be submitted by April 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–8608 Filed 4–8–03; 8:45 am]

BILLING CODE 8010–01–P

[4] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before June 9, 2003.

ADDRESSES: Send all comments regarding whether these information collections are necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Linda K. Waters, Program Analyst, Office of Government Contracting, Small Business Administration, 409 3rd Street SW., Suite 8800, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Linda K. Waters, Program Analyst, (202) 205–7315 or Curtis B. Rich, Management Analyst, (202) 205–7030.

SUPPLEMENTARY INFORMATION:

Title: ''Prime Contracts program Quarterly Report Part A and B''.

Form No's: 843 A & B.

Description of Respondents: Procurement Center Representatives.

Annual Responses: 63.

Annual Burden: 1,020.

SUPPLEMENTARY INFORMATION:

Title: ''Application for Certificate of Competency''.

Form No: 1531.

Description of Respondents: Small Business Owners.

Annual Responses: 300.

Annual Burden: 2,400.

SUPPLEMENTARY INFORMATION:

Title: ''7(j) Management and Technical Assistance Program Sponsored Training Impact and Longitudinal Studies''.

Form No's: 2167, 2168, 2169, 2170, 2171.

Description of Respondents: Person involved in the Executive Education Program (EEP).

Annual Responses: 500.

Annual Burden: 250.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Charles Ou, Economist, Office of Advocacy, Small Business Administration, 409 3rd Street SW., Suite 7800, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Charles Ou, Economist, (202) 205–6966 or Curtis B. Rich, Management Analyst, (202) 205–7030.

SUPPLEMENTARY INFORMATION:

Title: ''Value of Worker Training Programs to Small Business''.

Form No: N/A.

Description of Respondents: Small and Large Businesses.

Annual Responses: 1.

Annual Burden: 1,244.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Sandra L. Johnston, Program Analyst, Office of Financial Assistance, Small Business Administration, 409 3rd Street SW., Suite 8300 Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Sandra L. Johnston, Program Analyst, (202) 205–7528 or Curtis B. Rich, Management Analyst, (202) 205–7030.

SUPPLEMENTARY INFORMATION:

Title: ''CDC Annual Report Guide''.

Form No's: 1253 & 1235A.

Description of Respondents: Certified Development Companies.

Annual Responses: 270.

Annual Burden: 7,560.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Marcia Pixley, Regulatory Fairness Coordinator, Office of the National Ombudsman, Small Business Administration, 409 3rd Street SW., Suite 7125 Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Marcia Pixley, Regulatory Fairness Coordinator, (202) 619–1732 or Curtis B. Rich, Management Analyst, (202) 205–7030.

SUPPLEMENTARY INFORMATION:

Title: ''Small Business and Agriculture Regulatory Enforcement Form''.

Form No: 1993.

Description of Respondents: Small Business Owners and Farmers.

Annual Responses: 1,000.

Annual Burden: 500.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Cynthia G. Pitts, Program Analyst, Office of Disaster Assistance, Small Business Administration, 409 3rd Street SW., Suite 6050 Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Cynthia G. Pitts, Program Analyst, (202) 205–7570 or Curtis B. Rich, Management Analyst, (202) 205–7030.

SUPPLEMENTARY INFORMATION:

Title: ''Pre-Disaster Mitigation Small Business Loan Application''.

Form No: 5M.

Description of Respondents: Business Application for the Pre-Disaster mitigation loan program.

Annual Responses: 2,500.

Annual Burden: 5,000.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 03–8663 Filed 4–8–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3483, Amdt #1]

State of West Virginia

In accordance with notices received from the Department of Homeland Security—Federal Emergency Management Agency, effective March 28, 2003 and April 2, 2003, the above numbered declaration is hereby amended to establish the incident period for this disaster as beginning on February 16, 2003, and continuing through March 28, 2003. This declaration is also amended to include Calhoun, Fayette, Greenbrier, Mason, McDowell, Mercer, Nicholas, Raleigh, Upshur, Webster and Wyoming Counties in the State of West Virginia as a disaster area due to damages caused by a severe winter storm, record snow, heavy rains, flooding and landslides occurring on February 16, 2003, and continuing through March 28, 2003.

In addition, applications for economic injury loans from small businesses located in the contiguous counties of Barbour, Braxton, Gilmer, Harrison, Lewis, Monroe, Pocahontas, Randolph, Ritchie and Summers in the State of West Virginia; and Alleghany, Bath, Bland, Giles and Tazewell Counties in the State of Virginia may be filed until the specified date at the previously designated location. All other counties contiguous to the above named primary counties have been previously declared.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is May 13, 2003, and for economic injury the deadline is December 15, 2003.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: April 2, 2003.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 03–8662 Filed 4–8–03; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

The Ticket to Work and Work Incentives Advisory Panel Meeting

AGENCY: Social Security Administration (SSA).

ACTION: Notice of meetings.

DATES: May 19, 2003, 10 a.m.—3 p.m.*; May 20, 2003, 9 a.m.—5 p.m.; May 21, 2003, 9 a.m.—1 p.m.

* The full deliberative panel meeting ends at 3. The standing committees of the Panel will meet from 3:15 p.m. until 6:15 p.m.

ADDRESSES: Embassy Suites Hotel at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington DC, 20037, Phone: (202) 362–9300.

SUPPLEMENTARY INFORMATION:

Type of meeting: This is a quarterly meeting open to the public. The public is invited to participate by coming to the address listed above. Public comment will be taken during the quarterly meeting. The public is also invited to submit comments in writing on the implementation of the Ticket to Work and Work Incentives Improvement Act (TWWIIA) of 1999 at any time.

Purpose: In accordance with section 10(a)(2) of the Federal Advisory Committee Act, the Social Security Administration (SSA) announces a meeting of the Ticket to Work and Work Incentives Advisory Panel (the Panel). Section 101(f) of Public Law 106–170 establishes the Panel to advise the President, the Congress and the Commissioner of SSA, on issues related to work incentives programs, planning and assistance for individuals with disabilities as provided under section 101(f)(2)(A) of the TWWIIA. The Panel is also to advise the Commissioner on matters specified in section 101(f)(2)(B) of that Act, including certain issues related to the Ticket to Work and Self-Sufficiency Program established under section 101(a) of that Act.

Interested parties are invited to attend the meeting. The Panel will use the meeting time to receive briefings, hear presentations, conduct full Panel deliberations on the implementation of TWWIIA and receive public testimony. The topics for the meeting will include presentations of briefing papers prepared for the Panel, SSA's early intervention demonstration project and agency updates from SSA, the Department of Education and the Department of Health and Human Services.

The Panel will meet in person commencing on Monday, May 19, 2003 from 10 a.m. to 3 p.m. (standing committee meetings from 3:15 p.m. to 6:15 p.m.); Tuesday, May 20, 2003 from 9 a.m. to 5 p.m.; and Wednesday, May 21, 2003 from 9 a.m. to 1 p.m.

Agenda: The Panel will hold a quarterly meeting. Briefings, presentations, full Panel deliberations and other Panel business will be held Monday, Tuesday and Wednesday, May 19, 20, and 21, 2003. Public testimony will be heard in person Monday, May 19, 2003 from 2:30 p.m. to 3 p.m. and on Wednesday, May 21, 2003 from 9 a.m. to 9:30 a.m. Members of the public must schedule a timeslot in order to comment. In the event that the public comments do not take up the scheduled time period for public comment, the Panel will use that time to deliberate and conduct other Panel business.

Individuals interested in providing testimony in person should contact the Panel staff as outlined below to schedule time slots. Each presenter will be called on by the Chair in the order in which they are scheduled to testify and is limited to a maximum five-minute verbal presentation. Full written testimony on TWWIIA Implementation, no longer than 5 pages, may be submitted in person or by mail, fax or email on an on-going basis to the Panel for consideration.

Since seating may be limited, persons interested in providing testimony at the meeting should contact the Panel staff by e-mailing Kristen M. Breland, at *kristen.m.breland@ssa.gov* or calling (202) 358–6423.

The full agenda for the meeting will be posted on the Internet at *http://www.ssa.gov/work/panel* at least one week before the meeting or can be received in advance electronically or by fax upon request.

Contact Information: Anyone requiring information regarding the Panel should contact the TWWIIA Panel staff. Records are being kept of all Panel proceedings and will be available for public inspection by appointment at the Panel office. Anyone requiring information regarding the Panel should contact the Panel staff by:

- Mail addressed to Social Security Administration, Ticket to Work and Work Incentives Advisory Panel Staff, 400 Virginia Avenue, SW., Suite 700, Washington, DC 20024.
- Telephone contact with Kristen Breland at (202) 358–6423.
- Fax at (202) 358–6440.
- E-mail to *TWWIIAPanel@ssa.gov*.

Dated: April 1, 2003.

Carol Brenner,

Designated Federal Officer.

[FR Doc. 03–8580 Filed 4–8–03; 8:45 am]

BILLING CODE 4191–02–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8611

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8611, Recapture of Low-Income Housing Credit.

DATES: Written comments should be received on or before June 9, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage, (202) 622–3945, or through the Internet (*CAROL.A.SAVAGE@irs.gov.*), Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Recapture of Low-Income Housing Credit.

OMB Number: 1545–1035.

Form Number: 8611.

Abstract: IRC section 42 permits owners of residential rental projects providing low-income housing to claim a credit against their income tax. If the property is disposed of or if it fails to meet certain requirements over a 15-year compliance period and a bond is not posted, the owner must recapture on Form 8611 part of the credits taken in prior years.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 1,200.

Estimated Time Per Respondent: 9 hrs., 2 min.

Estimated Total Annual Burden Hours: 10,841.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 1, 2003.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 03–8593 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–107047–00]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–107047–00 (TD 8985), Hedging Transactions (§ 1.1221–2).

DATES: Written comments should be received on or before June 9, 2003 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Carol Savage, (202) 622–3945, or through the internet *CAROL.A.SAVAGE@irs.gov.,* Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Hedging Transactions.

OMB Number: 1545–1480.

Regulation Project Number: REG–107047–00.

Abstract: This regulation deals with the character and timing of gain or loss from certain hedging transactions entered into by members of a consolidated group of corporations. The regulation applies when one member of the group hedges its own risk, hedges the risk of another member, or enters into a risk-shifting transaction with another member. Also, this regulation clarifies the character of gain or loss from the sale or exchange of property that is a part of a business hedge. A taxpayer must identify the hedging transaction on its book and records before the close of the day on which the taxpayer enters into it and must also identify the item, items, or aggregate risk being hedged. The information will be used to verify that a taxpayer is properly reporting its business hedging transactions.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 127,100.

Estimated Time Per Respondent: 1 hour, 20 minutes.

Estimated Total Annual Burden Hours: 171,050.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information

displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 1, 2003.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 03–8594 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[EE–63–88; IA–140–86; REG–209785–95]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing regulations, EE–63–88 (Final and temporary regulations) Taxation of Fringe Benefits and Exclusions From Gross Income for Certain Fringe Benefits; *IA–140–86* (Temporary) Fringe Benefits; Listed Property; and *REG–209785–95* (Final) Substantiation of Business Expenses (§§ 1.61–2, 1.132–5, and 1.274–5).

DATES: Written comments should be received on or before June 9, 2003, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulation should be directed to Carol Savage, (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov.,* Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: EE–63–88 (Final and temporary regulations) Taxation of Fringe Benefits and Exclusions From Gross Income for Certain Fringe Benefits; *IA–140–86* (Temporary) Fringe Benefits; Listed Property; and *REG–209785–95* (Final) Substantiation of Business Expenses.

OMB Number: 1545–0771.

Regulation Project Number: EE–63–88; IA–140–86; and REG–209785–95.

Abstract:

EE–63–88—This regulation provides guidance on the tax treatment of taxable and nontaxable fringe benefits and general and specific rules for the valuation of taxable fringe benefits in accordance with Code sections 61 and 132. The regulation also provides guidance on exclusions from gross income for certain fringe benefits.

IA–140–86—This regulation provides guidance relating to the requirement that any deduction or credit with respect to business travel, entertainment, and gift expenses be substantiated with adequate records in accordance with Code section 274(d). The regulation also provides guidance on the taxation of fringe benefits and clarifies the types of records that are generally necessary to substantiate any deduction or credit for listed property.

REG–209785–95—This regulation provides that taxpayers who deduct, or reimburse employees for, business expenses for travel, entertainment, gifts, or listed property are required to maintain certain records, including receipts, for expenses of $75 or more.

Current Actions: There are no changes to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for profits institutions, farms and Federal, state, local or tribal governments.

Estimated Number of Respondents: 28,582,150.

Estimated Time Per Respondent: 1 hr., 20 min.

Estimated Total Annual Burden Hours: 37,922,688.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 1, 2003.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 03–8595 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Request for Nominations to the Electronic Tax Administration Advisory Committee

AGENCY: Internal Revenue Service (IRS).

ACTION: Notice.

SUMMARY: The Electronic Tax Administration Advisory Committee (ETAAC), was established to provide continued input into the development

and implementation of the Internal Revenue Service (IRS) strategy for electronic tax administration. The ETAAC provides an organized public forum for discussion of electronic tax administration issues in support of the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. ETAAC members covey the public's perception of IRS electronic tax administration activities, offer constructive observations about current or proposed policies, programs, and procedures, and suggest improvements. This document seeks nominations of individuals to be considered for selection as Committee members.

The Director, Electronic Tax Administration (ETA) will assure that the size and organizational representation of the ETAAC obtains balanced membership and includes representatives from various groups including: (1) Tax practitioners and preparers, (2) transmitters of electronic returns, (3) tax software developers, (4) large and small businesses, (5) employers and payroll service providers, (6) individual taxpayers, (7) financial industry (payers, payment options and best practices), (8) system integrators (technology providers), (9) academic (marketing, sales or technical perspectives), (10) trusts and estates, (11) tax exempt organizations, and (12) state and local governments. We are soliciting nominations from professional and public interest groups, IRS officials, the Department of Treasury, and Congress. Members will be limited to serving one two-year term on the ETAAC to ensure that new perspectives and ideas are generated by the members. All travel expenses within government guidelines will be reimbursed.

DATES: Written nominations must be received on or before May 1, 2003.

ADDRESSES: Nominations should be sent to Kim Logan, W:E:S, C4–158, 5000 Ellin Road, Lanham, Maryland 20706. Application forms can be obtained from Kim Logan, who can be reached on (202) 283–1947.

FOR FURTHER INFORMATION CONTACT: Kim Logan, (202) 283–1947.

SUPPLEMENTARY INFORMATION: The ETAAC will provide continued input into the development and implementation of the IRS strategy for electronic tax administration. The ETAAC members will convey the public's observations about current or proposed policies, programs, and procedures, and suggest improvements.

This activity is based on the authority to administer the Internal Revenue laws conferred upon the Secretary of the Treasury by section 7802 of the Internal Revenue Code and delegated to the Commissioner of the Internal Revenue. The ETAAC will research, analyze, consider, and make recommendations on a wide range of electronic tax administration issues and will provide input into the development of the strategic plan for electronic tax administration.

Nominations should describe and document the proposed member's qualifications for membership to the Committee. Equal opportunity practices will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in the account the needs of the diverse groups served by the Department, membership will include, to the extent practicable, individuals, with demonstrated ability to represent minorities, women, and persons with disabilities.

Dated: April 1, 2003.

Terence H. Lutes,

Director, Electronic Tax Administration.

[FR Doc. 03–8679 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of Inflation Adjustment Factor, Nonconventional Source Fuel Credit, and Reference Price for Calendar Year 2002

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Publication of the inflation adjustment factor, nonconventional source fuel credit, and reference price for calendar year 2002 as required by section 29 of the Internal Revenue Code (26 U.S.C. section 29). The inflation adjustment factor, nonconventional source fuel credit, and reference price are used in determining the tax credit allowable on the sale of fuel from nonconventional sources under section 29 during calendar year 2002.

DATES: The 2002 inflation adjustment factor, nonconventional source fuel credit, and reference price apply to qualified fuels sold during calendar year 2002.

SUPPLEMENTARY INFORMATION:

Inflation Adjustment Factor: The inflation adjustment factor for calendar year 2002 is 2.1169.

Credit: The nonconventional source fuel credit for calendar year 2002 is $6.35 per barrel-of-oil equivalent of qualified fuels.

Reference Price: The reference price for calendar year 2002 is $22.51. Because this reference price does not exceed $23.50 multiplied by the inflation adjustment factor, the phaseout of credit provided for in section 29(b)(1) does not occur for any qualified fuels sold during calendar year 2002.

FOR FURTHER INFORMATION CONTACT: For questions about how the inflation adjustment factor is calculated—Thomas A. Thompson, N:ADC:R:R:SMB, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, Telephone Number (202) 874–0585 (not a toll-free number).

For all other questions about the credit or the reference price—Jaime Park, CC:PSI:7, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, Telephone Number (202) 622–3120 (not a toll-free number).

Dated: March 31, 2003.

Heather Maloy,

Associate Chief Counsel (Passthroughs and Special Industries).

[FR Doc. 03–8680 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel

ACTION: Notice.

SUMMARY: An open meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be conducted in Washington DC.

DATES: The meeting will be held Saturday, May 3, 2003 and Sunday, May 4, 2003.

FOR FURTHER INFORMATION CONTACT: Mary O'Brien at 1–888–912–1227, or 206 220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be held Saturday, May 3, 2003 from 3 p.m. EST to 5 p.m. EST and on Sunday May 4, 2003 from 8 a.m. EST to 4 p.m. EST at the St. Gregory Hotel located at 2033 M Street, NW., Washington, DC. The public is

invited to make oral comments on Sunday May 4, 2003. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited space, notification of intent to participate must be made with Mary O'Brien. Ms O'Brien can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: Various IRS issues.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: April 1, 2003.

Deryle J. Temple,

Director, Taxpayer Advocacy Panel.

[FR Doc. 03–8592 Filed 4–8–03; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register

Vol. 68, No. 68

Wednesday, April 9, 2003

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF20

Endangered and Threatened Wildlife and Plants; Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves

Correction

In rule document 03–7018 beginning on page 15804 in the issue of Tuesday, April 1, 2003 make the following corrections:

1. On page 15864, in the table, in the second column heading, ''Experimental Populations Special Rules 50 CFR 17.40(n):'' should read ''Experimental Populations Special Rules 50 CFR 17.84(i):''.

2. On page 15875, in the third column, in the first paragraph, in the 11th line, ''paragraph (n)'' should read ''paragraph (o)''.

[FR Doc. C3–7018 Filed 4–8–03; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Wednesday,
April 9, 2003

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Kauai Cave Wolf Spider and Kauai Cave Amphipod; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AH01

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Kauai Cave Wolf Spider and Kauai Cave Amphipod

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Kauai cave wolf spider (*Adelocosa anops*) and the Kauai cave amphipod (*Spelaeorchestia koloana*) pursuant to the Endangered Species Act of 1973, as amended (Act). The critical habitat designation consists of 14 units whose boundaries encompass an area of approximately 110 hectares (ha)(272 acres (ac)) on the island of Kauai, Hawaii. This critical habitat designation requires the Service to consult under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Section 4 of the Act requires us to consider economic and other relevant impacts when specifying any particular area as critical habitat. We solicited data and comments from the public on all aspects of the proposed rule, including data on economic and other impacts of the designation.

DATES: This rule becomes effective on May 9, 2003.

ADDRESSES: Comments and materials received, as well as supporting documentation, used in the preparation of this final rule will be available for public inspection, by appointment, during normal business hours at U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Blvd., Room 3–122, Box 50088, Honolulu, HI 96850–0001.

FOR FURTHER INFORMATION CONTACT: Paul Henson, Field Supervisor, Pacific Islands Office, at the above address (telephone: 808/541–3441; facsimile: 808/541–3470).

SUPPLEMENTARY INFORMATION:

Background

The Hawaiian archipelago consists of eight main islands and the numerous shoals and atolls of the northwestern Hawaiian Islands. The islands were formed sequentially by basaltic lava that emerged from a hot spot in the earth's crust located near the current southeastern coast of the island of Hawaii (Stearns 1985). Kauai is the oldest of the main islands, with most of its land mass being formed between 3.6 and 5.6 million years ago (MYA) from a single, large shield volcano, now represented by the Alakai Plateau and adjacent ridges. Younger, secondary eruptions occurred over the eastern portion of the island as recently as the Pleistocene era (approximately 0.6 MYA). Due to the age of the island, the terrain is heavily eroded, with steep water-carved valleys and gulches characterizing the slopes of the Alakai Plateau and other isolated ridges. The Alakai Plateau is one of the wettest places on earth, receiving an average of 1.3 meters (m) (444 inches (in)) of rain annually (Juvik and Juvik 1998). Rain is delivered to the island by prevailing trade winds which come from the northeast. Southern and southwestern portions of the island lie in the rain shadow of the Alakai Plateau, ridges, or other uplands, and receive relatively little rain (NOAA 1990–1999).

The Koloa District lies in the southeast corner of Kauai and includes the town of Koloa and the community and resort area of Poipu. The area is dry to mesic (moderate rainfall), receiving an average of 107 to 223 centimeters (cm) (42 to 88 in) of rain annually. Although the Koloa District includes upland areas such as ridge lines derived from the Alakai Plateau and Haupu ridge, most human-occupied areas lie between sea level and about 183 m (600 feet (ft)) in elevation.

The Koloa area is composed of the youngest rock on Kauai, the Koloa Volcanics (MacDonald *et al.* 1960; Langenheim and Clague 1987), with flows dating from between 0.6 and 1.4 million years. Younger, consolidated marine deposits and lithified sand dunes lie on top of some coastal portions of the older Koloa Volcanics. The great age and subsequent weathering that has occurred on Kauai has resulted in most lava tubes having been collapsed or filled with sediments (MacDonald *et al.* 1960; Howarth 1973; Berger *et al.* 1981; Howarth 1987b), relative to younger islands (*e.g.,* Hawaii) where lava tubes are common features (Howarth 1983a). It is only in portions of the Koloa District, with its younger, cave-bearing rock, relative lack of developed soils, and minimal rainfall and subsequent sedimentation, that caves are known to be relatively common features on Kauai (Howarth 1981).

Kauai Cave Wolf Spider

The Kauai cave wolf spider (*Adelocosa anops*) is a member of the wolf spider family (Lycosidae). Spiders in this family are characterized by a distinctive eye pattern, including two particularly large eyes located within the middle row of eight eyes (Foelix 1982). While wolf spiders are typically visual predators, the most conspicuous physical character of the Kauai cave spider is its complete lack of eyes. This character is unique among wolf spiders and, in part, provides justification for the recognition of a separate genus for this taxon (Gertsch 1973). A few species of wolf spider have reduced eyes, including another cave-adapted species on the island of Hawaii, but only in the Kauai cave wolf spider are the eyes entirely absent. Adults of the Kauai cave wolf spider are about 12.7 to 19.0 millimeters (mm) (0.5 to 0.75 in) in total body length with a reddish-brown carapace, pale to silvery abdomen, and beige to pale orange legs. The hind margin of each chelicera (biting jaw) bears three large teeth, two situated basally, and the third at the outer end of the chelicera. The tibiae (the fifth segment of the leg) of the two front pairs of legs have four pairs of ventral spines, and the tarsi (ultimate segments) and metatarsi (penultimate segments) of all legs bear unusually long, silky, and shiny trichobothria (sensory hairs) (Gertsch 1973).

Dr. Frank Howarth, of the Bishop Museum, first discovered the Kauai cave wolf spider in Koloa in 1971, and it was formally described by Willis Gertsch of the Bishop Museum (Gertsch 1973). The Kauai cave wolf spider is a predator, and although blind, can detect the presence of potential food items through chemo-tactile sensory organs and actively stalks its prey (Howarth 1983a). Although predation has not been observed in the field, the spider probably feeds on the Kauai cave amphipod, other cave-inhabiting arthropods, and alien species of arthropods that enter the cave system. Compared to most wolf spiders, the reproductive capacity of the Kauai cave wolf spider is extremely low, with only 15 to 30 eggs produced in each egg sac (Wells *et al.* 1983; Howarth 1991). Newly hatched spiderlings are unusually large for wolf spiders, and are carried on the back of the female for only a few days (Howarth 1991; Howarth and Mull 1992). Other species of wolf spider may have in excess of 100 offspring per clutch and the newly hatched spiderlings are relatively small (Foelix 1982; Howarth 1991; Howarth and Mull 1992).

Kauai Cave Amphipod

The Kauai cave amphipod (*Spelaeorchestia koloana*) was discovered in some of the same caves as

the Kauai cave wolf spider in 1971 (Bousfield and Howarth 1976). Because of the unusual attributes of a highly reduced pincher-like condition of the first gnathopod (thoracic appendage) of the amphipod, and the second gnathopod being mitten-like in both sexes, this taxon is placed in its own unique genus (*Spelaeorchestia*) within the family Talitridae (Bousfield and Howarth 1976). This species is also distinctive in its lack of eye facets and pigmentation, and extremely elongate, spiny, post-cephalic appendages. Adult cave amphipods are 7 to 10 mm (0.25 to 0.4 in) in length with a slender, laterally compressed body and a hyaline (nearly transparent) cuticle, giving it a shiny, translucent appearance. The second pair of antenna are slender and elongate, with the flagellum (slender outer part of the antenna) only slightly longer than the peduncle (narrow stalk attaching to the body). Peraeopods (abdominal walking legs) are very elongate, with slender, attenuated claws. All pleopods (swimming legs) are reduced, with branches vestigial or lacking. Uropods (tail-like appendages) 1 and 2 have well-developed pre-peduncles, and brood plates in the mature female are vestigial or entirely absent (Bousfield and Howarth 1976).

The Kauai cave amphipod is a detritivore and has been observed feeding on the roots of *Pithecellobium dulce* (Manila tamarind) and *Ficus* sp. (fig), rotting roots, sticks, branches, and other plant material washed into, or otherwise carried into, the caves, as well as the fecal material of other arthropods. In large cave passages, most individuals are found in association with roots or rotting plant debris. When disturbed, this cave amphipod typically moves slowly away rather than jumping like other amphipods. Nothing is known of the reproductive biology of this amphipod, but the vestigial brood plates of the female suggest they give birth to a small number of large offspring (Poulson and White 1969; Bousfield and Howarth 1976).

Cave Habitat

Cave habitats have a high degree of zonation which plays a major role in the distribution of cave-dwelling organisms. Howarth and Stone (1990) recognize five distinct zones, not all of which are always present within any one cave. The first zone, the ''entrance zone,'' typically receives large amounts of solar radiation and is often vegetated with surface plants. Within the second zone, the ''twilight zone,'' ambient light levels decrease as one moves away from the entrance and photosynthesizing plants that may be present in the entrance decline. The third zone is referred to as the ''transition zone.'' The transition zone lacks light penetrance from the entrance, but other outside factors still greatly influence the cave habitat (*e.g.,* ample air movement and daily temperature fluctuations). All of the above described zones (entrance, twilight, and transition) are typically influenced by surface conditions, daily cycles of warming and cooling, surface humidity, and a fair degree of air exchange occurring between these zones and surface habitats over relatively short periods of time (daily). The fourth cave zone, the ''dark zone,'' typically exhibits a sharp climatological change from the three previously described zones. The dark zone largely lacks daily air exchange with the surface and the three previously described zones. The relatively constant conditions encountered in the dark zone are often the result of a narrowing cave passage or low ceiling(s) that serve as physical barriers that restrict air exchange with other cave zones, or may be due to an up-slope orientation into a dead-end passage that traps warm, moist air. While the dark zone may undergo drastic changes in temperature and relative humidity, this more often is associated with seasonal rather than diurnal changes in air temperature. As a result of this, dark zones are seasonally stable in their micro-climatic conditions, remaining warm and humid during warm seasons. The final recognized cave zone is that of the ''stagnant'' zone (Howarth and Stone 1990). This zone lies deeper than the dark zone, receiving significantly less air exchange. As a consequence, the composition of gasses within this last zone is often largely controlled by the decomposition of organic matter and maintains high concentrations of carbon dioxide and low concentrations of oxygen. While considered inhospitable by human standards, field observations have indicated that obligate cave-dwelling species are highly tolerant of these conditions and many may, in fact, thrive in the stagnant air zone of caves (Howarth and Stone 1990).

Cave habitats almost always contain small voids, cracks, and passages (mesocaverns) that cannot be accessed by researchers (Howarth 1983b), but remain readily accessible (or preferred) by small troglobites (obligate cave-dwelling animals). Although such voids and cracks can occur in any zone and possess characteristics of each of the five zones, they frequently represent areas of reduced air flow and consequently are most similar to the dark and stagnant air zones. Passages and mesocaverns in limestone caves can form or be destroyed at almost anytime in the life of the cave, depending on the chemical characteristics of the rock and normal geologic processes. Limestone caves often become larger over time as acidic waters from the surface dissolve away the calcium carbonate bedrock. Since water flow enlarges and creates caves in limestone by solution, subterranean voids do not fill through erosion. If any do, the water quickly finds a different path and enlarges a new void. Limestone caves grow deeper as the water table sinks and the surface over the caves dissolves away. Limestone caves improve with age because, although individual voids and passages may be short-lived, limestone caves continuously reform so that habitat can remain suitable for very long time spans. Caves derived from lava tube systems are fundamentally different from limestone in that basalt is not as readily soluble. Hence, lava tube passages and mesocaverns do not typically dissolve away and become larger (formed), but are subject to filling with sediments (destroyed).

The tendency for Hawaiian basalt to shrink and crack upon cooling results in younger lava flows having an abundance of mesocaverns throughout their structure that may serve as habitat or as corridors between habitats. However, the cave-building process typically stops some time after cave and crack formation, and is replaced by the cave-filling processes as weathering and sedimentation begin filling in mesocaverns and passages. On younger islands, the abundance of mesocaverns may allow cave animals to move among and between larger, adjacent lava tubes (Berger *et al.* 1981; Howarth 1991). However, because these smaller voids become filled with erosional sediment in older flows like the Koloa Volcanics, and as a result of surface disturbance (Mueller-Dombois and Howarth 1981; Adam Asquith, Service, *in litt.,* 1994a), it is less likely that the Kauai cave animals can readily move among separate lava tubes or other cave systems.

Cave ecosystems are typically regarded as being food limited, and in most caves, the resident food-web communities require food input which is derived from surface systems based upon a photo-autotrophic (*i.e.,* photosynthesizing plants) food base (Culver 1986). Nutrients may enter caves via subterranean streams or other surface runoff; as guano from bats, birds, rodents, or other cave visitors or residents; or from plant roots that penetrate the cave (Culver 1986). Of these methods, roots from surface plants

are the primary means by which Hawaiian caves receive nutrient input (Howarth 1973). Protection and restoration of surface plant communities is, therefore, an extremely important consideration for cave conservation in Hawaii, as it is elsewhere (Culver *et al.* 2000). Factors or activities that impact or modify surface vegetation over caves (*e.g.,* fire, replacement of native or other perennial vegetation with grasses or some nonnative plants) can damage or destroy the underlying cave community.

Adaptations of Troglobitic Animals

As discussed in the species descriptions of the Kauai cave wolf spider and cave amphipod, troglobites typically possess specialized anatomical characters that represent adaptations to life in the cave environment. Such anatomical adaptations include enlarged and/or elongate tactile-sensory appendages (*e.g.,* legs or other appendages, antennae), and the lack of, or reduced, pigmentation and/or eyes (Barr 1968). Less obvious adaptations are also present in the physiology of troglobites and this has the potential to restrict their distribution within various cave zones (Huppop 1985). Laboratory studies with Hawaiian crickets (*Caconemobius* spp.) were conducted that compared the abilities of closely related surface and cave-dwelling forms to cope with desiccation (Ahearn and Howarth 1982). Surface-dwelling species exhibited considerably lower evaporation/desiccation rates than did the troglobitic species, and in one case, the surface species became dehydrated at half the rate of its cave-inhabiting relative. This low desiccation threshold largely confines these troglobites to the high-humidity environment of the deeper portions of caves, the dark and stagnant air zones. While such tests have not been conducted on the Kauai cave species, a logical assumption is that they have similar humidity tolerances, and this has been supported by field studies and observations conducted in the Kauai caves (*see* below). Similar adaptations in other troglobitic faunas (Vandel 1965; Barr 1968; Huppop 1985) support the universality of these traits in troglobitic animals.

Given the great vulnerability of troglobites to desiccation, adjacent mesocavern habitats will contain appropriate microclimate conditions and provide habitat or serve as refugia for troglobites when conditions in the main cave passages become drier or otherwise less accommodating. For example, during a previous survey of one cave of the Koloa area, the Kauai cave amphipod was not observed (Miura and Howarth 1978). However, on a subsequent survey, the floor of a small, dead end passage was saturated with 40 liters (10 gallons) of water, and 24 hours later amphipods had moved into this area, presumably from the surrounding mesocaverns (Howarth 1983a, 1983b). The foraging activities of both the Kauai cave wolf spider and the Kauai cave amphipod are restricted to dark, moist areas of large caverns and mesocaverns, and it is possible that the majority of their time is spent within such spaces.

Both Howarth (1983a) and Huppop (1985) have postulated that troglobites may be adapted to cope with low levels of oxygen and/or elevated concentrations of carbon dioxide, similar to conditions that would be encountered in the stagnant air zone of caves. This ability has been substantiated from observations in known stagnant air zones (Howarth and Stone 1990), as well as under controlled laboratory experiments. Hadley *et al.* (1981) conducted experiments with Hawaiian wolf spiders, both troglobites (*Lycosa howarthi*) and a related surface-dwelling species (*Lycosa* sp.). These researchers found the surface-dwelling spider had a higher metabolic rate, requiring 2.5 times more oxygen than its cave-dwelling relative. The reduced need for oxygen would better allow these spiders to survive in stagnant air cave zones. Given the ability of at least some troglobites to cope with reduced oxygen and elevated carbon dioxide, as well as their ability to inhabit inaccessible mesocaverns, it is assured that many troglobites will be able to reside in areas not readily surveyed by biologists. Hence, cave habitats will extend well beyond those areas accessible by researchers (Howarth 1983a).

Species Distribution and Abundance

The Kauai cave wolf spider and Kauai cave amphipod are generally restricted to cave dark and stagnant air zones, or other subterranean habitats such as cracks, voids, and other mesocaverns containing microclimate conditions similar to those zones. However, both the cave wolf spider and amphipod may be found in sub-optimal cave habitats (*e.g.,* cave transition zone) when conditions are appropriate (*e.g.,* elevated humidity during periods of increased rainfall). All of the caves where the cave amphipod has been located contain penetrating plant roots and/or other decomposing plant material, which serves as a food source for this detritivore. Plant material upon which the amphipods feed need not be from native plants, although nonnative toxic or indigestible plants may be inappropriate or damaging for amphipod foraging. The Kauai cave wolf spider can be found in caves where the cave amphipod does not occur, but other nonnative arthropods (*e.g.,* cockroaches, wood lice, small spiders) can be used as food for this generalist predator.

Prior to the publication of the proposed rule to designate critical habitat for the Kauai cave wolf spider (67 FR 14671, March 27, 2002), the spider had been observed in only five caves in the Koloa area since its discovery in 1971. Through mapping of one of the caves, the Service considers two of the caves originally believed to be separate to actually be one system with two entrances. Since 1996, Service biologists have conducted annual surveys of the caves, and starting in 1998, we have conducted biannual monitoring visits to three of the known occupied caves. Observations recorded in these visits include a total count of animals within each cave, potential threats to the listed cave organisms or their habitat, and the cave's condition (*e.g.,* human disturbance, presence of standing water). The following information is based on these monitoring visits.

In two of the four known occupied caves, wolf spiders have been seen on only three occasions, but have been more often observed in two other caves. Of the two more frequently occupied caves, in only one of these wolf spiders have been encountered during every monitoring visit with 14 to 28 individuals observed (USFWS data from January 18, 1996 to November 20, 2002). The second cave contained a smaller number of wolf spiders when they were found there (one to four per monitoring visit). Since April 2000, no wolf spiders have been observed in this cave. The decline of wolf spiders in this cave has been matched with a corresponding increase in the number of resident brown violin spiders, an alien, web-building species that likely preys upon both the Kauai cave wolf spider and amphipod (A. Asquith, *in litt.* 1994b; David Hopper, Service, *in litt.* 1999). Although these data are not conclusive, the declining numbers of the Kauai cave wolf spider and their increased absence in the second of the regularly occupied caves warrants concern with regard to population persistence.

Since the publication of the proposed rule, more surveys have been conducted and the spider has been verified to occur in two additional caves (Tom Shigemoto, Vice President, Alexander and Baldwin, pers. comm., 2002; Gordon Smith, Service, *in litt.* 2002), one of which was previously unknown

and the other was known only to be occupied by amphipods. Therefore, the spider has verified occurrences in six caves.

The Kauai cave amphipod has been recorded from six caves in the Koloa area but was only regularly encountered in only three of these caves. In one of these three caves, where the amphipod was found with the wolf spider, their numbers have ranged from 8 to 67 during the biannual monitoring visits. In another regularly occupied cave, amphipod numbers have increased steadily from 10 to 20 individuals per visit in pre-1998 counts to over 300 individuals during a visit in November 2000 (Service, unpub. data).

In the three caves less frequently occupied by the amphipod, the lack of observations of the species is probably due to several factors. In one of these caves, relative humidity is often below 100 percent, which is a suboptimal condition for troglobites. Amphipods have been found in this cave when humidity conditions are optimal, such as after heavy rains which saturate the soil and increase the relative humidity in the dark zone. In a second cave, amphipods appear to be resident but were only observed during two visits that were conducted soon after the cave had been exposed by heavy machinery, and prior to the cave being re-closed for road construction (A. Asquith, *in litt.* 1999). The last of these three caves has been visited infrequently and amphipods have been observed during some, but not all, visits (Bousfield and Howarth 1976; D. Hopper, *in litt.* 1998a; D. Hopper, *in litt.,* 2000a).

Since the publication of the proposed rule, the Service was notified of a seventh cave where the amphipod's occurrence was previously recorded (Bousfield and Howarth 1976). No additional information has been provided on this particular cave nor do we know the current status of the cave. Therefore, the amphipod has been known from seven caves.

Despite the data obtained in our biannual monitoring counts, the quantities of animals reported do not represent sound population estimates. The methods needed to conduct non-damaging, mark-recapture studies for accurate estimates of population size have not been developed for these animals, and no attempt to conduct such studies have been undertaken.

Cave systems may be separated by various physical barriers such as subterranean streams, or areas with developed soils that have filled in the mesocavern passages or habitats of these old caves (Mueller-Dombois and Howarth 1981). The degradation and loss of naturally occurring mesocavern habitats and corridors has likely been accelerated by development or other land uses that often require clearing of vegetation, blasting, and filling of trenches and construction sites. These activities, as well as modern agricultural practices, exacerbate the rates of sediment mobilization (Kirch 1982; Cuddihy and Stone 1990), resulting in the filling of caves and mesocaverns (Howarth 1973; Mueller-Dombois and Howarth 1981; Burney *et al.* 2001).

Because distinct species can evolve in adjacent lava tubes even when cave animals can move extensively through mesocaverns (Hoch and Howarth 1993), it is reasonable to consider the separate localities of these animals as different populations, even though intervening areas of potential habitat cannot be surveyed. Thus, we have currently verified a total of six spider populations and seven amphipod populations that are distributed throughout the Koloa district as follows: the Koloa Caves #1, #2, the newly discovered spider cave, and adjacent areas west of Waikomo Stream are considered to harbor three populations of the spider and two populations of the amphipod; the seaward Kiahuna Caves #267 and #276 likely harbor two populations of the spider and one of the amphipod; the Kiahuna Cave #210 harbors a separate population each of the spider and amphipod; the Mahaulepu Cave harbors a separate population each of the cave amphipod and the spider (Service, unpublished data, 1998–1999; G. Smith *in litt.* 2002); a small cave near the St. Raphael church harbors a population of the cave amphipod; and a small cave near the Koloa bypass road harbors a cave amphipod population.

Threats

Small populations are also demographically vulnerable to extinction caused by random fluctuations in population size and sex ratio and to catastrophes such as hurricanes (Soule 1983; Gilpin and Soule 1986). In addition, the low reproductive potential of both cave species (less than five percent of their surface relatives) means that they require more time and space to recover from a disturbance than would similar animals living on the surface (F. Howarth, *in litt.* 2001).

One of the major threats facing the Kauai cave wolf spider and the Kauai cave amphipod is the introduction of invasive alien species (F. Howarth, *in litt.* 2001). For example, an alien terrestrial nemertine worm (*Argonemertes dendyi*) from Australia was discovered in the 1980s on the island of Hawaii (Howarth and Moore 1983). This animal can live and reproduce in caves and presumably feed on any invertebrates, such as the Kauai cave wolf spider and the Kauai cave amphipod. The impact on cave fauna is not known at this time (Howarth and Moore 1983). If portions of the habitat are more or less isolated and protected, the chances are greater that any one threat would not affect all occupied caves at the same time and animals that survive may eventually re-colonize their former habitat. This situation would also apply for other surface disturbances, such as oil spills, pollution, and pesticide application.

Human impacts in the Koloa caves, and resulting impacts on the Kauai cave wolf spider and Kauai cave amphipod, are another concern. Caves are frequently sought out by curiosity seekers, and over-use of caves occurs readily due to their fragile nature (Howarth 1982; Culver 1986). In addition, both natural and cultural features (*e.g.,* human burials and associated artifacts) of caves are often damaged or destroyed by collectors or vandals (Howarth 1982; N. McMahon, Hawaii Dept. Historic Preservation, pers. comm., 2001). Unauthorized visitation and vandalism is such an issue in caves that the Cave Resources Protection Act (16 U.S.C. 4301 *et seq.;* 102 Stat. 4546) was passed with the main intent of protecting cave-associated natural and cultural resources. Unauthorized entry and vandalism of the Koloa caves has been documented (D. Hopper, *in litt.,* 1998b, 2000a), and public interest in visiting caves is reflected in the publication of the location of two of these caves in a recent tourist guide (Doughty and Friedman 1998).

Human visitation to caves, even when not intentionally destructive, often results in severe impacts to the resident troglobites or other cave inhabitants. For example, nicotine is a potent insecticide that is easily introduced into the cave environment through cigarette smoke or discarded cigarette butts. Given the confined space and poor air circulation in caves supporting suitable troglobite habitat, the effects of cigarette smoke are far more pronounced in caves (Howarth 1982; Howarth and Stone 1993). The impacts of cigarette smoke are not restricted to the main cavern; the smoke will also impact mesocavern habitats, where its effects cannot be seen. Although less toxic than cigarette smoke, wood fire smoke may be equally damaging since far more smoke is produced and detrital food reserves may be burned. The use of cigarettes, as well as fire activity, have been documented

in the Koloa caves (D. Hopper, *in litt.,* 1998b, 2000a).

The narrow confines of most caves often result in focusing human travel and associated impacts to a small area, and increase the likelihood of troglobite mortality from unintentional trampling and the destruction or disturbance of food resources (*e.g.,* roots, detrital matter). In addition, human use of caves frequently results in the importation of garbage, which encourages the invasion of caves by potential competitors and predators such as cockroaches (F. Howarth, Bishop Museum, pers. comm., 1994; A. Asquith, *in litt.,* 1994a).

The restricted area in which the Koloa cave animals occur is rapidly undergoing development (KBGM Peat Marwick 1993). The shallow cave habitat has been, and continues to be, degraded or destroyed through surface alterations such as the removal of perennial vegetation, soil fill, grading, paving, collapsing and filling of caves, diversion of waste water into subterranean voids and spaces, and other activities associated with development and agriculture.

The Kauai cave wolf spider and Kauai cave amphipod are also increasingly at risk from predation and competition for space, water, and nutrients by introduced, nonnative animals (Howarth 1985, pers. comm., 1994; A. Asquith, *in litt.,* 1994a, b; D. Hopper, *in litt.,* 1999), biological and chemical pest control activities associated with residential and golf course development (Hawaii Office of State Planning 1992); and an increased likelihood of extinction from naturally occurring events due to the small number of remaining individuals, populations, and their limited distribution.

Due to the small number of known caves inhabited by these animals, we remain concerned that these threats may be exacerbated by the publication of the exact locations of individual caves. Since publication of the proposed listing rule for these animals in 1997 (62 FR 64340), we have found evidence of increased entry and vandalism in these caves (D. Hopper, *in litt.* 1998b, 2000b). While direct and intentional threats to these species from human take and collection are not documented, the sensitive nature of these animals and their habitat to increased human presence makes increased human awareness of these caves a potential direct threat to the Kauai cave wolf spider and Kauai cave amphipod.

Previous Federal Action

On June 16, 1978, we published in the **Federal Register** a proposal to list the Kauai cave wolf spider as an endangered species and the Kauai cave amphipod as threatened (43 FR 26084). That proposal was withdrawn on September 2, 1980 (45 FR 58171) as a result of a provision in the 1978 Amendments to the Endangered Species Act of 1973 that required withdrawal of all pending proposals that were not made final within 2 years of the proposal or within one year after passage of the Amendments, which ever period was longer. An initial comprehensive Notice of Review for invertebrate animals was published on May 22, 1984 (49 FR 21664), in which the Kauai cave wolf spider and Kauai cave amphipod were treated as category 2 candidates for Federal listing. Category 2 taxa were those for which conclusive data on biological vulnerability and threats were not currently available to support proposed rules to list the species as threatened or endangered.

We published an updated Notice of Review for animals on January 6, 1989 (54 FR 554). In this notice, the Kauai cave wolf spider and Kauai cave amphipod were treated as category 1 candidates for Federal listing. Category 1 taxa were those for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals. However, in the Notice of Review for all animal taxa published on November 21, 1991 (56 FR 58804), the two Kauai cave arthropods were listed as category 2 candidates. In the November 15, 1994, Notice of Review for all animal taxa (59 FR 58982), the two Kauai cave arthropods were again elevated to category 1 candidates. Upon publication of the February 28, 1996, Notice of Review (61 FR 7596), we ceased using candidate category designations and included the two cave arthropods as candidate species. Candidate species are those for which we have on file sufficient information on biological vulnerability and threats to support proposals to list the species as threatened or endangered. The two cave arthropods were included as candidate species in the September 19, 1997 (62 FR 49398), Notice of Review.

A proposed rule to list these two species as endangered was published on December 5, 1997 (62 FR 64340), and the final rule to list them was published on January 14, 2000 (65 FR 2348). Since that time, we have conducted conservation efforts for the Kauai cave wolf spider and Kauai cave amphipod through voluntary partnerships with two private landowners in the Koloa area.

In the proposed listing rule, we indicated that designation of critical habitat for the Kauai cave wolf spider and Kauai cave amphipod was not prudent. Our concern was that publication of precise maps and descriptions of critical habitat in the **Federal Register** could increase human visitation to these highly sensitive cave habitats, which could lead to incidents of vandalism, destruction of habitat, and unintentional cases of take. Also, we believed that critical habitat designation would not provide any additional benefit to these species beyond that provided through listing as endangered.

However, in the final listing rule, we determined that critical habitat designation was prudent as we did not find specific evidence of taking, vandalism, collection, or trade of these species or any other similarly situated species. Also, we found that there may also be some educational or informational benefit to designating critical habitat. Therefore, we found that the benefits of designating critical habitat for these two species outweighed the benefits of not designating critical habitat.

On June 2, 2000, we were ordered by the U.S. District Court for the District of Hawaii (in *Center for Biological Diversity* v. *Babbitt and Clark,* Civ. No. 99–00603 (D. Haw.)) to publish the final critical habitat designation for both cave animals by February 1, 2002. The plaintiffs and the Service entered into a consent decree in a separate action agreeing to jointly seek an extension of this deadline (*Center for Biological Diversity* v. *Norton,* Civ. No. 01–2063 (D.D.C. October 2, 2001)).

On February 14, 2001, we contacted landowners on the island of Kauai, notifying them of our requirement to designate critical habitat for the Kauai cave wolf spider and Kauai cave amphipod. We included a copy of a fact sheet describing the two species and their habitat, and a map showing the presumed historic and current range (based on occupied habitat and the distribution of similar geology and soils) of one or both of these species.

On January 30, 2002, the U.S. District Court in Hawaii approved a joint stipulation to modify the terms of the June 2 order to extend the deadline to August 10, 2002. Subsequently, the Service determined that an additional extension of time was needed to complete this designation process. On August 21, 2002, the U.S. District Court in Hawaii approved another joint stipulation extending the date for the final rule designating critical habitat for both cave animals to March 31, 2003.

The proposed rule published March 27, 2002, proposed to designate four critical habitat units which collectively

amounted to approximately 1,697 ha (4,193 ac) (67 FR 14671). The public comment period closed on May 28, 2002. On November 15, 2002, we announced the availability of the draft economic analysis and reopened the comment period until December 16, 2002 (67 FR 69177).

Summary of Comments and Recommendations

In the proposed rule published on March 27, 2002 (67 FR 14671), we requested that all interested parties submit written comments on the proposal. We also contacted all appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment. We received no requests for a public hearing.

We received individually written letters from 43 parties, including five designated peer reviewers. Approximately 417 additional letters were submitted as part of a mailing campaign that supported designation. Of the 43 commenters who were not part of the mailing campaign, 16 supported the proposed designation, 26 were opposed, and 1 expressed neither support nor opposition. Of the 26 commenters who opposed the proposal, 17 commenters specifically opposed designation of critical habitat on lands they own or manage, and requested that these areas be excluded from critical habitat designation.

We reviewed all comments received for substantive issues and new information regarding critical habitat for both cave animals. Similar comments were grouped into general issues and are addressed in the following summary.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited, in writing, the review of the proposed critical habitat designation from nine independent experts affiliated with academic and research organizations or natural resource conservation agencies. We also put in a request to Sustainable Ecosystems Institute. All of the individuals contacted are recognized leaders in the field of cave ecology and conservation, as demonstrated by a record of published peer reviewed results of past and current research in this field. Four parties responded with written reviews of the proposal, one provided a letter citing his inability to participate due to the lack of applicability to his state agency position, and the remaining four parties either verbally declined to participate due to workload or other constraints or simply did not respond.

The four scientific review responses were generally positive and in support of the proposed designation on the basis of its technical merits. Reviewers generally recognized the limitations on the extent of specific knowledge regarding the cave species in terms of population sizes, population dynamics, and distribution of occupied habitat. However, a lack of knowledge is not unusual for troglobitic organisms that only occur in areas where humans rarely go and that may primarily inhabit mesocavern areas where humans are unable to enter at all. The reviewers were in agreement that the primary constituent elements were identified adequately. Three of the reviewers commented that additional information, particularly detailed mapping, was needed regarding human activities that may have eliminated one or more primary constituent elements from the landscape, information which presumably would allow some areas to be eliminated from consideration as critical habitat. Comments received from the peer reviewers are summarized in the following section and were considered in developing the final rule.

Issue 1: Biological Justification and Methodology

(1) *Comment:* One scientific reviewer commented that it was difficult to justify inclusion of Units 2 and 3 on geological grounds alone, considering that evidence of historical or current occupation by the organisms was lacking. However, another reviewer stated that the proposed designation on the basis of geology alone was indeed adequate, and pointed out the ''plastic'' nature of the underlaying calcareous substrates of Unit 2 and 3 over geologic time. Another scientific reviewer did not feel that enough information was available to evaluate the adequacy of the large size of Unit 1a without more detailed maps of geology, cave locations, and past, present and future land use. Another commenter noted that the proposed designation does not provide enough connectivity between units, and recommended that there should be continuity between Unit 1a and Unit 1b and to accomplish this, all of Makahuena Point should be designated.

Our Response: Unit 2 has not been included in the designation on geology alone. This unit lies only a short distance from a known occupied site and as mentioned by another reviewer was likely connected at an earlier time. Information provided during the comment period shows that the large size of appropriate habitat is likely to sustain the cave animals and is expected to provide the best type of habitat. In determining adequacy of size of critical habitat, we have reviewed the best scientific and commercial data available in making our final designation. Units 1b and 3 have not been included in the designation. A considerable amount of new information was provided to the Service regarding site-specific conditions on lands that had previously never been surveyed or had been incompletely surveyed. This includes new information regarding occupied and unoccupied caves, and technical information (*e.g.,* drilling logs that include cross-section/stratigraphy data of geologic core samples) regarding subsurface geology of surrounding areas. The total number of known occupied caves and caves with appropriate habitat has increased substantially, and some of the intervening areas between caves has been shown not to contain the primary constituent elements required to support adequate habitat for the species. The new information has resulted in a reformulation of the number of caves (and amount of above-ground area) considered to be essential to the conservation of the species. The new information has reduced, but not eliminated, the need for establishing critical habitat boundaries on the basis of the underlying geology of a given unit. Critical habitat boundaries have been modified to encompass surface areas above known caves and mesocave-bearing geologic features. These modifications and the rationale for the changes are described in detail in the section ''Summary of Changes from the Proposed Rule.''

(2) *Comment:* One scientific reviewer stressed the importance of environmental requirements of obligate cave-dwelling species, noting that appropriate conditions (100 percent relative humidity) only occurs in larger, longer caves, and may be most commonly found in mesocavern spaces. Mesocavern areas may be limited in Koloa because of the geologic age of the lava flow series; however, where they occur they are important.

Our Response: As the reviewer points out, a variety of data supports the existence and occupation of mesocavern habitats. This includes the typically low, but variable, numbers of organisms observed in cave surveys. Survey events that detect few individuals probably occur during conditions of reduced humidity whereby the organisms retreat into mesocaverns with suitable environmental conditions. Also, two known occupied caves that tend to exhibit drier conditions have been

surveyed numerous times with the wolf spider observed on only a few occasions. This indicates that, despite careful searches by trained observers, the organisms are able to move into areas of suitable habitat that are too small for humans to enter. We note that the ''type locality'' from where the initial specimens of the cave amphipod were collected for scientific description (the ''sand chamber'' of the Mahaulepu Sinkhole cave) appears to have a drier environmental regime than during initial biological surveys there in the 1970s. No amphipods have been seen in that chamber in recent years, likely due to this alteration of conditions. The Service agrees with the scientific reviewer that maintenance (and possibly enhancement) of suitable environmental conditions of caves and voids is an important consideration in conservation of the caves species.

(3) *Comment:* Two scientific reviewers recommended that the size of the critical habitat areas should be sufficient to protect adequate population numbers such that, in the event of local extirpations of the species due to natural disaster or disease, recolonization of these areas can occur.

Our Response: We agree, and we consider the issue of population dynamics central to the concept of conservation of the species. The cave species have characteristics that make estimates of population sizes and dispersal capabilities difficult. In addition, the species have naturally low reproductive potential. These characteristics highlight the importance of ensuring that the populations do not slip towards extinction due to demographic stochasticity (natural disaster, disease, invasive species interactions) or suffer from the effects of loss of genetic variability (inbreeding, genetic drift). We feel that our revised critical habitat boundaries, based upon the incorporation of new information regarding the number and locations of known occupied sites and sites highly likely to be occupied, encompass a wide distribution across the Koloa Basin, which will provide adequate refugia despite the possibility that unforeseen events may eliminate the entire population of a single cave or cave complex. These modified critical habitat boundaries are described in detail in the section ''Summary of Changes from the Proposed Rule.''

(4) *Comment:* The proposed critical habitat designation is based upon little specific data regarding the distribution of the cave invertebrates and the caves they inhabit; this has resulted in an overly broad ''blanket'' approach to the proposed critical habitat boundaries. A more reasonable approach would be to designate critical habitat around known population centers and known likely habitat.

Our Response: The proposed critical habitat designation was developed using the best technical information available to the Service at the time of preparation of the proposed rule. The majority of the lands where these species are found is privately owned, which severely limits and may prohibit the ability of the Service to survey caves and analyze landforms exhibiting potential habitat in short timeframes. Through ongoing outreach efforts and development of a series of cooperative conservation programs with certain landowners, a reasonable amount of scientific information had accumulated over time, and it was this available information that was used in the development of the proposed critical habitat designation. In response to Service requests for additional relevant information, several parties, including landowners and land managers, undertook surveys of their lands to obtain and share new information with the Service. This information has increased the level of specific knowledge about the species in terms of distribution of occupied and unoccupied caves, locations of additional areas with geologic features likely to contain habitat, and areas that, because of natural processes or human-caused changes, do not contain the primary constituent elements adequate for support of the species. In particular, the number of individual caves where one or both of the species are found has increased from six to nine. This has greatly influenced the technical analysis leading to the ultimate conclusion of which areas are necessary for the conservation of the species. As described elsewhere, the identification of additional known occupied habitat has resulted in refocusing critical habitat boundaries in consideration of our better understanding of the cave species populations, their distribution, the effects of habitat fragmentation, protection of isolated populations, and potential for retaining areas of habitat connectivity.

(5) *Comment:* A sand mining operation is located in Unit 2. Significant portions of this unit have been disturbed and should be excluded from designation.

Our Response: The sand mining operation is not included in the designation of critical habitat. As described above, new information regarding the geology and modification of potential habitat due to human activities such as the sand-pit operation, agriculture, and past and current land use patterns, have resulted in modification of the boundaries of the proposed critical habitat. These modified critical habitat boundaries are described in detail in the section ''Summary of Changes from the Proposed Rule.''

(6) *Comment:* One scientific reviewer noted that the concern regarding diseases and alien species invasions is warranted, but the reference to *Bacillus thuringinensis* (Bt) toxin as a potential threat is weak.

Our Response: The threat of profound ecological disturbance, including species extinctions, due directly or indirectly to alien species introduction is a common theme in the conservation of virtually every native Hawaiian ecosystem. In addition to calling attention to this immediate threat, our use of the Bt example was to demonstrate: (1) That some disease and alien species threats are intentional ''biocontrol'' introductions that could have unintended effects upon native ecosystems (this has occurred and continues to occur in Hawaii and elsewhere); and (2) the rationale behind protecting multiple, isolated portions of suitable occupied and unoccupied habitat in the event of a catastrophic event, such as a pesticide spill or other surface disturbance.

(7) *Comment:* Based upon existing and new information, there appear to be four distinct populations of the cave invertebrates. They occur at: Kukuiula, Kiahuna, Bypass Road/Civil Defense caves, and the sinkhole area. Based upon other cave conservation efforts (including a proposed critical habitat designation for cave organisms in Texas by the Service), recovery goals can be achieved by protecting in perpetuity three discrete populations of organisms. Considering the cooperative conservation efforts of landowners at Kukuiula, Kiuahuna (for caves), and at the sinkhole (presently for archeological preservation), the requisite three faunal areas for each species has been identified, which is sufficient for species protection.

Our Response: While the cave animals in Hawaii share some similarities with cave animals in Texas, it is inappropriate to assume recovery standards would be the same just because both occur in caves. Caves in Texas and caves in Hawaii are formed through different processes, have different food resources, and face different specific threats. Recovery standards need to be determined by evaluating individual species and their threats. Although there is no final recovery plan for either the Kauai cave amphipod or the Kauai cave wolf

spider, we do not at this time believe the three areas mentioned above adequately provide protection against catastrophic events. Therefore, a designation limited to these three areas would not adequately provide for the conservation of either species.

Issue 2: Legal and Regulatory Issues

(8) *Comment:* The Service has misinterpreted the intent of the Act with exclusion of areas under 3(5)(A)(i) of the Act. If a specific area of cave invertebrate habitat is recognized to be critical to the extent that management is already taking place, the notion that such management renders designation unnecessary does not make sense. In fact, designation of these areas would seem more urgent.

Our Response: While we have not excluded any areas from this rule because they are already sufficiently managed, we still believe this interpretation of the definition is reasonable. Pursuant to the definition of critical habitat in section 3 of the Act, the primary constituent elements as found in any area so designated must also require ''special management considerations or protections.''

(9) *Comment:* Areas that are merely capable of supporting the species are proposed for designation, as opposed to areas that are essential for the conservation of the species.

Our Response: Based on new information received during the public comment period we have refined the proposed designation. All areas designated as critical habitat are deemed essential to the conservation of the species. Areas designated provide for areas known to be occupied by the animals or provide for protection against catastrophic events by contributing to a wide distribution throughout the Koloa Basin.

(10) *Comment:* The Service failed to consider the cascading impacts resulting from the State-led regulatory activities that must, by law, be implemented as a result of critical habitat designation. These include the broad interpretation of ''take'' under Hawaii's Endangered Species Act (HRS Ch. 195D); mandatory ''downzoning'' of private lands under Hawaii's Land Use Law (HRS Ch. 205); unreasonably frequent requirements for full environmental impact statements for minor actions under Hawaii's Environmental Impact Statement Law (HRS Ch. 343); unreasonable permit delays for county-regulated Special Management Area permits under Hawaii's Coastal Zone Management Law (HRS Ch. 205A); uncertainty of interpretation of the reach and extent of State regulatory authority under Hawaii's State Water Code (HRS Ch. 174C); and implications for water quality standards under Hawaii Administrative Rules Ch. 11–54, Water Quality Standards.

Our Response: Possible costs resulting from interplay of the Federal Endangered Species Act and Hawaii State laws were discussed in sections 3 and 4 of the November 2002 Draft Economic Analysis of Proposed Critical Habitat Designation for the Kauai Cave Wolf Spider and the Kauai Cave Amphipod Island of Kauai, Hawaii (DEA) under direct and indirect costs as modified by the Addendum. They consider the economic impacts of section 7 consultations related to critical habitat even if they are attributable co-extensively to the listing status of the species. In addition, they examine any indirect costs of critical habitat designation, such as where critical habitat triggers the applicability of a State or local statute. The addendum to the DEA also fully considered this issue.

(11) *Comment:* The proposal violates the ''commerce clause'' because the spider and the amphipod are not related to interstate commerce.

Our Response: The Federal government has the authority under the Commerce Clause of the U.S. Constitution to protect these species, for the reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *Nat'l Ass'n of Home Builders* v. *Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 1185 S. Ct. 2340 (1998). *See also Gibbs* v. *Babbitt,* No.99–1218 (4th Cir. 2000). The *Home Builders* case involved a challenge to application of ESA prohibitions to protect the listed Delhi Sands flower-loving fly. As with the species at issue here, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the ESA to this fly was a proper exercise of Commerce Clause power because it prevented loss of biodiversity and destructive interstate competition.

(12) *Comment:* The Service must take into consideration the completed economic analysis prior to designation of critical habitat. Currently, the proposed critical habitat boundaries are proposed prior to the completion of the economic analysis. This runs counter to the requirement for determination of prudency under the ESA.

Our Response: We did not designate critical habitat before conducting an economic analysis. The DEA was published and made available for review on November 15, 2002 (67 FR 69177). The comment period on the proposed rule to designate critical habitat for these two species was extended until December 16, 2002, to allow interested and affected parties the opportunity to review the DEA in conjunction with the proposed critical habitat rule.

The Service determines whether critical habitat designation is prudent according to regulations found at 50 CFR 424.12(a). In accordance with these regulations, critical habitat designation is not prudent only when one or both of the following two situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or, (2) such designation would not be beneficial to the species. The economic analysis is generally conducted after critical habitat has been proposed in a given area, as set forth in regulations found at 50 CFR 424.19. If we find that economic or other impacts outweigh the benefit of designating critical habitat in a given area, that area will be excluded under section 4(b)(2) of the Act.

(13) *Comment:* Existing protections are adequate to conserve the species. The additional action of designating critical habitat is unnecessary.

Our Response: We are required to designate critical habitat to the maximum extent prudent. Designation is not prudent only when the species is threatened by taking or other human activity and designation would increase that threat or designation would not be beneficial.

(14) *Comment:* Because the DEA indicates that there will be substantial adverse impacts on small landowners, such as KG Kauai Development, LLC, there should be a Regulatory Flexibility Analysis performed on the designation of critical habitat.

Our Response: Small landowners and other entities potentially impacted by the designation of critical habitat for the Kauai cave arthropods were identified and discussed in section 5 of the November 2002 DEA and February 2003 addendum. As summarized in the addendum, there are no small entities, as defined under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act) (RFA/SBREFA) that may be impacted by implementation of the section 7 provisions of the Act for the cave animals. Therefore, we concluded that the designation of critical habitat for the cave species is not likely to significantly impact a substantial number of small entities. The final determination is much smaller than that which was initially proposed, and the addendum discusses impacts to

landowners but also concludes that no small entities will be impacted.

(15) *Comment:* In the context of Hawaii law, the designation constitutes taking as it results in the loss of value to the property.

Our Response: To a property owner, the designation of critical habitat becomes important when viewed in the context of section 7 of the Act, which requires all Federal agencies to ensure, in consultation with the Service, that any action that these aagencies authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. If, after consultation, our biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of the critical habitat. If we cannot suggest acceptable reasonable and prudent alternatives, the agency (or the applicant) may apply for an exemption, in accordance with section 7(e) through (p) of the Act.

The mere promulgation of a regulation, like the enactment of a statute, does not take private property unless the regulation on its face denies the property owners all economically beneficial or productive use of their land (*Agins* v. *City of Tiburon,* 447 U.S. 255, 260–263 (1980); *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 195 (1981); *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992)). The designation of critical habitat alone does not deny anyone economically viable use of their property. The Act does not automatically restrict all uses of critical habitat; it only imposes restrictions under section 7(a)(2) of the Act on Federal agency actions that may result in destruction or adverse modification of designated critical habitat. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in destruction or modification of critical habitat, we are required to suggest reasonable and prudent alternatives.

(16) *Comment:* Several commenters requested an extension of the public comment period to enable more time for preparing and submitting comments to the Service. This request was made in part to enable the completion of scientific surveys of certain lands within proposed critical habitat and to allow more time to develop voluntary conservation agreements on some of these lands that might obviate the need for critical habitat.

Our Response: The Service provided a total of 90 days of public comment following publication of the proposed critical habitat rule and draft economic analysis. The Service was unable to accomodate further requests for an extension of the public comment period due to the court-ordered deadline mandating completion of this final critical habitat rule. However, the Service would be happy to receive and review any new information, and if warranted will consider this information in possible future revisions of this rule (*see* 16 U.S.C. 1533(a)(3)(B)). In addition, interested parties may petition to revise a critical habitat designation based on new information (16 U.S.C. 1533(b)(3)(D).

(17) *Comment:* The DEA lists economic impacts; however, there is no indication that the Service has identified appropriate critical habitat boundaries or modified the critical habitat boundaries in consideration of these economic impacts.

Our Response: We considered the economic impacts that were analyzed and summarized in the DEA and final addendum, and no critical habitat units in the proposed rule were excluded or modified due to economic impacts (*see* section ''Analysis of Impacts Under Section 4(b)(2)''). However, several areas were excluded or modified because they lacked primary constituent elements, or were more degraded than other essential habitat areas, and therefore were not considered essential to the conservation of the species (*see* ''Summary of Changes from the Proposed Rule'' section).

(18) *Comment:* The incremental impact of designating critical habitat, over and above the original listing, is that it creates a presumption that modification of the land will ''take'' members of the species. The Service is obliged to calculate the impact of deterring landowners' use of their lands. If any economic use of the land is prevented, the Service is liable to compensate the private landowner for losses.

Our Response: Under federal law, while critical habitat may provide information to help a landowner identify where take through habitat modification may occur, the take prohibition applies whether or not critical habitat has actually been designated. The Act defines ''take'' to include ''harm.'' 16 U.S.C. 1532 (19). ''Harm is defined by regulation to include significant habitat modification or degradation where it actually kills or injures wildlife. 50 CFR 17.3. However, just because an action occurs in critical habitat would not demonstrate a take violation; the action must actually kill or injure the species. Take of a listed wildlife species may occur inside or outside of critical habitat if it causes death or injury to the species.

(19) *Comment:* A cost benefit and economic analysis pursuant to Executive Order 12866 is required because the DEA indicates that there may be an annual effect on the economy of over $100 million per year.

Our Response: While the DEA estimated potential costs greater than $100 million, this was based on the proposed critical habitat acreage of approximately 1,697 ha (4,193 ac). The final economic analysis evaluated the revised acreage of 110 ha (272 ac) and concluded that costs did not exceed $100 million.

(20) *Comment:* Portions of Unit 2 and the eastern portion of Unit 1 are planned but not permitted for major resort development; the southern portion of Unit 1 is planned but not permitted for subdivision into over 50 ''upscale'' houselots; a portion of Unit 3 is planned and permitted for a future limestone and basalt quarry; the area surrounding the old Koloa sugar mill will be expanded into an industrial area; several water wells are located in Unit 1 and additional water wells are expected. This development will create residential and employment opportunities for over a thousand island residents. In view of their economic importance, these areas should be excluded from consideration.

Our Response: As indicated in the ''Summary of Changes from the Proposed Rule'' section, large portions of the proposed critical habitat Units 1 and 2 have been excluded in the final designation of critical habitat due to biological, rather than economic, considerations. Unit 3 has been completely removed from critical habitat designation for biological reasons, as well.

(21) *Comment:* The Eric A. Knudsen Trust is seeking to subdivide or otherwise participate in the development of at least 741 lots/resorts units on 202 acres of trust-controlled lands [Tax Map Keys (TMKs): (4) 2–8–015:082; (4) 2–8–013:01; (4) 2–8–014:01, 02, 03, 04, 19, 30 {in part}; (4) 2–8–09:09; (4) 2–8–011:01, 18, 20, 35]. Because critical habitat designation may impact these plans, the trust asks that the lands be excluded from designation. Certain Eric A. Knudsen Trust lands may not be suitable as critical habitat because of prior urban and resort development [TMKs: (4) 2–8–01421, 26], and the trust asks that these lands be excluded from designation.

Our Response: With the revised critical habitat boundaries, only two critical habitat units fall within the TMKs listed. Both units (unit 6 and 8) fall within TMK (4) 2–8–014:01. All other proposed areas were excluded from final critical habitat designation for biological reasons, as described in the ''Summary of Changes from the Proposed Rule'' section.

(22) *Comment:* The DEA acknowledges that the proposed critical habitat boundaries will change with the final designation; however, the process by which final boundary determinations are made is not clear. The lack of definitive boundaries under consideration makes it impossible for anyone commenting on the economic impacts to be precise.

Our Response: The proposed critical habitat units were described and depicted in the proposed rule (67 FR 14671), as were the methods and criteria used in determining the proposed areas. We have described our methods and criteria for designating final critical habitat boundaries within this final rule.

(23) *Comment:* The DEA fails to distinguish potential costs due to designation from costs due to listing the cave animals as endangered. Nowhere does the draft provide any analysis of what impacts, if any, designating critical habitat for the cave animals would impose above and beyond those associated with the species' listing. Because the draft economic analysis does not distinguish between these costs, it cannot exclude proposed critical habitat from a final critical habitat designation pursuant to section 4(b)(2).

Our Response: The court, as per *New Mexico Cattlegrowers Association* v. *U.S. Fish and Wildlife Service,* requires us to look at co-extensive costs (consideration of the impact of all section 7 effects that could be a result of the designation, even if they are the same as those that arise from the listing). This is the approach the economic analysis and addendum take. The Service recognizes that if an area is excluded under 4(b)(2), not all of the economic impacts may be avoided.

Issue 3: Economic Issues

(24) *Comment:* Elements of the economic analysis are based upon unsubstantiated and speculative development scenarios that greatly exceed foreseeable, sustainable growth for the Koloa/Po'ipu region as set by existing county zoning and State land use designations, as well as other legally-binding planning guidelines such as the Kaua'i County General Plan.

Our Response: The resort/residential development planned in Units 2 and 4 and the residential development planned in Unit 10 is consistent with the 2000 Kaua'i General Plan (General Plan), current State land use districts, and current county zoning. The resort/residential development planned in Units 6 and 8 requires minor modifications in the State land use districts and county zoning, but it is consistent with the General Plan. All of this development is likely to occur within the proposed critical habitat between 2003 and 2020 if no consideration is given to the indirect impacts of the intended designation.

The commercial development planned in Unit 10 is not in the General Plan and is not included in the State Urban District. As mentioned in the Indirect Costs section of the Addendum, this development may not occur for reasons unrelated to the intended designation. However, since the General Plan is updated every 10 years or so, the commercial development may be added to the General Plan before 2020. The property values used in the Addendum reflect the fact that the development is not fully entitled, but that the land has development potential.

Barring a hurricane or a major recession that disrupts tourism and resort/residential property sales, it is expected that, without the intended designation, all or nearly all of the planned development in the intended designation would occur by 2020.

(25) *Comment:* Most development can proceed with reasonable project modifications that will reduce or eliminate damage to the cave ecosystems, therefore the economic impacts are greatly overstated. The economic analysis indicates that $1.9 billion of development may occur in the region and that project modifications would cost $61.6 million. This represents 3.2 percent of the cost of development, not an unreasonable amount considering these species and their habitats are highly endangered. Another commenter stated that direct costs of consultation must actually be divided by the profits from the sales, rentals, jobs, *etc.,* produced by all the units of resort, residential, commercial and light industrial development which are likely to be built. Figured per saleable and rental unit and calculated over time, the cost is not likely to be as staggering as portrayed.

Our Response: The estimates of direct and indirect costs in the *Draft Economic Analysis of Proposed Critical Habitat Deisgnation for the Kaua'i Cave Wolf Spider and the Kaua'i Cave Amphipod, Island of Kaua'i, Hawai'i* (DEA) were revised based on new information from the Service, resulting in a reduction in these estimates. For the larger projects affected by the intended designation, the revised figures represent a small percentage of the total development costs and profits.

(26) *Comment:* Direct costs are summed with indirect costs to derive a total impact estimate. Yet, direct costs are associated with development put in place, while indirect costs are associated with development foregone. The benefits of the former should be offset against the costs of the latter, not summed. Also, direct cost estimates do not include multiplier effects of these expenditures, yet indirect costs do include multiplier effects. So we see the full impact of development foregone, but only partial impacts of development actually implemented.

Our Response: Since the DEA was published, the direct costs and indirect costs have been modified to reflect new information gained since the publication of the DEA and based on the intended critical habitat designation. Direct costs include expenditures, on section 7 consultations and project modifications for assumed development. Indirect costs include additional expenditures as well as lost income benefits associated with lost development. The direct and indirect costs are no longer summed; also, the direct costs are not benefits—they do not offset indirect costs.

Indirect costs that reflect the multiplier effects of lost development are no longer included in the analysis because they would be generated in any case; to the extent that development is displaced from the intended designation due to the implementation of section 7 for the cave animals, that development would still be expected to occur but in another location of Koloa outside the critical habitat. This is now expected because of the smaller area intended for designation.

(27) *Comment:* Total impact is based on a guess that between 25 percent (low) and 50 percent (high) of all proposed development will not proceed due to habitat restrictions. [Sec 4.c] Also, Table VI–3 indicates that the ''Low Projection'' actually assumes a 33 percent loss, not 25 percent as claimed in the text (pg. VI–57). Thus, the ''Low'' impact should be 25 percent lower than reported, or about $330 million in Net Present Value terms.

Our Response: Due to the Service's intended modifications to the critical habitat designation, the cost estimates presented have been revised. In particular, the indirect impacts on remaining parcels are considered on a

parcel-by-parcel basis whereby the change in the likelihood of development, if any, associated with the intended designation is identified. The costs associated with these impacts are presented in the Indirect Costs section of the Addendum.

(28) *Comment:* The State of Hawaii Department of Business, Economic Development and Tourism (DBEDT) population and tourism growth projections were used for this study. These estimates are higher than the 2000 Kaua'i's General Plan projections. DBEDT's projections are controversial and contested.

Our Response: The DBEDT projections are presented in Table II–1 of the DEA, although both the DBEDT and General Plan projections are discussed in Chapter II of the DEA. The General Plan projections and information from developers are used to determine the amount of development that is planned in the intended critical habitat designation.

While the DBEDT projections are used in comparisons of lost economic activity to projected island-wide economic activity in the DEA, neither the DBEDT projections nor the General Plan projections are directly used in the calculation of updated cost estimates presented in the Addendum.

(29) *Comment:* It is erroneous to assume hotel and resort development displaced at Po'ipu is not likely to be replaced by equivalent projects elsewhere on Kauai. (V–57). In fact, there is island-wide competition for the resort market, and new areas such as Kapalawai have received Kauais General Plan resort designation. Also, visitor accommodations on Kauai are diversified with significant uncounted numbers of people staying in vacation rental homes, bed and breakfasts and camping outside of planned visitor destination areas. According to the Kauai General Plan analysis, the total number of resort and residential units already permitted, as opposed to those desired, is 5,836. (Appendices, Tables C and D). If the density allotted to Kukui'ula is cut in half, that total number is 4,036. Taking the HIGH number of baseline development (2,253, which includes not permitted units desired by Grove Farm), it appears that there must be 1,783 permitted units *outside* of the proposed critical habitat area. Future growth opportunities in Koloa, not requiring cave species mitigation construction, do exist in both the resort and residential categories. Growth opportunities in the Koloa area are not foreclosed by habitat designation.

Our Response: As a result of the Service's intended modifications to critical habitat, the DEA's estimates of loss of resort/residential development in the Po'ipu area and reduction in the amount of islandwide development no longer reflect the impacts associated with the intended designation. As discussed in the Indirect Costs section of the Addendum, even if some of the development planned in critical habitat does not take place, it is assumed that other development projects in the Koloa/Po'ipu area will be able to be increased in density or area to satisfy unmet demand for residential or resort/residential development.

(30) *Comment:* The costs of public support of residential and tourism development is not adequately identified or calculated. These costs should be considered avoided costs for reductions in growth. Among the missing estimates for the taxpayers ''growth subsidies'' are the following: (1) Public expenditures for more schools or expansion of existing schools, including teachers, staff and administrators; for police, fire, ambulance, lifeguard personnel and equipment; solid waste; recycling; governmental administrative services; etc. Public subsidies of each unit of residential and of tourism development are substantial; (2) Most of these costs, as well as those for water, sewage, and roads (which the study states will not be affected by habitat designation and do require consultations etc.), are increased when development is sprawling rather than contiguous. Development of Maha'ulepu and the Sugar Mill area would leap beyond current developed areas; (3) Another avoided cost would be the cost to attain permits for projects and project design costs, *etc.* To get permits needed to develop, Grove Farm has previously estimated costs of over $5 million, higher than numbers in the study.

Our Response: As discussed in the Indirect Costs section of the Addendum, a reduction in islandwide development attributable to the intended designation is no longer anticipated. Similarly, it is assumed there will be no impacts to the Maha'ulepu development since the areas planned for development are no longer in critical habitat. As such, any avoided public-support costs for reductions in development are not anticipated.

(31) *Comment:* Table ES–1 appears to present both the low and high ends of the economic impacts estimated, implying that the low-end value reflects the likely least cost that critical habitat designation would impose. In fact, review of the DEA reveals that the ''low'' value represents the low end of the possible worst-case scenario, not the low end of all likely scenarios.

Our Response: The impact estimates have been revised in the Addendum to include expected impacts for a number of possible scenarios and the Service's intended modifications to critical habitat. As such, the high and low estimates in Table Add-3 represent the range of reasonably foreseeable direct costs associated with section 7 implementation for the cave animals and the indirect costs associated with the intended designation.

(32) *Comment:* The DEA fails to recognize that the costs to investigate the implications of critical habitat are sunk costs associated with the designation process, not additional costs that final designations would impose. Any concerned party investigating the proposed designation of critical habitat on their lands have already hired their lawyers and consultants, and incurred the costs associated with figuring out the implications of designation on their lands. Even were the private landowners' lands ultimately excluded from the final critical habitat designation, the landowners would still not recoup those costs; the money has already been spent. These costs should not be included in the analysis of future potential costs from designation since they have already been incurred and were incurred regardless of the final designation decision.

Our Response: For completeness, estimated expenditures by landowners to investigate the implications of the proposed critical habitat were included in the DEA and Addendum, even if the funds have already been expended and are not recoverable. In estimating costs, a distinction is not made between the designation process and the final designation.

(33) *Comment:* Project modification costs are underestimated, particularly the cascading effect of project realignment with the purpose of avoiding critical habitat. Also, the costs of avoiding subsurface impacts to sewer lines, buried cables, *etc.,* in addition to roads, is underestimated.

Our Response: The project modification cost estimates take into account a variety of projects, locations, and contingencies, and are based on (1) discussions with the Service and construction contractors, and (2) an examination of the historical record of project modifications regarding the cave animals. The one historical case of a road realignment due to the cave animals involved the Koloa Bypass Road. In this case, the realignment was minor and was completed quickly at

relatively low cost. The Service indicates that if a realignment is too costly for a particular project, other alternatives are possible. These include using post-tension concrete to bridge caves and mesocaverns, or placing sewer lines and cables above ground. If none of these options is economically or technically feasible, the Service indicates that a portion of a cave could be sealed off and filled in, as long as precautions are taken to minimize the impact to any cave animals that may be present. The costs associated with these various scenarios are considered in the project modification cost calculations in the Addendum.

In situations where development is displaced because of critical habitat, the cascading effect of project realignment is taken into account (*e.g.*, a school planned for a location in critical habitat would be relocated to an area planned for residential development, thereby resulting in a loss of planned housing).

(34) *Comment:* The DEA only partially considers the ''indirect impacts'' of critical habitat designation, and instead focuses on ''direct impacts'' due primarily to consultations under section 7 of the Act. Due to precedent set by *New Mexico Cattle Growers,* the Service must fully consider both types of impacts, and the DEA must present a thorough analysis of these economic effects. Another commenter stated that the DEA overemphasizes the direct costs attributable to critical habitat designation, which are relatively minor, and ignores or omits many indirect impacts, such as: Impacts to housing supply, especially affordable housing required by State and local governments as permit conditions associated with development of ''market-priced'' housing, upscale housing, and resort development; impacts to public infrastructure such as schools, parks, and roads, and decreases in public revenues as a result of reduced economic activity; disproportionate impacts to specific ethnic groups, and other social impacts.

Our Response: Both direct and indirect impacts are analyzed in Chapter VI and in the Addendum, and both are summarized in Table Add-2.

Regarding affordable housing, schools, parks and roads, the developers are obligated to provide them regardless of critical habitat. But if they cannot build them in critical habitat, then they could be moved elsewhere within a project site, displacing market housing or other project components. This displacement was assumed in analyzing the economic impacts of the section 7 implementation for the cave animals.

As discussed in the Indirect Costs section of the Addendum and in responses to other comments, a reduction in islandwide development attributable to the intended designation is no longer anticipated. As such, any changes in the public revenues associated with reduced economic activity are expected to be minimal.

No disproportionate economic or social impacts on specific ethnic groups were identified.

(35) *Comment:* The DEA acknowledges that some or all lands designated as critical habitat may be redistricted/rezoned at the State or county level to preclude further development, and the actual economic costs of redistricting could be very high ($1.54 billion to $3.1 billion). These estimates are mentioned in the text but not in the summaries of the economic impacts.

Our Response: Due to the Service's intended modifications to critical habitat, economic impacts on the order of $1.54 billion to $3.1 billion are no longer anticipated. The Indirect Costs section of the Addendum considers the potential indirect impact of the intended designation on each parcel in the intended designation to determine an estimate of development impacts (including any associated with potential redistricting, as applicable).

(36) *Comment:* The DEA does not account for investments and other expenditures already made on lands with the expectation that rezoning and redistricting will allow future development and hence a return on investment, nor does it account for the potential lost recapture of investment yields that may be foregone due to lost development potential for lands that have successfully been rezoned and permitted for development at a very high cost.

Our Response: The Indirect Costs section of the Addendum presents an estimate of the loss in property values due to the cave animals listing and critical habitat designation. The property values used in the analysis reflect the current market value of the land, which consists of real returns from existing uses and improvements as well as any anticipated improvements or uses.

(37) *Comment:* The DEA fails to consider the more restrictive Habitat Conservation Plan (HCP) guidelines under the Hawaii Endangered Species Law (HRS 195D–4, HRS 195D–21) which require that the State HCP permittee show a net benefit to the species. The DEA fails to analyze impacts due to the circumstance in which a landowner qualifies for a Federal HCP but is unable to obtain a State HCP.

Our Response: None of the landowners and developers remaining in the intended designation are anticipated to seek an HCP as a result of critical habitat designation. Section 4 of the Addendum discusses the indirect impacts of the intended designation in greater detail.

(38) *Comment:* The narrative exclusion of areas underlying currently developed areas such as buildings and driveways (''unmapped holes'') is too vague considering the cryptic nature of the organisms and their habitats. The DEA fails to fully consider the economic impacts of landowners costs to properly demarcate ''unmapped holes'' in the process of obtaining necessary permits for development projects.

Our Response: The intended critical habitat designation contains few unmapped holes or developed areas. The costs to landowners to demarcate these sites is expected to be minimal.

(39) *Comment:* The DEA does not take into account the loss of income by Jas W. Glover Ltd., the operators of the quarry. The DEA should use a figure of $31–35/ton for shipping of limestone to Kauai, not the $13 to $16 per ton due to costs of wharfage fees loading and unloading costs, trucking, insurance, and other costs. In addition, the loss of quarry materials will have impacts throughout the construction industry on Kauai. Another commenter stated the siting of an additional quarry in the area is no longer necessary because market conditions have changed and products produced by the expanded quarry are not needed by the local economy. Another commenter stated that the operator of the quarry on Grove Farm lands (Jas W. Glover Ltd.) is a small entity, and it is woman-owned and Native Hawiian-owned. Because this firm is one of only two aggregate producers on the island the impacts to this economic sector should be considered under ''Impacts to Small Entities.''

Our Response: The site planned for the future expansion of the limestone quarry is no longer included in the intended critical habitat designation, so the associated direct costs, indirect costs, and impacts to small entities attributable to the intended designation are zero.

(40) *Comment:* The DEA incorrectly lists Kobayashi Group LLC as the owner of Kiahuna Golf Course and surrounding lands. The golf course (225.063 acres) is owned by Kiahuna Golf Club, LLC; the adjacent lands (95.412 acres) are owned by KG Kauai Development, LLC. These are distinct entities and not subsidiaries

of Kobayashi Group LLC, although there are common elements of ownership between various individuals. Kiahuna Golf Club, LLC, and KG Kau'i Development, LLC believe they qualify as small businesses. Because the DEA indicates that there will be substantial adverse impacts on small landowners such as KG Kaua'i Development, LLC and Kiahuna Golf Club, LLC there should be a Regulatory Flexibility Analysis performed on the designation of critical habitat.

Our Response: The Addendum lists KG Kaua'i Development, LLC (KGKD) as the owner of the land that is planned for the Kiahuna Golf Village Expansion and the Kiahuna Golf Course Expansion. No impacts are anticipated for the continued operation of the existing Kiahuna Golf Course by Kiahuna Golf Club, LLC.

RFA/SBREFA regulations state that the Small Business Administration (SBA) counts the receipts or employees of the business whose size is at issue and those of all its affiliates in determining the business' size. Businesses are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another business, and contractual relationships, in determining whether affiliation exists. Finally, RFA/SBREFA regulations state that a firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size (13 CFR part 121).

KGKD states that it is affiliated with Kobayashi Group LLC through common ownership by certain individuals. In addition, KGKD was recently established by the Kobayashi Group LLC for the purpose of acquiring the properties surrounding the golf course. As such, Kobayashi may be considered a predecessor entity of KGKD. Due to its affiliation with Kobayashi Group LLC, KGKD is not considered separately in the RFA/SBREFA analysis in the Addendum.

(41) *Comment:* The level of effort to document and analyze the potential economic impacts resulting from critical habitat designation greatly exceeded the level of effort to document and analyze potential economic benefits due to designation, resulting in an unbalanced overestimation of detrimental economic impacts, and an unfair underestimation of economic benefits due to designation of critical habitat.

Our Response: See response to comment 42 below.

(42) *Comment:* The benefits of species protection are overstated and speculative. The DEA does not present the expected circumstances or timeline for delisting the species, nor is there a quantifiable estimate of the economic benefits of delisting. In addition, one commenter states the species themselves have no economic value; any estimate of economic benefit derived from not fully developing lands proposed for critical habitat are speculative and unquantifiable.

Our Response: This responds to comments 41 and 42 above: Even though the material presented in the DEA and in the Addendum regarding benefits is not as extensive as the material on costs, this does not result in overestimated costs and underestimated benefits. The less extensive analysis of the benefits is due to (1) a lack of scientific studies on environmental and biological changes that would be attributable to the section 7 implementation for the cave animals, and (2) the lack of existing economic studies on the economic value of these changes. However, the Addendum presents an expanded discussion of benefits, including the estimated value of retaining land in open space due to critical habitat.

The expected circumstances and the potential timeline of delisting the cave animals will be presented in the Service's final recovery plan for the cave animals. The DEA does discuss the reduced costs due to successful preservation and the existence value of the cave animals in the Benefits section of Chapter VI; however, these benefits are not quantified given the lack of information as described above.

(43) *Comment:* Based on 6,000 acres of undeveloped land bounded by Haupu ridge, and using pro rata estimates of ecological values from a University of Hawaii study of the value of the Koolau Range on Oahu (*http://www2.hawaii.edu/~uhero/workingpaper/HawaiiEnviroEvaluation.pdf* Environmental Valuation and the Hawaiian Economy, by Brooks Kaiser, Nancy Krause, and Jim Roumasset), the Koloa/Poipu viewscape is worth $29 million per year (at $0.23 per acre per household for Kauai's 21,000 households). Over 18 years (comparable to FWS estimates), this sums to $521 million. The annual stream of benefits from the conservation district is $10.1 million annually (at $1,690 per acre), summing to another $182.5 million on a comparable basis. The net present value of the undeveloped land is $456.9 million (at the UH lower estimate of $76,146 per acre). Degradation scenarios combining urban creep, invasive species, and human/animal disruption resulting in recharge loss could cost another $3.6 million annually (at $600 per acre), or a total of $65 million. That is only a start at estimating the ecological benefits and savings associated with preserving this undeveloped land, and we are at $1.225 billion already.

Our Response: The suggested benefits analysis would yield inaccurate results for several reasons. First, the proposed critical habitat for the cave animals as described in the proposed rule covers 4,193 acres. Since the publication of the proposed rule, the Service has identified several areas of the proposed critical habitat that it intends to remove for biological reasons, which would reduce the critical habitat to 272 acres. Basing the benefits analysis on 6,000 acres would overstate the economic benefits attributable to the implementation of section 7 for the cave animals.

Second, the commenter uses an incorrect value of open space. As stated in the University of Hawaii study, a recent survey found that Oahu residents are willing to pay $0.0023 per acre (0.23 cent per acre) for the preservation of open agricultural land on O'ahu. The commenter's use of $0.23 (23 cents) per acre overstates the benefits associated with open space by a factor of 100. The Benefits section of the Addendum uses the 0.23 cent per acre figure, corrected for (1) inflation; (2) the income levels on Kauai; and (3) the amount of existing open space on Kauai compared to Oahu. To calculate the value of additional open space, the corrected figure is then applied to the amount of land that may no longer be developed due to critical habitat.

Third, the University of Hawa'i (UH) study on the Koolau Range on Oahu focuses on the economic benefits provided by a mountainous region covered by dense forests and many native Hawaiian plants. The proposed critical habitat is in a gradually sloping and relatively dry area that contains many nonnative plant species. Since the ecosystems of these two areas are vastly different, the ecosystem services provided by these areas will also be different. As such, the economic valuation of the ecosystem services provided by the Koolau Mountains is generally not transferrable to the proposed or intended critical habitat. For example, the value of water recharge in the UH study reflects projected water supply and demand conditions on Oahu—an island which is nine percent

larger than Kauai but has a population of more than twelve times that of Kauai. Furthermore, neither the proposed nor the intended designation is in an area of high rainfall. Also, the UH benefit analysis of reducing soil runoff is unique to three valleys that drain through partially channelized streams in urban areas into the manmade Ala Wai Canal. Since this canal was designed with inadequate flushing from stream or ocean currents, it functions as an unintended settling basin so must be dredged periodically. The proposed critical habitat drains into a portion of the ocean that has strong currents and adequate flushing. And unlike the Koolaus, none of the proposed critical habitat contains streams and aquatic life, and none of the units are suitable for hunting wild pigs.

Finally, the commenter's summation of benefits to $1.225 billion is flawed due to double-counting. For example, the $1,690 per acre figure in the UH study includes the benefits of open space. So adding the estimated open space benefit of $521 million to the ecosystem services estimate of $182.5 million double-counts the benefits of open space. Similarly, the two per-acre figures taken from the UH study ($1,690 per acre and $76,146 per acre) are two different measures of the same ecosystem benefits. The first figure refers to the annual stream of benefits, while the second figure refers to the net present value. Multiplying both of these figures by 6,000 acres and adding them together clearly double-counts the ecosystem benefits.

(44) *Comment:* Assigning an economic value to preservation of ecosystem functions that may result from the designation of critical habitat (such as groundwater recharge, protection of coastal marine waters and fisheries, and other ecosystem services) is now an acceptable method of economic analysis. The dollar value of these services is high. However, this analysis was done in a qualitative, narrative manner in the draft economic analysis. Why was it not done quantitatively?

Our Response: Quantitative estimates of the economic benefits of the listed ecosystem services provided by critical habitat are not presented in the DEA or in the Addendum because studies estimating the change in the ecosystem associated with critical habitat designation and the value of that change are not available.

However, such benefits are likely to be small. For example, the proposed critical habitat is near the coast in an area of low rainfall, and thus contributes little to groundwater recharge.

The reduction of development and grazing in critical habitat could reduce soil runoff thereby protecting the coastal marine waters and fisheries off the south shore of Kauai. However, as mentioned in the DEA, this benefit is likely to be small because the affected marine ecosystem has already been altered by over 150 years of sugarcane cultivation in the area. Also, Koloa has an open coastline that is exposed to surf and strong ocean currents that continually flush the near-shore environment. Finally, any displaced development is likely to occur elsewhere in Koloa. Thus, the net environmental benefit to Kauai is likely to be small.

Additional environmental benefits, such as the preservation of open space, changes to traffic congestion, and the promotion of native plants, are discussed in the Benefits section of Chapter VI in the DEA and in the Addendum.

(45) *Comment:* There was no attempt to quantify the value of open space (parks, preserves, even golf courses) surrounding real estate. Such increased property values are acknowledged, but there was no attempt to estimate the corresponding increases in property values. Understanding of this principle is a large driver in the DMB Development Company's decision to halve the density of their joint project with A&B at Kukuiula.

Our Response: The Indirect Costs section of the Addendum discusses the possibility that the land planned for development in certain critical habitat units will remain open as a result of the intended designation. If this land is managed as a park or preserve, it could increase the selling values of the home lots that are directly adjacent to critical habitat. An estimate of the number of homes or lots adjacent to the critical habitat units, as well as the potential increase in selling values, is discussed for critical habitat Units 2, 6, and 8.

(46) *Comment:* Development in the Koloa/Poipu area is already progressing at unsustainable levels, and future traffic, emergency services, and possibly water supply are sources of uncertainty. It is good that the critical habitat designation places additional mechanisms to undertake reasonable slow-growth planning for the region. Also, some tourists prefer less developed areas. The potential loss of revenues due to people seeking less overbuilt resort area would be conjectural, but no more so than the assumption that critical habitat designation for cave species will reduce the number of visitors to Kauai.

Our Response: With the intended reduction in critical habitat, it is now assumed that any loss in development due to the intended designation will be replaced by development elsewhere in Koloa (see the Indirect Costs section of the Addendum). Thus, critical habitat designation for the cave animals, as intended by the Service, is expected to result in little or no change to future traffic, emergency services, water requirements, etc.

(47) *Comment:* Portions of Unit 2 and the eastern portion of Unit 1 are planned but not permitted for major resort development; the southern portion of Unit 1 is planned but not permitted for subdivision into over 50 ''upscale'' houselots; a portion of Unit 3 is planned and permitted for a future limestone and basalt quarry; the area surrounding the old Koloa sugar mill will be expanded into an industrial area; several water wells are located in Unit 1 and additional water wells are expected. This development will create residential and employment opportunities for over a thousand island residents.

Our Response: Most of the development projects and associated water well projects mentioned by the commenter are no longer in the intended critical habitat designation.

Summary of Changes From the Proposed Rule

Based on a review of public comments received on critical habitat, we have reevaluated our proposed designations and included several changes to the final designations of critical habitat. No specific information on habitat conditions or species occurrence was provided. At the time of the publication of the proposed rule, we were aware of only six known cave locations where the animals occurred and did not know the precise locations of other caves with suitable habitat. In addition, in the proposed rule, we acknowledged two theories with regard to intercave dispersal corridors (67 FR 14673 and 67 FR 14674). One theory is that very limited, if any dispersal was occurring between the cave systems, and the other that dispersal corridors needed to be protected if these species are to be conserved. Because of the limited verified occupied areas and the absence of other known suitable cave locations, we believed it necessary to include areas in the proposal that would provide for intercave dispersal corridors. In the absence of more specific data, we proposed those areas that were most likely to contain the primary constituent elements based on the best available information at the

time. In our request for peer review and public comments on the proposed rule, we asked for specific information on the number and/or distribution of both animals and what areas were essential for the conservation of the species.

During the comment periods on the proposed rule, a significant amount of specific information was received on the presence or absence of primary constituent elements, verified occupied cave locations, and other locations of suitable caves. No additional information was provided on either the location or importance of intercave dispersal corridors. Although our peer review confirmed the importance of protecting caves and surrounding mesocaverns for local dispersal, there was no consensus or scientific clarity provided on intercave dispersal corridors.

We only designate areas as final critical habitat if they contain the physical and biological features essential to the conservation of the species, and if unoccupied, they are essential to the conservation of the species. In the case of the intercave dispersal corridors, we suspect connectivity may be important, but we do not know where they are, to what degree they are used, or how to map these corridors to be consistent with the legal requirements in designating critical habitat. Therefore, we have not included such areas in the final rule.

Based on a review of the public comments received on the proposed critical habitat, we have reevaluated our proposed designations and included several changes to the final designations of critical habitat. These changes include the following:

(1) The final designation went from three proposed units encompassing an area of approximately 1,697 ha (4,193 ac) to 14 units encompassing a total of 110 ha (272 ac).

(2) We received new information on the presence of the Kauai cave wolf spider in two caves in the Koloa region and updated their verified occurrence from four caves to six caves.

(3) We received information indicating we missed a cave from which the Kauai cave amphipod was previously recorded and updated their verified occurrence from six caves to seven caves.

(4) We received information from a survey conducted by Dr. Frank Howarth which identified areas required to maintain the persistence of both animals on Alexander and Baldwin property. The information contained numbers of caves discovered and the amount of areas surrounding them to incorporate sufficient protection and inclusion of mesocaverns connected to the caves. Areas not identified in Dr. Howarth's survey were excluded from the designation. This information also assisted us in refining the amount of needed habitat surrounding other caves.

(5) We received substantial data from various parties such as drilling records, photographs, archeological surveys, and biological surveys indicating the lack of primary constituent elements in certain portions of proposed critical habitat. These data provided information as to the current depths of dirt, clay, and other soils. Soil deposits greater than a foot deep begin to degrade and fill the meoscaverns and caves necessary for the cave animals' survival and indicate a lack of the primary constituent elements, or at a minimum the primary constituent elements are likely to be severely degraded (Dr. F. Howarth, pers. comm., 2002). These areas have been removed from the designation.

(6) We received additional information from Dr. Frank Howarth on areas of higher quality habitat with a high likelihood of containing occupied caves on Grove Farm property and a Civil Defense map indicating a large cave previously used as a fall-out shelter. These areas have been mapped and retained in the designation.

(7) We received information from various parties on surveys done on their properties indicating the likelihood of suitable cave habitat. Areas found to have a low likelihood of suitability have been removed from the designation.

(8) We made revisions to the unit boundaries based on information supplied by commenters, as well as information gained from field visits to some of the sites, that indicated that the primary constituent elements were not present in certain portions of the proposed unit, that certain changes in land use had occurred on lands within the proposed critical habitat that would preclude those areas from supporting the primary constituent elements, or that the areas may not be essential to the conservation of the species in question.

This final critical habitat designation addresses the conservation of the species by protecting a number of discrete cave systems (*i.e.*, eight caves occupied by one or both species and associated mesocaverns, six caves where occupancy status is unknown with associated mesocaverns, and three areas containing higher quality habitat likely to be occupied by one or both species) that represent a widely distributed pattern throughout the highest quality habitat in the Koloa Basin. Designating only the known occupied caves themselves would only provide extremely small areas with several of the caves in close proximity to one another. A designation such as this would leave the species vulnerable to extinction due to a single catastrophic event and therefore not provide for the conservation of the species. As previously discussed in this rule under ''Adaptations of troglobitic animals,'' given the great vulnerability of these species to desiccation, adjacent mesocavern habitats that contain appropriate microclimate conditions will provide habitat or serve as refugia for both animals when conditions in the main cave passages become drier or otherwise less accommodating. It is within these mesocaverns where it is likely that the majority of their time is spent. Therefore, designating surrounding mesocaverns incorporates the area where the majority of the animals are likely to occur and provides for refugia from fluctuating conditions in caves which makes them essential to the conservation of the species. The remaining areas designated where occupancy by either species has not been verified are essential to the conservation of the species for the following reasons. The areas chosen, are known to contain caves or mesocaverns where the animals are most likely to occur. The designated spatter cones are the type of volcanic formations that produce rock with mesocaverns and likely produce cave structures as well. If animals do no currently occupy these areas, if dispersal is occurring, it can allow for areas for the species to disperse into, and if dispersal is not occurring, it can allow for reintroduction. These areas are deemed essential to the conservation of the species because they provide for a widely distributed pattern throughout the highest quality habitat available in the Koloa Basin. This wide distribution will protect the species from extinction from a single catastrophic event and therefore is essential to the conservation of the species. If new and additional scientific information shows that these areas are not essential, the critical habitat designation can then be revised.

Intervening areas between identified units of critical habitat may still be important to the recovery of the species although at this time we do not have information to identify them as essential to the conservation of the species. However, because either animal may be present at any given time in these intervening areas with suitable habitat, section 7 consultation requirements to ensure Federal actions are not likely to jeopardize the species and section 9 prohibitions, which preclude the

unauthorized taking of listed animals, may apply.

Absent any scientific data on the issue of intercave dispersal corridors, we applied a basic conservation strategy that protects all of the known cave locations and surrounding mesocaverns and identified high quality habitat where the animals are most likely to be found in a pattern that maximizes distribution across the basin. This wide distribution of cave systems should provide for the long term conservation of these two species if they are adequately protected and managed by reducing the vulnerability to diseases and other catastrophic events.

We are currently working on a draft recovery plan for the cave animals which will identify the need for genetic studies to determine the relationships between animals in verified occupied caves and continued study into ways to determine the importance and location of intercave dispersal corridors. In the event that new information is made available and indicates the necessity, we will consider amending the critical habitat designation.

A brief summary of the modifications made to each unit is given below.

Former Unit 1 Waikomo—subunit 1a

This unit has been redesignated into 13 separate units. All of Alexander and Baldwin property has been surveyed by Dr. Frank Howarth, the recognized expert on Hawaiian caves. Along with data that a significant portion of their land has been dynamited and therefore highly unlikely to contain the primary constituent elements, Dr. Howarth has indicated where the primary cave habitats are and the surrounding buffer area (61 m) (200 ft) necessary to maintain the species in this area. Units 1, 2, and 3 represent the areas identified by Dr. Howarth. All other areas surveyed either do not contain the primary constituent elements or are not believed to be necessary to the conservation of the species because they were not identified by Dr. Howarth as necessary to maintain the species in the area and have been removed from the designation.

Areas above the Old Railroad Grade have been surveyed and the caves found to contain these animal species have been retained in the designation. Service biologists have mapped these caves.

The southern cave found in this area is one of the caves where the spider's occurrence has been verified. This cave and a 61 m (200 ft) buffer area to capture the surrounding mesocaverns to provide for a protective area from the development that may occur outside the buffer area comprise Unit 4.

The northern cave which occurs on the Kiahuna golf course has been gated, informational signs have been posted, and the area above the cave has been planted with native vegetation that is likely to provide food for the Kauai cave amphipod. This cave was mapped and a 30 m (100 ft) buffer placed around to capture the mesocaverns surrounding the cave. The golf course has been fully developed, therefore an additional buffer to protect against additional development is not believed to be necessary. The cave located within the golf course and the buffer area comprise Unit 5.

Additional information was provided indicating large soil deposits on the southern end of the property owned by Kiahuna Golf Club, LLC and KG Kauai Development LLC. In addition, archaeological information was provided indicating a large portion of the property was once used as fish ponds and terraced agricultural fields that were routinely left flooded. The use of land in this manner is likely to have caused a buildup of silt and other deposits that would either eliminate any primary constituent elements or degrade them. Therefore, these areas have been removed from the designation.

Drilling information obtained near areas proposed on the south side of Poipu Road near Koloa Landing and Poipu Beach Park indicate large deposits of sand and therefore no appropriate primary constituent elements. It is unlikely that the three small areas proposed south of Poipu Road, which likely contain similar deposits, contain the primary constituent elements. In addition, drilling information provided just north of Poipu Road, next to Poipu Village Shopping Center indicate a settling basin where large deposits of silt, clay, and soil have accumulated, indicating a lack of primary constituent elements. These areas have been removed from the designation.

Information obtained on the area north of the private road above Alexander and Baldwin property and east of Waikomo Stream indicates that far more homes and other structures have been built than previously believed. It is unlikely that primary constituent elements will be found in this area, and therefore it has been removed from the designation.

Additional information provided by the Eric Knudsen Trust shows two caves located within their property. These caves were identified during an archeological survey. Because the caves have not been surveyed by anyone familiar with the Kauai cave animals, we do not know whether they are occupied by either species. However, given that many of the caves found in the same area contain the animals, if all the primary constituent elements are present, it is highly likely that the animals will be present in these caves. Therefore, the area mapped for these caves including a 61 m (200 ft) buffer around them to include surrounding mesocaverns and protection from potential development are included in this designation as Units 6 and 8. Other archaeological finds indicate an extensive irrigation system, and it is likely that the rest of Eric Knudsen Trust property was used as terraced agricultural land that would have been routinely flooded. The use of land in this manner is likely to have caused a buildup of silt and other deposits that would either eliminate any primary constituent elements or degrade them. These areas have been deemed not essential to the conservation of the species and removed from the designation.

Unit 7 comprises an area that has not been surveyed recently, but the cave located on the property had a verified occurrence of the Kauai cave amphipod. The property is owned by the Roman Catholic Church, and no new information was provided on it. Since we did not have information on the exact location of the cave, we viewed satellite imagery and designated the area where the cave is most likely located. If new information on the exact location of the cave is gathered in the future, we will consider it in possible future revisions of this rule.

The Koloa bypass cave which is now a park and has a verified occurrence of the Kauai cave amphipod has been retained in the designation as Unit 9. This cave is completely surrounded by previously disturbed areas. The area above the cave was planted with plants to provide food for the Kauai cave amphipod and the entrance sealed over to prevent human intrusion. This unit comprises the open field of the park, which incorporates the cave and mesocaverns surrounding the cave.

Unit 10 includes the area containing the cave indicated on the civil defense map. The civil defense map does not outline the extent of the cave, but gives a general location. The entrance to the cave has also been sealed making it difficult to locate its exact location. This unit also includes the surrounding areas containing mesocaverns. In addition, further refinement was made by reviewing drilling records provided during the comment period. These records showed large deposits of clay

north of Mahaulepu Road, along Kaluahono Road, and below Waita Reservoir. These areas are unlikely to contain the primary constituent elements and have been removed from the designation.

Site visits by Service biologists and Dr. Frank Howarth were made in the remaining areas of proposed Unit 1a. Units 11 and 12 represent Puu Wanawana and Puu Hunihuni, areas that are most likely to contain suitable cave habitat where animals are likely to be present. Both are spatter cones which are volcanic formations that are comprised of exposed barren rock that contain mesocaverns, limited soil deposits, and limited prior disturbance, and are likely to contain larger voids or caves. Information was provided by consultants hired by Grove Farm who were able to further investigate the area and have indicated it is the place most likely to be occupied by either species. Since we do not know of an exact cave location, the entire area of barren rock has been included in the designation. Areas surrounding the barren rock are less likely to contain the primary constituent elements and were deemed not essential to the conservation of either species. Puu Hi Reservoir is less likely to contain suitable habitat since these areas have a greater build up of soil and water does not seem to percolate through the rock, suggesting a lack of unfilled mesocaverns and caves (Dr. F. Howarth, pers. comm., 2002).

Unit 13 incorporates the limestone cave with verified occurrences of the Kauai cave amphipod. A recent visit to the cave by Service biologist Gordon Smith, Dr. Frank Howarth, and Grove Farm consultants Dr. Steven Carothers and Kemble White verified the presence of the Kauai cave wolf spider in the cave (G. Smith *in litt.,* 2002). This record is the first of the Kauai cave wolf spider occurring in limestone caves. Although the cave has been extensively surveyed, the remaining limestone bearing rock has not been surveyed. Dr. Howarth did look at the area near Makawehi and indicated that the area north of the limestone bench, outside of the conservation zoned area, was not likely to contain the primary constituent elements as little barren rock was seen and the soil layer appeared to be significant. Unit 13 incorporates the limestone cave with verified occurrences of both the Kauai cave wolf spider and the Kauai cave amphipod as well as adjoining limestone bench area that is most likely to contain suitable habitat. All other surrounding areas were deemed not essential to the conservation of either species.

Former Unit 1 Waikomo—subunit 1b

No new information specific to proposed Unit 1b was provided during the comment period. However, when this was evaluated in light of the information provided on the proposed rule, this unit was found to be of lower quality habitat due to its small size and greater isolation from occupied areas, and because of the identification of suitable caves and likely higher quality habitat in other areas, this unit was deemed not essential to the conservation of either species.

Former Unit 2—Haula

Additional information was provided in and adjacent to Unit 2 in the form of survey information indicating a lack of primary constituent elements in parts of the unit. Areas less likely to contain the appropriate habitat were excluded and the remaining area is included in the designation. This unit lies only a short distance (approximately 350 m (1,100 ft)) from Unit 13 which is occupied, and it was likely once connected to that unit in the geologic past (Pleistocene Era) by deposits that have since eroded away or have been covered by unconsolidated sediments. The large size of appropriate habitat in this area is most likely to be able to sustain a population of either the Kauai cave amphipod or the Kauai cave spider. Information provided by Grove Farm confirms a large drainage system that empties into the limestone formation expected to provide the best type of habitat for the cave animals. Inclusion of this area with Units 1 through 13 provides a diverse geographic distribution that will increase the likelihood the species will survive stochastic or catastrophic impacts. This unit has been renamed Unit 14 of the designation and includes all the limestone bench area most likely to contain the primary constituent elements and therefore the animals themselves.

Former Unit 3—Puu Keke

Drilling logs were provided around and in the proposed Unit 3 which showed a mixture of limestone, rock, dirt, and mud. Based on the number of areas elsewhere verified to be occupied or found to be highly likely to contain the animals, this area was deemed not essential to the conservation of either species.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and, (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation,'' as defined by the Act, means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''* * * the direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' The relationship between a speciessurvival and its recovery has been a source of confusion to some in the past. We believe that a species' ability to recover depends on its ability to survive into the future when its recovery can be achieved; thus, the concepts of long-term survival and recovery are intricately linked. However, in the March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434) regarding a not prudent finding, the Court found our definition of destruction or adverse modification as currently contained in 50 CFR 402.02 to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

In order to be included in a critical habitat designation, the habitat or its physical or biological features must first be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known, using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat for a species, to the extent such habitat is determinable, at the time of listing. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we may not have sufficient information to identify all the areas essential for the conservation of the species or, alternatively, we may inadvertently include areas that later will be shown to be nonessential. Nevertheless, we are required to designate those areas we determine to be critical habitat, using the best information available to us.

Our regulations state that ''The Secretary shall designate critical habitat outside the geographic areas presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species'' (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from recovery plans, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, and biological assessments or other unpublished materials.

It is important to clearly understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the Act's 7(a)(2) jeopardy standard and section 9 prohibitions, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species.

Methods

As required by the Act and regulations (section 4(b)(2) and 50 CFR 424.12), we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the conservation of the Kauai cave wolf spider and the Kauai cave amphipod. This information included: peer-reviewed scientific publications, the final listing rule for the Kauai cave wolf spider and Kauai cave amphipod (65 FR 2348), the Hawaii Natural Heritage Program database, unpublished field data collected by Service biologists, and unpublished field notes and communications with other qualified biologists or experts, archeological surveys, drilling records, photographs, and published descriptions of the regional geology and soils (MacDonald *et. al.* 1960; Foote *et. al.* 1972), and the Recovery Outline for Two Cave Arthropods from Kauai, Hawaii (Service, 2000).

Section 3(5)(A)(ii) of the Act provides that areas outside the geographical area currently occupied by the species may meet the definition of critical habitat upon determination that they are essential for the conservation of these species. Although we do not know whether the entire area is currently occupied, to date all caves that have been surveyed within the Koloa basin that contain all of the primary constituent elements have contained the Kauai cave amphipod and/or cave wolf spider. Hence, where appropriate habitat occurs within the Koloa basin, we fully expect it will be occupied by one or both of these species. Surrounding areas of the known occupied caves that are comprised of cave-bearing rock also will likely contain occupied habitat.

The final rule listing the Kauai cave wolf spider and Kauai cave amphipod stressed that these animals were at increasing risk from ''predation and competition for space, water, and nutrients by introduced, alien animals; biological and chemical pesticide control activities associated with residential and golf course development; and an increased likelihood of extinction from naturally occurring events due to the small number of remaining individuals and populations and their limited distribution'' (65 FR 2348). Recovery may require augmentation or enhancement of suitable cave habitat and the surrounding mesocaverns.

The primary goal of this critical habitat designation effort is to identify and designate a sufficient amount of suitable habitat to provide for the conservation of these two species. The Service has been challenged in this effort by the lack of scientific information on the distribution of the species and their suitable cave habitat within the Koloa basin, and a lack of understanding of the physical and genetic relationship between populations located in the various cave systems that are scattered throughout the basin.

To address these questions, the Service requested and received information in response to the publication of the proposed critical habitat designation. This information, which is detailed in the Summary of Changes from the Proposed Rule, provided new data on the location of occupied cave systems and also indicated areas of relatively higher quality habitat that are more likely to be occupied by these species. This new information allowed us to refine an original proposal by more precisely identifying areas essential to the conservation of these species.

However, there are still significant gaps in our current understanding of these species and their habitat needs, especially concerning the degree to which individual cave systems are or are not connected to one another. We did not receive any additional information as to the extent of the importance of intercave dispersal corridors or any information that would allow us to identify where these corridors are specifically located. Absent this information, we are unable to designate as critical habitat any areas that may provide connectivity between cave systems. First of all, we do not have data to show that such connectivity is occurring and if it is, to what extent and what importance does it play in the continued existence of the

species. Second, we are not able to precisely identify, map, and designate the underground corridors that would provide this connectivity.

Therefore, this final critical habitat designation is based on what we are at this time able to identify as essential to the conservation of these two species: multiple cave systems (*i.e.,* eight caves occupied by one or both species, six unknown occupied caves, their associated mesocaverns, and three areas containing higher quality habitat likely to contain one or more occupied caves) known to be occupied or that have relatively higher quality habitat and most likely to be occupied, and that are located in a wide distributional pattern within the basin. As discussed below, this approach of multiple populations that are distributed throughout the basin provides the best protections against extinction of the species due to catastrophic events as well as the highest likelihood of long-term conservation of these species.

In determining critical habitat for these species, we started with lands within the region containing geologic and soil characters similar or identical to those of known, occupied, accessible caves. This area includes the Waikomo-Kalihi-Koloa soil association (Foote *et al.* 1972) where it overlays the Koloa Volcanic Series flows (MacDonald *et al.* 1960). In addition, karst outcrops of calcified marine deposits are part of the same geologic deposits that contain the cave at Mahulepu that is occupied by the Kauai cave amphipod. Solution pockets and voids are abundant in this rock type and, like the cave at Mahulepu, lay on top of old, lava-tube-bearing pahoehoe flows.

Within these areas, we designated sites where either the Kauai cave amphipod or the Kauai cave wolf spider have been verified as occurring. We set out the following buffers to capture the adjacent mesocaverns where the animals are likely to spend the majority of their time as previously discussed in this rule. In cases where development was not complete, whenever possible, a 61 meter (200 ft) buffer was included around caves. Information provided during the comment period showed that a previous archeological and biological cave survey was done (Hammatt *et.al.,* 1978) that recommended a 30 meter (100 ft) buffer be placed around known caves. We believe that these buffers are essential to the conservation of the species because they reduce the vulnerability of the species to diseases and other catastrophic events by providing habitat that is most likely occupied, area for local intracave dispersal, as well as refugia from effects from disturbance that may take place in and around identified caves. We did not feel that with the additional known activities that may be occurring in the Koloa Basin, a 100 ft. buffer would be adequate to protect against impacts from adjacent development. Dr. Howarth's information on what he believed was a necessary buffer to maintain the existence of the species in a given area assisted us in refining what we believe to be an adequate buffer. In cases where development around the cave has been completed, a 30 meter (100 ft) buffer around caves was included. A smaller buffer zone was used for these areas which include habitat most likely occupied and allow for local intracave dispersal. Because all development and ground disturbance has already occurred in these areas, less refugia is needed and therefore a smaller buffer area was needed.

For those areas where surveys showed they were highly likely to contain suitable habitat and the animals were likely to occur, we designated the entire area to be sure we would capture any caves and the surrounding mesocaverns. The addition of these areas is essential to the conservation of the species because they create a widely distributed pattern of protected areas across the best habitat throughout the Koloa basin. This wide distribution protects the species from a single catastrophic event and therefore is essential to the conservation of both species.

Because a recovery plan has not been completed for either of these species, in making this determination, we looked to areas where the Kauai cave wolf spider and the Kauai cave amphipod have been verified and also included those areas that are highly likely to contain these animals. We looked for a distribution across geologically suitable habitat and conferred with the recognized expert on the necessary distribution of caves within the Koloa area to maintain both species (Dr. F. Howarth, pers. comm., 2002). This approach is consistent with the recovery outline for the Kauai cave wolf spider and the Kauai cave amphipod. If, after critical habitat for the Kauai cave wolf spider and the Kauai cave amphipod is designated, a final approved recovery plan for these animals calls for a different approach to the conservation of the Kauai cave wolf spider and the Kauai cave amphipod, we will consider amending the critical habitat designation.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12 in determining which areas to propose as critical habitat, we are required to consider those physical and biological features essential to the species' conservation that may require special management considerations and protection. Such features are termed primary constituent elements, and include but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, minerals and other nutritional or physiological requirements; cover or shelter; and habitats that are protected from disturbance and represent the historic geographical and ecological distributions of the species.

The habitat requirements of the Kauai cave wolf spider and Kauai cave amphipod may differ slightly, as the wolf spider can feed on other arthropods that become trapped in caves or reside in caves facultatively. However, as observed elsewhere in Hawaii, the presence of a healthy, intact cave ecosystem, which includes roots or other sources of naturally occurring detritus and an associated detritivore or herbivore fauna, contains larger numbers of healthy troglobitic predators (A. Asquith, pers. comm., 2001). While native, troglobitic predators, detritivores, and herbivores may be present in caves lacking naturally occurring plant biomass, this situation represents an unhealthy cave ecosystem. Native troglobitic assemblages occurring in ''sterile'' caves (those lacking roots or other sources of active nutrient input) probably represent declining populations that will be extirpated as the existing plant biomass is consumed unless efforts are made to enhance condititions.

As with most troglobites, both the Kauai cave wolf spider and Kauai cave amphipod require dark or stagnant air zone habitats in caves. These zones typically have atmospheres with humidity at saturation levels (greater or equal to 100 percent), which is necessary to prevent desiccation and death of the troglobites.

A sustainable food base, such as the roots of living perennial plants or other sources of detritus, is necessary to support a breeding population and for the long-term survival of the Kauai cave amphipod and other herbivorous or detritivorous troglobites. In turn, healthy populations of herbivores or detritivores will help ensure that co-evolved predators, such as the Kauai cave wolf spider, will also persist as viable populations.

There is little information on what, if any, species of food plants are preferred by the Kauai cave amphipod. Since the amphipod is regarded as a detritivore, there may be little or no food specialization by these animals.

However, plant species containing naturally occurring toxic compounds, such as tannins or alkaloids, might be of low food value, inhibit feeding, or result in the direct mortality of cave organisms. For this reason, plant species and their potential toxicity must be considered as well. Likely candidates for suitable plants would be native species like ohia (*Metrosideros polymorpha*), maiapilo (*Capparis sandwichiana*), and aalii (*Dodonea viscosa*).

The primary constituent elements required by the Kauai cave wolf spider and the Kauai cave amphipod consist of the presence of subterranean spaces from 5 to 25 cm (0.2 in to 10 in) at the narrowest dimension (collectively termed ''mesocaverns''), or caves or passages (spaces greater than 25 cm (10 in)), dark and/or stagnant air zones that maintain microclimates with humidity at saturation levels, and the presence of roots from living, non-toxic plants such as, but not limited to, ohia (*Metrosideros polymorpha*), maiapilo (*Capparis sandwichiana*), and aalii (*Dodonea viscosa*) in these types of mesocaverns or caves.

The areas designated as critical habitat for the Kauai cave wolf spider and the Kauai cave amphipod are designed to incorporate what is essential for their conservation. Habitat components that are essential for these two species include the primary biological needs of foraging, reproduction, intraspecific communication, intracave dispersal and intracave genetic exchange, or nonrestricted movement to appropriate microclimates in mesocaverns, and refugia from human-induced or other environmental threats. Caves and mesocaverns containing actively growing tree roots or other sources of detritus provide a food source for herbivorous or detritivorous troglobites, which in turn provide food for predators. Such caves will be necessary for the long-term persistence of viable populations of the endangered troglobites by providing areas for foraging and reproduction. Caves and or mesocaverns lacking food resources but containing appropriate microclimates may provide intracave corridors which facilitate movement and genetic exchange within populations. In addition, these areas may also provide refugia from areas impacted by human-induced or other environmental threats, such as when main cave passages become temporarily drier or otherwise less accomodating.

Criteria Used To Identify Critical Habitat

We used several criteria to identify and select lands for designation as critical habitat. First, we selected critical habitat areas based on the verified distributions of the Kauai cave wolf spider and the Kauai cave amphipod (known occupied habitat). Then we included additional areas containing mesocaverns surrounding the known occupied caves to capture habitat likely to be occupied and to allow for refugia.

The known occupied cave distribution is not sufficient to expect a reasonable probability of conservation of either species by protecting against threats including but not limited to, human intrusion, fluctuating humidity levels in caves, and loss through catastrophic events (*e.g.,* hurricanes, oil spills and nonnative species introductions). Therefore, we looked to those areas where suitable habitat had been identified through survey work. This included both biological surveys and archeological surveys. The suitable caves identified, and their surrounding appropriate mesocavern areas, were included in this final designation.

The inclusion of these identified caves, some of which were newly discovered, and their surrounding areas still did not provide for a wide enough distribution to protect against catastrophic events. Therefore, we looked to those areas within the Koloa basin where site visits indicated the presence of suitable habitat and therefore a high likelihood of the presence of the animals. We looked for areas with exposed barren basalt, proximity to the areas that were known to contain animals, soils less than a foot deep, native vegetation, and areas that had received the least known surface disturbance. These areas represent habitat likely to be occupied by one or both species and contain the greatest amount of intact mesocaverns with the required humidity levels necessary for the cave animals. These types of areas have been identified by Dr. Howarth as the ones most likely to be occupied by the Kauai cave amphipod and the Kauai cave wolf spider (Dr. F. Howarth, pers. comm., 2002).

To provide for the conservation of both species, a sufficient amount of limestone habitat needs to be present to provide refugia in case of a catastrophic event for those animals known to be existing in limestone habitat. We looked to areas closest to the known occupied limestone cave, with exposed limestone bench and native vegetation, with little or no prior surface disturbance, and with soils less than a foot deep. These places are where intact mesocaverns and caves with appropriate humidity levels necessary exist therefore, these areas are the places most likely to be occupied.

Areas within the appropriate geologic formations that have had long term or extensive surface disturbance, soil deposits greater than a foot deep, lack of native vegetation, or lack exposed barren basalt or limestone benches may still provide suitable habitat and animals may still occur there. However, it is more likely that the habitat will be relatively degraded, and thus the probability is lower that animals will be found there. However, if new information shows the discovery of additional caves and animals in the areas, and if warranted, we will consider this information in possible future revisions of this rule as time and available resources allow.

For the purpose of this determination, critical habitat units have been described using Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates using a scale of 1:85,000. Soil series was determined using information and maps from soil surveys (Foote *et al.* 1972). Geologic and soil features that appear to limit the distribution of cave and mesocavern habitats were determined using information and maps from MacDonald *et al.* (1960) and Foote *et al.* (1972).

We were unable to map the critical habitat unit boundaries in sufficient detail to exclude all existing developed lands that do not contain the primary constituent elements. However, as specified in the final rule language, existing features and structures within the boundaries of the mapped units that have resulted in below-surface modification or alteration are excluded from critical habitat designation. Existing human-constructed structures and features, such as large buildings, homes, major roads, and other activities or projects that involve trenching, filling, and/or excavation, which likely resulted in loss or degradation of the primary constituent elements, are therefore not included within this critical habitat designation. Such human-constructed structures and features would include homes and buildings for which the underlying bedrock has been altered for their construction through incorporation of or connection to buried structural foundations, septic tanks, city sewage and drainage systems, or water and underground electrical supply corridors and conduits. Additional areas that are also excluded from critical habitat

include existing paved roads, quarries, and sewage treatment facilities. Included in critical habitat are areas that have been modified on the surface, but for which below-surface modifications have not altered the underlying bedrock and subterranean habitat. These land uses include but are not limited to agriculture (*e.g.,* sugar cane, corn, coffee), range land, golf courses, county and city parks, unimproved roads, and undeveloped lands. These areas may lie adjacent to areas that have undergone extensive below-surface modification.

Critical Habitat Designation

Lands designated as critical habitat provide at least one of the primary constituent elements needed by the Kauai cave wolf spider and Kauai cave amphipod, including, but not limited to, the presence of subterranean spaces from 5 to 25 cm (0.2 in to 10 in) at the narrowest dimension (collectively termed ''mesocaverns''), or caves or passages (spaces greater than 25 cm (10 in)), dark and/or stagnant air zones that maintain microclimates with humidity at saturation levels, and the presence of roots from living, non-toxic plants such as, but not limited to, ohia (*Metrosideros polymorpha*), maiapilo (*Capparis sandwichiana*), and aalii (*Dodonea viscosa*) in these types of mesocaverns or caves. As discussed previously in this rule under ''Primary Constituent Elements,'' the presence of a healthy, intact cave ecosystem, includes roots or other sources of naturally occurring detritus. While native, troglobitic predators, detritivores, and herbivores may be present in caves lacking naturally occurring plant biomass, this situation represents an unhealthy cave ecosystem. Native troglobitic assemblages occurring in ''sterile'' caves (those lacking roots or other sources of active nutrient input) probably represent declining populations that will be extirpated as the existing plant biomass is consumed unless efforts are made to enhance condititions.

Lands designated as critical habitat for the Kauai cave wolf spider and Kauai cave amphipod occur in 14 separate units. The approximate area encompassing the designation of critical habitat by land ownership is shown in Table 1.

TABLE 1.—APPROXIMATE DESIGNATED CRITICAL HABITAT IN HECTARES (HA) (ACRES (AC)) BY LAND OWNERSHIP.

[Area estimates reflect critical habitat unit boundaries, not the primary constituent elements within.]

Unit	State/local	Private	Total
New Unit 01	0 ha	<1 ha	<1 ha
	0 ac	1 ac	1 ac
New Unit 02	0 ha	7 ha	7 ha
	0 ac	16 ac	16 ac
New Unit 03	0 ha	6 ha	6 ha
	0 ac	16 ac	16 ac
New Unit 04	0 ha	2 ha	2 ha
	0 ac	6 ac	6 ac
New Unit 05	0 ha	<1 ha	<1 ha
	0 ac	2 ac	2 ac
New Unit 06	0 ha	2 ha	2 ha
	0 ac	4 ac	4 ac
New Unit 07	0 ha	3 ha	3 ha
	0 ac	9 ac	9 ac
New Unit 08	<1 ha	2 ha	2 ha
	1 ac	6 ac	7 ac
New Unit 09	1 ha	<1 ha	1 ha
	3 ac	<1 ac	4 ac
New Unit 10	0 ha	14 ha	14 ha
	0 ac	35 ac	35 ac
New Unit 11	0 ha	4 ha	4 ha
	0 ac	10 ac	10 ac
New Unit 12	0 ha	6 ha	6 ha
	0 ac	16 ac	16 ac
New Unit 13	0 ha	21 ha	21 ha
	0 ac	51 ac	51 ac
New Unit 14	0 ha	39 ha	39 ha
	0 ac	96 ac	96 ac
Total	1 ha	109 ha	110 ha
	4 ac	268 ac	272 ac

Designated critical habitat includes land under private, county, and State ownership. Designated lands include areas known to be occupied by the Kauai cave wolf spider and the Kauai cave amphipod and include habitat with similar distribution of geologic and soil characteristics of known occupied habitat and that contain the most probable distribution of appropriate caves and mesocaverns. A brief description of each unit and reasons for including it as critical habitat are presented below.

Unit 1: Unit 1 incorporates a newly found cave and associated mesocaverns with the verified occurrence of the Kauai cave wolf spider. It is one of only six caves with a verified occurrence of the spider. It is highly likely that given the spider's presence, the amphipod is likely to be found there when conditions are appropriate. This unit contains a minimum of two of the primary constituent elements essential to these species and which may require protection.

Unit 2: Unit 2 incorporates four caves and surrounding mesocaverns with two of the caves having verified occurrences of both the Kauai cave wolf spider and the Kauai cave amphipod. This unit contains three of the primary constituent elements essential to these species and which may require protection.

Unit 3: Unit 3 consists of a cave and surrounding mesocaverns with suitable habitat for both cave animals. It was identified by Dr. Frank Howarth, an expert in this field, as important to maintaining the presence of these animals in this area. This unit contains at minimum two of the primary constituent elements and is one of only three sites west of Waikomo Stream. This unit adds to a wide distribution across the Koloa Basin which will protect the species from extinction from a single catastrophic event and therefore is essential to the conservation of the species.

Unit 4: Unit 4 consists of a cave with verified occurrences of both the amphipod and the spider and the surrounding mesocaverns. It is one of only six caves with a verified occurrence of the spider, and one of only seven verified occurrence of the amphipod. It contains at minimum two of the primary constituent elements, essential to the these species and which may require protection.

Unit 5: Unit 5 consists of a cave with verified occurrences of both the amphipod and the spider mapped by the Service and the surrounding mesocaverns. It is one of only seven verified occurrences of the amphipod, and one of only six verified occurrences for the spider. This unit contains three of the primary constituent elements essential to these species and which may require protection.

Unit 6: Unit 6 consists of a cave and surrounding mesocaverns identified in an archaeological survey and is likely to be occupied by one or both of the species. At this time, its occupancy status is unknown. This unit adds to the wide distribution across the Koloa Basin that will protect the species from extinction from a single catastrophic event and therefore is essential to the conservation of the species.

Unit 7: Unit 7 consists of a cave with a verified occurrence of the amphipod and surrounding available mesocaverns. It is one of only seven verified occurrences of the amphipod. This unit contains at minimum two of the primary constituent elements essential to the conservation of the species.

Unit 8: Unit 8 contains a lava tube identified through an archaelogical survey and the surrounding mesocaverns associated with the tube. It is an area that is most likely to harbor the animals and contains at least two of the primary constituent elements. This unit adds to the wide distribution across the Koloa Basin that will protect the species from extinction from a single catastrophic event and therefore is essential to the conservation of the species.

Unit 9: Unit 9 consists of a cave with the verified occurrence of the cave amphipod and surrounding available mesocaverns. It is only one of seven verified occurrences of the amphipod. It contains three of the primary constituent elements considered essential to the conservation of both species.

Unit 10: Unit 10 is located in the Koloa district, an area with cave-bearing rock containing an abundance of mesocaverns (small voids, cracks and passages). As previously discussed in the Background section of the rule, the Hawaiian basalt, found in this area, shrinks and cracks upon cooling creating the mesocaverns. In addition, this unit contains a cave that was used as a Civil Defense shelter. The entrance to the cave was sealed and has not been subsequently relocated. Therefore, the current occupancy status for these species is unknown. Although human use can detrimentally impact cave systems (see discussion under threats), they do not necessarily make the cave permanently unsuitable. For example, one of the cave systems included in critical habitat on Alexander and Baldwin (A&B) property (Unit 2) was also previously used as a civil defense shelter and is currently occupied by these species. Since the cave in Unit 10 was so large and long, it is unlikely that it has been completely filled in and the sealing of the entrance likely increased the humidity levels available in the cave. As discussed in the Cave Habitat section of the rule, cave systems for these species include one or more caves comprised of five zones (entrance, twilight, transition, dark and stagnant) and mesocaverns. While these mesocaverns can possess characteristics of each of the five zones, they frequently represent conditions of the stagnant zone. These mesocaverns are believed to provide refugia for these species when impacts make the caves uninhabitable for them. Unit 10 is believed to contain at least three PCEs (cave, mesocaverns, and appropriate microclimate [*i.e.*, high levels of humidity]). Information provided during the comment period (drilling records) show that the other areas surrounding Unit 10 have large deposits of clay or housing and other structures have been built in the area. The presence of clay and housing developments make it unlikely that additional areas adjacent to Unit 10 contain any remaining PCEs. Unit 10 is necessary to maintain continuity of the distribution of areas throughout the Koloa Basin making it essential to the conservation of the species.

Unit 11: Unit 11 consists of habitat that has been identified as an area most likely to be occupied by one or both of the species. The area within Unit 11 contains barren exposed rock, minimal prior surface disturbance, and minimal soil deposits, all of which provide higher quality caves and mesocaverns. This unit adds to the wide distribution across the Koloa Basin that will protect the species from extinction from a single catastrophic event and therefore is essential to the conservation of the species.

Unit 12: Unit 12 consists of habitat that has been identified as an area most likely to be occupied by one or both of the species. The area within Unit 12 contains barren exposed rock, minimal prior surface disturbance, and minimal soil deposits, all of which provide higher quality caves and mesocaverns. This unit adds to the wide distribution across the Koloa Basin that will protect the species from extinction from a single catastrophic event and therefore is essential to the conservation of the species.

Unit 13: Unit 13 consists of the only known occupied limestone cave and surrounding mesocaverns. The cave is occupied by both arthropods and is one of only seven verified locations of the amphipod, and one of six verified locations of the spider. This unit contains three of the primary constituent elements considered essential to the conservation of both species.

Unit 14: Unit 14 is composed of uplifted coral and algal reefs and consolidated calcareous deposits (MacDonald *et al.* 1960). Exposed basaltic flows are not believed to be present within this unit. This unit lies only a short distance (approximately 350 m (1,100 ft)) from Unit 13, which is occupied, and was likely once connected to that unit in the geologic past (Pleistocene Era) by deposits that have since eroded away or have been covered by unconsolidated sediments. It is not known if this unit is currently occupied by the Kauai cave wolf spider, Kauai cave amphipod, or other endemic troglobites.

Recent visits to this unit have found that the area is composed of exposed calcareous deposits containing cracks and solution pockets, which are indicative of the presence of underlying cave and mesocavern habitats. While accessible caves have not been located, air-passages, holes, and fissures visible above ground strongly suggest the presence of underlying caves or mesocaverns. Critical habitat is designated in this unit because of the cave-bearing nature of the geology, and

because of the occurrence of occupied habitat in adjacent areas with similar geologic features. Because the types of voids that occur in these calcareous formations continuously reform, thereby providing suitable habitat for very long time spans, this area is essential to provide for population expansion and refuge from human and catastrophic environmental threats. This unit currently has minimal human presence in the area, and there are no known current plans for development. Inclusion of this area with Units 1 through 13 provides a diverse geographic distribution that will increase the likelihood the species will survive stochastic or catastrophic impacts and is therefore considered essential to the conservation of both species.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Destruction or adverse modification occurs when a Federal action directly or indirectly alters critical habitat to the extent it appreciably diminishes the value of the critical habitat for the conservation of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat when their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a)(1) of the Act requires Federal agencies, including the Service, to use their authorities to carry out programs for the conservation of any species that is proposed or listed as endangered or threatened. Section 7(a)(4) of the Act requires Federal agencies (action agency) to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate formal consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide ''reasonable and prudent alternatives'' to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project.

Activities on Federal lands that may affect the Kauai cave wolf spider or Kauai cave amphipod or their critical habitat will require section 7 consultation. Activities on private or State lands that may affect the species or their critical habitat and that require a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (ACOE) under section 404 of the Clean Water Act, or some other Federal action, including funding (*e.g.,* from the Federal Highway Administration, Federal Aviation Administration, Federal Emergency Management Agency (FEMA), or Natural Resources Conservation Service (NRCS)) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may result in the destruction or adverse modification of critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for the conservation of the Kauai cave wolf spider and Kauai cave amphipod is appreciably reduced. We note that such activities also may jeopardize the continued existence of the species. Activities that may directly or indirectly adversely affect critical habitat for these cave animals include, but are not limited to:

(1) Removing, thinning, or destroying perennial surface vegetation occurring directly above or adjacent to the cave or within the cave (roots) or mesocaverns (as defined in the primary constituent elements discussion), whether by burning, or by mechanical, chemical, or other means (*e.g.,* wood cutting, grading, overgrazing, construction, road building, mining, herbicide application, etc.);

(2) Activities within or outside of the cave or other mesocavern (*i.e.,* all cave-bearing rock) that promotes prolonged soil-disturbance, resulting in the filling of caves, voids, and mesocaverns, with sediments or other materials, or alters airflow, and/or light penetration such that habitat microclimates are exposed to conditions of desiccation. These activities include, but are not limited to: Utilizing caves for the disposal of wastes or unwanted soil or rock, elevated and prolonged soil disturbance above or adjacent to cave-bearing rock, closing existing cave openings, breeching existing caves (*i.e.,* creating new openings), modifying the natural geomorphology of a cave interior, passage, or opening;

(3) Appreciably decreasing habitat value or quality through indirect effects (*e.g.,* introduction or promotion of potential predators, parasitoids, diseases, or disease vectors (*e.g.,* nonnative arthropods), vertebrate or invertebrate food competitors, or invasive plant species), habitat fragmentation, overgrazing, water diversion or impoundment, groundwater pumping, inappropriately planned ground water disposal (*e.g.,* diversion into potential habitat or prevention of natural water recharge into soils and rock above and adjacent to caves), or other activities that could

potentially alter water quality or quantity to an extent that vegetation structure is affected, cave humidity levels are reduced, habitat is flooded, or toxic materials (*e.g.,* pesticides, fuel, solvents, or other household or industrial chemicals) are transported into habitat, and activities that increase the risk of fire within or outside habitats above the cave;

(4) Application of pesticides, herbicides, insecticides, fungicides, or other such chemicals within, above, or adjacent to known habitat, that may directly or indirectly affect troglobitic organisms; and

(5) Release of certain biological control organisms within or outside of the critical habitat area. Biological organisms include, but are not limited to: Predaceous or parasitoid vertebrates or invertebrates, fungi, bacteria, or other natural or bioengineered biocontrol organisms.

Federal agencies already consult with us on activities in areas where the species may be affected by their projects to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Regulation of activities affecting waters of the United States by the ACOE under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Development on private or State lands requiring permits from other Federal agencies, such as the Department of Housing and Urban Development;

(4) Construction of communication sites licensed by the Federal Communications Commission;

(5) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities by Federal agencies;

(6) Hazard mitigation and post-disaster repairs funded by the FEMA; and.

(7) Activities not previously mentioned that are funded or authorized by the U.S. Department of Agriculture (Forest Service, NRCS), Department of Defense, Department of Transportation, Department of Energy, Department of the Interior (U.S. Fish and Wildlife Service, U.S. Geological Survey, National Park Service), Department of Commerce (National Oceanic and Atmospheric Administration), ACOE, FEMA, Environmental Protection Agency, or any other Federal agency.

If you have questions regarding whether specific activities would constitute adverse modification of critical habitat, contact the Field Supervisor, Pacific Islands Ecological Service's Field Office (*see* **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and plants, and inquiries about prohibitions and permits, should be directed to the Field Supervisor, Pacific Islands Ecological Service's Field Office.

Analysis of Impacts Under Section 4(b)(2)

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude an area from critical habitat when that exclusion will result in the extinction of the species concerned.

Economic Impacts

Following the publication of the proposed critical habitat designation on March 27, 2002, a draft economic analysis was prepared to estimate the potential economic impact of the designation, in accordance with recent decisions in the *N.M. Cattlegrowers Ass'n* v. *U.S. Fish and Wildlife Serv.,* 248 F.3d 1277 (10th Cir. 2001). The DEA was made available for review on November 15, 2002 (67 FR 69177). We accepted comments on the DEA until the comment period closed on December 16, 2002.

Following the close of the comment period on the draft economic analysis, a final addendum was completed, which incorporated public comments on the draft analysis and made other changes in the draft as necessary. In particular, the addendum focuses on the 272 acres and associated impacts that will be associated with the designation. The addendum to the draft economic analysis estimates that, over the next 18 years, the designation may result in potential direct economic effects ranging from approximately $260,000 to $429,000. The reduction ranging from approximately $56.2 million to $61.8 million from the costs estimated in the original draft economic analysis is primarily due to the significant reduction of acreage in proposed Units 1a and 2, and the removal of proposed Units 1b and 3 in the final critical habitat designation for the cave animals. These changes reduce the total critical habitat acreage from approximately 4,193 acres to 272 acres, a reduction of 3,921 acres or 94 percent. As described in the analysis, direct costs result from section 7 consultation, surveys, and project modifications associated with activities such as a county road (Koloa Bypass) widening project, and expansion of Kiahuna golf course.

Our final economic analysis includes an evaluation of potential indirect costs associated with designation of critical habitat for the Kauai cave wolf spider and Kauai cave amphipod. Based on the final economic analysis, the indirect costs are associated with actual or perceived loss of development potential and are expressed in terms of a loss in property value. These values reflect: Landowner's development plans (if any); existing entitlements; the probability of obtaining remaining development approvals (State redistricting, General Plan designation by the county, county zoning, *etc.*); and existing infrastructure improvements. In some cases, the loss in property value is estimated directly based on adjustments to the appraised or assessed value of comparable land. In other cases, the loss is based on the discounted present value of future profits based on specific development plans. Since the property value of undeveloped land reflects the discounted value of future profits, the two approaches are equivalent in concept. The analysis of lost property values focuses only on the land in or around the critical habitat units, and anticipates no islandwide impacts on economic and population growth. The analysis anticipates that while development will not occur within some areas designated as critical habitat, other developments in the Koloa/Poipu area will increase in density or area to largely offset this loss, thereby resulting in a negligible change in island wide development. For affected properties, however, the total potential loss in property values that could be indirectly associated with the designation ranges from $4.5 million to $6.1 million. This range represents the high estimate of the potential loss in property values indirectly associated with the critical habitat designation, and may be offset by adjusting the project (*e.g.,* density) to offset the loss of development within the critical habitat, or it may not be realized if the development within the critical habitat proceeds as proposed. Additional potential indirect costs are associated with the following: Contesting redistricting, State and county environmental review, and investigating the implications of the final designation. Other indirect costs identified in the draft economic analysis are no longer anticipated for the

designation of critical habitat because the affected areas have been excluded or reduced.

A more detailed discussion of our economic analysis is contained in the addendum. It is available for inspection at the Pacific Islands Fish and Wildlife Office (*see* **ADDRESSES** section).

No critical habitat units in the proposed rule were excluded or modified due to economic impacts because the expected cost of the designation (*i.e.* direct cost) is not significant. The indirect costs are speculative and represent a worst case scenario.

As described above, section 4(b)(2) of the Act also requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. No critical habitat units were excluded or modified due to non-economic impacts.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this critical habitat designation is not a significant regulatory action. This rule will not have an annual economic effect of $100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government. This designation will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. It will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Finally, this designation will not raise novel legal or policy issues. Accordingly, OMB has not reviewed this final critical habitat designation.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Federal courts and Congress have indicated that an RFA/SBREFA analysis should be limited to all impacts to entities directly subject to the requirements of the regulation (Service 2002). Directly regulated entities may laso be indirectly impacted and these indirect impacts should be considered. Therefore, entities not directly regulated by the listing or critical habitat designation are not considered in this section of the analysis.

In today's rule, we are certifying that the designation of critical habitat for the Kauai cave amphipod and the Kauai cave wolf spider will not have a significant effect on a substantial number of small entities. The following discussion explains our rationale.

Small entities include small organizations, such as independent non-profit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. The RFA/SBREFA defines ''small governmental jurisdiction'' as the government of a city, county, town, school district with a population of less than 50,000. By this definition, Federal government agencies are not small business under SBA guidelines and State agencies are not considered small governments under RFA. Kauai County is also not a small governmental jurisdiction because it has a population greater than 50,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.,* housing development, grazing, oil and gas production, timber harvesting, *etc.*). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

Based on our final economic analysis, the primary projects and activities that could be affected by the critical habitat designation include Service conservation agreements, NRCS conservation programs, FHWA funding road projects, ACOE section 404 permits, Kauai County Department of Public Works (DPW) road project, and two private entities—Grove Farm partial funding of a survey for a conservation project and KG Kauai Development (KGKD)/Kobayashi Group LLC planned golf courses. For the purposes of the RFA/SBREFA, Federal agencies are not considered small governments. Accordingly, the Service, NRCS, FHWA, and ACOE are not considered small entities. As mentioned above, county agencies such as the DPW are not considered small entities. The primary business activity of Grove Farm is real estate asset management. The SBA defines a business in the real estate asset management industry as small if its annual sales are less than $1.5 million. According to this definition and 2000 sales information, Grove Farm is not a small business. KGKD is affiliated with Kobayashi Group, LLC (Kobayashi). Kobayashi's primary business activity is real estate asset management. The SBA defines a business in the real estate asset-management industry as small if its annual sales are less than $1.5 million. Kobayashi is a private business, and its annual sales figures are not listed in the Dun & Bradstreet database. However, the Kobayashi Group owns the following properties: two hotels in Waikiki, the Ocean Resort Hotel Waikiki (450 rooms), and the Queen Kapiolani Hotel (314 rooms); three golf courses; developable land in Koloa; and possibly other property. Rough estimates of the revenues generated from these properties suggest that annual revenues for the Kobayashi Group are at least $24 million [(764 rooms × 70 percent occupancy × $100 per room × 365 days) + (3 golf courses × 30,000 rounds of golf per year × $50 per round) = $24 million per year]. According to the RFA/SBREFA regulations, the SBA counts

the receipts of the business whose size is at issue and those of all its affiliates in determining the size of the business. Therefore, KGKD and Kobayashi are not small businesses.

The Kauai cave wolf spider and the Kauai cave amphipod have only been listed since January 2000 and no consultations have occurred involving these species. As a result, the requirement to reinitiate consultations for ongoing projects will not affect a substantial number of small entities on Kauai.

None of the designation is on Federal lands. On non-Federal lands, activities that lack Federal involvement would not be affected by the critical habitat designations. However, activities of an economic nature that are likely to occur on non-Federal lands in the area encompassed by these designations consist of housing or resort development that may require permits from the Department of Housing and Urban Development, small farms that may receive funding or require authorizations from the Department of Agriculture, or restoration projects sponsored by NRCS. In addition, consultation with the ACOE may occur if a permit is required for a project in Waikomo Stream that may negatively impact adjacent cave systems. Waikomo Stream runs between two known occupied cave systems and consultation may be required if the activities on the stream may affect the cave systems and the Kauai cave amphipod and Kauai cave wolf spider. However, we are not aware of a significant number of future activities that would require Federal funds, permits, or authorizations in the designated areas. Two to three small fruit and vegetable farmers may be impacted by the designation but these entities do not represent a substantial number of the total small entities in these industries. Therefore, we conclude that the rule would not affect a substantial number of small entities.

Even where the requirements of section 7 might apply due to critical habitat, based on our experience with section 7 consultations for all listed species, virtually all projects-including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations-can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation.

For these reasons, we are certifying that the designation of critical habitat for the Kauai cave wolf spider and the Kauai cave amphipod will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*), this rule is not a major rule. Our detailed assessment of the economic effects of this designation are described in the final addendum to the economic analysis. Based on the effects identified in this document, we believe that this rule will not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final addendum to the economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy production supply and distribution facilities because no significant energy production, supply, and distribution facilities are included within designated critical habitat. Further, for the reasons described in the economic analysis, we do not believe that designation of critical habitat for the Kauai cave amphipod and the Kauai cave wolf spider will affect future energy production. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 August 25, 2000 *et seq.*):

(a) For the reasons described in the final economic analysis, this rule will not produce a Federal mandate on State or local governments or the private sector of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. Further, the designation of critical habitat imposes no direct obligations on State or local governments.

(b) This rule will not ''significantly or uniquely'' affect small governments, so a Small Government Agency Plan is not required. Small governments will not be affected unless they propose an action requiring Federal funds, permits, or other authorizations. Any such activities will require that the Federal agency ensure that the action will not adversely modify or destroy designated critical habitat.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for the Kauai cave wolf spider and the Kauai cave amphipod in a takings implication assessment. The takings implications assessment concludes that this final rule does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of Interior policy, we requested information from appropriate State agencies in Hawaii.

The designations may have some benefit to these governments, in that the areas essential to the conservation of these species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning, rather than waiting for a case-by-case section 7 consultation to occur.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Kauai cave wolf spider and Kauai cave amphipod.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which OMB approval under the Paperwork Reduction Act is required. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB Control Number.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This determination does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands essential for the conservation of the Kauai cave wolf spider and Kauai cave amphipod. Therefore, designation of critical habitat for these species does not involve any Tribal lands.

References Cited

A complete list of all references cited in this final rule is available, upon request, from the Pacific Islands Fish and Wildlife Office (*see* **ADDRESSES** section).

Author

This rule was primarily prepared by the Pacific Islands Fish and Wildlife Office (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless oherwise noted.

■ 2. In § 17.11(h), revise the entries for ''spider, Kauai cave wolf'' under ''ARACHNIDS'' and ''amphipod, Kauai cave'' under ''CRUSTACEANS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
ARACHNIDS							
*	*	*	*	*	*		*
Spider, Kauai cave wolf	*Adelocosa anops*	U.S.A. (HI)	NA	E	676	17.95(g)	NA
*	*	*	*	*	*		*
CRUSTACEANS							
*	*	*	*	*	*		*
Amphipod, Kauai cave	*Spelaeorchestia koloana.*	U.S.A. (HI)	NA	E	676	17.95(h)	NA
*	*	*	*	*	*		*

■ 3. Amend § 17.95 by adding, in the same alphabetical order as these species occur in § 17.11(h):

■ a. In paragraph (g), critical habitat for the Kauai cave wolf spider (*Adelocosa anops*); and

■ b. In paragraph (h), critical habitat for the Kauai cave amphipod (*Spelaeorchestia koloana*), as set forth below.

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(g) *Arachnids.*

* * * * *

Kauai cave wolf spider (*Adelocosa anops*).

(1) Critical habitat units are depicted for the island of Kauai, Hawaii, on the maps below.

(2) The primary constituent elements for the Kauai cave wolf spider are:

(i) The presence of subterranean spaces from 5 mm to 25 cm (0.2 in to 10 in) at their narrowest point (collectively termed ''mesocaverns'') and/or cave passages greater than 25 cm (>10 in);

(ii) Dark and/or stagnant air zones that maintain relative humidity at saturation levels (≥100 percent); and

(iii) The presence in these types of mesocaverns or caves of roots from living, nontoxic plants such as, but not limited to, ohia (*Metrosideros polymorpha*), maiapilo (*Capparis sandwichiana*), and aalii (*Dodonea viscosa*).

(3) All critical habitat areas contain one or more of the primary constituent elements for the Kauai cave wolf spider.

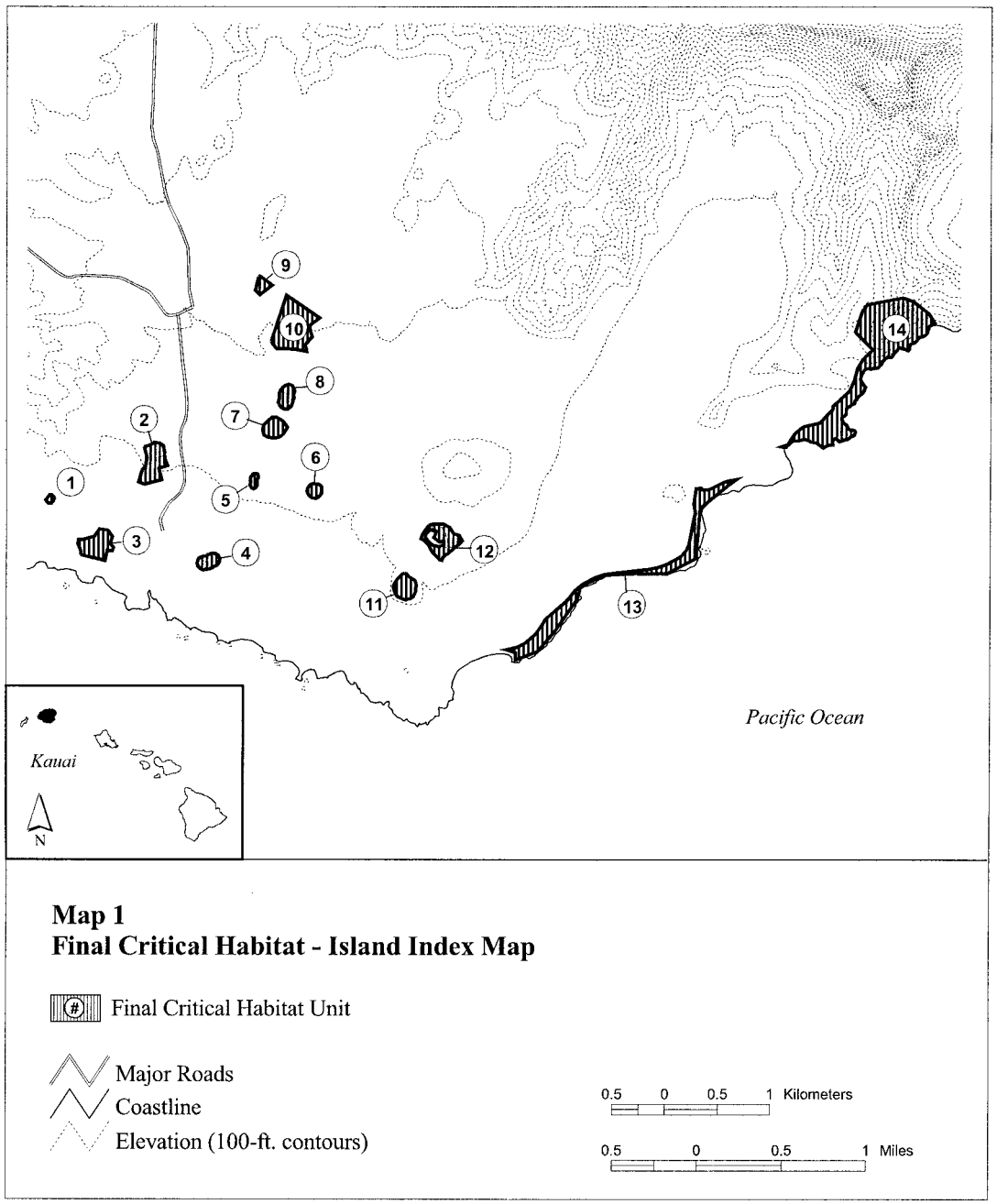
(4)(i) Existing human-constructed features and structures within the boundaries of mapped units that involved trenching, filling, or excavation resulting in below-surface modification or alteration would not contain either of the primary constituent elements and are excluded from critical habitat designation. Such features and structures include but are not limited to:

Homes and buildings for which the underlying bedrock has been altered for their construction or through incorporation of or connection to buried structural foundations, septic tanks, city sewage and drainage systems, or water or underground electrical supply corridors; paved roads; and areas previously or currently used as a quarry.

(ii) Areas that have been modified on the surface but without trenching, filling, or excavation resulting in below-surface modification or alteration are included in the critical habitat designation, even if they are adjacent to areas that have undergone below-surface modification.

(5) Critical habitat units are described below. Coordinates in UTM Zone 4 with units in meters using North American Datum of 1983 (NAD83). The following map shows the general locations of the 14 critical habitat units designated on the island of Kauai.

(i) **Note:** Map 1—Index map follows:



(6) Unit 1—(<1 ha (1 ac)):

(i) Unit 1 consists of the following 10 boundary points with the following coordinates in UTM Zone 4, with the units in meters, using North American Datum of 1983 (NAD83): Start at 450554, 2420457; 450546, 2420468; 450576, 2420510; 450586, 2420518; 450607, 2420516; 450624, 2420502; 450625, 2420480; 450618, 2420452; 450600, 2420437; 450574, 2420434; return to starting point.

(ii) **Note:** Unit 1 is depicted on Map 2—Units 1, 2, 3, and 4—below.

(7) Unit 2—(7 ha (16 ac)):

(i) Unit 2 consists of the following 16 boundary points with the following coordinates in UTM Zone 4, with the

units in meters, using North American Datum of 1983 (NAD83): Start at 451483, 2420974; 451539, 2420991; 451583, 2421015; 451622, 2421014; 451667, 2420984; 451677, 2420926; 451680, 2420869; 451705, 2420799; 451622, 2420769; 451650, 2420664; 451488, 2420620; 451468, 2420624; 451433, 2420642; 451470, 2420758; 451501, 2420801; 451510, 2420870; return to starting point.

(ii) **Note:** Unit 2 is depicted on Map 2—Units 1, 2, 3, and 4—below.

(8) Unit 3—(6 ha (16 ac)):

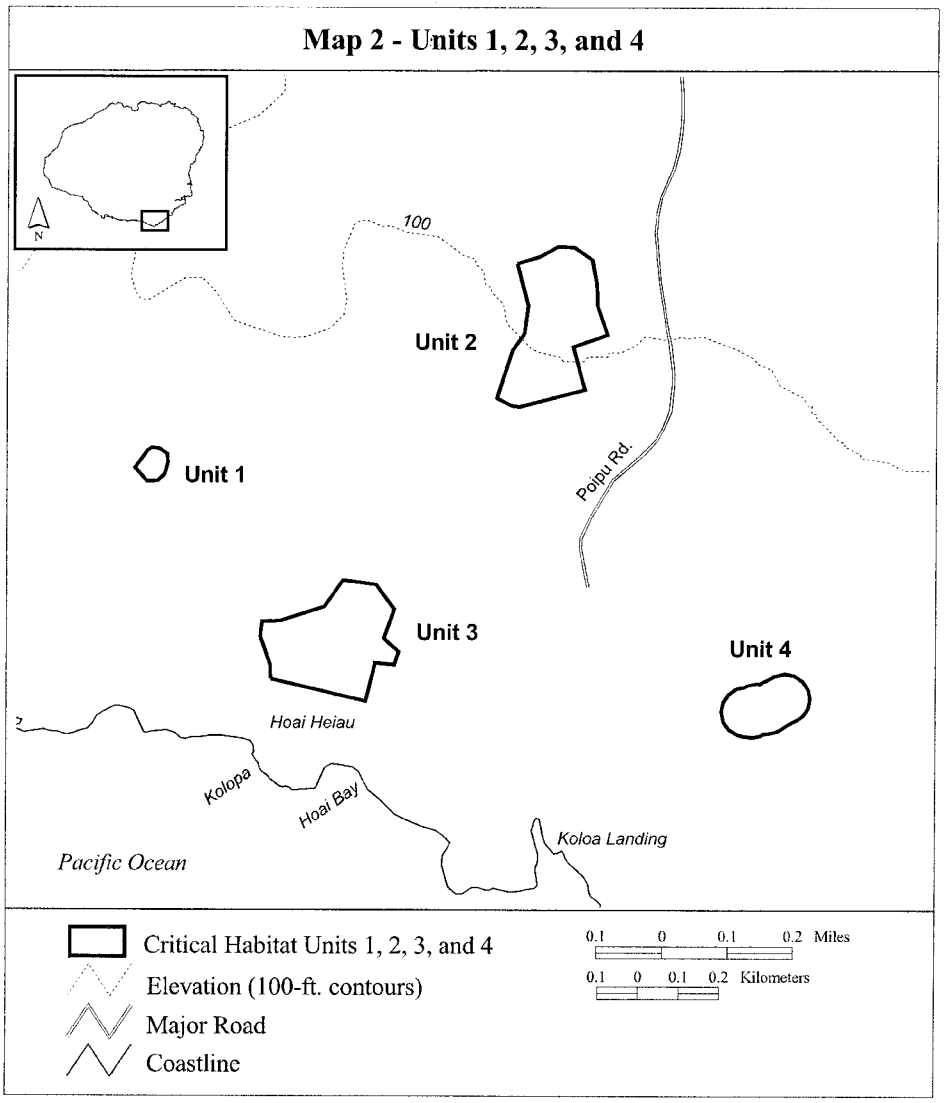
(i) Unit 3 consists of the following 14 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 450881, 2419947; 450879, 2419981; 450855, 2420053; 450859, 2420089; 450903, 2420089; 451012, 2420125; 451058, 2420191; 451138, 2420180; 451184, 2420119; 451159, 2420048; 451194, 2420014; 451183, 2419982; 451136, 2419987; 451114, 2419892; return to starting point.

(ii) **Note:** Unit 3 is depicted on Map 2—Units 1, 2, 3, and 4—below.

(9) Unit 4—(2 ha (6 ac)):

(i) Unit 4 consists of the following 33 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452087, 2419809; 452063, 2419804; 452053, 2419805; 452040, 2419807; 452027, 2419811; 452007, 2419824; 451994, 2419844; 451989, 2419867; 451994, 2419890; 452007, 2419910; 452027, 2419923; 452045, 2419927; 452053, 2419932; 452076, 2419936; 452082, 2419936; 452084, 2419936; 452090, 2419939; 452095, 2419942; 452096, 2419943; 452118, 2419954; 452145, 2419960; 452168, 2419955; 452188, 2419942; 452201, 2419922; 452206, 2419899; 452201, 2419876; 452188, 2419856; 452172, 2419844; 452153, 2419835; 452132, 2419822; 452123, 2419817; 452099, 2419812; 452093, 2419812; return to starting point.

(ii) **Note:** Unit 4 is depicted on Map 2—Units 1, 2, 3, and 4—which follows:



(10) Unit 5—(1 ha (2 ac)):

(i) Unit 5 consists of the following 35 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452493, 2420608; 452493, 2420613; 452493, 2420616; 452496, 2420639; 452492, 2420652; 452491, 2420660; 452492, 2420669; 452497, 2420683; 452498, 2420686; 452502, 2420694; 452516, 2420711; 452518, 2420713;

452528, 2420720; 452540, 2420722; 452552, 2420720; 452561, 2420713; 452568, 2420704; 452570, 2420692; 452568, 2420680; 452564, 2420673; 452553, 2420660; 452556, 2420649; 452557, 2420641; 452557, 2420637; 452554, 2420613; 452555, 2420611; 452555, 2420607; 452553, 2420595; 452546, 2420585; 452536, 2420579; 452525, 2420576; 452513, 2420579; 452503, 2420585; 452496, 2420595; 452494, 2420602; return to starting point.

(ii) Unit 5 is depicted on Map 3—Units 5, 6, 7, and 8—below.

(11) Unit 6—(2 ha (4 ac)):

(i) Unit 6 consists of the following 21 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 453052, 2420607; 453065, 2420616; 453078, 2420622; 453101, 2420626; 453126, 2420621; 453139, 2420616; 453154, 2420606; 453164, 2420591; 453167, 2420579; 453169, 2420551; 453165, 2420533; 453156, 2420517; 453141, 2420500; 453127, 2420490; 453109, 2420486; 453078, 2420490; 453053, 2420505; 453042, 2420522; 453034, 2420543; 453032, 2420559; 453036, 2420585; return to starting point.

(ii) Unit 6 is depicted on Map 3—Units 5, 6, 7, and 8—below.

(12) Unit 7—(3 ha (9 ac)):

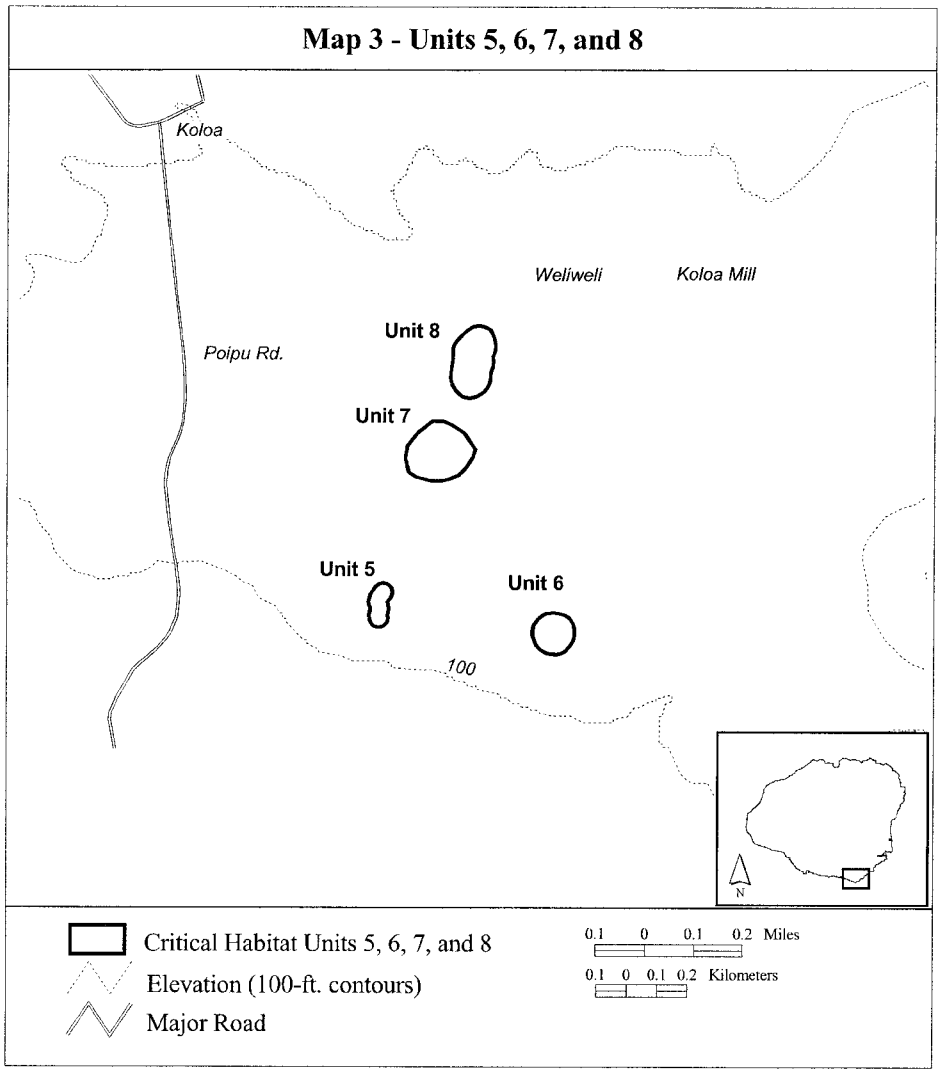
(i) Unit 7 consists of the following 7 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452623, 2421100; 452812, 2421077; 452831, 2421041; 452816, 2421016; 452786, 2420896; 452590, 2420946; 452608, 2421015; return to starting point.

(ii) Unit 7 is depicted on Map 3—Units 5, 6, 7, and 8—below.

(13) Unit 8—(2 ha (7 ac)):

(i) Unit 8 consists of the following 33 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452763, 2421383; 452759, 2421402; 452760, 2421421; 452767, 2421462; 452766, 2421477; 452768, 2421497; 452771, 2421510; 452780, 2421523; 452812, 2421556; 452824, 2421564; 452831, 2421567; 452848, 2421571; 452857, 2421571; 452875, 2421567; 452890, 2421557; 452899, 2421542; 452904, 2421531; 452907, 2421514; 452908, 2421497; 452904, 2421480; 452899, 2421471; 452902, 2421454; 452900, 2421439; 452894, 2421422; 452891, 2421412; 452891, 2421402; 452888, 2421385; 452880, 2421368; 452871, 2421355; 452844, 2421338; 452822, 2421335; 452799, 2421339; 452778, 2421357; return to starting point.

(ii) Unit 8 is depicted on Map 3—Units 5, 6, 7, and 8—which follows:



(14) Unit 9—(1 ha (4 ac)):

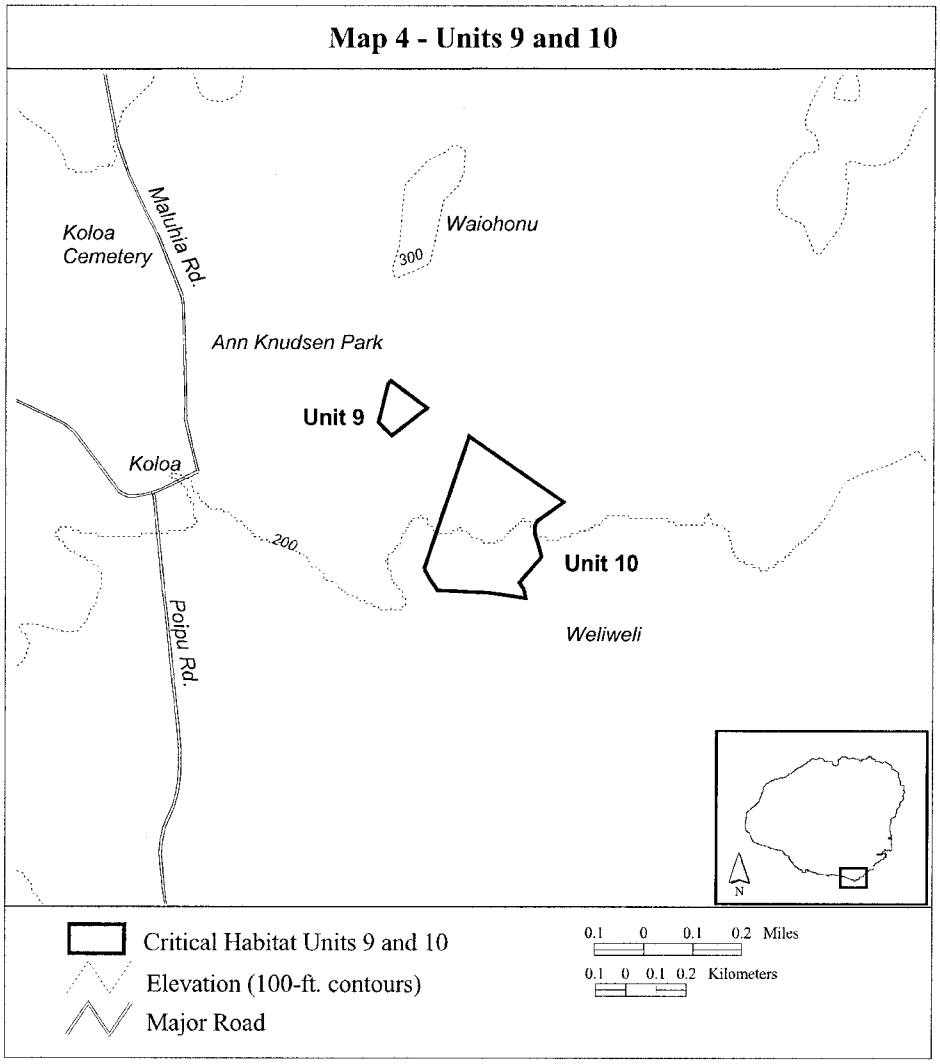
(i) Unit 9 consists of the following 5 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452568, 2422604; 452577, 2422610; 452696, 2422521; 452580, 2422429; 452537, 2422471; return to starting point.

(ii) **Note:** Unit 9 is depicted on Map 4—Units 9 and 10—below.

(15) Unit 10—(14 ha (35 ac)):

(i) Unit 10 consists of the following 14 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452688, 2421988; 452834, 2422427; 453145, 2422210; 453061, 2422147; 453053, 2422133; 453053, 2422102; 453061, 2422078; 453074, 2422029; 453002, 2421944; 453015, 2421922; 453022, 2421892; 452896, 2421910; 452733, 2421917; 452705, 2421959; return to starting point.

(ii) **Note:** Unit 10 is depicted on Map 4—Units 9 and 10—which follows:



(16) Unit 11—(4 ha (10 ac)):

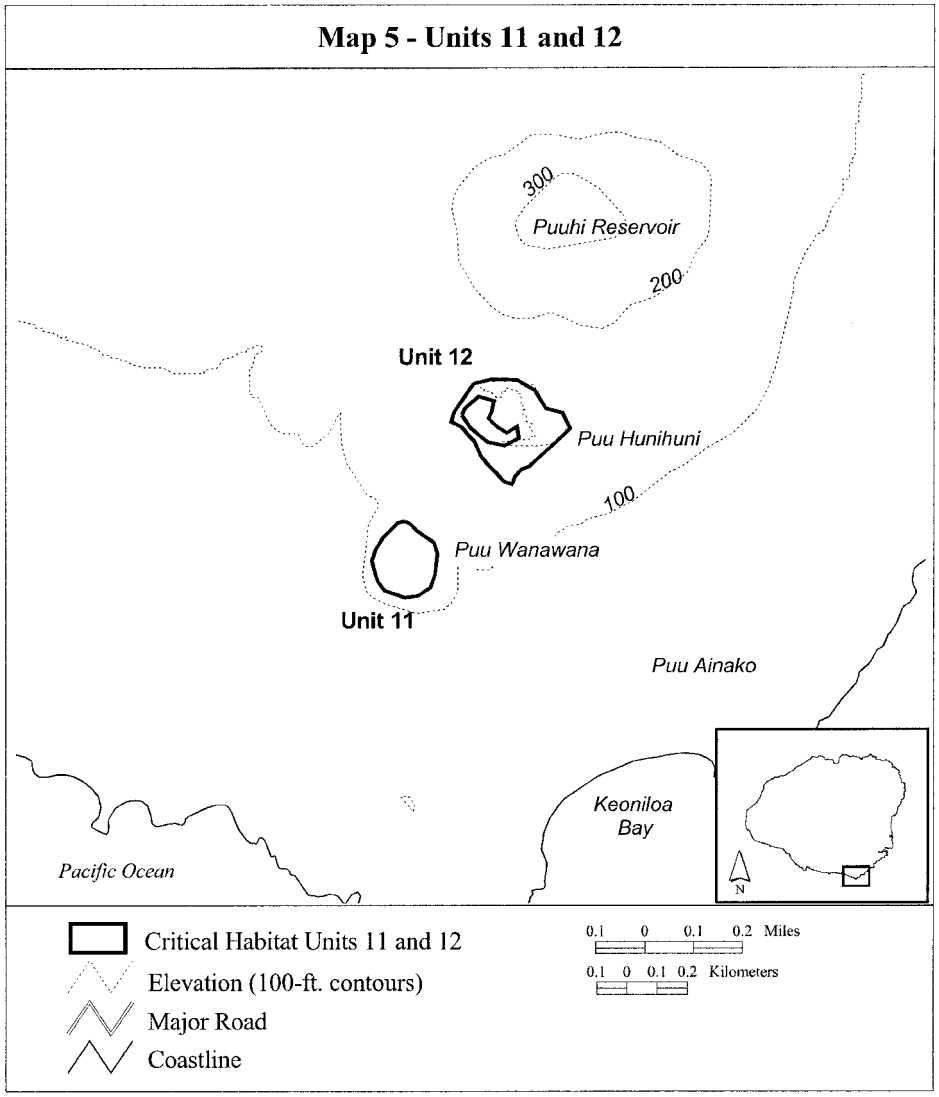
(i) Unit 11 consists of the following 17 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 453958, 2419773; 453976, 2419766; 453999, 2419741; 454054, 2419702; 454068, 2419667; 454060, 2419596; 454042, 2419553; 454005, 2419528; 453962, 2419521; 453894, 2419545; 453872, 2419573; 453862, 2419600; 453852, 2419642; 453862, 2419676; 453887, 2419718; 453912, 2419742; 453936, 2419768; return to starting point.

(ii) **Note:** Unit 11 is depicted on Map 5—Units 11 and 12—below.

(17) Unit 12 (6 ha (16 ac)):

(i) Unit 12 consists of the following 21 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 454185, 2420229; 454242, 2420243; 454326, 2420241; 454387, 2420207; 454420, 2420147; 454475, 2420133; 454502, 2420080; 454474, 2420055; 454366, 2419954; 454341, 2419944; 454321, 2419921; 454311, 2419895; 454286, 2419903; 454264, 2419927; 454229, 2419962; 454208, 2419993; 454186, 2420038; 454169, 2420058; 454145, 2420086; 454112, 2420103; 454120, 2420133; return to starting point.

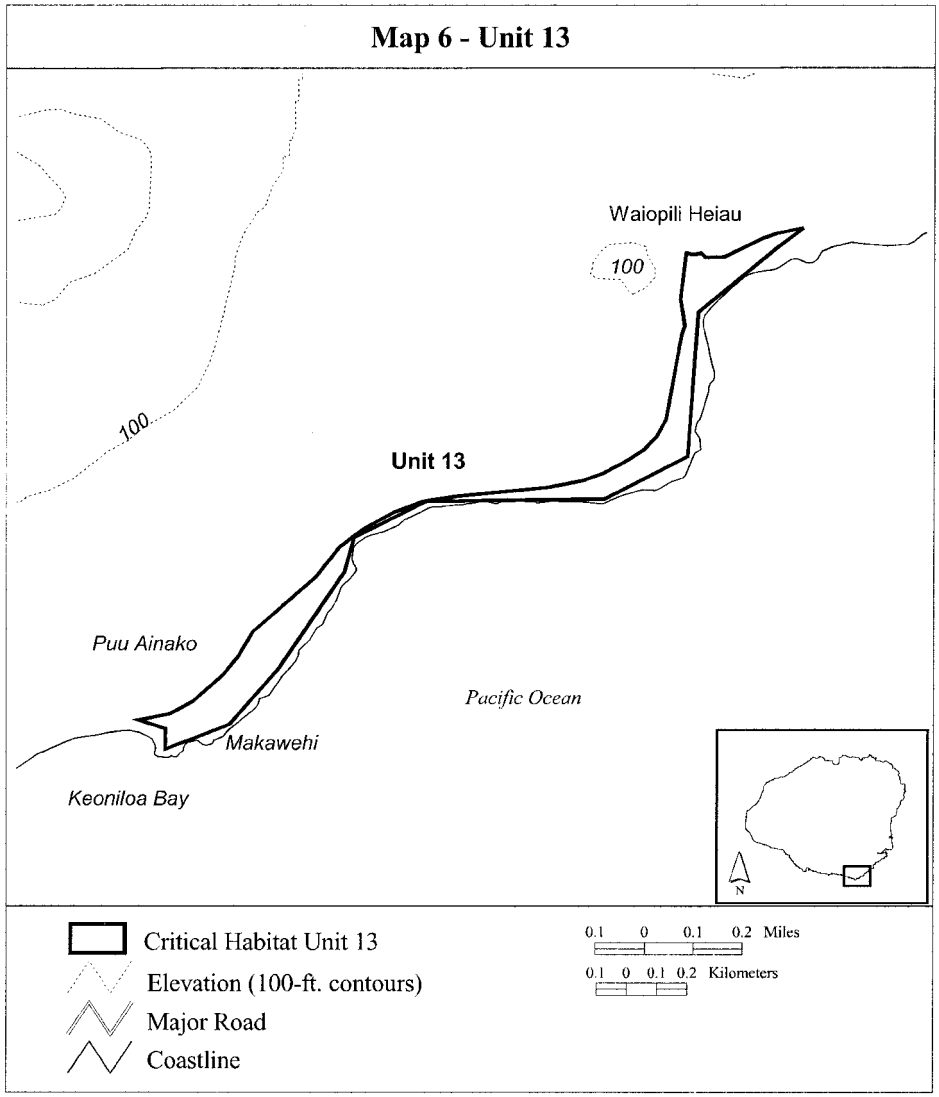
(ii) **Note:** Unit 12 is depicted on Map 5—Units 11 and 12—which follows:



(18) Unit 13—(21 ha (52 ac)):

(i) Unit 13 consists of the following 43 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 457108, 2420666; 457027, 2420606; 456763, 2420391; 456727, 2419912; 456456, 2419772; 455868, 2419764; 455633, 2419645; 455601, 2419531; 455389, 2419219; 455225, 2419029; 455014, 2418947; 455014, 2419015; 454926, 2419043; 455027, 2419064; 455102, 2419103; 455202, 2419192; 455255, 2419258; 455300, 2419334; 455508, 2419515; 455586, 2419614; 455664, 2419674; 455767, 2419730; 455859, 2419764; 455969, 2419780; 456212, 2419805; 456272, 2419811; 456376, 2419831; 456451, 2419859; 456531, 2419900; 456583, 2419935; 456627, 2419981; 456656, 2420036; 456682, 2420173; 456709, 2420316; 456718, 2420343; 456704, 2420433; 456723, 2420583; 456747, 2420580; 456771, 2420584; 456786, 2420569; 456848, 2420572; 456979, 2420634; 457022, 2420649; return to starting point.

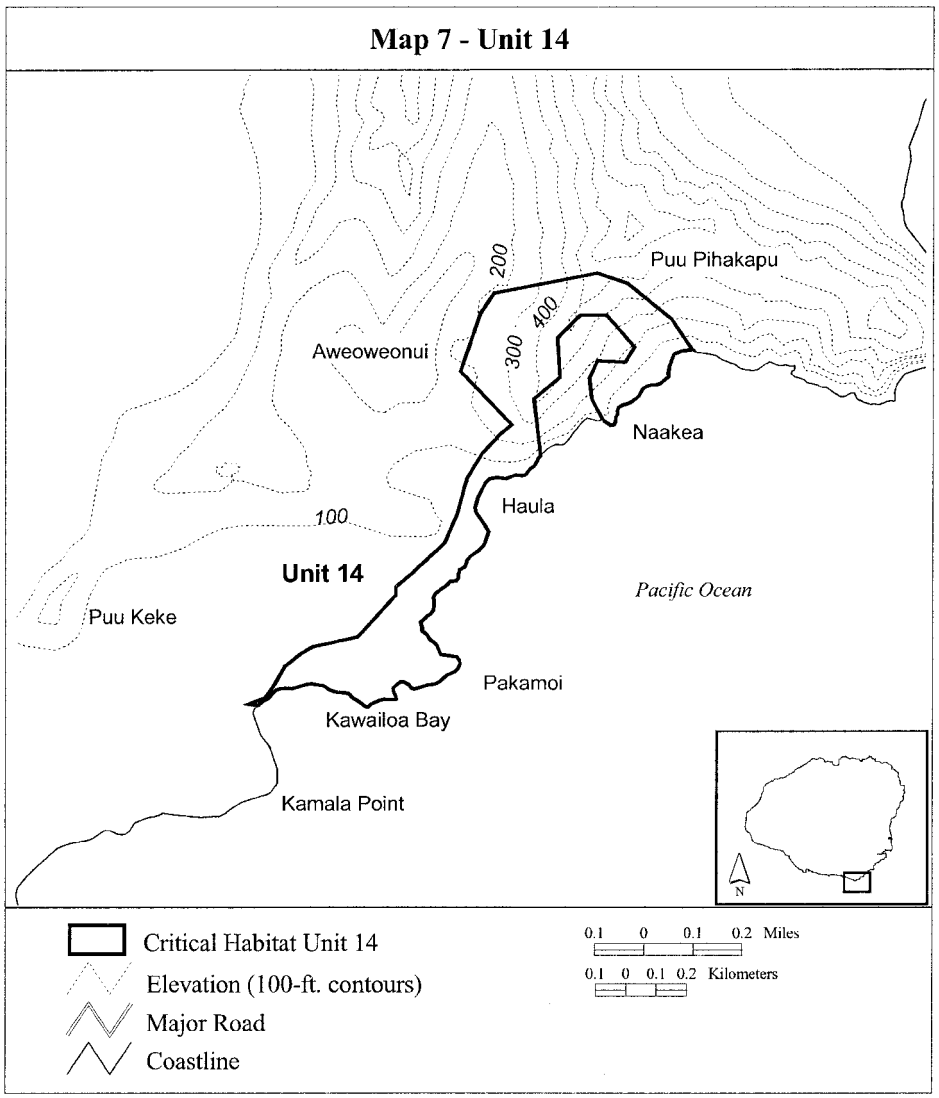
(ii) **Note:** Unit 13 is depicted on Map 6—Unit 13—which follows:



(19) Unit 14—(39 ha (96 ac)):

(i) Unit 14 consists of the following 47 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Coastline. 457575, 2420977; 457548, 2420981; 457598, 2421002; 457624, 2421039; 457624, 2421039; 457624, 2421039; 457664, 2421105; 457715, 2421146; 457755, 2421170; 457901, 2421204; 458025, 2421342; 458025, 2421367; 458078, 2421412; 458078, 2421413; 458078, 2421413; 458184, 2421510; 458226, 2421607; 458226, 2421607; 458226, 2421607; 458259, 2421727; 458308, 2421809; 458371, 2421876; 458405, 2421905; 458237, 2422080; 458301, 2422271; 458346, 2422339; 458686, 2422403; 458785, 2422371; 458932, 2422252; 458997, 2422153; Coastline. 458706, 2421920; 458670, 2421988; 458662, 2422059; 458688, 2422116; 458778, 2422112; 458809, 2422160; 458719, 2422266; 458630, 2422266; 458556, 2422191; 458563, 2422061; 458479, 2421989; 458500, 2421803.

(ii) **Note:** Unit 14 is depicted on Map 7—Unit 14—which follows:



* * * * *

(h) Crustaceans.

* * * * *

Kauai cave amphipod (*Spelaeorchestia koloana*)

(1) Critical habitat units are depicted for the island of Kauai, Hawaii, on the maps below.

(2) The primary constituent elements for the Kauai cave amphipod are:

(i) The presence of subterranean spaces from 5 mm to 25 cm (0.2 in to 10 in) at their narrowest point (collectively termed ''mesocaverns'') and/or cave passages greater than 25 cm (>10 in);

(ii) Dark and/or stagnant air zones that maintain relative humidity at saturation levels (≥100 percent); and

(iii) The presence in these types of mesocaverns or caves of roots from living, nontoxic plants such as, but not limited to, ohia (*Metrosideros polymorpha*), maiapilo (*Capparis sandwichiana*), and aalii (*Dodonea viscosa*).

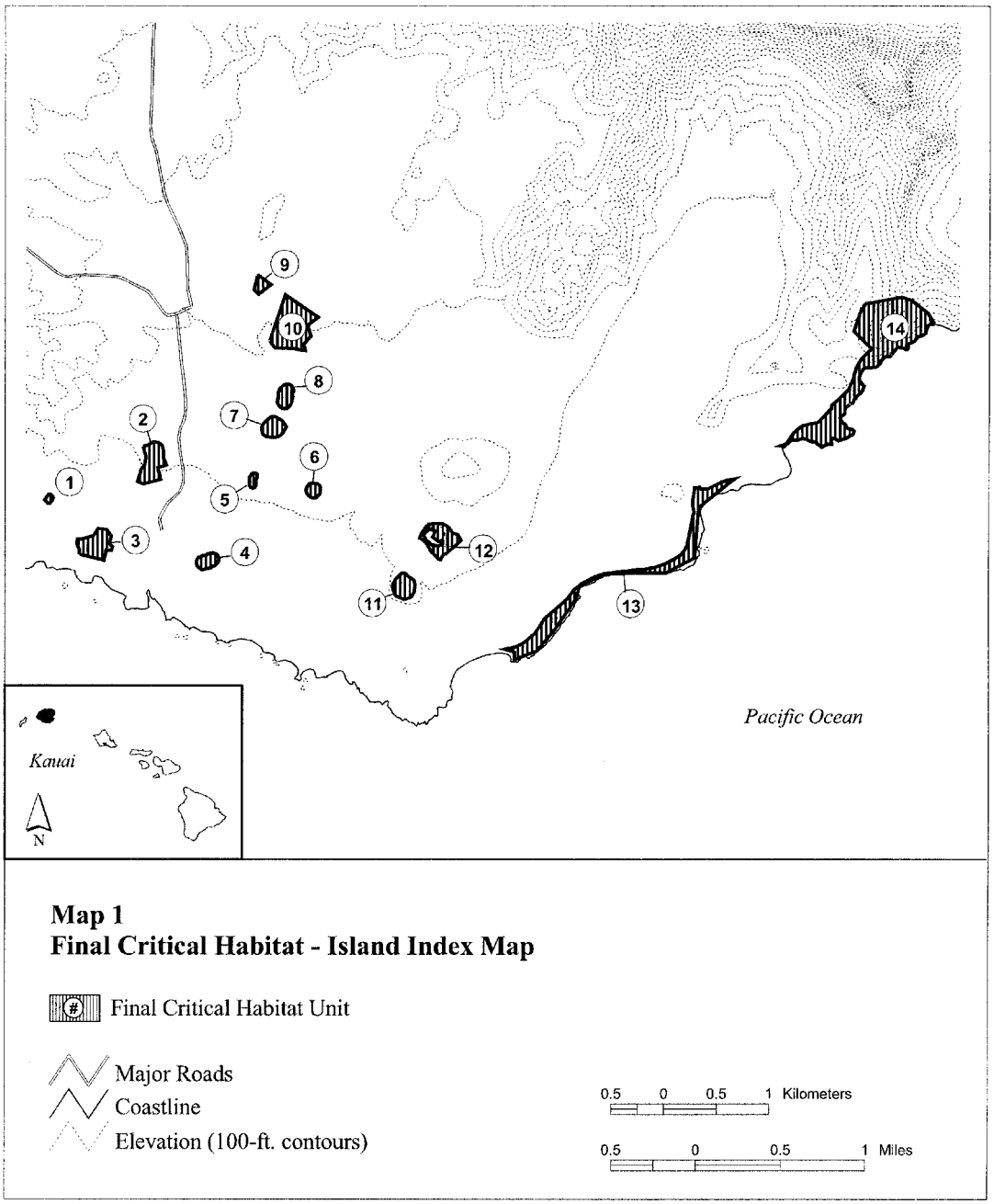
(3) All critical habitat areas contain one or more of the primary constituent elements for the Kauai cave amphipod.

(4)(i) Existing human-constructed features and structures within the boundaries of mapped units that involved trenching, filling, or excavation resulting in below-surface modification or alteration would not contain either of the primary constituent elements and are excluded from critical habitat designation. Such features and structures include but are not limited to: Homes and buildings for which the underlying bedrock has been altered for their construction or through incorporation of or connection to buried structural foundations, septic tanks, city sewage and drainage systems, or water or underground electrical supply corridors; paved roads; and areas previously or currently used as a quarry.

(ii) Areas that have been modified on the surface but without trenching, filling, or excavation resulting in below-surface modification or alteration are included in the critical habitat designation, even if they are adjacent to areas that have undergone below-surface modification.

(5) Critical habitat units are described below. Coordinates in UTM Zone 4 with units in meters using North American Datum of 1983 (NAD83). The following map shows the general locations of the 14 critical habitat units designated on the island of Kauai.

(i) **Note:** Map 1—Index map follows:



(6) Unit 1—(<1 ha (1 ac)):

(i) Unit 1 consists of the following 10 boundary points with the following coordinates in UTM Zone 4, with the units in meters, using North American Datum of 1983 (NAD83): Start at 450554, 2420457; 450546, 2420468; 450576, 2420510; 450586, 2420518; 450607, 2420516; 450624, 2420502; 450625, 2420480; 450618, 2420452; 450600, 2420437; 450574, 2420434; return to starting point.

(ii) **Note:** Unit 1 is depicted on Map 2—Units 1, 2, 3, and 4—below.

(7) Unit 2—(7 ha (16 ac)):

(i) Unit 2 consists of the following 16 boundary points with the following coordinates in UTM Zone 4, with the units in meters, using North American Datum of 1983 (NAD83): Start at 451483, 2420974; 451539, 2420991; 451583, 2421015; 451622, 2421014; 451667, 2420984; 451677, 2420926; 451680, 2420869; 451705, 2420799; 451622, 2420769; 451650, 2420664; 451488, 2420620; 451468, 2420624; 451433, 2420642; 451470, 2420758; 451501, 2420801; 451510, 2420870; return to starting point.

(ii) **Note:** Unit 2 is depicted on Map 2—Units 1, 2, 3, and 4—below.

(8) Unit 3—(6 ha (16 ac)):

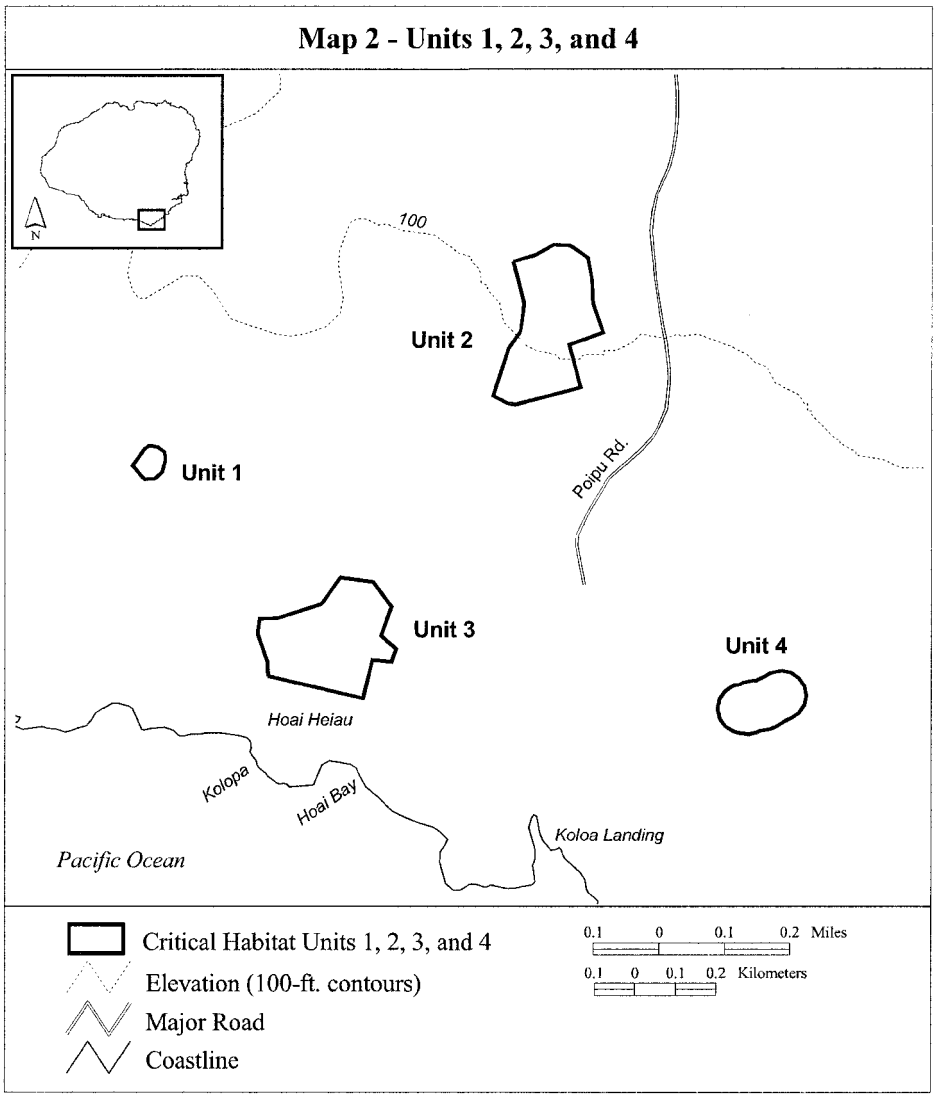
(i) Unit 3 consists of the following 14 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 450881, 2419947; 450879, 2419981; 450855, 2420053; 450859, 2420089; 450903, 2420089; 451012, 2420125; 451058, 2420191; 451138, 2420180; 451184, 2420119; 451159, 2420048; 451194, 2420014; 451183, 2419982; 451136, 2419987; 451114, 2419892; return to starting point.

(ii) **Note:** Unit 3 is depicted on Map 2—Units 1, 2, 3, and 4—below.

(9) Unit 4—(2 ha (6 ac)):

(i) Unit 4 consists of the following 33 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452087, 2419809; 452063, 2419804; 452053, 2419805; 452040, 2419807; 452027, 2419811; 452007, 2419824; 451994, 2419844; 451989, 2419867; 451994, 2419890; 452007, 2419910; 452027, 2419923; 452045, 2419927; 452053, 2419932; 452076, 2419936; 452082, 2419936; 452084, 2419936; 452090, 2419939; 452095, 2419942; 452096, 2419943; 452118, 2419954; 452145, 2419960; 452168, 2419955; 452188, 2419942; 452201, 2419922; 452206, 2419899; 452201, 2419876; 452188, 2419856; 452172, 2419844; 452153, 2419835; 452132, 2419822; 452123, 2419817; 452099, 2419812; 452093, 2419812; return to starting point.

(ii) **Note:** Unit 4 is depicted on Map 2—Units 1, 2, 3, and 4—which follows:



(10) Unit 5—(1 ha (2 ac)):

(i) Unit 5 consists of the following 35 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452493, 2420608; 452493, 2420613; 452493, 2420616; 452496, 2420639; 452492, 2420652; 452491, 2420660; 452492, 2420669; 452497, 2420683; 452498, 2420686; 452502, 2420694; 452516, 2420711; 452518, 2420713; 452528, 2420720; 452540, 2420722; 452552, 2420720; 452561, 2420713; 452568, 2420704; 452570, 2420692; 452568, 2420680; 452564, 2420673; 452553, 2420660; 452556, 2420649; 452557, 2420641; 452557, 2420637; 452554, 2420613; 452555, 2420611; 452555, 2420607; 452553, 2420595; 452546, 2420585; 452536, 2420579; 452525, 2420576; 452513, 2420579; 452503, 2420585; 452496, 2420595; 452494, 2420602; return to starting point.

(ii) Unit 5 is depicted on Map 3—Units 5, 6, 7, and 8—below.

(11) Unit 6—(2 ha (4 ac)):

(i) Unit 6 consists of the following 21 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 453052, 2420607; 453065, 2420616; 453078, 2420622; 453101, 2420626; 453126, 2420621; 453139, 2420616; 453154, 2420606; 453164, 2420591; 453167, 2420579; 453169, 2420551; 453165, 2420533; 453156, 2420517; 453141, 2420500; 453127, 2420490; 453109, 2420486; 453078, 2420490; 453053, 2420505; 453042, 2420522;

453034, 2420543; 453032, 2420559; 453036, 2420585; return to starting point.

(ii) Unit 6 is depicted on Map 3—Units 5, 6, 7, and 8—below.

(12) Unit 7—(3 ha (9 ac)):

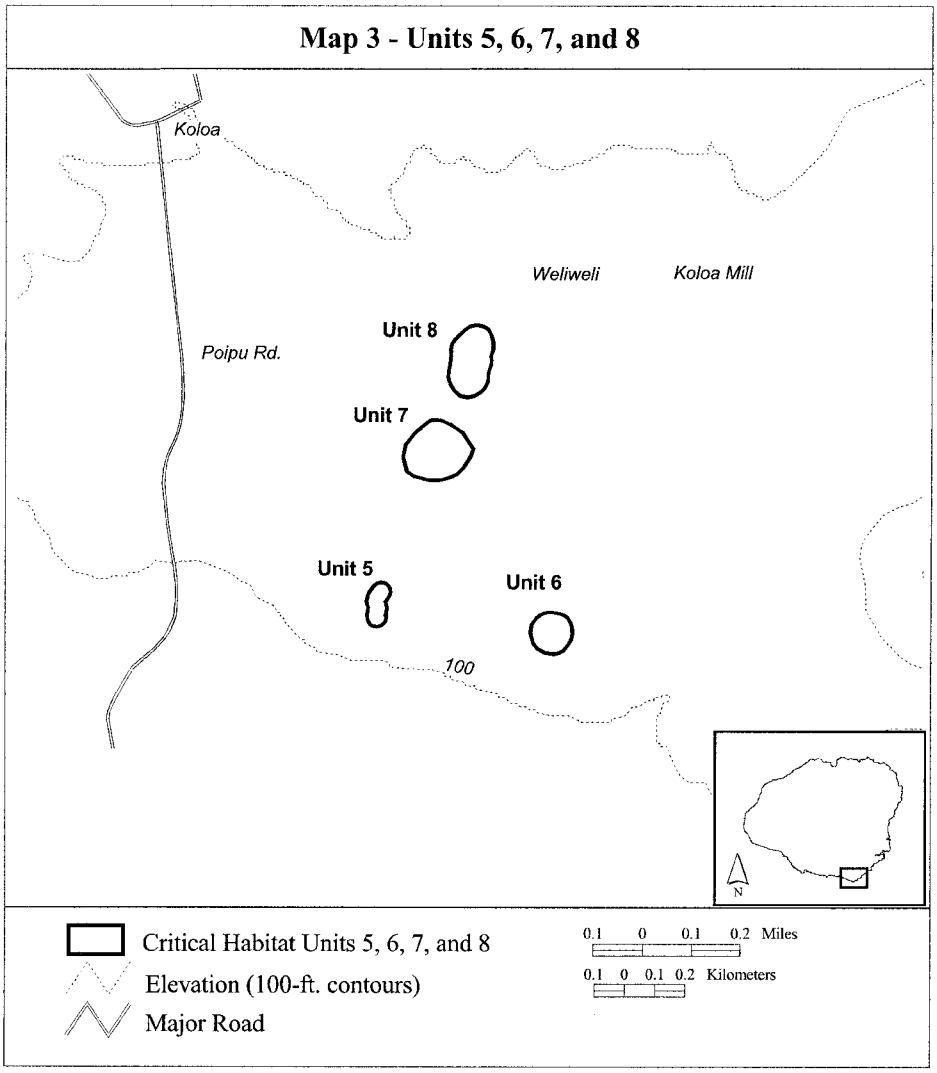
(i) Unit 7 consists of the following 7 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452623, 2421100; 452812, 2421077; 452831, 2421041; 452816, 2421016; 452786, 2420896; 452590, 2420946; 452608, 2421015; return to starting point.

(ii) Unit 7 is depicted on Map 3—Units 5, 6, 7, and 8—below.

(13) Unit 8—(2 ha (7 ac)):

(i) Unit 8 consists of the following 33 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452763, 2421383; 452759, 2421402; 452760, 2421421; 452767, 2421462; 452766, 2421477; 452768, 2421497; 452771, 2421510; 452780, 2421523; 452812, 2421556; 452824, 2421564; 452831, 2421567; 452848, 2421571; 452857, 2421571; 452875, 2421567; 452890, 2421557; 452899, 2421542; 452904, 2421531; 452907, 2421514; 452908, 2421497; 452904, 2421480; 452899, 2421471; 452902, 2421454; 452900, 2421439; 452894, 2421422; 452891, 2421412; 452891, 2421402; 452888, 2421385; 452880, 2421368; 452871, 2421355; 452844, 2421338; 452822, 2421335; 452799, 2421339; 452778, 2421357; return to starting point.

(ii) Unit 8 is depicted on Map 3—Units 5, 6, 7, and 8—which follows:



(14) Unit 9—(1 ha (4 ac)):

(i) Unit 9 consists of the following 5 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452568, 2422604; 452577, 2422610; 452696, 2422521; 452580, 2422429; 452537, 2422471; return to starting point.

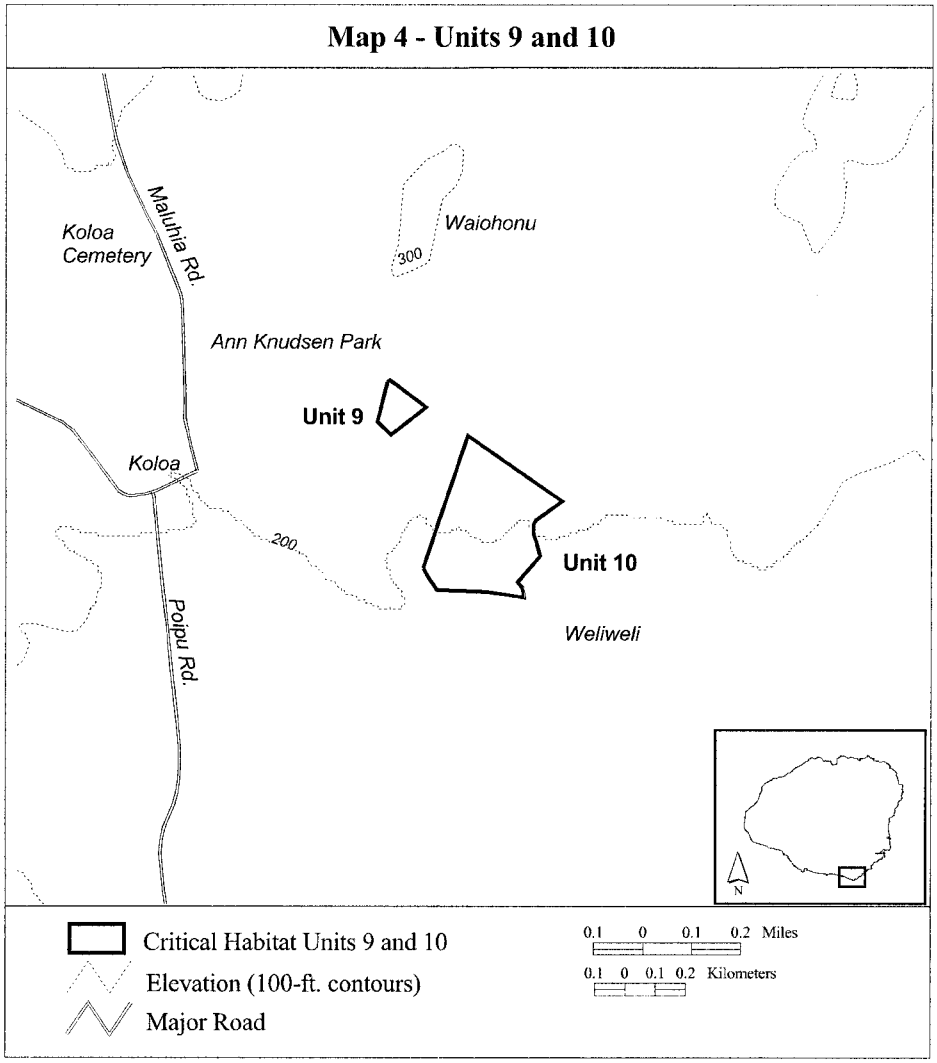
(ii) **Note:** Unit 9 is depicted on Map 4—Units 9 and 10—below.

(15) Unit 10—(14 ha (35 ac)):

(i) Unit 10 consists of the following 14 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 452688, 2421988; 452834, 2422427; 453145, 2422210; 453061, 2422147; 453053, 2422133; 453053, 2422102; 453061, 2422078; 453074, 2422029; 453002, 2421944; 453015, 2421922; 453022, 2421892; 452896, 2421910;

452733, 2421917; 452705, 2421959; return to starting point.

(ii) **Note:** Unit 10 is depicted on Map 4—Units 9 and 10—which follows:



(16) Unit 11—(4 ha (10 ac)):

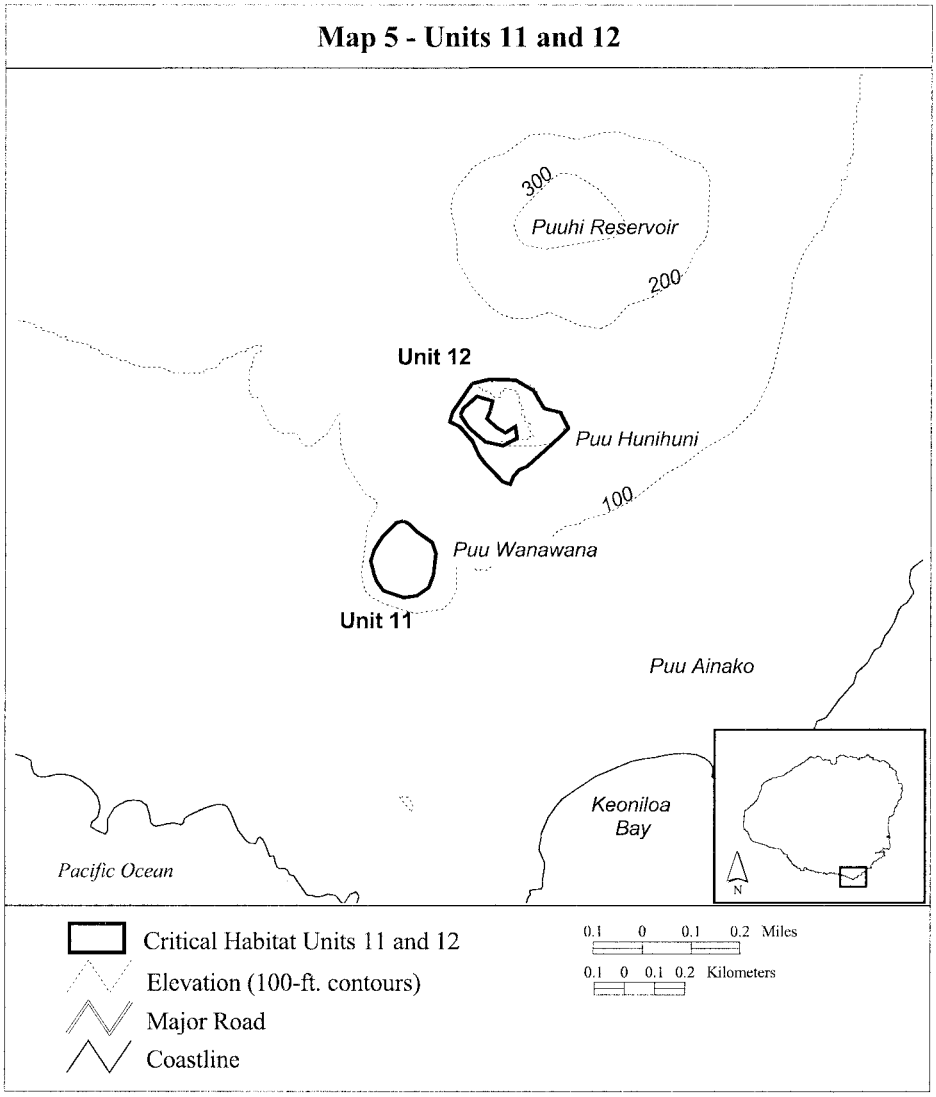
(i) Unit 11 consists of the following 17 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 453958, 2419773; 453976, 2419766; 453999, 2419741; 454054, 2419702; 454068, 2419667; 454060, 2419596; 454042, 2419553; 454005, 2419528; 453962, 2419521; 453894, 2419545; 453872, 2419573; 453862, 2419600; 453852, 2419642; 453862, 2419676; 453887, 2419718; 453912, 2419742; 453936, 2419768; return to starting point.

(ii) **Note:** Unit 11 is depicted on Map 5—Units 11 and 12—below.

(17) Unit 12 (6 ha (16 ac)):

(i) Unit 12 consists of the following 21 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 454185, 2420229; 454242, 2420243; 454326, 2420241; 454387, 2420207; 454420, 2420147; 454475, 2420133; 454502, 2420080; 454474, 2420055; 454366, 2419954; 454341, 2419944; 454321, 2419921; 454311, 2419895; 454286, 2419903; 454264, 2419927; 454229, 2419962; 454208, 2419993; 454186, 2420038; 454169, 2420058; 454145, 2420086; 454112, 2420103; 454120, 2420133; return to starting point.

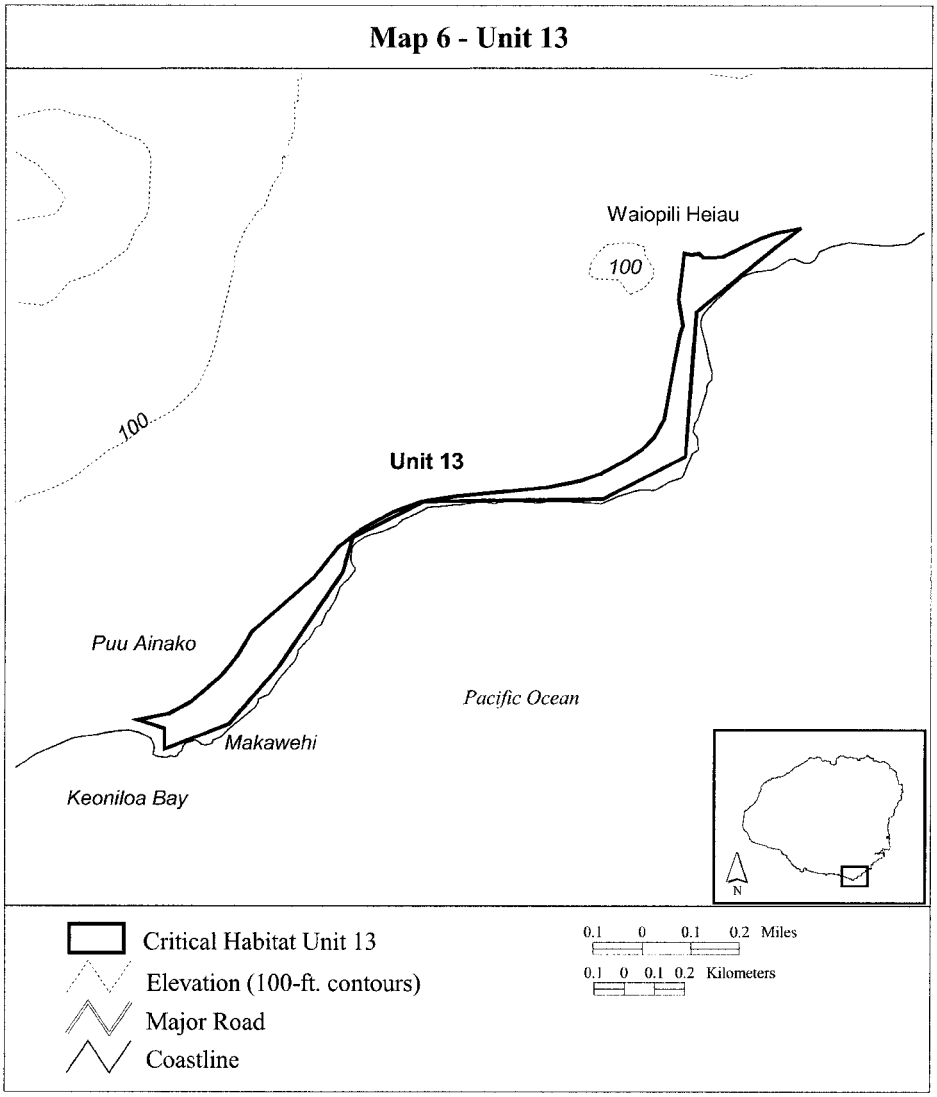
(ii) **Note:** Unit 12 is depicted on Map 5—Units 11 and 12—which follows:



(18) Unit 13—(21 ha (52 ac)):

(i) Unit 13 consists of the following 43 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Start at 457108, 2420666; 457027, 2420606; 456763, 2420391; 456727, 2419912; 456456, 2419772; 455868, 2419764; 455633, 2419645; 455601, 2419531; 455389, 2419219; 455225, 2419029; 455014, 2418947; 455014, 2419015; 454926, 2419043; 455027, 2419064; 455102, 2419103; 455202, 2419192; 455255, 2419258; 455300, 2419334; 455508, 2419515; 455586, 2419614; 455664, 2419674; 455767, 2419730; 455859, 2419764; 455969, 2419780; 456212, 2419805; 456272, 2419811; 456376, 2419831; 456451, 2419859; 456531, 2419900; 456583, 2419935; 456627, 2419981; 456656, 2420036; 456682, 2420173; 456709, 2420316; 456718, 2420343; 456704, 2420433; 456723, 2420583; 456747, 2420580; 456771, 2420584; 456786, 2420569; 456848, 2420572; 456979, 2420634; 457022, 2420649; return to starting point.

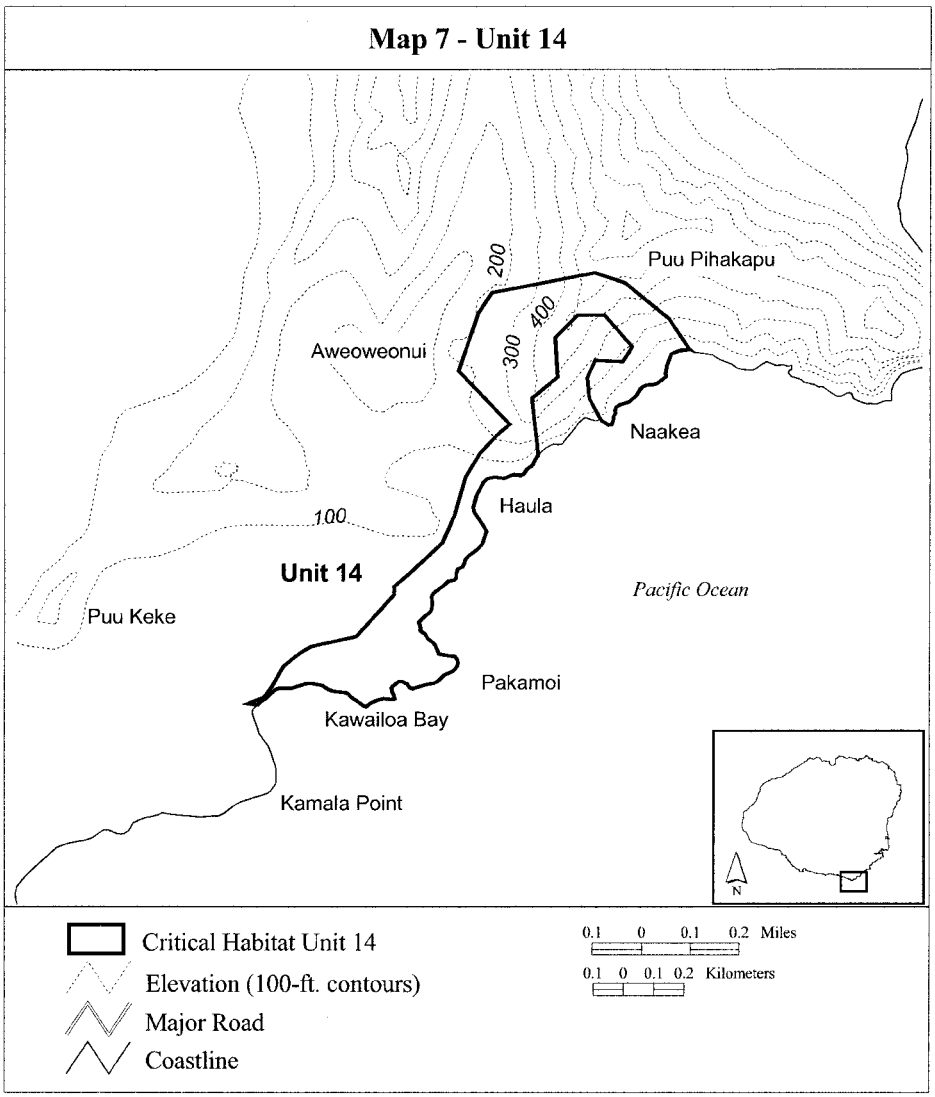
(ii) **Note:** Unit 13 is depicted on Map 6—Unit 13—which follows:



(19) Unit 14—(39 ha (96 ac)):

(i) Unit 14 consists of the following 47 boundary points with the following coordinates in UTM Zone 4, with the units in meters using North American Datum of 1983 (NAD83): Coastline. 457575, 2420977; 457548, 2420981; 457598, 2421002; 457624, 2421039; 457624, 2421039; 457624, 2421039; 457664, 2421105; 457715, 2421146; 457755, 2421170; 457901, 2421204; 458025, 2421342; 458025, 2421367; 458078, 2421412; 458078, 2421413; 458078, 2421413; 458184, 2421510; 458226, 2421607; 458226, 2421607; 458226, 2421607; 458259, 2421727; 458308, 2421809; 458371, 2421876; 458405, 2421905; 458237, 2422080; 458301, 2422271; 458346, 2422339; 458686, 2422403; 458785, 2422371; 458932, 2422252; 458997, 2422153; Coastline. 458706, 2421920; 458670, 2421988; 458662, 2422059; 458688, 2422116; 458778, 2422112; 458809, 2422160; 458719, 2422266; 458630, 2422266; 458556, 2422191; 458563, 2422061; 458479, 2421989; 458500, 2421803.

(ii) **Note:** Unit 14 is depicted on Map 7—Unit 14—which follows:



Dated: March 27, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 03–8180 Filed 4–8–03; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Wednesday,
April 9, 2003

Part III

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2510 and 2570

Employee Retirement Income Security Act of 1974; Procedures for Administrative Hearings Regarding Plans Established or Maintained Under or Pursuant to Collective Bargaining Agreements Under Section 3(40)(A) of ERISA; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AA48

Employee Retirement Income Security Act of 1974; Plans Established or Maintained Under or Pursuant to Collective Bargaining Agreements Under Section 3(40)(A) of ERISA

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a regulation under the Employee Retirement Income Security Act of 1974, as amended, (ERISA or the Act) setting forth specific criteria that, if met and if certain other factors set forth in the regulation are not present, constitute a finding by the Secretary of Labor (the Secretary) that a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. Employee welfare benefit plans, such as health care plans, that meet the requirements of the regulation are excluded from the definition of ''multiple employer welfare arrangements'' under section 3(40) of ERISA and consequently are not subject to state regulation of multiple employer welfare arrangements as provided for by the Act. Regulations published elsewhere in this issue of the **Federal Register** set forth a procedure for obtaining a determination by the Secretary as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more agreements that are collective bargaining agreements for purposes of section 3(40) of ERISA. The procedure is available only in situations where the jurisdiction or law of a state has been asserted against an entity that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements. This regulation is intended to assist labor organizations, plan sponsors and state insurance departments in determining whether a plan is a ''multiple employer welfare arrangement'' within the meaning of section 3(40) of ERISA.

EFFECTIVE DATE: June 9, 2003.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5669, Washington, DC 20210, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

The Statute

Section 3(40) of ERISA defines the term multiple employer welfare arrangement (MEWA), in pertinent part, as an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) of section 3 of the Act to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements.

This definition was added to ERISA by the Multiple Employer Welfare Arrangement Act of 1983, Sec. 302(b), Pub. L. 97–473, 96 Stat. 2611, 2612 (29 U.S.C. 1002(40)) (the MEWA amendments), which also amended section 514(b) of ERISA to narrow the scope of federal preemption of state laws applicable to MEWAs. The purpose of the MEWA amendments generally was to permit states to regulate employee welfare benefit plans that are MEWAs; the extent of the states' jurisdiction over such entities under the MEWA amendments depends on whether or not the MEWA is fully insured. Sec. 302(b), Pub.L. 97–473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).

The Multiple Employer Welfare Arrangement Act of 1983, which was introduced to counter what the Congressional drafters termed abuse by the ''operators of bogus 'insurance' trusts,'' *see* 128 Cong. Rec. E2407 (1982) (Statement of Congressman Erlenborn), significantly enhanced the states' ability to regulate MEWAs. Nevertheless, problems in this area persist. Among other things, the exception for collectively bargained plans contained in section 3(40) has been exploited by some MEWA operators who, through the use of sham unions and collective bargaining agreements, market fraudulent insurance schemes under the guise of collectively bargained welfare plans exempt from state insurance regulation. Another problem in this area involves the use of collectively bargained plans as vehicles for marketing health care coverage to individuals and employers with no relationship to the bargaining process or the underlying bargaining agreement. The definition of a MEWA in section 3(40) was drafted to exclude certain types of plans. As pertains to this rulemaking, section 3(40)(A)(i) of ERISA provides that employee welfare benefit plans that are found by the Secretary of Labor (the Secretary) to be established or maintained under or pursuant to one or more collective bargaining agreements are not MEWAs for purposes of ERISA. Such collectively bargained plans, as a result, were not made subject to the regulatory jurisdiction of the states pursuant to the MEWA amendments.

The Department of Labor (the Department) notes that also appearing in today's **Federal Register** are final regulations relating to filing the Form M–1 and Civil Monetary Penalties for failure or refusal to file the Form M–1. For information on the Form M–1 and related civil monetary penalties, contact Deborah S. Hobbs or Amy J. Turner, Employee Benefits Security Administration, U.S. Department of Labor, Room C–5331, 200 Constitution Ave., NW., Washington, DC 20210 (telephone (202) 693–8335) (this is not a toll-free number).

The Proposed Regulations

On October 27, 2000, the Department published a notice in the **Federal Register** (65 FR 64482) containing a proposed regulation (the criteria regulation) setting forth specific criteria that, if met in the case of a specific plan, and provided that certain other factors set forth in the proposed regulation are not present, would constitute a finding by the Secretary pursuant to section 3(40)(A)(i) of ERISA that a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. The Department also simultaneously published in the **Federal Register** (65 FR 64498) proposed regulations (the procedural regulations) that set forth an administrative procedure for obtaining, under certain limited circumstances, an individualized determination by the Secretary as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more agreements that are collective bargaining agreements for purposes of section 3(40) of ERISA.

The proposed regulations followed the recommendations of the ERISA section 3(40) Negotiated Rulemaking Advisory Committee (the Committee). The Committee was convened under the Negotiated Rulemaking Act (the NRA)

and the Federal Advisory Committee Act (the FACA), 5 U.S.C. App. 2, to assist the Department in developing proposed regulations to implement section 3(40)(A)(i) of ERISA, 29 U.S.C. 1002(40)(A)(i).

The criteria regulation set forth standards that, if satisfied, would constitute a finding by the Secretary that a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40).

The proposed regulation established four general criteria for a finding that a plan was established or maintained under or pursuant to collective bargaining for purposes of section 3(40)(A)(i). First, the entity in question had to be an employee welfare benefit plan within the meaning of ERISA section 3(1). Second, the preponderance of those participants covered by the plan (at least 80%) had to have a nexus to the bargaining relationships under or pursuant to which the plan was established or maintained (referred to as the ''nexus'' group or test). Third, the agreements under or pursuant to which the plan is established or maintained had to have certain characteristics that indicate that they were, for purposes of section 3(40) of ERISA only, collective bargaining agreements, including that the agreements were the product of a ''*bona fide* collective bargaining relationship.'' Fourth, the proposed regulation listed eight specific ''factors'' deemed to indicate the existence, for purposes of section 3(40) only, of a *bona fide* collective bargaining relationship. If at least four of those specified factors were present, the regulation indicated that a *bona fide* collective bargaining relationship underlying the agreements under or pursuant to which the plan is established or maintained could be presumed to exist.

The proposed criteria regulation included a ninth non-specific ''factor'' in the list. The ninth factor indicated that the Secretary would consider, in making a finding, whether ''other objective or subjective indicia of actual collective bargaining and representation'' were present. The inclusion of this ''catch-all'' factor recognized that, in any particular case, other facts might need to be taken into account to determine whether a *bona fide* collective bargaining relationship existed, especially where the entity did not meet at least four of the eight specific factors, or where, despite meeting four of the eight factors, there were other facts indicating that a *bona fide* collective bargaining relationship did not exist.

The proposed criteria regulation also specified circumstances that, if present, would lead to a conclusion that an employee welfare benefit plan is not established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements. The regulation stated that, for any plan year in which the specified circumstances were present, a plan that otherwise met the criteria of the regulation should not be deemed to be excluded from the MEWA definition by virtue of section 3(40)(A)(i).

The proposed regulation provided that, under certain limited circumstances, an entity would be permitted to petition the Secretary for an individual finding. The ability to petition, however, would arise under the proposed regulation only if a state's law or jurisdiction had been asserted against the entity in an administrative or judicial proceeding. The procedural regulations set forth specific processes for petitioning for an individual finding.

Public Comments

Subsequent to publication of the proposed regulations, the Department received seven public comments. The Department reconvened the Committee and held a public meeting on March 1, 2002, to obtain the Committee's views on the public comments. Minutes of this meeting, as well as other meetings, of the Committee are available for inspection by the public in the Department's Public Disclosure Room, 200 Constitution Avenue, NW., N1513, Washington, DC 20210.

The following discussion summarizes the issues raised by the public comments, the Committee's discussion of those issues at the public meeting, and the Department's decisions, which are reflected in the final regulations.

1. Whether the Factors Set Forth in the Proposed Criteria Regulation as Presumptive of Bona Fide Collective Bargaining Should Be Expanded or Modified

Two commenters suggested that the Department should expand the list of factors indicative of a *bona fide* collective bargaining relationship. One commenter argued that such an expansion is necessary to make sure that small employers and employers in manufacturing, warehousing, service and other non-construction related industries could easily meet this criterion. The commenter further suggested that government certification of a union, as a collective bargaining agent should be a stand-alone safe harbor factor. The other commenter noted that newly established unions, particularly those organizing in the health care field, might have difficulty meeting four of the eight factors. That commenter suggested that an additional factor—that the welfare plan was being administered along sound actuarial principles—be added to the list of factors. The commenter also suggested that the examples set out as part of the non-specific ninth factor be listed individually as separate factors that could be counted towards meeting the ''safe harbor.''

In discussing these comments, the Committee noted that these issues were not new and had been considered by the Committee in its initial deliberations. It was noted that the language of the proposed regulation went as far as possible to be inclusive of various types of collective bargaining relationships. The purpose of the ninth ''catch-all'' factor is to take into account that the eight specific factors may not encompass all *bona fide* collective bargaining relationships. Concerns were also expressed about lowering the threshold for what constitutes a *bona fide* collective bargaining relationship. *Bona fide* collectively bargained arrangements are not likely to be challenged under the regulation by the states. The consensus of the Committee was that the eight factors should not be expanded or modified.

After consideration of the comments and the Committee's discussion, the Department has decided not to expand or modify the factors presumptive of a *bona fide* collective bargaining relationship. The final regulation therefore retains, in section 2510.3–40(b)(4)(i)–(viii), the factors as originally proposed. In the view of the Department, the regulation carefully distinguishes between the specific factors that generally evidence a *bona fide* collective bargaining relationship and the types of activities and fact patterns that are common to sham MEWA operators. Expanding or modifying the factors to include less well-established or less common situations, or making any single factor a stand-alone safe-harbor, may make it easier for sham MEWA operators to mimic the regulation's factors presumptive of a *bona fide* collective bargaining relationship.

The Department also declines to add to the factors, as suggested by one commenter, the fact that the plan is maintained on sound actuarial principles. Although maintaining a plan on sound actuarial principles is important in other regards, that a plan is actuarially sound does not necessarily

evidence the existence of a *bona fide* collective bargaining relationship.

The Department notes, however, that the final regulations are structured to take into account the possibility that a *bona fide* collective bargaining relationship might, in some case, fail to meet the ''safe harbor'' factors. In addition to including the ninth catch-all factor, the regulations permit entities that assert they are in fact established or maintained under or pursuant to *bona fide* collective bargaining, and against which state law or jurisdiction is asserted, to petition for an individualized finding from the Department as to their status.

2. Whether the Definition of Collective Bargaining Agreement Should Be Modified

The Department received one comment suggesting that the definition of collective bargaining agreement in section 2510.3–(40)(b)(3) needed to be modified to correct a technical defect. As proposed, the regulation required that a plan be ''incorporated or referenced in a written agreement between two or more employers and one or more employee organizations.'' The commenter argued that the requirement of a minimum of two employers, rather than one, was unnecessarily narrow, since there may be situations where a plan that originally was established or maintained under or pursuant to a collective bargaining agreement signed by two or more employers, is now maintained only by one due to a dwindling number of participating employers, although the plan still covers the employees of more than one employer.

The Committee, in discussing this issue, considered whether, in addition to the reasons articulated by the commenter, the language of paragraph 2510.3–40(b)(3) should be changed to make clear that the regulation applies to plans established or maintained under or pursuant to collective bargaining by a single employer but covering the employees of other employers who do not bind themselves to the collective bargaining agreement. It was noted that such entities are MEWAs. The Committee's discussion focused on the fact that it is important for the regulation to make clear that such entities are subject to evaluation under the regulation to see whether in fact they meet the exception under section 3(40) for plans established or maintained under or pursuant to collective bargaining.

On the basis of the public comment and the Committee's discussion, the Department has determined to amend 2510.3–40 to provide that the conditions of (b)(3) will be met if the written agreement referencing the plan is between one or more employers, rather than two or more employers, and one or more employee organizations.

3. Whether the Nexus Group Categories Should Be Expanded or Modified

As part of the process for determining whether a preponderance of the participants covered by the plan have a nexus to the bargaining relationships under or pursuant to which the plan is established or maintained, the proposed criteria regulation defined a ''nexus group'' of categories of participants who could be counted towards the 80% coverage level set in the proposed regulation as demonstrating such a preponderance. One commenter requested that the nexus group categories be expanded to include employees of an employer trade association that has negotiated any of the multiemployer agreements under or pursuant to which a plan is established or maintained. The commenter noted that the proposed regulation included, as part of the nexus group, employees of employee organizations that sponsor or jointly sponsor a plan, or are represented on the committee, joint board of trustees, or other similar group of representatives of the parties who sponsor the plan. The commenter noted that employees of employer associations might have a similar connection to the collective bargaining process. The commenter asserted that employer trade associations often are involved in negotiating collective bargaining agreements on behalf of many employers, and that such employers routinely become signatories to, or otherwise adopt, agreements that have been negotiated by their employer associations. The multiemployer plans that result from such bargaining often cover the employees of the employer association as well as the employees of the employers represented by the association.

The Committee concluded that, as a matter of parity, employees of an authorized representative of employers in collective bargaining should be included in the nexus group, just as are employees of the employee organization.

Based on its consideration of the comment and the Committee's discussion, the Department has determined to amend 2530.3–40(b)(2)(vi) to include, as a separate category, the employees of an authorized employer representative that actually engaged in the collective bargaining that led to the agreement that references the plan as described in 2510.3–40(b)(3)(i).

4. Whether the Regulation Should Be Expanded To Include Entities That Are Not Collectively Bargained, i.e., Long-Established MEWAs, Union-Only Sponsored Public Sector Benefit Plans

The Department received two comments suggesting that the regulation should be expanded to include certain types of entities that technically are not established or maintained under or pursuant to collective bargaining. The commenters were concerned that issuance of regulations providing clear guidance addressing what the Secretary finds to be collective bargaining for the purposes of the collective bargaining exception in 3(40) of ERISA might result in more state regulation of entities that are not established pursuant to collective bargaining than there had been in the absence of regulations.

The first commenter was a long-established MEWA that contended that it should be excluded from the scope of the MEWA definition pursuant to a ''grandfather'' provision in the regulation, allowing it to operate free of state regulation even though it is not a plan established or maintained under or pursuant to collective bargaining, because it had been operating on a financially sound basis for many years. A similar comment had been previously submitted to the Committee for consideration prior to the issuance of its Report to the Secretary. Another commenter requested that the preamble to the regulation discuss the nature of legal defense funds for peace officers, which are established by employee organizations for the employees of more than one employer, but are not actually the subject of collective bargaining.

The Committee reiterated its belief, as noted in the preamble to the proposed criteria regulation, that the regulation should serve only to define what constitutes a plan that is established or maintained under or pursuant to collective bargaining. The Department believes that the issues raised by these commenters go beyond the scope of the regulation and, therefore, has determined not to modify the final regulation in response to these comments.

5. Whether and How the Procedural Regulation Should Be Modified in Order To Obviate the Possibility That It May Hinder or Impede Timely State Enforcement Actions

One commenter expressed concern that the availability of administrative proceedings for an individualized section 3(40) finding in cases where the

jurisdiction or law of a state has been asserted may result in delays in state enforcement that could substantially hinder a state's ability to take timely enforcement actions against sham MEWA operators. The commenter stated that time is often of the essence in such circumstances and that a delay of even a few days in a state's taking effective action against a MEWA may seriously increase the harm to the participants in the MEWA by permitting the amount of unpaid medical benefit claims to increase, allowing the plan to collect additional illegal premiums, and impinging or eliminating the states' ability to preserve assets by giving the plan operators and opportunity to transfer and hide funds. The commenter specifically identified the need to be able to obtain preliminary and permanent injunctive relief and cease and desist orders where sham union plans are continuing to collect premiums or failing to pay claims. The commenter asserted that, unless the Department made clear that the availability of administrative proceedings was not meant to provide a basis for a stay or delay of state enforcement actions, the regulations should not be implemented.

Recognizing the need to ensure that the regulations assist, rather than hinder, state enforcement efforts against sham MEWA operators and that there are situations where time is of the essence for effective enforcement by the states, the Committee recommended that the regulatory language be clarified to emphasize that the section 3(40) ALJ proceedings are not a basis in themselves for a stay-of-state administrative or judicial proceedings against a putative MEWA.

As proposed, paragraph 2510.3–40(g)(2) of the criteria regulation provided that ''nothing in this section or in part 2570, subpart H of this chapter is intended to have any effect on applicable law relating to stay or delay of a state administrative or court proceeding or enforcement subpoena.'' In response to the commenter and the concerns of the Committee, the Department has amended that paragraph to state that ''nothing in this section or in part 2570, subpart H of this chapter is intended to provide the basis for a stay or delay of a state administrative or court proceeding or enforcement of a subpoena.''

Miscellaneous Changes

In its consideration of a final regulation, the Committee questioned whether consideration should be given to the effect of plan mergers on counting years of service for purposes of the determining the ''nexus'' group. In this regard, the Committee noted that the nexus group in section 2510.3–40(b)(2) includes retirees who either participated in the welfare benefit plan for at least five of the last 10 years preceding their retirement or are receiving benefits as participants under a multiemployer pension benefit plan that is maintained under the same agreement referred to in paragraph (b)(2)(i), and have at least five years of service or the equivalent under that pension plan. The Committee suggested that participation in the pre-merger multiemployer plans should also be considered in determining whether employees meet the requirements of these categories of the nexus group. The Committee also raised the issue of whether employment in the bargaining unit under the pre-merger plan should be considered for determining whether an individual is a bargaining unit alumnus under 2510.3–40(b)(2)(vii) where the merger was based on a merger of unions. The Committee noted that Example 2 of the proposed regulation addresses how a merger affects the evaluation of the factors in (b)(4)(iii) and (iv) and suggested that another example could be added to the final regulation to address the effect of merging unions and multiemployer plans on the nexus group analysis. After considering the issues raised by the Committee, the Department has determined that it is appropriate to clarify the examples at 2510.3–40(e) to make clear that, in the case of a merger of multiemployer plans, participation in a predecessor plan or employment with a predecessor union may be considered for purposes of determining the nexus group individuals in section 2510.3–40(b)(2)(ii) and (vii). In this regard, a new paragraph (3) was added to Example 2 to clarify that the merger of two unions and the related pension and health and welfare plans will not affect the determinations of who is a ''retiree'' or a ''bargaining unit alumni'' for purposes of determining the nexus group under the regulation.

In reviewing the 75% test in paragraph (b)(4)(vi) of 2510.3–40, the Department decided that the regulation should be modified to make clear that in determining the amount of premiums or contributions to which the 75% test applies does not include any amount that a participant or beneficiary might be required to pay as a co-pay or deductible under the provided coverage. Accordingly, the Department has modified paragraph 2510.3–40(b)(4)(iv) to make clear that, in addition to dental or vision care and coverage for excepted benefits under 29 CFR 2590.732(b), amounts payable by participants and beneficiaries as co-payments or deductibles are disregarded for purposes of the 75% test. In so clarifying this provision, however, the Department notes that if an entity were to establish a co-payment or deductible schedule designed solely to satisfy the criteria of paragraph 2510.3–40(b)(4)(vi), without actually requiring substantial employer contributions, evidence of such a design may be considered in evaluating whether for purposes of 2510.3–40(c)(3) there is fraud, forgery, or willful misrepresentation as to the factors relied on to demonstrate that the plan satisfies the criteria set forth in paragraph (b) of this section. The Department further notes that the collective bargaining history appropriately may be examined in a 3(40) proceeding, including a review of those factors in section 2510.3–40(b)(4).

Independent of the Committee's review of the regulations, the Department considered whether the proposed 80% minimum coverage requirement for the ''nexus'' test is too low. In the August 1, 1995, proposed regulation, the Department proposed that no less than 85% of the individuals covered by a plan must be within the ''nexus'' group. A number of commenters on that regulation expressed concern that the percentage was too high. In developing a new proposal, the Committee recommended, and the Department proposed, an 80% test. In this regard, the preamble to the proposal indicated that ''[t]he Committee recommended a 20% margin for coverage of non-nexus people, even though it understood that the percentage of participants in collectively bargained plans who are not within one of the nexus categories is rarely likely to be that high.'' 65 FR 64485 (Oct. 27, 2000). While comments were specifically invited on the 80% test, no comments were received on that provision. Moreover, the Department received no comments suggesting that changing the 80% test to an 85% test would present a problem for affected plans. The Department further notes that H.R. 2563 of the 107th Congress, the ''Bipartisan Patients Protection Act,'' as passed by the U.S. House of Representatives, among other things, amends ERISA section 3(40)(A)(i) to clarify the standards applicable to determining whether a plan is established or maintained pursuant to collective bargaining agreements. *See* section 423 of H.R. 2563. Although similar in many respects to the regulatory standards proposed by the Department, H.R. 2563

limits the percentage of non-nexus group individuals to 15 percent.

On the basis of the comments, as well as the discussions of the Committee, the Department does not believe that, in the absence of any data to the contrary, requiring 85% of the covered individuals to be within the ''nexus'' group, rather than 80%, will have any significant effect on the status of otherwise *bona fide* collectively bargained plans. Increasing the ''nexus'' group percentage to 85% should enhance the regulation's deterrent effect on sham MEWA operators who attempt to masquerade as collectively bargained plans in order to avoid state insurance regulation and oversight. In an environment where problems with sham MEWA operators are growing, the Department believes that any action it can take to reduce the likelihood of health insurance fraud against workers and their families is action that should be taken. Accordingly, the Department determined it appropriate to modify paragraph (b)(2) of 2510.3–40 to require that at least 85% of the participants in the plan be within the ''nexus'' group (described in subparagraphs (i) through (x) of 2510.3–40(b)(2)).

B. Economic Analysis Under Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this action is ''significant'' within the meaning of 3(f)(4), and therefore subject to review by the Office of Management and Budget (OMB). Consistent with the Executive Order, the Department has undertaken an assessment of the costs and benefits of this regulatory action. This analysis is detailed below.

Summary

Although neither the benefits nor costs have been fully quantified, the Department believes that the benefits of this final regulation more than justify its costs. The final regulation yields positive benefits by reducing uncertainty over which welfare benefit plans are excepted from the definition of a multiple employer welfare arrangement under section 3(40) and are therefore not subject to state regulation. The Department sought comments from the public concerning its analysis of benefits and costs of the proposed regulation. Having received no comments, the Department has relied on its initial analysis in concluding that the benefits of the final regulation justify its costs.

The regulation's elements for distinguishing collectively bargained plans from MEWAs are verifiable through documentation that plans or their agents generally maintain as part of usual business practices. The regulation also incorporates elements of flexibility, allowing entities to demonstrate the existence of a *bona fide* collective bargaining agreement, one of the regulatory factors, by satisfying any four of eight specified factors. Finally, the regulation is both sufficiently broad to include all plans established or maintained under or pursuant to one or more collective bargaining agreements, yet is discriminating enough to ensure that state law will apply to entities not meeting the criteria. Only a very small number of entities are likely to be treated differently as a result of promulgation of this criteria regulation. In the case of the few entities that will be determined to be not collectively bargained plans, the additional cost attributable to state regulation is outweighed by the benefit that such state regulation will provide by way of additional protections for participants and beneficiaries.

Background

It is the view of the Department that the uncertainty created by the lack of clear criteria for distinguishing collectively bargained plans from MEWAs has encouraged unscrupulous operators of sham MEWAs in attempts to escape or delay state regulatory efforts by asserting that states lack jurisdiction to regulate such entities because they are excluded from the definition of MEWA by reason of the exception for collectively bargained plans. In order to establish their authority to regulate, states have had to take additional steps, such as initiating administrative or legal proceedings contesting the defendant's status as a collectively bargained plan, and have been the subject of actions initiated by sham MEWA operators, such as suits for federal declaratory judgment or removal actions.

Confusion about whether a plan was established or maintained under or pursuant to an agreement which the Secretary finds to be a collective bargaining agreement has made it difficult for the states to enforce appropriate laws. The criteria regulation will reduce or eliminate this uncertainty. It will provide greater clarity for entities and states and reduce the time and expense attributable to court actions or requests to the Department for guidance.

Benefits of the Regulation—Reducing Uncertainty

Plans and arrangements will benefit from greater assurance concerning their actual legal status. States, through an enhanced ability to regulate based on the greater certainty offered by the regulation, will be better able to protect employers, participants, and beneficiaries from unscrupulous MEWA operators. Further, the majority of plans established or maintained under or pursuant to collective bargaining agreements currently operate in a manner that is consistent with the regulation. Most entities will therefore not perceive any need to undertake a systematic reassessment of their status under the regulation. It is possible, however, that some will choose to undertake such an assessment by ''comparison testing'' the plan's operations against the ''safe harbor'' criteria established in the final regulation. The Department has estimated below the number of entities likely to undertake a status assessment and the costs likely to be associated with those activities.

Costs of the Regulation

Entities Potentially Affected. To estimate the number of entities potentially affected by the final rule, the Department examined available data on multiemployer welfare plans established or maintained under or pursuant to collective bargaining agreements, and the number of entities self-reporting as MEWAs. Under ERISA, multiemployer collectively bargained plans are required to file an annual financial report, the Form 5500. MEWAs are required to file the Form M–1 annually. The 1998 Form 5500 filings by

multiemployer collectively bargained plans numbered about 2,000 (with about 6 million participants). The MEWAs that filed Form M–1 for the year 2000, pursuant to section 101 of ERISA and related interim final rules (65 FR 7152, February 11, 2000) numbered about 600 (with about 2 million participants).[1] The total number of MEWAs and collectively bargained plans, which represents the total universe of arrangements that might have questions about their legal status and ''comparison test'' under this regulation, is estimated at about 2,600 (8 million participants).

The Department was unable to identify any direct measure of the number of entities whose status is uncertain or whose status would remain uncertain under the regulation. Therefore, in order to assess the economic impact of reduced uncertainty under the regulation, the Department examined proxies for the number of entities that might be subject to such uncertainty. After estimating the total number of MEWAs and collectively bargained plans at 2,600, the Department then tallied the number of inquiries to the Department concerning MEWAs and the number of MEWA-related lawsuits to which the Department has been party, taking this to represent a reasonable indicator of the number of entities that have been subject to uncertainty in the past.

Department data indicate that in recent years, the Department has received an average of about nine MEWA-related requests for information each year from state and federal agencies and the private sector. The Department also considered the number of MEWA-related lawsuits that were filed by the Department in recent years. An average of about 45 actions have been brought each year. For purposes of this analysis, it has been assumed that each case involved a different MEWA. Accordingly, the Department has estimated for purposes of this economic analysis that approximately 54 entities (45 + 9) annually may have reason to be uncertain about their legal status with respect to section 3(40) of ERISA, or about two percent of the estimated total number of 2,600 MEWAs and collectively bargained plans.

The Department views this approximate number of 54 entities per year as a conservatively high estimate of the number of entities whose status could be made more certain by issuance of this regulation. On one hand, because some number of entities may confront uncertainty without becoming either the subject of an inquiry addressed to the Department or a lawsuit to which the Department is party, this estimate may represent only a subset of the entities that face uncertainty over their status. On the other hand, this estimate may overstate the number of entities that face uncertainty because it is known that not all requests to the Department or court actions actually raised issues related directly to the collective bargaining exception under section 3(40).

Assessment of Status. The Department estimates the cost to the 54 entities of conducting an assessment of their status under the regulation to be small. Such cost would be largely generated by reviewing records kept by third parties or by the entity in the ordinary course of business. The Department assumes that such a review requires 16 hours of an attorney's or comparable professional's time, plus 5 hours of clerical staff time. At $72 per hour and $21 per hour respectively, the total cost would be $1,173 per entity, or about $63,342 on aggregate per year for 54 entities. This cost would be incurred only once for a given entity unless its circumstances changed substantially relative to the standard. The Department believes that the cost is more than justified by savings to entities that, by conducting this assessment, avoid the need to engage in litigation or seek guidance from the Department in order to determine their status. These net savings represent a net benefit of this regulation.

Following a self-assessment of status, some fraction of these 54 entities might nonetheless find themselves in a situation leading them to seek an administrative determination from the Secretary under the procedural regulations, incurring attendant costs, perhaps because a state's jurisdiction or laws are asserted against the entity. The administrative process under the procedural regulations is, in the Department's view, an efficient and less costly process for resolving such disputes than would be available in the absence of the procedural regulations. The Department has elected to attribute the net benefit from these savings not to this regulation, but to the accompanying procedural regulations.

Reclassifying Incorrectly Classified Entities. Some number of entities, generally a subset of the 54 estimated annually to face uncertainty over status, will be reclassified as a result of comparison testing against the regulation's criteria. Entities that formerly considered themselves to be excluded from the MEWAs definition as collectively bargained plans may be required under the criteria regulation to classify themselves as MEWAs. These MEWAs will likely incur costs to comply with newly applicable state requirements. Such requirements vary from state to state, making it difficult to estimate the cost of compliance, but it is likely that costs might include those attributable to audits, funding and reserves, reporting, premium taxes and assessments, provision of state-mandated benefits, underwriting and rating rules, market conduct standards, and managed care patient protection rules, among other costs. These costs may be higher for those MEWAs that conduct business in more than one state.

Relevant literature suggests these costs can amount to ten percent of premium.[2] The cost may be substantially more if a state regulates premium rates and the entity otherwise would have benefited from insuring a population whose health costs are far lower than average. However, these added costs are transfers and not true economic costs because they serve as cross-subsidies that reduce costs for populations that are costlier than average.

As noted above, the universe of 2,600 entities that includes those potentially subject to uncertainty covers 8 million participants, or about 3,100 participants per entity on average. Industry surveys put the cost of health coverage at about $4,500 per employee and retiree per year. Applying these figures to 54 entities that might face uncertainty over status—an upper bound on the number likely to be reclassified—produces an

[1] This represents a smaller number of plans and fewer participants than the numbers projected at the time of the proposal. Because the Form M–1 requirement had not been fully implemented at the time of the proposal, actual information on its use was not available, and the Department relied on survey data regarded as the most comparable at the time.

[2] Data from the Health Insurance Association of America (Source Book of Health Insurance Data, 1999–2000) suggests that insurance companies' loss ratios for group health insurance policies historically ranged from about 85 percent to 90 percent. The inverse of the loss ratio, or about 10 percent to 15 percent, generally would include all of these costs except those associated with benefit mandates and some managed care protections, as well as insurance company profits, income taxes, and normal administrative overhead. Loss ratios tend to be higher (and these costs lower) for larger group policies, and MEWAs are likely to be large. The cost of benefit mandates and managed care protection will very across states depending on their extent and across MEWAs depending largely on the degree to which they otherwise are included voluntarily in the insurance products they provide. One study estimated that mandates raise premiums by between 4 percent and 13 percent (Gail A. Jensen and Michael A. Morrisey, Mandated Benefit Laws and Employer-Sponsored Health Insurance (Washington, DC: HIAA 1999)).

upper-bound estimated cost of about $75 million.[3]

The Department has concluded that actual costs will be far lower than this and will be outweighed by the benefit of the associated protections that will flow from clarifying the state's authority to regulate. As noted above, it is likely that the true number of entities that are reclassified as MEWAs will be a fraction of the estimated 54 that annually might face uncertainty over status. Among those that are reclassified, certain entities likely would already have elected voluntarily to comply with some of the state regulatory requirements and therefore would not incur any cost from the application of state law. For those that would not have complied with relevant state law, operation of the regulation may impose additional costs, such as meeting solvency requirements or providing mandated benefits. The additional costs are offset and justified by increased security for plans and improved coverage for participants. Thus, the added cost from state regulation would be offset by the benefits derived from the protections that state regulations provide. GAO, in 1992, identified $124 million in unpaid claims owed by sham MEWAs. Department enforcement actions involving MEWAs in recent years have identified monetary violations of approximately $121.6 million. With state licensing and solvency requirements in place, at least some incidences of the $124 million in unpaid claims cited in the GAO study or the $121.6 million in violations would most likely not have occurred.

It is also possible that some entities considered to be MEWAs because they are not collectively bargained will be reclassified under the criteria regulation as collectively bargained plans. However, this number seems likely to be very small because entities that can legitimately be treated as collectively bargained have an economic incentive to do so. Any entities that are so classified benefit from the savings of having no obligation to comply with state regulatory requirements. There is no meaningful loss of benefits from the absence of state protections in such cases because the combination of a legitimate collective bargaining agreement and the application of ERISA provides adequate protections.

[3] Recent data from actual Form M–1 filings results in a higher estimated number of participants per entity than was indicated in the proposal; therefore, the estimated cost for the final regulation exceeds the $58 million cost estimate for the proposal.

C. Paperwork Reduction Act

This Notice of Final Rulemaking is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502(3).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10, certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare benefit plans covering fewer than 100 participants and that satisfy certain other requirements.

Further, while some large employers may have small plans, generally, most small plans are maintained by small employers. Thus, EBSA believes that assessing the impact of this rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). At the time of the proposed rule, EBSA requested comments on the appropriateness of the size standard used in evaluating the impact of this rule on small entities; no comments were received that would cause the Department to reevaluate its size standard.

On this basis, however, EBSA has determined that this rule will not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, EBSA has prepared the following final regulatory flexibility analysis.

(1) *Reasons for Action.* EBSA is proposing this regulation because it believes that regulatory guidance concerning the definition of a ''plan or arrangement which is established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements'' (ERISA 3(40)(A)(1)) is necessary to ensure that state insurance regulators have ascertainable guidelines to help regulate MEWAs operating in their jurisdictions. The guidance will also allow sponsors of employee welfare benefit plans to determine independently whether their entities are excepted under section 3(40) of ERISA. A more detailed discussion of the agency's reasoning for issuing the regulation is found above.

(2) *Objective.* The objective of the regulation is to provide criteria for the application of an exception to the definition ''multiple employer welfare arrangement'' (MEWA) found in section 3(40) of ERISA for a ''plan or other arrangement which is established or maintained—(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements.'' An extensive list of authority may be found in the Statutory Authority section, below.

(3) *Estimate of Small Entities Affected.* Form 5500 filings and Form M–1 filings indicate that there are about 2,600 entities that could be classified as collectively bargained plans or MEWAs and that could be affected by the new criteria for defining collectively bargained plans. It is expected, however, that a very small number of these entities will have fewer than 100 participants. By their nature, the affected entities must involve at least two employers, which decreases the likelihood of their covering fewer than 100 participants. Also, the underlying goals behind the formation of these

entities, such as gaining purchasing and negotiating power through economies of scale, improving administrative efficiencies, and gaining access to additional benefit design features, are not readily accomplished if the group of covered lives remains small.

Available data indicate that about 200 or eight percent of the 2,600 entities have fewer than 100 participants. Based on the health coverage reported in the Employee Benefits Supplement to the 1993 Current Population Survey and a 1993 Small Business Administration survey of retirement and other benefit coverages in small firms, the Department estimates that there are more than 2.5 million private group health plans with fewer than 100 participants. Thus, the number of small plans and MEWAs potentially affected is very small in light of this large number of small plans. Even if every one of the 2,600 entities at issue had fewer than 100 participants, the number of entities affected would represent approximately one-tenth of one percent of all small group health plans. Accordingly, the Department has determined that this regulation will not have a significant economic impact on a substantial number of small entities.

Although relatively few small plans and other entities are expected to be affected by this proposal, it is known that the employers typically involved in these entities are often small (that is, they have fewer than 500 employees, which is generally consistent with the definition of small entity found in regulations issued by the Small Business Administration (13 CFR 121.201)). At the time of the proposed regulation, the Department sought comments and data with respect to the number of small employers potentially impacted by the establishment of a standard for determining whether a welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements. No comments or data were received in response to this request; the Department therefore continues to believe that, because these plans and arrangements involve at least two employers, and assuming that each is small, it can be estimated that at least 5,200 small employers may be affected.

It is possible that a small employer participating in what it thinks is a legitimate MEWA may find that it has unknowingly participated in a sham MEWA and will need to change its method of providing welfare benefits to its employees. By enabling states to regulate fraudulent and financially unsound MEWAs, therefore, the regulation may limit the sources of welfare benefits available to some small businesses, requiring them to seek alternative coverage for their employees. The greater benefit for employers, however, is an increased certainty that the MEWAs that remain in business will meet state regulatory standards and will be more certain to provide promised health, life, disability or other welfare benefits to employees. Consequently, employers will receive a net benefit from the reduced incidence of fraud and insolvency among the pool of MEWAs in the marketplace.

(4) *Reporting and Recordkeeping.* In most cases, the records used to determine if a welfare benefit plan is established or maintained under or pursuant to a collective bargaining agreement are routinely prepared and held by a collectively bargained multiemployer plan in the ordinary course of business. For any entities that are newly determined to be MEWAs under the regulation, there will be an economic impact related to the start-up costs of compliance with state regulations. These costs arise from state requirements, however, and not the requirements of this regulation. Start-up costs under state regulations may include expenses of registration, licensing, financial reporting, auditing, and any other requirement of state insurance law. Reporting and filing this information with the state would require the professional skills of an attorney, accountant, or other health benefit plan professional; however, post start-up, the majority of the recordkeeping and reporting could be handled by clerical staff.

(5) *Duplication.* No federal rules have been identified that duplicate, overlap, or conflict with the final rule.

(6) *Alternatives.* The regulation adopts generally the views of the consensus report of the Committee that was established to provide an alternative to the Department's earlier Notice of Proposed Rulemaking on Plans Established or Maintained Under or Pursuant to Collective Bargaining Agreements, published in the **Federal Register** (60 FR 39209, Aug. 1, 1995). At that time, recognizing that guidance was needed to clarify the collective bargaining exception to the MEWA regulation, the Department had proposed certain criteria describing the collective bargaining agreement. Commenters on the first proposed regulation expressed concerns related to plan compliance and the issue of state regulation.

Based on the comments received, the Department subsequently turned to negotiated rulemaking, establishing the Committee to assist the Department in developing acceptable criteria. The Committee included representatives from labor unions, multiemployer plans, state governments, employer/management associations, Railway Labor Act plans, third-party administrators, independent agents and brokers of health care products, insurance carriers and the federal government. Because this rule takes into account the Committee's consensus views, and because the Committee represented a full cross-section of the parties affected by the rule, including state, federal, association, and private sector health care organizations, the Department believes that, as an alternative to the 1995 NPRM, this regulation accomplishes the stated objectives of the Secretary and will have a beneficial effect on small employer participation in MEWAs.

The Department has concluded that the implementation of the regulation will be less costly than alternative methods of determining compliance with section 3(40), such as through case-by-case analysis by EBSA of each employee welfare benefit plan or litigation. In addition, if the Department elected not to define specific guidelines for the application of section 3(40), thereby enabling sham MEWAs to continue to evade state regulation, costs for small businesses would rise in terms of loss of coverage and unpaid claims. No other significant alternatives that would minimize economic impact on small entities were identified.

Further, the Department has concluded that it would be inappropriate to create a specific exemption under the regulation for small MEWAs because small MEWAs are just as likely as large MEWAs to be underfunded or otherwise have inadequate reserves to meet the benefit claims submitted for payment.

E. Small Business Regulatory Enforcement Fairness Act

The rule being issued here is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or

on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

F. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million.

G. Executive Order 13132

When an agency promulgates a regulation that has federalism implications, Executive Order 13132 (64 FR 43255, August 10, 1999), requires the Agency to provide a federalism summary impact statement. Pursuant to section 6(c) of the Order, such a statement must include a description of the extent of the agency's consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State have been met.

This regulation has federalism implications because it sets forth standards and procedures for determining whether certain entities may be regulated under certain state laws or whether such state laws are preempted with respect to such entities. The state laws at issue are those that regulate the business of insurance.

From the inception of the Committee through final deliberations on comments received on the proposed regulation, a representative from the National Association of Insurance Commissioners (NAIC), representing the interests of state governments in the regulation of insurance, participated in the rulemaking. NAIC raised the following concerns at Committee meetings: (1) That the rule should allow MEWAs to be easily distinguishable from collectively bargained plans so that MEWAs properly may be subjected to state jurisdiction and regulation; (2) that the rule should prevent the unlicensed sale of health insurance; and (3) that losses to individuals in the form of unreimbursed and denied medical claims should be eliminated.

The Department's position is that there is a substantial need for this regulation. Unscrupulous individuals have been able to exploit the lack of clear guidance regarding the criteria for determining whether an entity is established or maintained pursuant to collective bargaining agreements to create entities that falsely promise benefits they are unable to provide. These operators, free of state solvency and reserve requirements, have marketed unlicensed health insurance to small employers, often offering health insurance at significantly lower rates than state-licensed insurance companies. Ultimately, these operations have often gone bankrupt, leaving individuals with significant unpaid health claims and without health insurance. The lack of clear guidance has hampered states in their efforts to regulate these entities, and appropriate state regulation would reduce or eliminate the risk of losses to employers, employees and their families.

This regulation provides objective criteria for distinguishing collectively bargained plans from arrangements subject to state insurance law. The regulation will facilitate state enforcement efforts against arrangements attempting to misuse the collectively bargained exception in section 3(40) of ERISA. In that regard, the regulation will reduce the incidence of sale of unlicensed insurance under the guise of collectively bargained plans and will limit the losses to individuals in the form of unreimbursed medical and other welfare benefit insurance claims.

The Department notes further, as discussed more fully above, that one commenter expressed concern that the availability of administrative proceedings for an individualized section 3(40) finding in cases where the jurisdiction or law of a state has been asserted may result in delays in state enforcement that could substantially hinder a state's ability to take timely enforcement actions against sham MEWA operators. Recognizing the need to ensure that the regulations assist, rather than hinder, state enforcement efforts against sham MEWA operators, and taking into account the input of the Committee, including the NAIC representative, the Department has amended the regulation to make clear that it is not intended to provide the basis for a stay or delay of any state actions, including administrative or court proceedings and enforcement subpoenas, where immediate state enforcement action is warranted.

List of Subjects in 29 CFR Part 2510

Collective bargaining, Employee benefit plans, Pensions.

■ For the reasons set forth in the preamble, 29 CFR part 2510 is amended as follows:

PART 2510—[AMENDED] DEFINITION OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2003, 68 FR 5374; Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275, and 29 U.S.C. 1135 note. Sec. 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275.

■ 2. Add new section 2510.3–40 to read as follows:

§ 2510.3–40 Plans Established or Maintained Under or Pursuant to Collective Bargaining Agreements Under Section 3(40)(A) of ERISA.

(a) *Scope and purpose.* Section 3(40)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that the term ''multiple employer welfare arrangement'' (MEWA) does not include an employee welfare benefit plan that is established or maintained under or pursuant to one or more agreements that the Secretary of Labor (the Secretary) finds to be collective bargaining agreements. This section sets forth criteria that represent a finding by the Secretary whether an arrangement is an employee welfare benefit plan established or maintained under or pursuant to one or more collective bargaining agreements. A plan is established or maintained under or pursuant to collective bargaining if it meets the criteria in this section. However, even if an entity meets the criteria in this section, it will not be an employee welfare benefit plan established or maintained under or pursuant to a collective bargaining agreement if it comes within the exclusions in the section. Nothing in or pursuant to this section shall constitute a finding for any purpose other than the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements under section 3(40) of ERISA. In a particular case where there is an attempt to assert state jurisdiction or the application of state law with respect to a plan or other arrangement that allegedly is covered under Title I of ERISA, the Secretary has set forth a procedure for obtaining individualized findings at 29 CFR part 2570, subpart H.

(b) *General criteria.* The Secretary finds, for purposes of section 3(40) of ERISA, that an employee welfare benefit

plan is ''established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements'' for any plan year in which the plan meets the criteria set forth in paragraphs (b)(1), (2), (3), and (4) of this section, and is not excluded under paragraph (c) of this section.

(1) The entity is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

(2) At least 85% of the participants in the plan are:

(i) Individuals employed under one or more agreements meeting the criteria of paragraph (b)(3) of this section, under which contributions are made to the plan, or pursuant to which coverage under the plan is provided;

(ii) Retirees who either participated in the plan at least five of the last 10 years preceding their retirement, or

(A) Are receiving benefits as participants under a multiemployer pension benefit plan that is maintained under the same agreements referred to in paragraph (b)(3) of this section, and

(B) Have at least five years of service or the equivalent under that multiemployer pension benefit plan;

(iii) Participants on extended coverage under the plan pursuant to the requirements of a statute or court or administrative agency decision, including but not limited to the continuation coverage requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985, sections 601–609, 29 U.S.C. 1169, the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*, the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, or the National Labor Relations Act, 29 U.S.C. 158(a)(5);

(iv) Participants who were active participants and whose coverage is otherwise extended under the terms of the plan, including but not limited to extension by reason of self-payment, hour bank, long or short-term disability, furlough, or temporary unemployment, provided that the charge to the individual for such extended coverage is no more than the applicable premium under section 604 of the Act;

(v) Participants whose coverage under the plan is maintained pursuant to a reciprocal agreement with one or more other employee welfare benefit plans that are established or maintained under or pursuant to one or more collective bargaining agreements and that are multiemployer plans;

(vi) Individuals employed by:

(A) An employee organization that sponsors, jointly sponsors, or is represented on the association, committee, joint board of trustees, or other similar group of representatives of the parties who sponsor the plan;

(B) The plan or associated trust fund;

(C) Other employee benefit plans or trust funds to which contributions are made pursuant to the same agreement described in paragraph (b)(3) of this section; or

(D) An employer association that is the authorized employer representative that actually engaged in the collective bargaining that led to the agreement that references the plan as described in paragraph (b)(3) of this section;

(vii) Individuals who were employed under an agreement described in paragraph (b)(3) of this section, provided that they are employed by one or more employers that are parties to an agreement described in paragraph (b)(3) and are covered under the plan on terms that are generally no more favorable than those that apply to similarly situated individuals described in paragraph (b)(2)(i) of this section;

(viii) Individuals (other than individuals described in paragraph (b)(2)(i) of this section) who are employed by employers that are bound by the terms of an agreement described in paragraph (b)(3) of this section and that employ personnel covered by such agreement, and who are covered under the plan on terms that are generally no more favorable than those that apply to such covered personnel. For this purpose, such individuals in excess of 10% of the total population of participants in the plan are disregarded;

(ix) Individuals who are, or were for a period of at least three years, employed under one or more agreements between or among one or more ''carriers'' (including ''carriers by air'') and one or more ''representatives'' of employees for collective bargaining purposes and as defined by the Railway Labor Act, 45 U.S.C. 151 *et seq.,* providing for such individuals' current or subsequent participation in the plan, or providing for contributions to be made to the plan by such carriers; or

(x) Individuals who are licensed marine pilots operating in United States ports as a state-regulated enterprise and are covered under an employee welfare benefit plan that meets the definition of a qualified merchant marine plan, as defined in section 415(b)(2)(F) of the Internal Revenue Code (26 U.S.C.).

(3) The plan is incorporated or referenced in a written agreement between one or more employers and one or more employee organizations, which agreement, itself or together with other agreements among the same parties:

(i) Is the product of a *bona fide* collective bargaining relationship between the employers and the employee organization(s);

(ii) Identifies employers and employee organization(s) that are parties to and bound by the agreement;

(iii) Identifies the personnel, job classifications, and/or work jurisdiction covered by the agreement;

(iv) Provides for terms and conditions of employment in addition to coverage under, or contributions to, the plan; and

(v) Is not unilaterally terminable or automatically terminated solely for non-payment of benefits under, or contributions to, the plan.

(4) For purposes of paragraph (b)(3)(i) of this section, the following factors, among others, are to be considered in determining the existence of a bona fide collective bargaining relationship. In any proceeding initiated under 29 CFR part 2570 subpart H, the existence of a bona fide collective bargaining relationship under paragraph (b)(3)(i) shall be presumed where at least four of the factors set out in paragraphs (b)(4)(i) through (viii) of this section are established. In such a proceeding, the Secretary may also consider whether other objective or subjective indicia of actual collective bargaining and representation are present as set out in paragraph (b)(4)(ix) of this section.

(i) The agreement referred to in paragraph (b)(3) of this section provides for contributions to a labor-management trust fund structured according to section 302(c)(5), (6), (7), (8), or (9) of the Taft-Hartley Act, 29 U.S.C. 186(c)(5), (6), (7), (8) or (9), or to a plan lawfully negotiated under the Railway Labor Act;

(ii) The agreement referred to in paragraph (b)(3) of this section requires contributions by substantially all of the participating employers to a multiemployer pension plan that is structured in accordance with section 401 of the Internal Revenue Code (26 U.S.C.) and is either structured in accordance with section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. 186(c)(5), or is lawfully negotiated under the Railway Labor Act, and substantially all of the active participants covered by the employee welfare benefit plan are also eligible to become participants in that pension plan;

(iii) The predominant employee organization that is a party to the agreement referred to in paragraph (b)(3) of this section has maintained a series of agreements incorporating or referencing the plan since before January 1, 1983;

(iv) The predominant employee organization that is a party to the agreement referred to in paragraph (b)(3) of this section has been a national or international union, or a federation of

national and international unions, or has been affiliated with such a union or federation, since before January 1, 1983;

(v) A court, government agency, or other third-party adjudicatory tribunal has determined, in a contested or adversary proceeding, or in a government-supervised election, that the predominant employee organization that is a party to the agreement described in paragraph (b)(3) of this section is the lawfully recognized or designated collective bargaining representative with respect to one or more bargaining units of personnel covered by such agreement;

(vi) Employers who are parties to the agreement described in paragraph (b)(3) of this section pay at least 75% of the premiums or contributions required for the coverage of active participants under the plan or, in the case of a retiree-only plan, the employers pay at least 75% of the premiums or contributions required for the coverage of the retirees. For this purpose, coverage under the plan for dental or vision care, coverage for excepted benefits under 29 CFR 2590.732(b), and amounts paid by participants and beneficiaries as co-payments or deductibles in accordance with the terms of the plan are disregarded;

(vii) The predominant employee organization that is a party to the agreement described in paragraph (b)(3) of this section provides, sponsors, or jointly sponsors a hiring hall(s) and/or a state-certified apprenticeship program(s) that provides services that are available to substantially all active participants covered by the plan;

(viii) The agreement described in paragraph (b)(3) of this section has been determined to be a *bona fide* collective bargaining agreement for purposes of establishing the prevailing practices with respect to wages and supplements in a locality, pursuant to a prevailing wage statute of any state or the District of Columbia.

(ix) There are other objective or subjective indicia of actual collective bargaining and representation, such as that arm's-length negotiations occurred between the parties to the agreement described in paragraph (b)(3) of this section; that the predominant employee organization that is party to such agreement actively represents employees covered by such agreement with respect to grievances, disputes, or other matters involving employment terms and conditions other than coverage under, or contributions to, the employee welfare benefit plan; that there is a geographic, occupational, trade, organizing, or other rationale for the employers and bargaining units covered by such agreement; that there is a connection between such agreement and the participation, if any, of self-employed individuals in the employee welfare benefit plan established or maintained under or pursuant to such agreement.

(c) *Exclusions.* An employee welfare benefit plan shall not be deemed to be ''established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements'' for any plan year in which:

(1) The plan is self-funded or partially self-funded and is marketed to employers or sole proprietors

(i) By one or more insurance producers as defined in paragraph (d) of this section;

(ii) By an individual who is disqualified from, or ineligible for, or has failed to obtain, a license to serve as an insurance producer to the extent that the individual engages in an activity for which such license is required; or

(iii) By individuals (other than individuals described in paragraphs (c)(1)(i) and (ii) of this section) who are paid on a commission-type basis to market the plan.

(iv) For the purposes of this paragraph (c)(1):

(A) ''Marketing'' does not include administering the plan, consulting with plan sponsors, counseling on benefit design or coverage, or explaining the terms of coverage available under the plan to employees or union members;

(B) ''Marketing'' does include the marketing of union membership that carries with it plan participation by virtue of such membership, except for membership in unions representing insurance producers themselves;

(2) The agreement under which the plan is established or maintained is a scheme, plan, stratagem, or artifice of evasion, a principal intent of which is to evade compliance with state law and regulations applicable to insurance; or

(3) There is fraud, forgery, or willful misrepresentation as to the factors relied on to demonstrate that the plan satisfies the criteria set forth in paragraph (b) of this section.

(d) *Definitions.* (1) *Active participant* means a participant who is not retired and who is not on extended coverage under paragraphs (b)(2)(iii) or (b)(2)(iv) of this section.

(2) *Agreement* means the contract embodying the terms and conditions mutually agreed upon between or among the parties to such agreement. Where the singular is used in this section, the plural is automatically included.

(3) *Individual employed* means any natural person who furnishes services to another person or entity in the capacity of an employee under common law, without regard to any specialized definitions or interpretations of the terms ''employee,'' ''employer,'' or ''employed'' under federal or state statutes other than ERISA.

(4) *Insurance producer* means an agent, broker, consultant, or producer who is an individual, entity, or sole proprietor that is licensed under the laws of the state to sell, solicit, or negotiate insurance.

(5) *Predominant employee organization* means, where more than one employee organization is a party to an agreement, either the organization representing the plurality of individuals employed under such agreement, or organizations that in combination represent the majority of such individuals.

(e) *Examples.* The operation of the provisions of this section may be illustrated by the following examples.

Example 1. Plan A has 500 participants, in the following 4 categories of participants under paragraph (b)(2) of this section:

Categories of participants	Total number	Nexus group	Non-nexus
1. Individuals working under CBAs	335 (67%)	335 (67%)	0
2. Retirees	50 (10%)	50 (10%)	0
3. ''Special Class''—Non-CBA, non-CBA-alumni	100 (20%)	50 (10%)	50 (10%)
4. Non-nexus participants	15 (3%)	0	15 (3%)
Total	500 (100%)	435 (87%)	65 (13%)

In determining whether at least 85% of Plan A's participant population is made up of individuals with the required nexus to the collective bargaining agreement as required by paragraph (b)(2) of this section, the Plan may count as part of the nexus group only

50 (10% of the total plan population) of the 100 individuals described in paragraph (b)(2)(viii) of this section. That is because the number of individuals meeting the category of individuals in paragraph (b)(2)(viii) exceeds 10% of the total participant population by 50 individuals. The paragraph specifies that of those individuals who would otherwise be deemed to be nexus individuals because they are the type of individuals described in paragraph (b)(2)(viii), the number in excess of 10% of the total plan population may not be counted in the nexus group. Here, 50 of the 100 individuals employed by signatory employers, but not covered by the collective bargaining agreement, are counted as nexus individuals and 50 are not counted as nexus individuals. Nonetheless, the Plan satisfies the 85% criterion under paragraph (b)(2) because a total of 435 (335 individuals covered by the collective bargaining agreement, plus 50 retirees, plus 50 individuals employed by signatory employers), or 87%, of the 500 participants in Plan A are individuals who may be counted as nexus participants under paragraph (b)(2). Beneficiaries (*e.g.,* spouses, dependent children, etc.) are not counted to determine whether the 85% test has been met.

Example 2. (i) International Union MG and its Local Unions have represented people working primarily in a particular industry for over 60 years. Since 1950, most of their collective bargaining agreements have called for those workers to be covered by the National MG Health and Welfare Plan. During that time, the number of union-represented workers in the industry, and the number of active participants in the National MG Health and Welfare Plan, first grew and then declined. New Locals were formed and later were shut down. Despite these fluctuations, the National MG Health and Welfare Plan meets the factors described in paragraphs (b)(4)(iii) and (iv) of this section, as the plan has been in existence pursuant to collective bargaining agreements to which the International Union and its affiliates have been parties since before January 1, 1983.

(ii) Assume the same facts, except that on January 1, 1999, International Union MG merged with International Union RE to form International Union MRGE. MRGE and its Locals now represent the active participants in the National MG Health and Welfare Plan and in the National RE Health and Welfare Plan, which, for 45 years, had been maintained under collective bargaining agreements negotiated by International Union RE and its Locals. Since International Union MRGE is the continuation of, and successor to, the MG and RE unions, the two plans continue to meet the factors in paragraphs (b)(4)(iii) and (iv) of this section. This also would be true if the two plans were merged.

(iii) Assume the same facts as in paragraphs (i) and (ii) of this Example. In addition to maintaining the health and welfare plans described in those paragraphs, International Union MG also maintained the National MG Pension Plan and International Union RE maintained the National RE Pension Plan. When the unions merged and the health and welfare plans were merged, National MG Pension Plan and National RE Pension Plan were merged to form National MRGE Pension Plan. When the unions merged, the employees and retirees covered under the pre-merger plans continued to be covered under the post-merger plans pursuant to the collective bargaining agreements and also were given credit in the post-merger plans for their years of service and coverage in the pre-merger plans. Retirees who originally were covered under the pre-merger plans and continue to be covered under the post-merger plans based on their past service and coverage would be considered to be ''retirees'' for purposes of 2550.3–40(b)(2)(ii). Likewise, bargaining unit alumni who were covered under the pre-merger plans and continued to be covered under the post-merger plans based on their past service and coverage and their continued employment with employers that are parties to an agreement described in paragraph (b)(3) of this section would be considered to be bargaining unit alumni for purposes of 2550.3–40(b)(2)(vii).

Example 3. Assume the same facts as in paragraph (ii) of Example 2 with respect to International Union MG. However, in 1997, one of its Locals and the employers with which it negotiates agree to set up a new multiemployer health and welfare plan that only covers the individuals represented by that Local Union. That plan would not meet the factor in paragraph (b)(4)(iii) of this section, as it has not been incorporated or referenced in collective bargaining agreements since before January 1, 1983.

Example 4. (i) Pursuant to a collective bargaining agreement between various employers and Local 2000, the employers contribute $2 per hour to the Fund for every hour that a covered employee works under the agreement. The covered employees are automatically entitled to health and disability coverage from the Fund for every calendar quarter the employees have 300 hours of additional covered service in the preceding quarter. The employees do not need to make any additional contributions for their own coverage, but must pay $250 per month if they want health coverage for their dependent spouse and children. Because the employer payments cover 100% of the required contributions for the employees' own coverage, the Local 2000 Employers Health and Welfare Fund meets the ''75% employer payment'' factor under paragraph (b)(4)(vi) of this section.

(ii) Assume, however, that the negotiated employer contribution rate was $1 per hour, and the employees could only obtain health coverage for themselves if they also elected to contribute $1 per hour, paid on a pre-tax basis through salary reduction. The Fund would not meet the 75% employer payment factor, even though the employees' contributions are treated as employer contributions for tax purposes. Under ERISA, and therefore under this section, elective salary reduction contributions are treated as employee contributions. The outcome would be the same if a uniform employee contribution rate applied to all employees, whether they had individual or family coverage, so that the $1 per hour employee contribution qualified an employee for his or her own coverage and, if he or she had dependents, dependent coverage as well.

Example 5. Arthur is a licensed insurance broker, one of whose clients is Multiemployer Fund M, a partially self-funded plan. Arthur takes bids from insurance companies on behalf of Fund M for the insured portion of its coverage, helps the trustees to evaluate the bids, and places the Fund's health insurance coverage with the carrier that is selected. Arthur also assists the trustees of Fund M in preparing material to explain the plan and its benefits to the participants, as well as in monitoring the insurance company's performance under the contract. At the Trustees' request, Arthur meets with a group of employers with which the union is negotiating for their employees' coverage under Fund M, and he explains the cost structure and benefits that Fund M provides. Arthur is not engaged in marketing within the meaning of paragraph (c)(1) of this section, so the fact that he provides these administrative services and sells insurance to the Fund itself does not affect the plan's status as a plan established or maintained under or pursuant to a collective bargaining agreement. This is the case whether or how he is compensated.

Example 6. Assume the same facts as Example 5, except that Arthur has a group of clients who are unrelated to the employers bound by the collective bargaining agreement, whose employees would not be ''nexus group'' members, and whose insurance carrier has withdrawn from the market in their locality. He persuades the client group to retain him to find them other coverage. The client group has no relationship with the labor union that represents the participants in Fund M. However, Arthur offers them coverage under Fund M and persuades the Fund's Trustees to allow the client group to join Fund M in order to broaden Fund M's contribution base. Arthur's activities in obtaining coverage for the unrelated group under Fund M constitutes marketing through an insurance producer; Fund M is a MEWA under paragraph (c)(1) of this section.

Example 7. Union A represents thousands of construction workers in a three-state geographic region. For many years, Union A has maintained a standard written collective bargaining agreement with several hundred large and small building contractors, covering wages, hours, and other terms and conditions of employment for all work performed in Union A's geographic territory. The terms of those agreements are negotiated every three years between Union A and a multiemployer Association, which signs on behalf of those employers who have delegated their bargaining authority to the Association. Hundreds of other employers—including both local and traveling contractors—have chosen to become bound to the terms of Union A's standard area agreement for various periods of time and in various ways, such as by signing short-form binders or ''me too'' agreements, executing a single job or project labor agreement, or entering into a subcontracting arrangement with a signatory employer. All of these employ individuals represented by Union A and contribute to Plan A, a self-insured multiemployer health and welfare plan established and maintained under Union A's

standard area agreement. During the past year, the trustees of Plan A have brought lawsuits against several signatory employers seeking contributions allegedly owed, but not paid to the trust. In defending that litigation, a number of employers have sworn that they never intended to operate as union contractors, that their employees want nothing to do with Union A, that Union A procured their assent to the collective bargaining agreement solely by threats and fraudulent misrepresentations, and that Union A has failed to file certain reports required by the Labor Management Reporting and Disclosure Act. In at least one instance, a petition for a decertification election has been filed with the National Labor Relations Board. In this example, Plan A meets the criteria for a regulatory finding under this section that it is a multiemployer plan established and maintained under or pursuant to one or more collective bargaining agreements, assuming that its participant population satisfies the 85% test of paragraph (b)(2) of this section and that none of the disqualifying factors in paragraph (c) of this section is present. Plan A's status for the purpose of this section is not affected by the fact that some of the employers who deal with Union A have challenged Union A's conduct, or have disputed under labor statutes and legal doctrines other than ERISA section 3(40) the validity and enforceability of their putative contract with Union A, regardless of the outcome of those disputes.

Example 8. Assume the same facts as Example 7. Plan A's benefits consultant recently entered into an arrangement with the Medical Consortium, a newly formed organization of health care providers, which allows the Plan to offer a broader range of health services to Plan A's participants while achieving cost savings to the Plan and to participants. Union A, Plan A, and Plan A's consultant each have added a page to their Web sites publicizing the new arrangement with the Medical Consortium. Concurrently, Medical Consortium's Web site prominently publicizes its recent affiliation with Plan A and the innovative services it makes available to the Plan's participants. Union A has mailed out informational packets to its members describing the benefit enhancements and encouraging election of family coverage. Union A has also begun distributing similar material to workers on hundreds of non-union construction job sites within its geographic territory. In this example, Plan A remains a plan established and maintained under or pursuant to one or more collective bargaining agreements under section 3(40) of ERISA. Neither Plan A's relationship with a new organization of health care providers, nor the use of various media to publicize Plan A's attractive benefits throughout the area served by Union A, alters Plan A's status for purpose of this section.

Example 9. Assume the same facts as in Example 7. Union A undertakes an area-wide organizing campaign among the employees of all the health care providers who belong to the Medical Consortium. When soliciting individual employees to sign up as union members, Union A distributes Plan A's information materials and promises to bargain for the same coverage. At the same time, when appealing to the employers in the Medical Consortium for voluntary recognition, Union A promises to publicize the Consortium's status as a group of unionized health care service providers. Union A eventually succeeds in obtaining recognition based on its majority status among the employees working for Medical Consortium employers. The Consortium, acting on behalf of its employer members, negotiates a collective bargaining agreement with Union A that provides terms and conditions of employment, including coverage under Plan A. In this example, Plan A still meets the criteria for a regulatory finding that it is collectively bargained under section 3(40) of ERISA. Union A's recruitment and representation of a new occupational category of workers unrelated to the construction trade, its promotion of attractive health benefits to achieve organizing success, and the Plan's resultant growth, do not take Plan A outside the regulatory finding.

Example 10. Assume the same facts as in Example 7. The Medical Consortium, a newly formed organization, approaches Plan A with a proposal to make money for Plan A and Union A by enrolling a large group of employers, their employees, and self-employed individuals affiliated with the Medical Consortium. The Medical Consortium obtains employers' signatures on a generic document bearing Union A's name, labeled ''collective bargaining agreement,'' which provides for health coverage under Plan A and compliance with wage and hour statutes, as well as other employment laws. Employees of signatory employers sign enrollment documents for Plan A and are issued membership cards in Union A; their membership dues are regularly checked off along with their monthly payments for health coverage. Self-employed individuals similarly receive union membership cards and make monthly payments, which are divided between Plan A and the Union. Aside from health coverage matters, these new participants have little or no contact with Union A. The new participants enrolled through the Consortium amount to 18% of the population of Plan A during the current Plan Year. In this example, Plan A now fails to meet the criteria in paragraphs (b)(2) and (b)(3) of this section, because more than 15% of its participants are individuals who are not employed under agreements that are the product of a *bona fide* collective bargaining relationship and who do not fall within any of the other nexus categories set forth in paragraph (b)(2) of this section. Moreover, even if the number of additional participants enrolled through the Medical Consortium, together with any other participants who did not fall within any of the nexus categories, did not exceed 15% of the total participant population under the plan, the circumstances in this example would trigger the disqualification of paragraph (c)(2) of this section, because Plan A now is being maintained under a substantial number of agreements that are a ''scheme, plan, stratagem or artifice of evasion'' intended primarily to evade compliance with state laws and regulations pertaining to insurance. In either case, the consequence of adding the participants through the Medical Consortium is that Plan A is now a MEWA for purposes of section 3(40) of ERISA and is not exempt from state regulation by virtue of ERISA.

(f) *Cross-reference. See* 29 CFR part 2570, subpart H for procedural rules relating to proceedings seeking an Administrative Law Judge finding by the Secretary under section 3(40) of ERISA.

(g) Effect of proceeding seeking Administrative Law Judge Section 3(40) Finding.

(1) An Administrative Law Judge finding issued pursuant to the procedures in 29 CFR part 2570, subpart H will constitute a finding whether the entity in that proceeding is an employee welfare benefit plan established or maintained under or pursuant to an agreement that the Secretary finds to be a collective bargaining agreement for purposes of section 3(40) of ERISA.

(2) Nothing in this section or in 29 CFR part 2570, subpart H is intended to provide the basis for a stay or delay of a state administrative or court proceeding or enforcement of a subpoena.

Signed this 31st day of March 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2570

RIN 1210–AA48

Procedures for Administrative Hearings Regarding Plans Established or Maintained Pursuant to Collective Bargaining Agreements Under Section 3(40)(A) of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains regulations under the Employee Retirement Income Security Act of 1974, as amended, (ERISA or the Act) describing procedures for administrative hearings to obtain a determination by the Secretary of Labor (Secretary) as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. An administrative hearing is available

only if the jurisdiction or law of a state has been asserted against a plan or other arrangement that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements. A separate document published elsewhere in this issue of the **Federal Register** contains a rule setting forth the criteria for determining when an employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. These regulations are intended to assist labor organizations, plan sponsors and state insurance departments in determining whether a plan is a ''multiple employer welfare arrangement'' within the meaning of section 3(40) of ERISA.

EFFECTIVE DATE: June 9, 2003.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5669, Washington, DC 20210, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

These final rules set forth an administrative procedure for obtaining a determination by the Secretary of Labor (the Secretary) as to whether a particular employee benefit plan is established or maintained under or pursuant to one or more agreements that are collective bargaining agreements for purposes of section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA). These rules (the procedural regulations) are being published simultaneously with a final regulation (the criteria regulation) setting forth specific criteria that, if met and if certain other factors set forth in the final regulation are not present, constitute a finding by the Secretary that a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40). Both of these final rulemakings take into account the views expressed by the ERISA section 3(40) Negotiated Rulemaking Advisory Committee (the Committee), which was convened by the Department under the Negotiated Rulemaking Act (NRA) and the Federal Advisory Committee Act (the FACA), 5 U.S.C. App. 2. Together, these final regulations will assist states, plan sponsors, and administrators of employee benefit plans, in determining the scope of state regulatory authority over plans or other arrangements as set forth in sections 3(40) and 514(b)(6) of ERISA.

The procedural rules provide for administrative hearings to obtain a determination by the Secretary as to whether a particular plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. The rules are modeled on the procedures set forth in 29 CFR sections 2570.60 through 2570.71 regarding civil penalties under section 502(c)(2) of ERISA related to reports required to be filed under ERISA section 101(b)(1) and are designed to maintain the maximum degree of uniformity with those rules that is consonant with the need for an expedited procedure accommodating the specific characteristics necessary for proceedings under section 3(40). Accordingly, the rules adopt many, although not all, of the provisions of subpart A of 29 CFR part 18 for the 3(40) proceedings. In this regard, it should be noted that the rules apply only to adjudicatory proceedings before administrative law judges (ALJs) of the United States Department of Labor (the Department). An administrative hearing is available under these rules only to an entity that contends it meets the exception provided in section 3(40)(A)(i) for plans established or maintained under or pursuant to collective bargaining agreements and only if the jurisdiction or law of a state has been asserted against that entity.

These procedural rules were published in the **Federal Register** in proposed form on October 27, 2000, (65 FR 64498), simultaneously with the proposed criteria regulation. As discussed more fully in the preamble to the final criteria regulation, the Department received seven comments on the proposed criteria and procedural regulations, only one of which related to the procedural regulations. After considering the views of the Committee, which was reconvened by the Department for that purpose and met in public session on March 1, 2002, the Department has determined to issue the final procedural regulations in the same format and language as proposed.

The Department received only one comment relating to the proposed procedural rules. This comment also concerned the criteria regulation and is discussed in the preamble to that final rule. As described in the preamble to the final criteria regulation, the Department has clarified the language of paragraph (g)(2) of the criteria regulation to emphasize that the ALJ proceedings do not provide a basis for a stay-of-state administrative or judicial proceedings. The language of the procedural regulations remains unchanged.

B. Economic Analysis Under Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) Having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this action is ''significant'' within the meaning of 3(f)(4), and therefore subject to review by the Office of Management and Budget (OMB). Consistent with the Executive Order, the Department has undertaken an assessment of the costs and benefits of this regulatory action. The analysis is detailed below.

Summary

Pursuant to the requirements of Executive Order 12866, at the time of the Notice of Proposed Rulemaking, the Department sought comments and information from the public on its analysis of the benefits and costs of the proposed regulation. Having received none, the Department believes, based on its original discussion, that the benefits of this final regulation justify its costs. The regulation will benefit plans, states, insurers, and organized labor by reducing the cost of resolving some disputes over a state's right to regulate certain multiple employer welfare benefit arrangements, facilitating the conduct of hearings, reducing disputes over a plan or arrangement's status, and improving the efficiency and ensuring the consistency in determinations of such jurisdiction.

Background

When state law or jurisdiction is asserted over an entity that claims to be excepted from state regulation under the collective bargaining exception, the entity has the option of using these procedures to resolve the dispute. In the absence of the procedure provided under these regulations for determining whether a given plan or arrangement is established or maintained pursuant to a collective bargaining agreement, such disputes have generally been resolved in courts. The Department believes that resolving disputes through the procedures established by these regulations will generally be more efficient and less costly than resolving the disputes in a court of law. Also, determinations made in the single, specialized venue of administrative hearings are likely to be more consistent than determinations made in multiple, non-specialized court venues.

Benefits of the Regulation

The procedure established by these regulations will complement the criteria established by the criteria regulation. Together, the regulations will assist in accurately identifying MEWAs and collectively bargained plans and ensure that disputes over such classifications are resolved efficiently. For purposes of its assessment of the economic impact of the regulations, the Department has attributed the net benefits of ensuring accurate determinations to the criteria regulation. It has attributed the net benefits of ensuring efficient resolution of disputes to these procedural regulations.

Determining Jurisdiction Accurately and Consistently

The criteria regulation will reduce existing confusion about whether an entity falls under the collective bargaining agreement exception. However, given the wide variety of agreements, plans and arrangements, as well as the potential for conflicting determinations where a MEWA is conducting business in more than one state, some uncertainties might remain. The Department has therefore established a procedure for obtaining an individualized hearing before a Department of Labor ALJ and for final appeals to the Secretary or the Secretary's delegate to determine an entity's legal status.

Employers and employees will benefit from an administrative decision that provides greater assurance that the entity will comply with applicable federal and state laws designed to protect welfare benefits. In addition, both the petitioner and the state whose authority is being asserted will benefit from the uniform application of criteria by the ALJ, avoiding any confusion that would result from inconsistent decisions. Finally, state insurance departments that receive a timely resolution about an entity's status as a MEWA will be able to swiftly deal with sham MEWAs and then re-direct saved resources to other areas. Because an ALJ decision will be based on the criteria regulation, the Department has attributed the net benefit from the reclassification of currently inaccurately classified plans or arrangements (and the consequent application of appropriate state or federal protections) to that regulation.

Resolving Disputes Efficiently

An administrative hearing under the final regulations will economically benefit the small number of plans or arrangements that dispute state assertion of law or jurisdiction. The Department foresees improved efficiencies through use of administrative hearings that are at the option of entities over which state jurisdiction has been asserted. An administrative hearing allows the various parties to obtain a decision in a timely, efficient, and less costly manner than is usual in federal or state court proceedings, thus benefiting employers and employees.

The Department's analysis of costs involved in adjudication in a federal or state court versus an administrative hearing assumes that parties seeking to establish regulatory authority incur a baseline cost to resolve the question of status in federal or state court proceeding. This baseline cost includes, but is not limited to, expenditures for document production, attorney fees, filing fees, depositions, etc. Because regulatory authority may be decided in motions or pleadings in cases where that issue is not primary, the direct cost of using only the courts as a decision-maker for such issues is too variable to specify; however, custom and practice indicate that the cost of an administrative hearing is similar to or represents a cost savings compared with the baseline cost of litigating in federal or state court.

Because the procedures and evidentiary rules of an administrative hearing generally track the Federal Rules of Civil Procedure and of Evidence, document production is similar for both an administrative hearing and for a federal or state court proceeding. Documents such as by-laws, administrative agreements, collective bargaining agreements, and other documents and instruments governing the entity are generally kept in the normal course of business, and it is likely that the cost for an administrative hearing will be no more than that which would be incurred in preparation for litigation in a federal or state court. Certain administrative hearing practices and other new procedures initiated by this regulation may, however, represent a cost savings over litigation. For example, neither party need employ an attorney; the prehearing exchange is short and general; either party may move to shorten the time for the scheduling of a proceeding, including the time for conducting discovery; the general formality of the hearing may vary, particularly depending on whether the petitioner is appearing *pro se;* an expedited hearing is possible; and, the ALJ generally has 30 days after receipt of the transcript of an oral hearing or after the filing of all documentary evidence if no oral hearing is conducted to reach a decision.

The Department cannot predict that any or all of these conditions will exist, nor can it predict that any of these factors represent a cost-savings. However, it is likely that the specialized knowledge of ERISA that the ALJ will bring to the process will facilitate a prompt decision, reduce costs, and introduce a consistent standard to what has been a confusion of decisions on regulatory authority. ALJ case histories will educate MEWAs and states by articulating the characteristics of a collectively bargained plan, which clarity will in turn promote compliance with appropriate federal and state regulations. Participants and beneficiaries of arrangements that are newly identified as MEWAs will especially benefit from appropriate state oversight that provides for secure contributions and paid-up claims. In its Notice of Proposed Rulemaking, the Department solicited comments on the comparative cost of a trial in federal or state court versus an administrative hearing on the issue of whether an entity is a plan is established or maintained under or pursuant to an agreement or agreements that the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of ERISA. No comments concerning the comparative costs of a trial versus an administrative hearing were received.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of

section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b-10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare benefit plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, EBSA believes that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). In its Notice of Proposed Rulemaking, EBSA requested comments on the appropriateness of the size standard used; no comments were received.

On this basis, EBSA has determined that this rule does not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, EBSA has prepared the following final regulatory flexibility analysis.

(1) *Reason for the Action.* The Department is establishing a procedure for an administrative hearing so that states and entities will be able to obtain a determination by the Secretary as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of an exception to section 3(40) of ERISA.

(2) *Objectives.* The objective of these regulations is to make available to plans an individualized procedure for obtaining a hearing before a Department of Labor ALJ, and for appeals of an ALJ decision to the Secretary or the Secretary's delegate. The procedure is appropriate for the resolution of a dispute regarding an entity's legal status in situations where the jurisdiction or law of a state has been asserted against a plan that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements.

(3) *Estimate of Small Entities Affected.* For purposes of this discussion, the Department has deemed a small entity to be an employee benefit plan with fewer than 100 participants. No small governmental jurisdictions are affected.

Based on Form 5500 filings and Form M–1 filings by MEWAs pursuant to interim final rules published in the **Federal Register** on February 11, 2000 (65 FR 7152), it is estimated that there about 2,600 entities that can be classified as either collectively bargained plans or as MEWAs; however, EBSA believes that a very small number of these arrangements will have fewer than 100 participants. By their nature, the affected arrangements must involve at least two employers, which decreases the likelihood of coverage of fewer than 100 participants. Also, underlying goals of the formation of these arrangements, such as gaining purchasing and negotiating power through economies of scale, improving administrative efficiencies, and gaining access to additional benefit design features, are not readily accomplished if the group of covered lives remains small.

The number of small plans found within the group of 2,600 collectively bargained plans or MEWAs is about 200, or eight percent. The Employee Benefits Supplement to the 1993 Current Population Survey and a 1993 Small Business Administration survey of retirement and other benefit coverages in small firms indicate that there are more than 2.5 million private group health plans with fewer than 100 participants. Thus, the 200 small entities potentially affected represent a very small portion of all small group health plans. Even if all 2,600 potentially affected entities were to have fewer than 100 participants, they would represent approximately one-tenth of one percent of all small group health plans.

The Department is not aware of any source of information indicating the number of instances in which state law or jurisdiction has been asserted over these entities, or the portion of those instances that involved the collective bargaining agreement exception. However, in order to develop an estimate of the number of plans or arrangements that might seek to clarify their legal status by using an administrative hearing as proposed by these regulations, the Department examined the number of lawsuits to which the Department had previously been a party. While this number is not viewed as a measure of the incidence of the assertion of state jurisdiction, it is considered the only reasonable available proxy for an estimate of a maximum number of instances in which the applicability of state requirements might be at issue.

In recent years, the Department has been a party to an average of 45 legal actions annually. The proportion of these lawsuits that involved a dispute over state jurisdiction based on a plan's or an arrangement's legal status is unknown. On the whole, 45 is therefore considered a reasonable estimate of an upper bound number of plans that could have been a party to a lawsuit involving a determination of the plan's legal status. Because this procedural regulation and the related criteria regulation are expected to reduce the number of disputes, the Department assumes that 45 represents a conservatively high estimate of the number of plans or arrangements that would petition for an administrative hearing. Of all small plans and arrangements, then, the greatest number of plans or arrangements likely to petition for an administrative hearing represents a tiny fraction of the total number of small plans.

In addition, the Department has assumed that an entity's exercise of the opportunity to petition for a finding will generally be less costly than available alternatives. Accordingly, the Department has concluded that these regulations will not have a significant economic impact on a substantial number of small entities.

(4) *Reporting and Recordkeeping.* In most cases, the records that will be used to support a petition for a hearing pursuant to these procedures will be maintained by plans and MEWAs in the

ordinary course of their business. Certain documents, such as affidavits, would likely be required to be prepared specifically for purposes of the petition. It is assumed that documents will most often be assembled and drafted by attorneys, although this is not required by the express terms of the procedure.

(5) *Duplication.* No federal rules have been identified that duplicate, overlap, or conflict with the final rule.

(6) *Alternatives.* The regulations are based on the consensus report of the Committee. Recognizing that guidance was needed in clarifying collective bargaining exceptions to the MEWA regulation, in 1995, the Department had published a Notice of Proposed Rulemaking on Plans Established or Maintained Under or Pursuant to Collective Bargaining Agreements in the **Federal Register** (60 FR 39209). Under the terms of the 1995 NPRM, it would have been within the authority of state insurance regulators to identify and regulate MEWAs operating in their jurisdictions. The 1995 proposal did not establish a method for obtaining individual findings by the Department.

The Department received numerous comments on the NPRM expressing concerns about plans' abilities to meet the standards set forth in the NPRM. Commenters also objected to granting authority to state regulators for determining whether a particular agreement was a collective bargaining agreement. Commenters strongly preferred that determination of whether a plan was established under or pursuant to a collective bargaining agreement lie with a federal agency and not with individual states.

Based on the comments received, the Department turned to negotiated rulemaking as an appropriate method of developing a revised Notice of Proposed Rulemaking. In September 1998, the Secretary established the Committee under the NRA. The Committee membership was chosen from the organizations that submitted comments on the Department's August 1995 NPRM and from the petitions and nominations for membership received in response to a Department Notice of Intent. These regulations are based on the Committee's consensus on the need for an individualized administrative proceeding in limited circumstances for determining the legal status of an entity. Based on the fact that the Committee represented a cross section of the state, federal, association, and private sector insurance organizations concerned with these issues, the Department believes that, as an alternative to the 1995 NPRM, these regulations accomplish the stated objectives of the Secretary and will have a beneficial effect on MEWAs, state insurance regulators, small employers who offer group health coverage, and plan participants. No other significant alternatives that would minimize the economic impact on small entities have been identified.

Participating in an administrative hearing to determine legal status is a voluntary undertaking on the part of a plan or arrangement. It would be inappropriate to create an exemption for small entities under the regulation because small entities are as much in need of clarification of their legal status as are larger entities.

D. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 *et seq.*), the Department submitted the information collection request (ICR) included in the Procedures for Administrative Hearings Regarding Plans Established or Maintained Pursuant to Collective Bargaining Agreements under section 3(40)(A) of ERISA to the Office of Management and Budget (OMB) for review and clearance at the time the NPRM was published in the **Federal Register** (65 FR 64498). A request for comments on the ICR was included in the NPRM. No comments were received about the ICR, and no changes have been made to the ICR in connection with this Notice of Final Rulemaking. OMB subsequently approved the ICR under control number 1210–0119. The approval will expire on January 31, 2004.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Petition for Finding under section 3(40) of ERISA.

OMB Number: 1210–0119.

Affected Public: Business or other for-profit; not-for-profit institutions.

Respondents: 45.

Responses: 45.

Average Time Per Response: 32 hours.

Estimated Total Burden Hours: 1.

Estimated Total Burden Cost (Operating and Maintenance): $104,100.

E. Small Business Regulatory Enforcement Fairness Act

The rule being issued here is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

F. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this proposed rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million.

G. Executive Order 13132

When an agency promulgates a regulation that has federalism implications, Executive Order 13132 (64 FR 43255, Aug. 10, 1999) requires the Agency to provide a federalism summary impact statement. Pursuant to section 6(c) of the Order, such a statement must include a description of the extent of the agency's consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State have been met.

This regulation has Federalism implications because it sets forth standards and procedures for an ALJ hearing for determining whether certain entities may be regulated under certain state laws or whether such state laws are preempted with respect to such entities. The state laws at issue are those that regulate the business of insurance. A member of the National Association of Insurance Commissioners (NAIC), representing the interest of state governments in the regulation of insurance, participated in the negotiations throughout the negotiated rulemaking process that provided the basis for this regulation.

In response to comments from the public about the proposed rule, the NAIC raised a concern that the process by which the Department issues ALJ determinations regarding the collectively bargained status of entities should move forward as quickly as possible and not result in a stay of state enforcement proceedings against MEWAs. The final regulation specifically states that the proceedings shall be conducted as expeditiously as possible and that the parties shall make every effort to avoid delay at each stage of the proceeding. The companion

regulation that establishes criteria for determining whether an employee benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA provides that ALJ proceedings under this regulation are not intended to provide the basis for a stay or delay of a state administrative or court proceeding or enforcement of a subpoena.

List of Subjects in 29 CFR Part 2570

Administrative practice and procedure, Claims, Employee benefit plans, Government employees, Law enforcement, Penalties, Pensions, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Part 2570 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended to read as follows:

PART 2570—[AMENDED]

■ 1. The authority citation for part 2570 is revised to read as follows:

Authority: 5 U.S.C. 8477, 29 U.S.C. 1002(40), 1021, 1108, 1132, 1135; sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp. p. 332, and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275; Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003).

■ 2. Add new Subpart H to read as follows:

Subpart H—Procedures for Issuance of Findings Under ERISA Sec. 3(40)

Sec.
2570.150 Scope of rules.
2570.151 In general.
2570.152 Definitions.
2570.153 Parties.
2570.154 Filing and contents of petition.
2570.155 Service.
2570.156 Expedited proceedings.
2570.157 Allocation of burden of proof.
2570.158 Decision of the Administrative Law Judge.
2570.159 Review by the Secretary.

§ 2570.150 Scope of rules.

The rules of practice set forth in this subpart H apply to ''section 3(40) Finding Proceedings'' (as defined in § 2570.152(g)), under section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Refer to 29 CFR 2510.3–40 for the definition of relevant terms of section 3(40) of ERISA, 29 U.S.C. 1002(40). To the extent that the regulations in this subpart differ from the regulations in subpart A of 29 CFR part 18, the regulations in this subpart apply to matters arising under section 3(40) of ERISA rather than the rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges in subpart A of 29 CFR part 18. These proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

§ 2570.151 In general.

If there is an attempt to assert state jurisdiction or the application of state law, either by the issuance of a state administrative or court subpoena to, or the initiation of administrative or judicial proceedings against, a plan or other arrangement that alleges it is covered by title I of ERISA, 29 U.S.C. 1003, the plan or other arrangement may petition the Secretary to make a finding under section 3(40)(A)(i) of ERISA that it is a plan established or maintained under or pursuant to an agreement or agreements that the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of ERISA.

§ 2570.152 Definitions.

For section 3(40) Finding Proceedings, this section shall apply instead of the definitions in 29 CFR 18.2.

(a) *ERISA* means the Employee Retirement Income Security Act of 1974, *et seq.,* 29 U.S.C. 1001, *et seq.,* as amended.

(b) *Order* means the whole or part of a final procedural or substantive disposition by the administrative law judge of a matter under section 3(40) of ERISA. No order will be appealable to the Secretary except as provided in this subpart.

(c) *Petition* means a written request under the procedures in this subpart for a finding by the Secretary under section 3(40) of ERISA that a plan is established or maintained under or pursuant to one or more collective bargaining agreements.

(d) *Petitioner* means the plan or arrangement filing a petition.

(e) *Respondent* means:

(1) A state government instrumentality charged with enforcing the law that is alleged to apply or which has been identified as asserting jurisdiction over a plan or other arrangement, including any agency, commission, board, or committee charged with investigating and enforcing state insurance laws, including parties joined under § 2570.153;

(2) The person or entity asserting that state law or state jurisdiction applies to the petitioner;

(3) The Secretary of Labor; and

(4) A state not named in the petition that has intervened under § 2570.153(b).

(f) *Secretary* means the Secretary of Labor, and includes, pursuant to any delegation or sub-delegation of authority, the Assistant Secretary for Employee Benefits Security or other employee of the Employee Benefits Security Administration.

(g) *Section 3(40) Finding Proceeding* means a proceeding before the Office of Administrative Law Judges (OALJ) relating to whether the Secretary finds an entity to be a plan to be established or maintained under or pursuant to one or more collective bargaining agreements within the meaning of section 3(40) of ERISA.

§ 2570.153 Parties.

For section 3(40) Finding Proceedings, this section shall apply instead of 29 CFR 18.10.

(a) The term ''party'' with respect to a Section 3(40) Finding Proceeding means the petitioner and the respondents.

(b) States not named in the petition may participate as parties in a Section 3(40) Finding Proceeding by notifying the OALJ and the other parties in writing prior to the date for filing a response to the petition. After the date for service of responses to the petition, a state not named in the petition may intervene as a party only with the consent of all parties or as otherwise ordered by the ALJ.

(c) The Secretary of Labor shall be named as a ''respondent'' to all actions.

(d) The failure of any party to comply with any order of the ALJ may, at the discretion of the ALJ, result in the denial of the opportunity to present evidence in the proceeding.

§ 2570.154 Filing and contents of petition.

(a) A person seeking a finding under section 3(40) of ERISA must file a written petition by delivering or mailing it to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or by making a filing by any electronic means permitted under procedures established by the OALJ.

(b) The petition shall—

(1) Provide the name and address of the entity for which the petition is filed;

(2) Provide the names and addresses of the plan administrator and plan sponsor(s) of the plan or other arrangement for which the finding is sought;

(3) Identify the state or states whose law or jurisdiction the petitioner claims has been asserted over the petitioner, and provide the addresses and names of responsible officials;

(4) Include affidavits or other written evidence showing that:

(i) State jurisdiction has been asserted over or legal process commenced against the petitioner pursuant to state law;

(ii) The petitioner is an employee welfare benefit plan as defined at section 3(1) of ERISA (29 U.S.C. 1002(1)) and 29 CFR 2510.3–1 and is covered by title I of ERISA (*see* 29 U.S.C. 1003);

(iii) The petitioner is established or maintained for the purpose of offering or providing benefits described in section 3(1) of ERISA (29 U.S.C. 1002(1)) to employees of two or more employers (including one or more self-employed individuals) or their beneficiaries;

(iv) The petitioner satisfies the criteria in 29 CFR 2510.3–40(b); and

(v) Service has been made as provided in § 2570.155.

(5) The affidavits shall set forth such facts as would be admissible in evidence in a proceeding under 29 CFR part 18 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavit or other written evidence must set forth specific facts showing the factors required under paragraph (b)(4) of this section.

§ 2570.155 Service.

For section 3(40) proceedings, this section shall apply instead of 29 CFR 18.3.

(a) *In general.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing by first class, prepaid U.S. mail, a copy to the last known address. The Secretary shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA Section 3(40) Proceeding, PO Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions and all other documents shall be made to all parties of record by regular mail to their last known address.

(d) *Form of pleadings* (1) Every pleading shall contain information indicating the name of the Employee Benefits Security Administration (EBSA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the OALJ and a designation of the type of pleading or paper (*e.g.,* notice, motion to dismiss, *etc.*). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ x 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopies, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

§ 2570.156 Expedited proceedings.

For section 3(40) Finding Proceedings, this section shall apply instead of 29 CFR 18.42.

(a) At any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding, including the time for conducting discovery.

(b) Except when such proceedings are directed by the Chief Administrative Law Judge or the administrative law judge assigned, any party filing a motion under this section shall:

(1) Make the motion in writing;

(2) Describe the circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery, or by facsimile, followed by first class, prepaid, U.S. mail. Service is complete upon personal delivery or mailing.

(d) Except when such proceedings are required, or unless otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, all parties to the proceeding in which the motion is filed shall have ten (10) days from the date of service of the motion to file an opposition in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may advance pleading schedules, discovery schedules, prehearing conferences, and the hearing, as deemed appropriate; provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.

(f) When an expedited hearing is held, the decision of the administrative law judge shall be issued within twenty (20) days after receipt of the transcript of any oral hearing or within twenty (20) days after the filing of all documentary evidence if no oral hearing is conducted.

§ 2570.157 Allocation of burden of proof.

For purposes of a final decision under § 2570.158 (Decision of the Administrative Law Judge) or § 2570.159 (Review by the Secretary), the petitioner shall have the burden of proof as to whether it meets 29 CFR 2510.3–40.

§ 2570.158 Decision of the Administrative Law Judge.

For section 3(40) finding proceedings, this section shall apply instead of 29 CFR 18.57.

(a) *Proposed findings of fact, conclusions of law, and order.* Within twenty (20) days of filing the transcript of the testimony, or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion under 29 CFR 18.55, proposed findings of fact, conclusions of law, and order together with the supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision based on oral argument in lieu of briefs.* In any case in which the administrative law judge believes that written briefs or proposed findings of fact and conclusions of law may not be necessary, the administrative law judge shall notify the parties at the opening of the hearing or as soon thereafter as is practicable that he or she may wish to hear oral argument in lieu of briefs. The administrative law judge shall issue his or her decision at the close of oral argument, or within 30 days thereafter.

(c) *Decision of the administrative law judge.* Within 30 days, or as soon as

possible thereafter, after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefore, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations found at 29 CFR 2510.3–40 and shall be limited to whether the petitioner, based on the facts presented at the time of the proceeding, is a plan established or maintained under or pursuant to collective bargaining for the purposes of section 3(40) of ERISA.

§ 2570.159 Review by the Secretary.

(a) A request for review by the Secretary of an appealable decision of the administrative law judge may be made by any party. Such a request must be filed within 20 days of the issuance of the final decision or the final decision of the administrative law judge will become the final agency order for purposes of 5 U.S.C. 701 *et seq*.

(b) A request for review by the Secretary shall state with specificity the issue(s) in the administrative law judge's final decision upon which review is sought. The request shall be served on all parties to the proceeding.

(c) The review by the Secretary shall not be a de novo proceeding but rather a review of the record established by the administrative law judge.

(d) The Secretary may, in his or her discretion, allow the submission of supplemental briefs by the parties to the proceeding.

(e) The Secretary shall issue a decision as promptly as possible, affirming, modifying, or setting aside, in whole or in part, the decision under review, and shall set forth a brief statement of reasons therefor. Such decision by the Secretary shall be the final agency action within the meaning of 5 U.S.C. 704.

Signed this 31st day of March, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03–8114 Filed 4–7–03; 8:45 am]

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Federal Register

Wednesday,
April 9, 2003

Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2520, 2560, and 2570

Reporting by Multiple Employer Welfare Arrangements and Certain Other Entities That Offer or Provide Coverage for Medical Care to the Employees of Two or More Employers; Assessment of Civil Penalties under Section 502(c)(5) of ERISA; Procedures for Administrative Hearings Regarding the Assessment of Civil Penalties Under Section 502(c)(5) of ERISA; Final Rules

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AA64

Reporting by Multiple Employer Welfare Arrangements and Certain Other Entities that Offer or Provide Coverage for Medical Care to the Employees of Two or More Employers

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule governing certain reporting requirements under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) for multiple employer welfare arrangements (MEWAs) and certain other entities that offer or provide coverage for medical care to the employees of two or more employers. The final rule generally requires the administrator of a MEWA, and certain other entities, to file a form with the Secretary of Labor for the purpose of determining whether the requirements of certain recent health care laws are being met.

DATES: *Effective Date:* This final rule is effective January 1, 2004.

Compliance Dates: If a filing is required for an entity, it is due on or before each March 1 following the period to be reported. A 90-day origination report is also required to be filed as described in paragraph (e)(2)(ii) of §2520.101–2. (Therefore, the first filing required under this final rule is the 2003 Form M–1, which is generally required to be filed by March 1, 2004. Prior to that date, filings are due in accordance with §2520.101–2 contained in the 29 CFR revised as of July 1, 2002.

FOR FURTHER INFORMATION CONTACT: Amy J. Turner or Deborah S. Hobbs, Employee Benefits Security Administration, U.S. Department of Labor, Room C–5331, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone (202) 693–8335).

SUPPLEMENTARY INFORMATION:

Customer Service Information: The Department of Labor's Employee Benefits Security Administration (EBSA) is committed to working together with administrators to help them comply with this filing requirement. The Form M–1, as well as the publication MEWAs; Multiple Employer Welfare Arrangements Under the Employee Retirement Income Security Act: A Guide to Federal and State Regulation, are available by calling EBSA toll free at 1–866–444–3272 and on the Internet at: *http://www.dol.gov/ebsa.* In addition, the EBSA Help Desk (telephone (202) 693–8360) is available to answer questions (such as whether an entity is required to file a report) and to provide assistance in completing a report. If you have other questions about this reporting requirement, or about the requirements of the recent health care laws in Part 7 of ERISA, you may call the Office of Health Plan Standards and Compliance Assistance at 202–693–8335. If you have questions about the definition of a MEWA (including the exception for collectively bargained plans under 29 CFR 2510.3–40), or coverage questions concerning whether a plan is or is not subject to the provisions of Title I of ERISA, you may call the Office of Regulations and Interpretations, Division of Coverage, Reporting and Disclosure at 202–693–8500. Copies of Form M–1 filings are available over the Internet at: *askebsa.dol.gov/epds.*

A. Background

The Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191) (HIPAA) amended ERISA to provide for, among other things, improved portability and continuity of health insurance coverage. The Mental Health Parity Act of 1996 (Pub. L. 104–204, as amended by Pub. L. 107–116 and Pub. L. 107–147) (MHPA) amended ERISA to provide parity in the application of annual and lifetime dollar limits for certain mental health benefits with such dollar limits on medical and surgical benefits. The Newborns' and Mothers' Health Protection Act of 1996 (Pub. L. 104–204) (Newborns' Act) amended ERISA to provide new protections for mothers and their newborn children with regard to the length of hospital stays in connection with childbirth. The Women's Health and Cancer Rights Act of 1998 (WHCRA) (Pub. L. 105–277) amended ERISA to provide individuals new rights for reconstructive surgery in connection with a mastectomy. All of the foregoing provisions are set forth in part 7 of subtitle B of title I of ERISA (Part 7).

HIPAA also added a new section 101(g) to ERISA providing the Secretary with the authority to require, by regulation, annual MEWA reporting. Specifically, this section provides that the Secretary of Labor may, by regulation, require multiple employer welfare arrangements providing benefits consisting of medical care (within the meaning of section 733(a)(2)) which are not group health plans to report, not more frequently than annually, in such form and such manner as the Secretary may require for the purpose of determining the extent to which the requirements of Part 7 are being carried out in connection with such benefits.

The term ''multiple employer welfare arrangement'' is defined in section 3(40) of ERISA to mean, in pertinent part an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing [welfare plan benefits] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained under or pursuant to one or more agreements which the Secretary of Labor finds to be collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association.

For purposes of this definition, two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group, the term ''control group'' means a group of trades or businesses under common control, and the determination of whether a trade or business is under ''common control'' with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent. [1]

An interim final rule implementing the MEWA reporting requirement was published in the **Federal Register** on February 11, 2000 at 65 FR 7152. The interim final rule generally required the administrator of a MEWA (or certain other entity that offers or provides coverage for medical care to the employees of two or more employers) to file the Form M–1 Annual Reporting Requirement for Multiple Employer

[1] This provision was added to ERISA by the Multiple Employer Welfare Arrangement Act of 1983, Sec. 302(b), Pub. L. 97–473, 96 Stat. 2611, 2612 (29 U.S.C. 1002(40)), which also amended section 514(b) of ERISA. Section 514(a) of ERISA provides that state laws that relate to employee benefit plans are generally preempted by ERISA. Section 514(b) sets forth several exceptions to the general rule of section 514(a) and subjects employee benefit plans that are MEWAs to various levels of state regulation depending on whether the MEWA is fully insured. Sec. 302(b), Pub. L. 97–473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).

Welfare Arrangements and Certain Entities Claiming Exception with the Secretary of Labor for the purpose of determining whether the requirements of part 7 are being met.

This reporting requirement also responds to a 1992 recommendation of the General Accounting Office (GAO). *See* ''Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements,'' March 1992, GAO/HRD–92–40. In that report, the GAO detailed a history of fraud and abuse by some MEWAs and recommended that the Department develop a mechanism to help states identify MEWAs. The problems pointed out in that report continue to this date. By the end of Fiscal Year 2002, the Department had initiated approximately 522 civil and 90 criminal investigations (with 70 criminal convictions) affecting over 1.825 million participants and beneficiaries and involving monetary violations of over $121.6 million. During the last three years, the Department has had an average of over 100 MEWA cases under active investigation. Thus, the identification of problem MEWAs and correction of violations remains an important investigative priority and consumes substantial resources.

In the preamble to the February 2000 interim final regulation, the Department sought comments from those affected. After consideration of all the comments received on the MEWA reporting requirement, the Department is publishing this final rule. The final rule does not significantly modify the reporting requirement established in the interim rule. Instead, several clarifications were added to make clearer the application of the reporting requirement to different types of arrangements. Some of these clarifications were initially issued in the form of question-and-answer guidance during the period of interim effectiveness of this rule and were included in the instructions to the Form M–1 in Years 2000, 2001, and 2002.

B. Overview of the Final Rule

(1) Definitions

(a) *Entity Claiming Exception (ECE).* The final rule retains the term ''entity claiming exception'' or ''ECE.'' An ''ECE'' is defined as an entity that claims it is not a MEWA due to the exception in section 3(40)(A)(i) of ERISA. In general, this exception is for entities that are established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements. In connection with this exception, today the Department is also publishing a final regulation under ERISA section 3(40) setting forth specific criteria that, if met and if certain other factors set forth in the regulation are not present, constitute a finding by the Secretary of Labor that a plan is maintained pursuant to one or more collective bargaining agreements and, therefore, excluded from the definition of a MEWA. *See* 29 CFR 2510.3–40. In a separate regulation also published today, the Department adopts a process pursuant to which a plan or other arrangement may, if subject to an action under state law, seek an individualized finding from a Department of Labor Administrative Law Judge (ALJ). *See* 29 CFR 2570.150 through 2570.159.

However, because some entities may incorrectly claim the exemption under § 2510.3–40, this final rule retains the requirement that ECEs file a Form M–1 with the Department for three years following an ''origination'' (the three-year rule). Of course, if an entity does have a determination from an ALJ that it is a collectively-bargained plan, that entity does not have to file while the opinion remains in effect unless the circumstances underlying the determination change.

Moreover, because, some operators of insurance fraud schemes continue to market health coverage to small employers under the guise of collectively bargained plans using, among other things, sham unions and collective bargaining agreements, in an effort to avoid state insurance regulation, the retention of the three-year rule provides an important enforcement tool for the Department and state insurance departments, while imposing little burden on bona fide collectively bargained plans. Finally, bona fide collectively bargained plans and their sponsors also benefit from the early identification of sham MEWA operators.

Under the final rule, as under the interim final rule, the term origination continues to be defined as the occurrence of any of the following three events '' (1) The MEWA or ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals); (2) The MEWA or ECE begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals) after a merger with another MEWA or ECE (unless all of the MEWAs or ECEs that participate in the merger previously were last originated at least three years prior to the merger); or (3) The number of employees receiving coverage for medical care under the MEWA or ECE is at least 50 percent greater than the number of such employees on the last day of the previous calendar year (unless the increase is due to a merger with another MEWA or ECE under which all MEWAs and ECEs that participate in the merger were last originated at least three years prior to the merger).

(b) *Excepted Benefits.* The final rule adds a definition of ''excepted benefits'' and defines the term by reference to section 733(c) of ERISA and 29 CFR 2590.732(b). This definition was added because of a clarification that MEWAs or ECEs that provide coverage consisting solely of excepted benefits are not required to report under this section. This clarification is discussed in more detail below, under the heading Persons required to report.

(2) Persons Required To Report

Paragraph (c) of the final rule sets forth the persons required to report under the final rule. As under the interim final rule, the final rule requires filing by the administrator of a MEWA that provides benefits consisting of medical care, whether or not the MEWA is a group health plan. It also requires filing by the administrator of an ECE that offers or provides coverage consisting of medical care during the first three years after the ECE is originated.

The final rule also contains language to clarify the scope of the reporting requirement. The clarifications were initially included in question-and-answer guidance published by the Department in April and June of 2000, and are described in the Instructions to the Form M–1 for the Years 2000, 2001, and 2002.

(a) *Exception for coverage consisting solely of excepted benefits.* First, because coverage consisting solely of excepted benefits is not subject to the requirements of part 7 of ERISA (pursuant to ERISA sections 732 and 733 and § 2590.732), the final rule provides that a MEWA or ECE is not subject to this filing requirement if it provides coverage that consists solely of excepted benefits. However, if the MEWA or ECE provides coverage that consists of both excepted benefits and other benefits for medical care that are not excepted benefits (and is, therefore, subject to the requirements of part 7 of ERISA), the administrator of the MEWA or ECE is required to file the Form M–1.

(b) *Exceptions for coverage not subject to ERISA.* In addition, because governmental plans, church plans, and

plans maintained solely for the purpose of complying with workmen's compensation laws (as defined in sections 4(b)(1), 4(b)(2) and 4(b)(3) of ERISA, respectively) are not covered by Title I of ERISA, the final rule provides that a MEWA or ECE is not subject to the filing requirement if it is a governmental plan, church plan, or plan maintained solely for the purpose of complying with workmen's compensation laws. Similarly, the final rule also provides that a MEWA or ECE is not subject to the filing requirement under this section if it provides coverage only through governmental plans, church plans, or plans maintained solely for the purpose of complying with workmen's compensation laws (or other arrangements not covered by Title I of ERISA, such as health insurance coverage offered to individuals other than in connection with a group health plan, known as individual market coverage). However, if a MEWA provides coverage both to group health plans that meet the definition of a governmental plan, church plan, or plan maintained solely for the purpose of complying with workmen's compensation laws and to any group health plan that is subject to part 7 of ERISA, the MEWA is required to file the Form M–1.

(c) *Other exceptions.* Finally, the final rule also contains a clarification that reporting is not required if an entity would not constitute a MEWA or ECE but for any of the three circumstances described below.

(1) *Common control interest of at least 25 percent.* The first of these circumstances relates to the treatment of two or more trades or businesses as a single employer for purposes of the definition of MEWA if the trades or businesses are within the same control group. Section 3(40)(a)(1)(B) defines the term ''control group'' to mean a group of trades or businesses under common control, and provides that trades or businesses that are part of the same ''control group'' are deemed to be a single employer for purposes of the definition of MEWA. It then states that the determination of whether a trade or business is under ''common control'' with another trade or business is to be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer, except that common control shall not be based on an interest of less than 25 percent. The Department has not issued any regulations under this provision.

Commenters argued that arrangements where businesses maintain significant ownership interests in other businesses and provide benefits under the same health plan are not the kinds of arrangements that historically have been found to lead to problems with fraud and failure to provide promised benefits. The Department agrees and has modified the final rule accordingly.

The final rule clarifies that a filing is not required on behalf of certain plans or other arrangements that provide coverage to the employees of two or more employers that share a common control interest. Specifically, if an entity would not constitute a MEWA or ECE but for the fact that it provides coverage to the employees of two or more trades or businesses that share a common control interest of at least 25 percent at any time during the plan year (applying the principles applied under section 414(b) or (c) of the Internal Revenue Code), a Form M–1 filing is not required. However, while use of a 25 percent test may result in a determination of common control for purposes of the Form M–1 filing requirement, common control generally means, under sections 414 (b) and (c) of the Internal Revenue Code, an 80 percent interest in the case of a parent-subsidiary group of trades or businesses and a more than 50 percent interest in the case of a brother-sister relationship among organizations controlled by five or fewer persons that are the same persons with respect to each organization.

(2) *Temporary MEWAs created by a change in control.* The second of these circumstances that will not, by itself, trigger a filing relates to temporary arrangements providing medical benefits to the employees of more than one employer that are created by a change in control of the business. This exception was suggested by a commenter who argued that entities that end up covering employees of another employer for a brief period of time by virtue of a change in business ownership should not be required to file a Form M–1. The commenter suggested that the Department define ''temporary'' to mean that the arrangement does not extend beyond the end of the plan year following the plan year in which the change in control occurs.

Commenters explained how change in control transactions may take place over a period of time, and the health plan for a control group may therefore be providing medical benefits to the employees of more than one employer for a temporary period. According to one source cited by a commenter, reasons that a transaction may occur over a period of time include the need to obtain financing, the need to obtain various regulatory approvals, and the need to ''iron out the details'' of the transaction.

The Department agrees with the comment and has modified the final rule to create an exception for arrangements that would not constitute MEWAs but for their creation in connection with a change in control of businesses (such as a merger or acquisition) and which are temporary in nature (*i.e.,* do not extend beyond the end of the plan year following the plan year in which the change in control occurs). The change in control must occur for a purpose other than avoiding Form M–1 filing.

(3) *Very small number of persons who are not employees or former employees.* The last of the circumstances that will not, by itself, trigger a filing is an exception for entities that would not be a MEWA or ECE but for the fact that they cover a very small number of persons (excluding spouses and dependents) who are not employees or former employees of the plan sponsor. For example, an arrangement may cover non-employee members of the board of directors of the plan sponsor or individuals classified as independent contractors. The final rule provides that any entity is not required to file the Form M–1 if it would not be a MEWA but for the fact that it provides coverage to persons who are not employees nor former employees (including those participants on COBRA continuation coverage) [2] of the sponsor (excluding spouses and dependents) and the number of such persons does not exceed one percent of the total number of employees or former employees covered by the arrangement, determined as of the last day of the year to be reported (or, in the case of a 90-day origination report, determined as of the 60th day following the origination date).

(d) *Persons not excepted.* Some commenters argued that MEWAs that are fully-insured should not be required to report. One commenter argued that coverage under insurance contracts that have been approved by state regulators complies with part 7 by virtue of this

[2] The term ''employee'' is defined in section 3(7) of ERISA as any individual employed by an employer, and includes all common law employees. *See also National Mutual Insurance Company* v. *Darden,* 503 U.S. 318 (1992) (''Darden does not cite, and we do not find, any provision [of ERISA] either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an 'employee' under ERISA * * *.'')

state approval. The final rule makes no change to the scope of the reporting requirement because the purpose of the Form M–1 filing requirement is largely to evaluate compliance with part 7 of ERISA. The evaluation of part 7 compliance requires a determination that the group health plan is in compliance both on the face of the plan documents (including the plan's insurance policy) and in operation. The Form M–1 requires the administrator of the MEWA to answer as to whether the coverage it provides is in compliance with part 7. The answer to this question should address compliance both on the face of the documents and in operation. This evaluation is as important for fully-insured arrangements as it is for self-insured arrangements.

Moreover, as noted earlier, the Form M–1 reporting requirement is an important enforcement tool for the Department and state insurance departments. While, in part, this reporting requirement serves as a vehicle for reviewing compliance with the requirements of part 7 of ERISA, the Form M–1 also serves as the only national registry of MEWAs operating throughout the United States. For this reason, it is important that fully-insured MEWAs continue to file the Form M–1.

One commenter asked what authority the Department has to ask about compliance with part 7 by insured group health plans, presumably because of the fact that section 502(b)(3) of ERISA provides that the Secretary is not authorized to enforce any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan. The Secretary does, however, have authority to enforce the requirements of part 7 against all group health plans, whether insured or self-insured.

Several comments on the MEWA/ECE reporting requirement were also received from representatives of Professional Employer Organizations (PEOs). In general, PEO representatives have argued that, for a variety of reasons, they should be treated as ''co-employers'' and, accordingly, their group health plans should not be considered MEWAs. While PEOs have sought to distinguish themselves from employee leasing companies on the basis of a ''co-employer'' relationship with employees, the Department is unable to conclude that the group health plans maintained by PEOs, like the plans maintained by employee leasing companies, do not cover the employees of more than one employer.[3] For this reason the final regulation does not create an exception from the filing requirement.

The Department recognizes that other arguments were also made on behalf of PEOs to support either a complete or limited exception from the requirement to file a Form M–1. However, this registration regulation allows the Department to collect information to facilitate compliance with the requirements of part 7. As noted earlier, it is also an important enforcement tool for the Department and state insurance departments and serves as the only national registry of MEWAs operating throughout the United States. It also responds to the GAO's recommendation in its 1992 GAO report entitled ''States Need Labor's Help Regulating Multiple Employer Welfare Arrangements,'' where the GAO detailed a history of fraud and abuse by MEWAs and recommended a federal MEWA registration requirement. GAO/HRD–92–40, March 1992.

(3) Extensions

An extension may be granted for filing reports if the administrator complies with the extension procedure prescribed in the Instructions to the Form M–1.

One commenter argued that the extension of time to file should be longer than the 60 days provided in the Instructions to the Form M–1 in certain special circumstances. Specifically, the commenter stated that the 60-day period is not adequate for a merger or acquisition context. This comment has been addressed in the final regulation by creating an exception from the filing requirement for a MEWA that is created by a change in control of businesses and is temporary in nature. (This exception to the reporting requirement is discussed above, under the discussion of Persons Required to Report).

(4) Civil Penalties and Procedures

Paragraph (g) of the final rule contains a cross-reference for civil penalties and procedures. The penalty and procedure regulations are being published separately in this issue of the **Federal Register.**[4] In this regard, ERISA section 502(c)(5), as amended by HIPAA, provides for the assessment of a penalty for the failure or refusal to file a report pursuant to section 101(g) of ERISA, as amended by HIPAA. The penalty and procedure regulations are designed to parallel the procedures set forth in 29 CFR 2560.502c–2 regarding civil penalties under section 502(c)(2) of ERISA relating to reports required to be filed under ERISA section 101(b)(4). In general these regulations provide that, in the event of no filing, an incomplete filing, or a late filing, a penalty may apply of up to $1,000 a day (or a higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996) for each day that the administrator of a MEWA or ECE fails or refuses to file a complete report. For information relating to administrative hearings and appeals in connection with the assessment of civil penalties under section 502(c)(5) of ERISA, see 29 CFR 2570.90 through 2570.101 (published in this issue of the **Federal Register).**

C. Regulatory Impact Analysis

The total cost of the reporting requirement as implemented by this final rule is estimated to be $403,000, or about $200 for each of the 2,000 entities expected to be required to file the annual reporting form for MEWAs, the Form M–1. No additional cost is attributable to the clarifying changes made in this final rule. Although the benefits have not been quantified, EBSA believes that the cost of the filing requirement is more than justified by the benefits associated with ensuring uniform adherence to the requirements and protections added to ERISA by HIPAA, MHPA, the Newborns' Act, and WHCRA. HIPAA amended ERISA to add section 101(g), which authorizes the Secretary of Labor to require reporting by MEWAs that are not group health plans for the purpose of determining their compliance with part 7 of ERISA. The principal intent of Congress in enacting this provision was to ensure that all participants and beneficiaries of such arrangements receive these health care protections.

The reporting requirement implemented by this final rule provides the most cost effective means of facilitating compliance with part 7 of ERISA, as well as with the full range of other Federal and State requirements

[3] The Department has issued a number of advisory opinions over the years under which an arrangement providing benefits for medical care and sponsored by an employee leasing company was found to be a MEWA. *See, e.g.,* Advisory Opinion 91–17A to L.J. Darter, III (April 5, 1991); Advisory Opinion 91–47A to Lee P. Jedziniak (December 20, 1991); Advisory Opinion 92–04A to Sandra Milburn (January 27, 1992); Advisory Opinion 92–05A to Chuck Huff (January 27, 1992); Advisory Opinion 92–07A to Lee P. Jedziniak (February 20, 1992); Advisory Opinion 93–29A to Alfred W. Gross (November 2, 1993); Advisory Opinion 95–22A to Dale Robison (August 25, 1995); and Advisory Opinion 95–29A to Kevin W. Ahern (December 7, 1995).

[4] Moreover, other relevant criminal penalties may apply. *See, e.g.,* ERISA § 501 and 18 U.S.C. 1021, 1027, and 1035.

that may apply to MEWAs under ERISA, the Internal Revenue Code, the Public Health Service Act, and State insurance laws. The data collected as a result of the filing requirement will ultimately serve as the only source of complete and uniform information identifying these arrangements, helping Federal and State regulators to evaluate their compliance with all applicable requirements. Evaluation of compliance based on the information reported is significantly more cost effective for both governmental entities and MEWAs than the alternative of active intervention by compliance examiners.

Ensuring compliance by these arrangements is beneficial to participants and beneficiaries who are able to fully realize their rights under these statutes. The greater assurance of compliance is also beneficial because compliance by these arrangements with various provisions that apply to them has been shown to be inconsistent. Although the provisions of Title I of ERISA generally supercede State laws that relate to employee benefit plans, the regulation of MEWAs is a joint Federal and State responsibility pursuant to ERISA.

Because State insurance statutes are not uniform, an arrangement doing business in more than one State may be required to comply with a range of States' varying requirements. Identification of these entities through this reporting requirement helps to ensure that administrators of these arrangements are aware of the requirements that apply, and that the protections intended to be provided are actually implemented for the benefit of employers and of participants who obtain their group health coverage through these arrangements.

Ancillary benefits arise from the public disclosure of this data. Participants with greater access to information about the arrangements through which they obtain their group health coverage may better exercise their rights in the event of a dispute with the arrangement. The data collected also enhance capability to conduct analysis of the market segment represented by MEWAs, which is useful to policy makers in evaluating the role of these entities in providing access to employment-based health care benefits.

When the Department developed its initial estimates of the number of filers and the costs potentially associated with these filings, it acknowledged a significant degree of uncertainty with respect to the number of entities that would be required to file. Although reasonable estimates were available from the Form 5500 Annual Return/Report of Employee Benefit Plan data for the potential number of Entities Claiming Exemption and multiple-employer group health plans that file the Form 5500, no information was available that specifically identified the universe of MEWAs that are not group health plans under ERISA.

To develop the estimates used in the analysis of the potential impact of the interim final rule, the Department considered information from several sources. The first of these was the GAO study from 1992,[5] which indicated there were about 1,000 MEWAs doing business in the states in 1991. These figures are not current, and the MEWA universe is known to be variable over time relative to health insurance market cost fluctuations. Surveys of association members[6] with respect to group health plan sponsorship were also reviewed. This information, adjusted conservatively for low response rates, suggested the existence of about 1,200 health plans sponsored by associations. The overlap between plan and non-plan MEWAs within this number is unclear, however.

A third source of information was a RAND Corporation analysis of the 1997 Robert Wood Johnson Foundation Employer Health Insurance Survey as it pertains to pooled purchasing arrangements.[7] This analysis suggested the existence of 4,000 to 4,800 multiple employer arrangements, including collectively bargained group health plans, association plans, and MEWAs. The data reviewed was establishment-based, and the imputation of the number of arrangements reported by establishments to employer sponsored group health plans was thought to introduce additional uncertainty into the estimate of the possible universe of filers.

As a result of data limitations and uncertainty within available data, the Department conservatively estimated that about 2,700 entities would file Form M–1. A substantial degree of uncertainty remained about this estimate, and we reported a possible range of 1,000 to 4,000. Actual filer counts have been significantly lower, totaling approximately 600 in each of the three years (*i.e.,* 1999–2001) for which complete data are available at this time. In the Department's view, actual experience to date may differ from the estimate for several reasons, the first of these being the limited level of confidence in the original estimate. Based on past history of non-compliance of MEWAs with a variety of regulatory requirements, the Department assumes that the actual number of filers continues to reflect incomplete compliance with this still relatively new filing requirement. Further, the Department is still in the process of implementing its civil penalty enforcement program to correct compliance failures, which faces the same significant challenges in identifying non-filers as are faced in developing reliable estimates of the number of MEWAs doing business at any given time. Finalization of this rule and the clarifications incorporated in the final rule may also help to ensure that potentially affected parties are aware of the filing requirement.

The Department still has no data to support a more accurate estimate of the filer universe than that represented by actual filers. However, it reviewed available information on its active enforcement cases involving MEWAs to determine the degree to which those MEWAs had complied with the M–1 filing requirement. This information showed that about 42% of the MEWAs undergoing investigation that were required to file the M–1 had complied with the requirement. If this rate of non-compliance applies to all MEWAs, about 1,400 MEWAs would be required to file the M–1 annually.

Because the rate of non-compliance may differ from that found in the sample of enforcement cases, and because the Department continues to believe that full compliance has not yet been achieved, it has selected 2,000 as a conservative estimate of the number of potential filers of the M–1. This is approximately the mid-point between the number projected at the time of publication of the interim final rule, and the 1,400 developed from the number of actual filers adjusted for what is known about non-compliance in the available sample of MEWAs.

To develop the current cost estimate of the cost of the filing requirement, the Department looked at the characteristics of the actual filers and applied the relevant factors to the projected number of filers. In its original estimates, the Department differentiated filing preparation time by whether a filer did business in more than one state, and whether or not the filer was fully insured. The existing filer data offers more information about the actual characteristics of filers. For purposes of these estimates, it is assumed that

[5] "EMPLOYEE BENEFITS—States Need Labor's Help Regulating Multiple Employer Welfare Arrangements," GAO/HRD–92–40.

[6] "Survey of Association Member Health Plans," W.G. Morneau & Associates/American Society of Association Executives, 1993 and 1997.

[7] "Pooled Purchasing: Who Are the Players?" Stephen H. Long and M. Susan Marquis, "Health Affairs," July–August 1999.

available data is representative of all filers.

Original estimates, as well as those shown here, were based on the assumption that 2 hours of start-up time for learning the law and becoming familiar with the form and instructions would be required for all filers, and that a range of 50 minutes for single state filers to 1 hour and 35 minutes for multiple state filers would be required for Part III of the form. Part IV was estimated to require 15 minutes for fully insured filers, and 30 minutes for non-fully insured filers. It was also assumed that 100% of filings would be made by providers of service to the MEWA administrators, and thus result in the payment of fees rather than in the expenditure of time.

Approximately 50% of actual filers report doing business in multiple states, and 50% in single states. Also, about 50% of all filers, without regard to the number doing business in single or multiple states, report being fully insured in most or all of the states in which they do business. Applying these ratios to the estimate of 2,000 filers results in estimates of 1,000 MEWAs doing business in multiple states, 1,000 in single states, 1,000 fully insured MEWAs, and 1,000 not-fully insured. The resulting cost estimate is about $403,000, or $200 per filer on average. This estimate incorporates updated assumptions for wage rates and increased postage rates. Of the projected filers, about 15%, or about 300 filers are expected to have fewer than 100 participants, based upon the number of actual filers with fewer than 100 participants. As noted earlier, this is the total estimated cost of the filing requirement; no incremental cost is considered to be associated with this final rule.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is an action that is likely to result in a rule (1) having an annual effect of the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. This action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, OMB has reviewed this regulatory action.

Paperwork Reduction Act

The Department of Labor submitted the Form M–1 and instructions to OMB for emergency review and approval at the time of publication of the interim final rule on February 11, 2000. OMB subsequently approved the ICR on March 2, 2000 under control number 1210–0116. On November 22, 2000, OMB approved the Department's request for extension of the emergency approval for a three-year period ending November 30, 2003. This final rule does not implement any substantive or material change to the information collection, and as such, no change is made to the ICR, and no further review is requested of OMB at this time. The estimated burden hours and costs associated with the information collection have been adjusted to reflect an updated estimate of the likely number of respondents as well as updated wage and postal rates. Estimates of the number of filers and burden hours and costs are shown below.

You may address requests for copies of the ICR to Joseph S. Piacentini, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers

Agency: U.S. Department of Labor, Employee Benefits Security Administration.

Title: Annual Report for Multiple Employer Welfare Arrangements and Certain Entities Claiming Exception.

Form: M–1.

Affected Public: Business or other for-profit; Individuals or households, Not-for-profit institutions.

OMB Control Number: 1210–0116.

Frequency of Response: Annually.

Respondents: 2,000.

Response time: Ranges from 2 hours to 3 hours and 50 minutes based on characteristics of filer.

Responses: 2,000.

Estimated Burden Hours: 1.

Estimated Annual Cost (Operating and Maintenance): $403,000.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5. U.S.C. 551 *et seq.*) and likely to have a significant economic impact on a substantial number of small entities. Unless the agency certifies that a rulemaking action subject to section 553(b) is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis at the time of publication of the notice of final rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules were issued as interim final rules and not as a notice of proposed rulemaking, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or conduct a regulatory flexibility analysis. The Department did, however, take the potential impact on small entities into account in developing the interim final and final rules. The Department defines a small entity for purposes of its RFA analyses as an employee benefit plan with fewer than 100 participants. This definition is grounded in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for certain employee benefit plans which cover fewer than 100 participants. Based on actual filer data, about 15% of filers are expected to be small. This results in an estimate of 300 small MEWAs being required to file Form M–1. The average cost to all filers, including the highest average cost filers—those not-fully insured and those doing business in multiple states—is about $200 per year. The cost to small MEWA filers is expected to be lower than average due to the lower likelihood that they are not fully insured, and that they do business in many states. This cost is not expected to be considered substantial for any entity. The Department has developed a form for the collection of data, and has included voluntary worksheets with the form that are designed to assist with compliance and ease compliance burdens for all filers.

Small Business Regulatory Enforcement Fairness Act

The final rule being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

Pursuant to provisions of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million or more.

Federalism Statement Under Executive Order 13132

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe in the preamble to the regulation the extent of their consultation and the nature of the concerns of state and local officials, as well as the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of state and local officials have been met.

In the Department's view, these final regulations do not have federalism implications because they do not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. Not only do these regulations not reduce state discretion, the reports they require will facilitate state enforcement of their own laws as they apply to MEWAs since the reports will be available to the states and will identify MEWAs operating in each state.

Although the Department concludes that these final regulations do not have federalism implications, in keeping with the spirit of the Executive Order that agencies shall closely examine any policies that may have federalism implications or limit the policy making discretion of the states, the Department of Labor engages in extensive efforts to consult with and work cooperatively with affected state and local officials.

For example, the Department attends quarterly meetings of the National Association of Insurance Commissioners (NAIC) to listen to the concerns of state insurance departments. The NAIC is a non-profit corporation established by the insurance commissioners in the 50 states, the District of Columbia, and the four U.S. territories that, among other things, provides a forum for the development of uniform policy when uniformity is appropriate. Its members meet, discuss, and offer solutions to mutual problems. The NAIC sponsors quarterly meetings to provide a forum for the exchange of ideas, and in-depth consideration of insurance issues by regulators, industry representatives, and consumers. In addition to the general discussions, committee meetings, and task force meetings, the NAIC sponsors standing HIPAA meetings for members during the quarterly conferences, including a Centers for Medicare and Medicaid Services (CMS)/Department of Labor (DOL) meeting on HIPAA issues. (This meeting provides CMS and DOL the opportunity to provide updates on regulations, bulletins, enforcement actions, and outreach efforts regarding HIPAA.) In these quarterly meetings, issues relating to MEWAs and the implementation of the Form M–1 filing requirement are frequently discussed and, periodically, entire sessions are scheduled that are dedicated exclusively to MEWA/Form M–1 issues.

The Department also cooperates with the states in several ongoing outreach initiatives, through which information is shared among federal regulators, state regulators, and the regulated community. For example, the Department has established a Health Benefits Education Campaign with more than 70 partners, including CMS, the NAIC, and many business and consumer groups. In addition, the Department website offers links to important state websites and other resources, facilitating coordination between the state and federal regulators and the regulated community.

The Department also coordinates with state insurance departments to freeze assets when a MEWA operator is committing fraud or operating in a financially unsound manner. In these situations, typically, a state will obtain a cease and desist order to stave off further action by the MEWA in that state. In certain situations, the Department will then obtain a temporary restraining order (TRO) to freeze assets of the MEWA nationwide. In one case this year, the Department obtained a TRO to freeze assets of a MEWA whose operators were committing fraud and not paying benefits. This case affects more than 23,000 participants and beneficiaries in 50 states and the amount of unpaid claims could exceed $6 million. In a similar case last year, the Department obtained a TRO to freeze assets of a MEWA that was diverting plan assets for personal use of the MEWA's operators. That case affected at least 1,500 participants and $2.8 million in unpaid claims. A court order was also issued in that case appointing an independent fiduciary to manage the MEWA.

In conclusion, the Department has stayed in contact with state regulators and considered their concerns in developing these regulations. These regulations should help the states enforce their own laws as they apply to MEWAs since the reports they require will be available to them and will identify MEWAs operating in each state.

Statutory Authority

29 U.S.C. 1021, 1027, 1059, 1132, 1135, 1181–1183, 1181 note, 1185, 1185a–b, 1191, 1191a–c; Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003).

List of Subjects in 29 CFR Part 2520

Accounting, Employee benefit plans, Pensions, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, part 2520 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2520—[AMENDED]

■ 1. The authority for part 2520 continues to read:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134 and 1135; Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.102–

3, 2520.104b–1 and 2520.104b–3 also issued under 29 U.S.C. 1003,1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788. Sec. 2520.101–3 is also issued under 29 U.S.C. 1021(i).

■ 2. Section 2520.101–2 is revised to read:

§ 2520.101–2 Annual Reporting by Multiple Employer Welfare Arrangements and Certain Other Entities Offering or Providing Coverage for Medical Care to the Employees of Two or More Employers.

(a) *Basis and scope.* Section 101(g) of the Employee Retirement Income Security Act (ERISA) permits the Secretary of Labor to require, by regulation, multiple employer welfare arrangements (MEWAs) providing benefits that consist of medical care (within the meaning of section 733(a)(2) of ERISA), and that are not group health plans, to report, not more frequently than annually, in such form and manner as the Secretary may require, for the purpose of determining the extent to which the requirements of part 7 of subtitle B of title I of ERISA (part 7) are being carried out in connection with such benefits. Section 734 of ERISA provides that the Secretary may promulgate such regulations as may be necessary or appropriate to carry out the provisions of part 7. This section sets out requirements for annual reporting by MEWAs that provide benefits that consist of medical care and by certain entities that claim not to be a MEWA solely due to the exception in section 3(40)(A)(i) of ERISA (referred to in this section as Entities Claiming Exception or ECEs). These requirements apply regardless of whether the MEWA or ECE is a group health plan.

(b) *Definitions.* As used in this section, the following definitions apply:

Administrator means—

(1) The person specifically so designated by the terms of the instrument under which the MEWA or ECE is operated;

(2) If the MEWA or ECE is a group health plan and the administrator is not so designated, the plan sponsor (as defined in section 3(16)(B) of ERISA); or

(3) In the case of a MEWA or ECE for which an administrator is not designated and a plan sponsor cannot be identified, jointly and severally the person or persons actually responsible (whether or not so designated under the terms of the instrument under which the MEWA or ECE is operated) for the control, disposition, or management of the cash or property received by or contributed to the MEWA or ECE, irrespective of whether such control, disposition, or management is exercised directly by such person or persons or indirectly through an agent, custodian, or trustee designated by such person or persons.

Entity Claiming Exception (ECE) means an entity that claims it is not a MEWA on the basis that the entity is established or maintained pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements within the meaning of section 3(40)(A)(i) of ERISA and 29 CFR 2510.3–40.

Excepted benefits means *excepted benefits* within the meaning of section 733(c) of ERISA and 29 CFR 2590.732(b).

Group health plan means a *group health plan* within the meaning of section 733(a) of ERISA and 29 CFR 2590.701–2.

Health insurance issuer means a *health insurance issuer* within the meaning of section 733(b)(2) of ERISA and 29 CFR 2590.701–2.

Medical care means *medical care* within the meaning of section 733(a)(2) of ERISA and 29 CFR 2590.701–2.

Multiple employer welfare arrangement (MEWA) means a multiple employer welfare arrangement within the meaning of section 3(40) of ERISA and 29 CFR 2510.3–40.

Origination means the occurrence of any of the following three events (and a MEWA or ECE is considered to have been *originated* when any of the following three events occurs)—

(1) The MEWA or ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals);

(2) The MEWA or ECE begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals) after a merger with another MEWA or ECE (unless all of the MEWAs or ECEs that participate in the merger previously were last originated at least three years prior to the merger); or

(3) The number of employees receiving coverage for medical care under the MEWA or ECE is at least 50 percent greater than the number of such employees on the last day of the previous calendar year (unless the increase is due to a merger with another MEWA or ECE under which all MEWAs and ECEs that participate in the merger were last originated at least three years prior to the merger).

(c) *Persons required to report*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section, the following persons are required to report under this section—

(i) The administrator of a MEWA that offers or provides benefits consisting of medical care, regardless of whether the entity is a group health plan; and

(ii) The administrator of an ECE that offers or provides benefits consisting of medical care during the first three years after the ECE is originated.

(2) *Exceptions*—(i) Nothing in this paragraph (c) shall be construed to require reporting under this section by the administrator of a MEWA or ECE if the MEWA or ECE—

(A) Is licensed or authorized to operate as a health insurance issuer in every state in which it offers or provides coverage for medical care to employees;

(B) Provides coverage that consists solely of excepted benefits, which are not subject to Part 7. If the MEWA or ECE provides coverage that consists of both excepted benefits and other benefits for medical care that are not excepted benefits, the administrator of the MEWA or ECE is required to report under this section;

(C) Is a group health plan that is not subject to ERISA, including a governmental plan, church plan, or a plan maintained solely for the purpose of complying with workmen's compensation laws, within the meaning of sections (4)(b)(1), 4(b)(2), or 4(b)(3) of ERISA, respectively; or

(D) Provides coverage only through group health plans that are not covered by ERISA, including governmental plans, church plans, or plans maintained solely for the purpose of complying with workmen's compensation laws within the meaning of sections 4(b)(1), 4(b)(2), or 4(b)(3) of ERISA, respectively (or other arrangements not covered by ERISA, such as health insurance coverage offered to individuals other than in connection with a group health plan, known as individual market coverage);

(ii) Nothing in this paragraph (c) shall be construed to require reporting under this section by the administrator of an entity that would not constitute a MEWA or ECE *but for* the following circumstances:

(A) The entity provides coverage to the employees of two or more trades or businesses that share a common control interest of at least 25 percent at any time during the plan year, applying the principles of section 414(b) or (c) of the Internal Revenue Code (26 U.S.C.);

(B) The entity provides coverage to the employees of two or more employers due to a change in control of businesses (such as a merger or acquisition) that occurs for a purpose other than avoiding Form M–1 filing and is temporary in nature. For purposes of this paragraph, ''temporary'' means the MEWA or ECE

does not extend beyond the end of the plan year following the plan year in which the change in control occurs; or

(C) The entity provides coverage to persons (excluding spouses and dependents) who are not employees or former employees of the plan sponsor, such as non-employee members of the board of directors or independent contractors, and the number of such persons who are not employees or former employees does not exceed one percent of the total number of employees or former employees covered under the arrangement, determined as of the last day of the year to be reported or, in the case of a 90-day origination report, determined as of the 60th day following the origination date.

(d) *Information to be reported*— (1) The annual report required by this section shall consist of a completed copy of the Form M–1 Annual Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs) and any additional statements required in the Instructions to the Form M–1.

(2) The Secretary may reject any filing under this section if the Secretary determines that the filing is incomplete, in accordance with 29 CFR 2560.502c–5.

(3) If the Secretary rejects a filing under paragraph (d)(2) of this section, and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the notice of rejection, the Secretary may bring a civil action for such relief as may be appropriate (including penalties under section 502(c)(5) of ERISA and 29 CFR 2560.502c-5).

(e) *Reporting requirement and timing*—(1) *Period for which report is required.* A completed copy of the Form M–1 is required to be filed for each calendar year during all or part of which the MEWA or ECE offers or provides coverage for medical care to the employees of two or more employers (including one or more self-employed individuals).

(2) *Filing deadline*—(i) *General March 1 filing due date for annual filings.* A completed copy of the Form M–1 is required to be filed on or before each March 1 that follows a period to be reported (as described in paragraph (e)(1) of this section). However, if March 1 is a Saturday, Sunday, or federal holiday, the form must be filed no later than the next business day.

(ii) *Special rule requiring a 90–Day Origination Report when a MEWA or ECE is originated*—(A) *In general.* Subject to paragraph (e)(2)(ii)(B) of this section, when a MEWA or ECE is originated, the administrator of the MEWA or ECE is also required to file a completed copy of the Form M–1 within 90 days of the origination date (unless 90 days after the origination date is a Saturday, Sunday, or federal holiday, in which case the form must be filed no later than the next business day).

(B) *Exception.* Paragraph (e)(2)(ii)(A) of this section does not apply if the origination occurred between October 1 and December 31. (Thus, no 90-day origination report is due when an entity is originated between October 1 and December 31. However, the March 1 filing deadline of paragraph (e)(2)(i) of this section continues to apply.)

(iii) *Extensions.* An extension may be granted for filing a report if the administrator complies with the extension procedure prescribed in the Instructions to the Form M–1.

(f) *Filing address.* A completed copy of the Form M–1 is filed with the Secretary by sending it to the address prescribed in the Instructions to the Form M–1.

(g) *Civil penalties and procedures.* For information on civil penalties under section 502(c)(5) of ERISA for persons who fail to file the information required under this section, *see* 29 CFR 2560.502c-5. For information relating to administrative hearings and appeals in connection with the assessment of civil penalties under section 502(c)(5) of ERISA, see 29 CFR 2570.90 through 2570.101.

(h) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. (i) *Facts.* MEWA *A* began offering coverage for medical care to the employees of two or more employers July 1, 1989 (and continues to offer such coverage). MEWA *A* does not claim the exception under section 3(40)(A)(i) of ERISA.

(ii) *Conclusion.* In this *Example 1,* the administrator of MEWA *A* must file a completed copy of the Form M–1 each year by March 1.

Example 2. (i) Facts. ECE *B* began offering coverage for medical care to the employees of two or more employers on January 1, 1992. ECE *B* has not been involved in any mergers and the number of employees to which ECE *B* provides coverage for medical care has not grown by more than 50 percent in any given year.

(ii) *Conclusion.* In this *Example 2,* ECE *B* was originated on January 1, 1992 and has not been originated since then. Therefore, the administrator of ECE *B* is not required to file a 2003 Form M–1 on March 1, 2004 because the last time the ECE *B* was originated was January 1, 1992 which is more than 3 years prior to March 1, 2004.

Example 3. (i) *Facts.* ECE *C* began offering coverage for medical care to the employees of two or more employers on July 1, 2004.

(ii) *Conclusion.* In this *Example 3,* the administrator of ECE *C* must file a completed copy of the 2004 Form M–1 on or before September 29, 2004 (which is 90 days after the origination date). In addition, the administrator of ECE *C* must file an updated copy of the 2004 Form M–1 by March 1, 2005 because the last date *C* was originated was July 1, 2004, which is less than 3 years prior to the March 1, 2005 due date. Furthermore, the administrator of ECE *C* must file a 2005 Form M–1 by March 1, 2006 and a 2006 Form M–1 by March 1, 2007 (because July 1, 2004 is less than three years prior to March 1, 2006 and March 1, 2007, respectively). However, if ECE *C* is not involved in any mergers that would result in a new origination date and if ECE *C* does not experience a growth of 50 percent or more in the number of employees to which ECE *C* provides coverage from the last day of the previous calendar year to any day in the current calendar year, then no Form M–1 report is required to be filed after March 1, 2007.

Example 4. (i) *Facts.* MEWA *D* begins offering coverage to the employees of two or more employers on January 1, 2000. MEWA *D* is licensed or authorized to operate as a health insurance issuer in every state in which it offers coverage for medical care to employees.

(ii) *Conclusion.* In this *Example 4,* the administrator of MEWA *D* is not required to file Form M–1 because it is licensed or authorized to operate as a health insurance issuer in every state in which it offers coverage for medical care to employees.

Example 5. (i) *Facts.* MEWA *E* is originated on September 1, 2004.

(ii) *Conclusion.* In this *Example 5,* because MEWA *E* was originated on September 1, 2004, the administrator of MEWA *E* must file a completed copy of the Form M–1 on or before November 30, 2004 (which is 90 days after the origination date). In addition, the administrator of MEWA *E* must file a completed copy of the Form M–1 annually by every March 1 thereafter.

Example 6. (i) *Facts.* Company *F* maintains a group health plan that provides benefits for medical care for its employees (and their dependents). Company *F* establishes a joint venture in which it has a 25 percent stock ownership interest, determined by applying the principles under section 414(b) of the Internal Revenue Code, and transfers some of its employees to the joint venture. Company *F* continues to cover these transferred employees under its group health plan.

(ii) *Conclusion.* In this *Example 6,* the administrator is not required to file the Form M–1 because Company *F's* group health plan meets the exception to the filing requirement in paragraph (c)(2)(ii)(A) of this section. This is because Company *F's* group health plan would not constitute a MEWA but for the fact that it provides coverage to two or more trades or businesses that share a common control interest of at least 25 percent.

Example 7. (i) *Facts.* Company *G* maintains a group health plan that provides benefits for medical care for its employees. The plan year of Company *G's* group health plan is the fiscal year for Company *G,* which is October 1st—September 30th. Therefore, October 1, 2004—September 30, 2005 is the 2005 plan year. Company *G* decides to sell a portion of its business, Division *X,* to Company *H.*

Company *G* signs an agreement with Company *H* under which Division *X* will be transferred to Company *H,* effective September 30, 2005. The change in control of Division *X* therefore occurs on September 30, 2005. Under the terms of the agreement, Company *G* agrees to continue covering all of the employees that formerly worked for Division *X* under its group health plan until Company *H* has established a new group health plan to cover these employees. Under the terms of the agreement, it is anticipated that Company *G* will not be required to cover the employees of Division *X* under its group health plan beyond the end of the 2006 plan year, which is the plan year following the plan year in which the change in control of Division *X* occurs.

(ii) *Conclusion.* In this *Example 7,* the administrator of Company *G's* group health plan is not required to file the Form M–1 on March 1, 2006 for fiscal year 2005 because it is subject to the exception to the filing requirement in paragraph (c)(2)(ii)(B) of this section for an entity that would not constitute a MEWA but for the fact that it is created by a change in control of businesses that occurs for a purpose other than to avoid filing the Form M–1 and is temporary in nature. Under the exception, ''temporary'' means the MEWA does not extend beyond the end of the plan year following the plan year in which the change in control occurs. The administrator is not required to file the 2005 Form M–1 because it is anticipated that Company *G* will not be required to cover the employees of Division *X* under its group health plan beyond the end of the 2006 plan year, which is the plan year following the plan year in which the change in control of businesses occurred.

Example 8. (i) *Facts.* Company I maintains a group health plan that provides benefits for medical care for its employees (and their dependents) as well as certain independent contractors who are self-employed individuals. The plan is therefore a MEWA. The administrator of Company I's group health plan uses calendar year data to report for purposes of the Form M–1. The administrator of Company *I's* group health plan determines that the number of independent contractors covered under the group health plan as of the last day of calendar year 2004 is less than one percent of the total number of employees and former employees covered under the plan determined as of the last day of calendar year 2004.

(ii) *Conclusion.* In this *Example 8,* the administrator of Company *I's* group health plan is not required to file a Form M–1 for calendar year 2004 (which is otherwise due by March 1, 2005) because it is subject to the exception to the filing requirement provided in paragraph (c)(2)(ii)(C) of this section for entities that cover a very small number of persons who are not employees or former employees of the plan sponsor.

Signed at Washington, DC, this 31st day of March 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03–8115 Filed 4–7–03; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2560

RIN 1210–AA64

Assessment of Civil Penalties Under Section 502(c)(5) of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule that describes procedures relating to the assessment of civil penalties under section 502(c)(5) of the Employee Retirement Income Security Act of 1974, (ERISA) as amended by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 502(c)(5) authorizes the Secretary of Labor (the Secretary) to assess a civil monetary penalty against any person from the date of the person's failure or refusal to file the information required to be filed under section 101(g) of ERISA. The final rule clarifies the manner in which the Secretary will assess penalties under ERISA section 502(c)(5) and the procedures for agency review. Separate documents containing a final rule on the reporting requirement under section 101(g) of ERISA and a final rule relating to procedures for administrative hearings and appeals on assessments of penalties under ERISA section 502(c)(5) appear separately in this issue of the **Federal Register**.

EFFECTIVE DATE: This final rule is effective January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Amy J. Turner or Deborah S. Hobbs, Employee Benefits Security Administration, U.S. Department of Labor, Room C–5331, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone (202) 693–8335).

SUPPLEMENTARY INFORMATION:

A. Background and Overview of Changes in the Final Rule

This document contains a final rule that provides guidance relating to the assessment of civil penalties under section 502(c)(5) of ERISA for the failure or refusal to file a report pursuant to section 101(g) of ERISA. This regulation is designed to parallel the procedures set forth in § 2560.502c—2 regarding civil penalties under section 502(c)(2) of ERISA.

An interim final rule relating to the assessment of civil penalties under section 502(c)(5) of ERISA was published in the **Federal Register** on February 11, 2000 at 65 FR 7181. In the February 11, 2000 interim rule, the Department sought comments from affected parties. No comments were received.

On October 21, 2002, the Department published interim final rules relating to notice of blackout periods to participants and beneficiaries (during which their right to direct or diversify investments, obtain a loan, or obtain a distribution under a pension plan may be suspended) and related civil penalties under ERISA section 502(c)(7). Those rules also made conforming changes to the penalty assessment regulations under this section. Specifically, this section was amended to provide an additional five days in which to file a statement of reasonable cause or a request for hearing and answer, as applicable, when the Department serves a notice of intent to assess a penalty or a notice of penalty determination by certified mail, and to provide that service of a notice by the Department by regular mail is complete upon receipt. In addition, conforming amendments were made to provide that statements of reasonable cause are treated as filed on mailing or on transmittal under certain circumstances. Finally, amendments were made to accommodate those changes in the filing and service rules. No comments were received with respect to these conforming amendments.

This regulation finalizes the interim final regulations published February 20, 2000, as amended by the interim final amendments published October 21, 2002. Only one modification was made, involving applicability dates. Specifically, the interim final rule contained a transition safe harbor period under which no civil penalty was assessed against an administrator that had made a good faith effort to comply with a § 2520.101–2 filing that was due in the Year 2000. This transition rule was created because, during the first year in which a report was required to be filed under section 101(g) in particular, the Department was focused on educating administrators about this filing requirement. Because the dates during which the transition rule was applicable have passed, this rule has been deleted from the final rule.

The Department remains committed to working with administrators to help them comply with the Form M–1 filing requirement. Filers who have questions or who need assistance in completing a filing may call the EBSA Help Desk, at 202–693–8360.

B. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. On the basis of these criteria, it has been determined that this regulatory action is significant under section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed this regulation.

Paperwork Reduction Act

The rule being issued here is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502(3).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires each Federal agency to perform a regulatory flexibility analysis for all rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C 551 *et seq.*) unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules were issued as interim final rules and not as a notice of proposed rulemaking, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or conduct a regulatory flexibility analysis. The Department does not anticipate that this final rule will impose a significant impact on a substantial number of small entities, however, regardless of whether one uses the definition of small entity found in regulations issued by the Small Business Administration (13 CFR § 121.201) or one defines small entity, on the basis of section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants.

Small Business Regulatory Enforcement Fairness Act

The final rule being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and will not impose an annual burden of $100 million or more on the private sector.

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Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe in the preamble to the regulation the extent of their consultation and the nature of the concerns of state and local officials, as well as the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of state and local officials have been met.

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Although the Department concludes that these final regulations do not have federalism implications, in keeping with the spirit of the Executive Order that agencies shall closely examine any policies that may have federalism implications or limit the policy making discretion of the states, the Department of Labor engages in extensive efforts to consult with and work cooperatively with affected state and local officials.

For example, the Department attends quarterly meetings of the National Association of Insurance Commissioners (NAIC) to listen to the concerns of state insurance departments. The NAIC is a non-profit corporation established by the insurance commissioners in the 50 states, the District of Columbia, and the four U.S. territories that, among other things, provides a forum for the development of uniform policy when uniformity is appropriate. Its members meet, discuss, and offer solutions to mutual problems. The NAIC sponsors quarterly meetings to provide a forum for the exchange of ideas, and in-depth consideration of insurance issues by regulators, industry representatives, and consumers. In addition to the general discussions, committee meetings, and task force meetings, the NAIC sponsors standing HIPAA meetings for members during the quarterly conferences, including a Centers for Medicare and Medicaid Services (CMS)/Department of Labor (DOL) meeting on HIPAA issues. (This meeting provides CMS and DOL the opportunity to provide updates on regulations, bulletins, enforcement actions, and outreach efforts regarding HIPAA.) In these quarterly meetings, issues relating to MEWAs and the implementation of the Form M–1 filing requirement are frequently discussed and, periodically, entire sessions are scheduled that are dedicated exclusively to MEWA/Form M–1 issues.

The Department also cooperates with the states in several ongoing outreach initiatives, through which information is shared among federal regulators, state regulators, and the regulated community. For example, the Department has established a Health Benefits Education Campaign with more than 70 partners, including CMS, the NAIC, and many business and consumer groups. In addition, the Department Web site offers links to important state Web sites and other resources, facilitating coordination between the state and federal regulators and the regulated community.

The Department also coordinates with state insurance departments to freeze assets when a MEWA operator is committing fraud or operating in a financially unsound manner. In these situations, typically, a state will obtain a cease and desist order to stave off further action by the MEWA in that state. In certain situations, the Department will then obtain a temporary restraining order (TRO) to freeze assets of the MEWA nationwide. In one case this year, the Department obtained a TRO to freeze assets of a MEWA whose operators were committing fraud and not paying benefits. This case affects more than 23,000 participants and beneficiaries in 50 states and the amount of unpaid claims could exceed $6 million. In a similar case last year, the Department obtained a TRO to freeze assets of a MEWA that was diverting plan assets for personal use of the MEWA's operators. That case affected at least 1,500 participants and $2.8 million in unpaid claims. A court order was also issued in that case appointing an independent fiduciary to manage the MEWA.

In conclusion, the Department has stayed in contact with state regulators and considered their concerns in developing these regulations. These regulations should help the states enforce their own laws as they apply to MEWAs since the reports they require will be available to them and will identify MEWAs operating in each state.

Statutory Authority

29 U.S.C. 1132(c)(5) and 1135 and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003).

List of Subjects in 29 CFR Part 2560

Claims, Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Penalties, Pensions, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Part 2560 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2560—[AMENDED]

■ 1. The authority for part 2560 continues to read:

Authority: 29 U.S.C. 1132, 1135, and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2560.503–1 also issued under 29 U.S.C. 1133.

■ 2. Part 2560 is amended by revising §2560.502c–5 to read:

§ 2560.502c–5—Civil penalties under section 502(c)(5).

(a) *In general*—(1) Pursuant to the authority granted the Secretary under section 502(c)(5) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator of a multiple employer welfare arrangement (MEWA) (within the meaning of section 3(40)(A) of the Act) that is not a group health plan, and that provides benefits consisting of medical care (within the meaning of section 733(a)(2)), for which a report is required to be filed under section 101(g) of the Act and 29 CFR 2520.101–2, shall be liable for civil penalties assessed by the Secretary under section 502(c)(5) of the Act for each failure or refusal to file a completed report required to be filed under section 101(g) and 29 CFR 2520.101–2. The term ''administrator'' is defined in 29 CFR 2520.101–2(b).

(2) For purposes of this section, a failure or refusal to file the report required to be filed under section 101(g) shall mean a failure or refusal to file, in whole or in part, that information described in section 101(g) and 29 CFR 2520.101–2, on behalf of the MEWA, at the time and in the manner prescribed therefor.

(b) *Amount assessed*—(1) The amount assessed under section 502(c)(5) shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure to file the report. However, the amount assessed under section 502(c)(5) of the Act shall not exceed $1,000 a day, computed from the date of the administrator's failure or refusal to file the report and, except as provided in paragraph (b)(2) of this section, continuing up to the date on which a report meeting the requirements of section 101(g) and 29 CFR 2520.101–2, as determined by the Secretary, is filed.

(2) If, upon receipt of a notice of intent to assess a penalty (as described in paragraph (c) of this section), the administrator files a statement of reasonable cause for the failure to file, in accordance with paragraph (e) of this section, a penalty shall not be assessed for any day from the date the Department serves the administrator with a copy of such notice until the day after the Department serves notice on the administrator of its determination on reasonable cause and its intention to assess a penalty (as described in paragraph (g) of this section).

(3) For purposes of this paragraph, the date on which the administrator failed or refused to file the report shall be the date on which the report was due (determined without regard to any extension of time for filing). A report which is rejected under 29 CFR 2520.101–2 shall be treated as a failure to file a report when a revised report meeting the requirements of this section is not filed within 45 days of the date of the Department's notice of rejection. If a revised report meeting the requirements of this section, as determined by the Secretary, is not submitted within 45 days of the date of the notice of rejection by the Department, a penalty shall be assessed under section 502(c)(5) beginning on the day after the date of the administrator's failure or refusal to file the report.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(5), the Department shall provide to the administrator of the MEWA a written notice indicating the Department's intent to assess a penalty under section 502(c)(5), the amount of such penalty, the period to which the penalty applies, and a statement of the facts and the reason(s) for the penalty.

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(g) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(5) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of 29 CFR 2570.91(g), forty-five (45) days from the date of service of the notice.

(g) *Notice of the determination on statement of reasonable cause*—(1) The Department, following a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section, and a brief statement of the reasons for assessing the penalty. This notice is a ''pleading'' for purposes of 29 CFR 2570.91(m).

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of 29 CFR 2570.91(g), forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of 29 CFR 2570.91(g), if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under 29 CFR 2570.90 through 2570.101, and files an answer to the notice. The request for hearing and answer must be filed in accordance with 29 CFR 2570.92 and 18.4. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements*—(1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

(j) *Liability*—(1) If more than one person is responsible as administrator for the failure to file the report, all such persons shall be jointly and severally liable with respect to such failure.

(2) Any person against whom a civil penalty has been assessed under section 502(c)(5) pursuant to a final order, within the meaning of 29 CFR 2570.91(g), shall be personally liable for the payment of such penalty.

(k) *Cross-reference. See* 29 CFR 2570.90 through 2570.101 for procedural rules relating to administrative hearings under section 502(c)(5) of the Act.

Signed at Washington DC, this 31st day of March, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–8116 Filed 4–7–03; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2570

RIN 1210–AA64

Procedures for Administrative Hearings Regarding the Assessment of Civil Penalties Under Section 502(c)(5) of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule that describes procedures relating to administrative hearings, in connection with the assessment of civil penalties under section 502(c)(5) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 502(c)(5) of ERISA authorizes the Secretary of Labor (the Secretary) to assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) of ERISA. Separate documents are also being published today in the **Federal Register** containing final rules implementing the reporting requirement under section 101(g) of ERISA and final rules describing the manner in which the Department will assess civil penalties under ERISA section 502(c)(5).

EFFECTIVE DATE: This final rule is effective January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Amy J. Turner or Deborah S. Hobbs, Employee Benefits Security Administration, U.S. Department of Labor, Room C–5331, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone (202) 693–8335).

SUPPLEMENTARY INFORMATION:

A. Background and Overview of Changes in the Final Rule

This document contains a final rule that provides guidance relating to the procedures for administrative hearings and appeals regarding the assessment of civil penalties under section 502(c)(5) of ERISA for the failure or refusal to file a completed report pursuant to section 101(g) of ERISA. This regulation is designed to parallel the procedures set forth in § 2570.502c–2 regarding civil penalties under section 502(c)(2) of ERISA.

An interim final rule relating to the procedures for administrative hearings and appeals relating to the assessment of civil penalties under section 502(c)(5) of ERISA was published in the **Federal Register** on February 11, 2000, 65 FR 7185. In the February 11, 2000 interim rule, the Department sought comments from those affected by this regulation. No comments were received.

On October 21, 2002, the Department published interim final rules relating to notice of blackout periods to participants and beneficiaries (during which their right to direct or diversify investments, obtain a loan, or obtain a distribution under a pension plan may be suspended) and related civil penalties under ERISA section 502(c)(7). Those rules also made conforming changes to the procedural regulations under this section. Specifically, § 2570.94, which describes ''consequences of default'' was modified to provide that, if a respondent fails to file an answer to the notice of determination, the notice of determination shall become a final order of the Secretary 45 days from the date of service of the notice. No comments were received with respect to this conforming amendment.

The interim rule is, therefore, being published as a final rule without change.

B. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. On the basis of these criteria, it has been determined that this regulatory action is significant under section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed this regulation.

Paperwork Reduction Act

The rule being issued here is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502(3).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), (RFA) requires each Federal agency to perform a regulatory flexibility analysis for all rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C 551 *et seq.*) unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules were issued as interim final rules and not as a notice of proposed rulemaking, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or conduct a regulatory flexibility analysis. The Department does not anticipate that this final rule will impose a significant impact on a substantial number of small entities, however, regardless of whether one uses the definition of small entity found in regulations issued by the Small Business Administration (13 CFR 121.201) or one defines small entity, on the basis of section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants.

Small Business Regulatory Enforcement Fairness Act

The final rule being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and will not impose an annual burden of $100 million or more on the private sector.

Federalism Statement Under Executive Order 13132

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe in the preamble to the regulation the extent of their consultation and the nature of the concerns of state and local officials, as well as the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of state and local officials have been met.

In the Department's view, these final regulations do not have federalism implications because they do not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. Not only do these regulations not reduce state discretion, the reports they require will facilitate state enforcement of their own laws as they apply to MEWAs since the reports will be available to the states and will identify MEWAs operating in each state.

Although the Department concludes that these final regulations do not have federalism implications, in keeping with the spirit of the Executive Order that agencies shall closely examine any policies that may have federalism implications or limit the policy making discretion of the states, the Department of Labor engages in extensive efforts to consult with and work cooperatively with affected state and local officials.

For example, the Department attends quarterly meetings of the National Association of Insurance Commissioners (NAIC) to listen to the concerns of state insurance departments. The NAIC is a non-profit corporation established by the insurance commissioners in the 50 states, the District of Columbia, and the four U.S. territories that, among other things, provides a forum for the development of uniform policy when uniformity is appropriate. Its members meet, discuss, and offer solutions to mutual problems. The NAIC sponsors quarterly meetings to provide a forum for the exchange of ideas, and in-depth consideration of insurance issues by regulators, industry representatives, and consumers. In addition to the general discussions, committee meetings, and task force meetings, the NAIC sponsors standing HIPAA meetings for members during the quarterly conferences, including a Centers for Medicare and Medicaid Services (CMS)/Department of Labor (DOL) meeting on HIPAA issues. (This meeting provides CMS and DOL the opportunity to provide updates on regulations, bulletins, enforcement actions, and outreach efforts regarding HIPAA.) In these quarterly meetings, issues relating to MEWAs and the implementation of the Form M–1 filing requirement are frequently discussed and, periodically, entire sessions are scheduled that are dedicated exclusively to MEWA/Form M–1 issues.

The Department also cooperates with the states in several ongoing outreach initiatives, through which information is shared among federal regulators, state regulators, and the regulated community. For example, the Department has established a Health Benefits Education Campaign with more than 70 partners, including CMS, the NAIC, and many business and consumer groups. In addition, the Department Web site offers links to important state Web sites and other resources, facilitating coordination between the state and federal regulators and the regulated community.

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In conclusion, the Department has stayed in contact with state regulators and considered their concerns in developing these regulations. These regulations should help the states enforce their own laws as they apply to MEWAs since the reports they require will be available to them and will identify MEWAs operating in each state.

Statutory Authority

29 U.S.C. 1132(c)(5) and 1135 and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb.3, 2003).

List of Subjects in 29 CFR Part 2570

Administrative practice and procedure, Claims, Employee benefit plans, Law enforcement, Penalties, Pensions, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Part 2570 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2570—[AMENDED]

■ 1. The authority for part 2570 continues to read:

Authority: 5 U.S.C. 8477, 29 U.S.C. 1002(40), 1021, 1108, 1132, 1135, sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332, and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275; Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb.3, 2003).

■ 2. Sec. 2570.3 is amended to revise paragraph (a) to read as follows:

§ 2570.3 Service: Copies of documents and pleadings.

* * * * *

(a) *General.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges, 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or to the OALJ regional Office to which the proceedings may have been transferred for hearing. Each document filed shall be clear and legible.

* * * * *

■ 3. Subpart E of part 2570 is amended to read as follows:

Subpart E—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(5)

Sec.
2570.90 Scope of Rules.
2570.91 Definitions.
2570.92 Service: Copies of documents and pleadings.
2570.93 Parties, how designated.
2570.94 Consequnces of default.
2570.95 Consent order or settlement.
2570.96 Scope of discovery.
2570.97 Summary decision.
2570.98 Decision of the administrative law judge.
2570.99 Review by the Secretary.
2570.100 Scope of review.
2570.101 Procedures for review by the Secretary.

§ 2570.90 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(5) civil penalty proceedings'' (as defined in 2570.91(n)) under section 502(c)(5) of the Employee Retirement Income Security Act of 1974. The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges in subpart A of 29 CFR part 18 will apply to matters arising under ERISA section 502(c)(5) except as described by this section. These proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

§ 2570.91 Definitions.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of the definitions in § 18.2 of this title.

(a) *Adjudicatory proceeding* means a judicial-type proceeding before an administrative law judge leading to the formulation of a final order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to 29 CFR 2560.502c–5(g);

(d) *Commencement of proceeding* is the filing of an answer by the respondent;

(e) *Consent agreement* means any written document containing a specified proposed remedy or other relief acceptable to the Department and consenting parties;

(f) *ERISA* means the Employee Retirement Income Security Act of 1974, as amended;

(g) *Final order* means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(5) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, the failure of a party to file a statement of reasonable cause described in 29 CFR 2560.502c–5(e) within the prescribed time limits, or the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. 704;

(h) *Hearing* means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission, to the administrative law judge;

(i) *Order* means the whole or any part of a final procedural or substantive disposition of a matter under ERISA section 502(c)(5);

(j) *Party* includes a person or agency named or admitted as a party to a proceeding;

(k) *Person* includes an individual, partnership, corporation, employee benefit plan, association, exchange, or other entity or organization;

(l) *Petition* means a written request, made by a person or party, for some affirmative action;

(m) *Pleading* means the notice as defined in 29 CFR 2560.502c–5(g), the answer to the notice, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) *502(c)(5) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(5) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(5);

(p) *Secretary* means the Secretary of Labor and includes, pursuant to any delegation of authority by the Secretary, any assistant secretary (including the Assistant Secretary for Employee Benefits Security), administrator, commissioner, appellate body, board, or other official of the Department of Labor; and

(q) *Solicitor* means the Solicitor of Labor or his or her delegate.

§ 2570.92 Service: Copies of documents and pleadings.

For 502(c)(5) penalty proceedings, this section shall apply in lieu of 29 CFR 18.3.

(a) *In general.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The Department shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA Section 502(c)(5) Proceeding, P.O. Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions and all other documents shall be made by regular mail to the last known address.

(d) *Form of pleadings*—(1) Every pleading shall contain information indicating the name of the Employee Benefits Security Administration (EBSA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (*e.g.*, notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ × 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopies, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

§ 2570.93 Parties, how designated.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.10.

(a) The term *party* wherever used in this subpart shall include any natural person, corporation, employee benefit plan, association, firm, partnership, trustee, receiver, agency, public or private organization, or government agency. A party against whom a civil penalty is sought shall be designated as ''respondent.'' The Department shall be designated as the ''complainant.''

(b) Other persons or organizations shall be permitted to participate as parties only if the administrative law judge finds that the final decision could directly and adversely affect them or the class they represent, that they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties, and that in the discretion of the administrative law judge the participation of such persons or organizations would be appropriate.

(c) A person or organization not named as a respondent wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person or organization who has been made a party at the time of filing. Such petition shall concisely state:

(1) Petitioner's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for petitioner;

(4) The issues on which petitioner wishes to participate; and

(5) Whether petitioner intends to present witnesses.

(d) Objections to the petition may be filed by a party within fifteen (15) days of the filing of the petition. If objections to the petition are filed, the administrative law judge shall then determine whether petitioners have the requisite interest to be a party in the proceedings, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner as

well as the parties, written notice of the decision on his or her petition. For each petition granted, the administrative law judge shall provide a brief statement of the basis of the decision. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae.

§ 2570.94 Consequences of default.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.5(a) and (b). Failure of the respondent to file an answer to the notice of determination described in 29 CFR 2560.502c–5(g) within the 30 day period provided by 29 CFR 2560.502c–5(h) shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(5) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.91(g), forty-five (45) days from the date of the service of the notice.

§ 2570.95 Consent order or settlement.

For 502(c)(5) civil penalty proceedings, the following shall apply in lieu of 29 CFR 18.9.

(a) *In general.* At any time after the commencement of a proceeding, but at least five (5) days prior to the date set for hearing, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge;

(4) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(5) That the order and decision of the administrative law judge shall be final agency action.

(c) *Submission.* On or before the expiration of the time granted for negotiations, but, in any case, at least five (5) days prior to the date set for hearing, the parties or their authorized representative or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order to the administrative law judge;

(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action subject to compliance with the terms of the settlement; or

(3) Inform the administrative law judge that agreement cannot be reached.

(d) *Disposition.* In the event that a settlement agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge shall issue a decision incorporating such findings and agreement within thirty (30) days of receipt of such document. The decision of the administrative law judge shall incorporate all of the findings, terms, and conditions of the settlement agreement and consent order of the parties. Such decision shall become a final agency action within the meaning of 5 U.S.C. 704.

(e) *Settlement without consent of all parties.* In cases in which some, but not all, of the parties to a proceeding submit a consent agreement to the administrative law judge, the following procedure shall apply:

(1) If all of the parties have not consented to the proposed settlement submitted to the administrative law judge, then such non-consenting parties must receive notice, and a copy, of the proposed settlement at the time it is submitted to the administrative law judge;

(2) Any non-consenting party shall have fifteen (15) days to file any objections to the proposed settlement with the administrative law judge and all other parties;

(3) If any party submits an objection to the proposed settlement, the administrative law judge shall decide within thirty (30) days after receipt of such objections whether to sign or reject the proposed settlement. Where the record lacks substantial evidence upon which to base a decision or there is a genuine issue of material fact, then the administrative law judge may establish procedures for the purpose of receiving additional evidence upon which a decision on the contested issues may reasonably be based;

(4) If there are no objections to the proposed settlement, or if the administrative law judge decides to sign the proposed settlement after reviewing any such objections, the administrative law judge shall incorporate the consent agreement into a decision meeting the requirements of paragraph (d) of this section.

§ 2570.96 Scope of discovery.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.14.

(a) A party may file a motion to conduct discovery with the administrative law judge. The motion for discovery shall be granted by the administrative law judge only upon a showing of good cause. In order to establish ''good cause'' for the purposes of this section, a party must show that the discovery requested relates to a genuine issue as to a material fact that is relevant to the proceeding. The order of the administrative law judge shall expressly limit the scope and terms of discovery to that for which ''good cause'' has been shown, as provided in this paragraph.

(b) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials or information in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials or information by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

§ 2570.97 Summary decision.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.41.

(a) *No genuine issue of material fact.*

(1) Where no issue of material fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal pursuant to §§ 2570.99 through 2570.101, shall become a final order.

(2) A decision made under this paragraph shall include a statement of:

(i) Findings of fact and conclusions of law, and the reasons therefore, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

(3) A copy of any decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 2570.98 Decision of the administrative law judge.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.57.

(a) *Proposed findings of fact, conclusions, and order.* Within twenty (20) days of the filing of the transcript of the testimony or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion, proposed findings of fact, conclusions of law, and an order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the administrative law judge.* Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. In a contested case in which the Department and the Respondent have presented their positions to the administrative law judge pursuant to the procedures for 502(c)(5) civil penalty proceedings as set forth in this subpart, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the penalty expressly provided for in section 502(c)(5) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become a final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.99 through 2570.101.

§ 2570.99 Review by the Secretary.

(a) The Secretary may review a decision of an administrative law judge. Such a review may occur only when a party files a notice of appeal from a decision of an administrative law judge within twenty (20) days of the issuance of such decision. In all other cases, the decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704.

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

(c) Upon receipt of a notice of appeal, the Secretary shall request the Chief Administrative Law Judge to submit to him or her a copy of the entire record before the administrative law judge.

§ 2570.100 Scope of review.

The review of the Secretary shall not be a *de novo* proceeding but rather a review of the record established before the administrative law judge. There shall be no opportunity for oral argument.

§ 2570.101 Procedures for review by the Secretary.

(a) Upon receipt of the notice of appeal, the Secretary shall establish a briefing schedule which shall be served on all parties of record. Upon motion of one or more of the parties, the Secretary may, in his or her discretion, permit the submission of reply briefs.

(b) The Secretary shall issue a decision as promptly as possible after receipt of the briefs of the parties. The Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal and shall issue a statement of reasons and bases for the action(s) taken. Such decision by the Secretary shall be final agency action within the meaning of 5 U.S.C. 704.

Signed at Washington DC, this 31st day of March, 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–8117 Filed 4–7–03; 8:45 am]

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Federal Register

Wednesday,
April 9, 2003

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 121

Flightcrew Compartment Access and Door Designs; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2001–10770; SFAR 92–5]

RIN 2120–AH97

Flightcrew Compartment Access and Door Designs

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action supersedes Special Federal Aviation Regulation (SFAR) 92–4, which was published on March 19, 2002, to allow operators to quickly modify the flightcrew compartment door to delay or deter unauthorized entry to the flightcrew compartment. This action temporarily authorizes variances from existing design standards for the doors and certain operational rules associated with the modifications. It allows for approval for return to service of modified airplanes without prior approved data if the modification constitutes a major alteration. This action prohibits the possession of flightdeck compartment door keys by other than the flightcrew during flight, unless the flightdeck door has an internal flightdeck locking device installed, operative, and in use. This action extends regulatory relief for all-cargo transport category airplanes and a limited number of passenger airplanes beyond April 9, 2003.

DATES: This action is effective April 9, 2003 and shall remain in effect until rescinded.

FOR FURTHER INFORMATION CONTACT: Dave Rich, Certification Procedures Branch, Aircraft Certification Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–7141; e-mail address: *9-awa-avr-design@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of This Action

You can get an electronic copy of this document from the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*).

(2) On the search page, type in the last five digits of the docket number shown at the beginning of this document. Click on ''search.''

(3) On the next page, which contains the docket summary information, click on the item you want to see.

You can also get an electronic copy using the Internet through the FAA's Web page at *http://www.faa.gov/avr/arm/nprm/nprm.htm* or the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Ave., SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number or SFAR number of this rulemaking.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information advice about compliance with statutes and regulations within the FAA's jurisdiction. Therefore, any small entity that has a question regarding this document may contact its local FAA official. Internet users can find additional information on SBREFA on the FAA's Web page at *http://www.faa.gov/avr/arm/sbrefa.htm* and send electronic inquiries to the following Internet address: *9–AWA–SBREFA@faa.gov.*

Background

The September 11, 2001, hijacking events demonstrated that some persons are willing to hijack airplanes and use them as weapons against the citizens of the United States. This safety and security threat was not anticipated and, therefore, not considered in the design of transport airplanes. The hijackings made clear the critical need to improve the security of the flightcrew compartment.

On November 16, 2001, Congress enacted the Aviation and Transportation Security Act, Pub. L. 107–71. Section 104(a)(1)(B) of the Act requires the FAA to issue an order requiring the strengthening of the flightdeck door and locks on certain passenger carrying airplanes.

Flightcrew Compartment Door Designs

Flightcrew compartment doors on transport category airplanes have been designed principally to ensure privacy, so pilots could focus their entire attention on their normal and emergency flight duties. The doors have not been designed to provide an impenetrable barrier between the cabin and the flightcrew compartment. Doors have not been required to meet any significant security threat, such as small arms fire or shrapnel, or the exercise of brute force to enter the flightcrew compartment.

Besides affording an uninterrupted work environment for the flightcrew, flightcrew compartment doors often must meet other important safety standards. Should there be a sudden decompression of the airplane, separate compartments within the airplane, like the cabin and the crew compartments, must be designed so that the pressure differential that is created does not compromise the basic airplane structure. Certification standards require that airplane designs provide a method to compensate for decompression in a manner that avoids significant damage to the airplane. In many cases, flightcrew compartment doors provide the pressure compensation by being vented or swinging open to equalize the pressure between the cabin and the flightcrew compartment.

In addition, design standards require that the flightcrew have a path to exit the flightcrew compartment in an emergency, if the cockpit window exits are not usable. Flightcrew compartment doors have been designed to provide this escape path. But this escape feature may also enable easier unauthorized entry into the flightcrew compartment from the cabin.

Operating regulations, in particular § 121.379(b) in the case of a major alteration, require the work to be done in accordance with technical data approved by the Administrator. Operating regulations for airlines also require that each crewmember have a key readily available to open doors between passengers and an emergency exit. Some airlines issue flightcrew compartment door keys to all their crewmembers. This allows flight attendants to enter the flightcrew compartment and assist the flightcrew in an emergency, such as incapacitation of a flight crewmember. But it also offers an opportunity for an individual to overpower or coerce a flight attendant, take away the key, and enter the flightcrew compartment.

This SFAR authorized a temporary period during which non-compliance with design requirements were allowed when improvements to flightcrew compartment security were made. In addition, the FAA waived procedural requirements applicable to major alterations (§ 121.379(b)), the approval of service information and requirements for production of parts for door modifications.

Prior Versions of SFAR 92

Original SFAR 92 was published on October 9, 2001, and allowed all part 121 passenger carrying operators to install flightcrew compartment door improvements. It allowed airframe manufacturers and modifiers to produce service information without separate FAA approval to assist operators in developing modifications to improve intrusion resistance to the flightcrew compartment. The SFAR included a provision that overrode the requirement for parts production approval in support of door reinforcement activities. Should any of the changes to the door constitute a major alteration, the SFAR relieved the operator of having to obtain prior approval of the data. In addition to the above changes, the FAA also believed it was prudent to eliminate the ability of intruders to gain access by obtaining a flight attendant's key. For that reason, the SFAR temporarily changed the requirement in § 121.313(g) by stating that only flight crewmembers, and not cabin crewmembers, would have flightcrew compartment keys during flight.

SFAR 92–1, published on October 17, 2001, extended the SFAR to cargo airplane operators.

As mentioned above, SFAR 92 temporarily changed section 121.313(g) to prohibit the possession of flightdeck keys by non-flightdeck crewmembers. SFAR 92–2, published on November 21, 2001, modified the prohibition to allow possession of the key under certain limited circumstances.

When SFAR 92 was originally issued, and subsequently revised, the FAA expected that flightdeck modifications would be made as soon as possible. While this was the case for the substantial majority of operators, not all had accomplished the short-term modifications. Therefore, on January 15, 2002, SFAR 92–3 was published to mandate installation of the internal locking devices. This revision also expanded the modification authority to U.S. registered, transport category airplanes that are operated under part 129, foreign operations.

SFAR 92–4 was published on March 19, 2002, to extend the authority to return airplanes to service without previously approved data past the previously established April 22, 2002 date. This revision to the SFAR explicitly stated that operational requirements in sections 121.313(h) and 121.583(b)(1) and (2) are waived if a conflict exists when internal locks are installed and used. The introductory language of paragraph 2 was also revised to address airplanes that are registered in another country, but operated by a part 121 certificate holder.

Other Rulemaking

In parallel with SFAR 92, the FAA issued an immediately adopted rule (IAR) setting new design standards for flightdeck doors in 14 CFR part 25 (Amendment Nos. 25–106 and 121–288, 67 FR 2118, January 10, 2002). These new standards enhance resistance to blunt force and ballistic intrusion. In addition, the IAR requires all airplanes required to have a door under section 121.313(f), as well as all-cargo transport category airplanes that have flightdeck doors installed on or after January 15, 2002, to have a door meeting the new design standards. The stronger doors must be installed not later than April 9, 2003. Doors meeting the new design standards will replace the doors reinforced under this SFAR.

SFAR 92–5

This SFAR is being extended to address two circumstances. One is a response to recent legislation limiting the application and enforcement of requirements for reinforced doors on cargo airplanes. The other is the need for continued relief for a limited number of passenger operators.

Section 355 of the recently adopted Consolidated Appropriations Resolution (Pub. L. 108–7) limited the FAA's ability to apply and enforce the new reinforced door standards for cargo airplanes. As a result, cargo operators will not be subject to the April 9, 2003 deadline for installation of reinforced doors. However, cargo operators have installed internal locking devices under the requirements and authority of this SFAR. We expect that cargo operators who have such devices will want to continue to use them after April 9, 2003, even if they choose not to install a reinforced door. As described above, expiration of the SFAR on April 9, 2003, will limit or eliminate the authority for cargo operators to continue to use these devices. To avoid this decrease in security, the SFAR is extended to continue the authority for these devices on cargo airplanes. The new expiration date of September 30, 2003, was selected to correspond with the expiration date of the Resolution.

Passenger operators have made great strides in meeting the April 9, 2003, deadline for installation of reinforced doors. As a part of the installation process, and to adopt improved security expeditiously, some operators installed doors that meet the strength requirements prior to formal certification approval. These installations are possible because SFAR 92 waived otherwise applicable certification processes.

We expect that all passenger operators will have reinforced doors on their airplanes by April 9, 2003. But some doors may not have formal certification approval by that date. As presently written, SFAR 92–4 will expire on April 9, 2003. If it expires, operators will lose the ability to operate with reinforced doors that lack certification approval. If this were to happen, the operators would be penalized even though doors capable of deterring terrorists are in place.

To avoid this result, the SFAR is being extended to July 31, 2003, provided certain criteria are met. July 31, 2003, is selected because we believe that all projects that will qualify for approval will have approval by that date. To take advantage of this extension,

(1) Passenger operators must have installed reinforced doors before midnight April 9, 2003.

(2) The FAA must have determined before midnight April 9, 2003, that those doors meet the updated intrusion resistance standards of 14 CFR 25.795(a)(1) and (2).

(3) A formal application for certification approval of the door must have been submitted to the FAA before March 10, 2003.

These criteria should assure that operators and door producers have made a good faith effort to meet the reinforced door requirement. Once these criteria have been satisfied, operators can continue to operate until the final certification approval is issued.

Applicants and operators must recognize that compliance with all airworthiness standards is essential. For example, some applicants have been unable to demonstrate compliance with the decompression standards of § 25.365. Based on their progress to date, it is not clear that they will ultimately be able to do so. Unless these designs can be shown to comply with all airworthiness standards by the extended deadline provided by this SFAR, operators will be required to replace these doors with doors that have been shown to comply with all applicable standards. Operators who are aware that their doors are unlikely to be approved must procure doors from other approved sources in sufficient time to comply with § 121.313(j) by July 31, 2003, the extended deadline for this SFAR.

Justification for Immediate Adoption

The SFAR is scheduled to expire on April 9, 2003. There is insufficient time to solicit comment on this proposal.

Because the circumstances described herein warrant immediate action by the FAA, the Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and contrary to the public interest. Further, the Administrator finds that good cause exists under 5 U.S.C. 553(d) for making this final rule effective immediately upon publication. This action is necessary to prevent a possible imminent hazard to airplanes and to protect persons and property within the United States.

Additionally, with respect to the provisions requiring modifications to strengthen the flightdeck doors and locks, Pub. L. 107–71 authorized the Administrator to issue an order without regard to the provisions of chapter 5 of Title 5 of the United States Code. The modification to section 121.313 contained in this SFAR is within the scope of this authority and is adopted without public notice and a prior opportunity to comment.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to this SFAR.

Paperwork Reduction Act

This emergency final SFAR contains information collection activities subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). In accordance with section 3507(j)(1)(B) of that statute, the FAA requested the Office of Management and Budget to grant an immediate emergency clearance on the paperwork package. OMB granted an emergency clearance and assigned OMB control number 2120–0674. As protection provided by the Paperwork Reduction Act, 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. Following is a description of the information collection burden associated.

Title: Flightcrew Compartment Access and Door Designs

Summary/Need: The SFAR required operators to submit a report to the FAA by February 15, 2002, that details the specific modifications. This will allow the FAA to monitor what has been installed and take action if the installation creates an unwarranted safety risk. Further, to monitor progress toward the goal of full compliance, the SFAR requires a report by April 22, 2002, that describes how the operator will come into full regulatory compliance.

Respondents: The respondents are an estimated 135 airplane operators covered under 14 CFR parts 121 and 129.

Burden: The burden associated with this SFAR is 6480 hours.

Regulatory Evaluation

This rulemaking action is taken under an emergency situation within the meaning of Section 6(a)(3)(D) of Executive Order 12866, Regulatory Planning and Review. It also is considered an emergency regulation under Paragraph 11(g) of the Department of Transportation (DOT) Regulatory Policies and Procedures. In addition, it is a significant rule within the meaning of the Executive Order and DOT's policies and procedures. No regulatory analysis or evaluation accompanies the final rule; however, both DOT and OMB have reviewed this rulemaking. At this time, the FAA is not able to assess whether this final rule will have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act of 1980, as amended. However, we will be conducting a regulatory evaluation of the cost and benefits of this rulemaking, including any impact on small entities, at a later date.

Executive Order 13132, Federalism

The FAA has analyzed this SFAR under the principles and criteria of Executive Order 13132, Federalism. We have determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we have determined that this final rule does not have federalism implications.

Also, the Regulatory Flexibility Act does not require the preparation of a regulatory flexibility assessment on a rule not required to be issued as a Notice of Proposed Rulemaking (NPRM) under the Administrative Procedure Act.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' This SFAR does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Also, the Regulatory Flexibility Act does not require the preparation of a regulatory flexibility assessment on a rule not required to be issued as a Notice of Proposed Rulemaking (NPRM) under the Administrative Procedure Act.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j) this rulemaking action qualifies for a categorical exclusion.

Energy Impact

The energy impact of this SFAR has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Pub. L. 94–163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. It has been determined that this SFAR is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Aviation safety, Charter flights, Reporting and recordkeeping requirements, Safety, Transportation.

The Amendment

■ For the reasons set forth above, the Federal Aviation Administration amends 14 CFR part 121 as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1153, 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

SFAR No. 92–4 [Removed]

■ 2. Remove Special Federal Aviation Regulation No. 92–4.

■ 3. Add Special Federal Aviation Regulation (SFAR) 92–5 to read as follows:

Special Federal Aviation Regulations No. 92–5—Flightcrew Compartment Access and Door Designs

1. *Applicability.* This Special Federal Aviation Regulation (SFAR) applies to all operators that hold an air carrier certificate or operating certificate issued under 14 CFR part 119 and that conduct operations under this part 121 and to operators of U.S. registered transport category airplanes operated under 14 CFR part 129, except paragraph 5 of this SFAR does not apply to cargo operations and 14 CFR part 129 operations. It applies to the operators specified in this SFAR that modify airplanes to improve the flightcrew compartment door installations to restrict the unwanted entry of persons into the flightcrew compartment. This SFAR also applies to production certificate holders and applicants for airworthiness certificates for airplanes to be operated by operators specified in this SFAR, and producers of parts to be used in modifications of such airplanes.

2. *Regulatory Relief.* Contrary provisions of this part 21, and §§ 121.313(h), 121.153(a)(2), 121.153(c), 121.379(b), 121.583(b)(1) and (2) and 14 CFR 129.13 notwithstanding:

(a) An operator may operate airplanes modified to improve the flightcrew compartment door installations to restrict the unauthorized entry of persons into the flightcrew compartment without regard to the applicable airworthiness requirements and may modify those airplanes for that purpose, using technical data not previously approved by the Administrator, subject to the following conditions:

(i) Not later than February 15, 2002, submit to the Director, Aircraft Certification Service, a detailed description of the changes to the airplane that have been accomplished before that date to enhance the intrusion resistance of the flightcrew compartment including identification of what major alterations have been done without previously approved data.

(ii) If, upon reviewing the data submitted in paragraph 2(a)(i) of this SFAR, the Administrator determines that a door modification presents an unacceptable safety risk, the FAA may issue an order requiring changes to such modifications.

(b) An applicant for an airworthiness certificate may obtain such a certificate for modified airplanes to be operated by operators described in this SFAR.

(c) A holder of a production certificate may submit for airworthiness certification or approval, modified airplanes to be operated by operators described in this SFAR.

(d) A person may produce parts for installation on airplanes in connection with modifications described in this SFAR, without FAA parts manufacturer approval (PMA).

3. *Report of Modifications.* Not later than April 22, 2002, all operators who are required to install flightdeck door modifications in accordance with 14 CFR 121.313(j) must submit a report to the Director, Aircraft Certification Service. The report must describe the modifications to be made and provide a schedule for the changes necessary to restore compliance with all applicable airworthiness requirements and to meet the requirements of 14 CFR 121.313(j). The schedule may not extend beyond the termination date of this SFAR.

4. *Return to Service Documentation.* Where operators have modified airplanes as authorized in this SFAR, the affected airplane must be returned to service with a note that it was done under the provisions of this SFAR.

5. *Provision for Flightdeck Door Compartment Key.* Contrary to provisions of § 121.313(g), the following provision applies: A key for each door that separates a passenger compartment from an emergency exit must be identified to passengers in the briefing required by § 121.571(a)(1)(ii). The key required for access to the emergency exit must be readily available for each crewmember. No key to the flightcrew compartment shall be available to any crewmember during flight, except for flight crewmembers, unless an internal flightdeck locking device such as a deadbolt or bar is installed, operative, and in use.

6. *Door Modification Requirement.* After March 1, 2002, for each airplane required under § 121.313(f) to have a door between the passenger and pilot compartments, and for transport category all-cargo airplanes that have a door installed between the pilot compartment and any other occupied compartment on or after January 15, 2002, such door must be equipped with an internal locking device installed, operative, and in use. Such internal locking device has to be designed so that it can only be unlocked from inside the flightdeck.

7. *Termination.* For all-cargo transport category airplanes, this SFAR terminates on October 1, 2003. For passenger airplanes, this SFAR expires on April 9, 2003, except for airplanes meeting the criteria specified in paragraphs 7.a, b, and c, below. For airplanes meeting these criteria, this SFAR expires on July 31, 2003.

a. Before midnight April 9, 2003, the operator must have installed a strengthened flightdeck door meeting the requirement of paragraph 7.b;

b. Before midnight April 9, 2003, the FAA must have found that the door complies with 14 CFR 25.795(a)(1) and (2) in effect on January 15, 2002; and

c. Before March 10, 2003, a formal application for certification approval of the door must have been submitted to the FAA.

Issued in Washington, DC, on April 4, 2003.

Marion C. Blakey,

Administrator.

[FR Doc. 03–8735 Filed 4–7–03; 9:17 am]

BILLING CODE 4910–13–P

Federal Register

Wednesday,
April 9, 2003

Part VI

Department of Commerce

Economic Development Administration

Economic Development Assistance Programs—Availability of Funds Under the Public Works and Economic Development Act of 1965, as Amended and the Trade Act of 1974, as Amended; Notice

DEPARTMENT OF COMMERCE

Economic Development Administration

[Docket No. 991215339–3057–05]

RIN 0610–ZA14

Economic Development Assistance Programs—Availability of Funds Under the Public Works and Economic Development Act of 1965, as Amended and the Trade Act of 1974, as Amended

AGENCY: Economic Development Administration (EDA), Department of Commerce (DOC).

ACTION: Notice of Funding Availability (NOFA).

SUMMARY: The role of government is to create conditions in which jobs are created, and in which people can find work. The Economic Development Administration (EDA) announces general policies and application procedures for investments that will help our partners across the nation (States, regions and communities) create wealth and minimize poverty by promoting a favorable business environment to attract private capital investment and higher-skill, higher-wage jobs through world-class capacity building, planning, infrastructure, research grants, business assistance, and strategic initiatives. EDA will fulfill this mission by promoting progressive domestic business policies and growth, and by assisting states, local governments, and community-based organizations in achieving their highest economic potential.

DATES: Unless otherwise noted below, proposals are accepted on a continuing basis and applications are invited and processed as received. Normally, two months are required for a final decision after the receipt of a completed application invited by EDA that meets all requirements.

ADDRESSES: Addresses for EDA's six regional offices and Washington, DC, office are provided in part XVI. Addresses for Economic Development Representatives (EDRs) are listed under each regional office.

FOR FURTHER INFORMATION CONTACT: For national technical assistance, research, and trade adjustment assistance investments, please contact the appropriate program office as shown in parts X, XII, and XIII, respectively. For community and regional economic development investments, contact EDA's regional office or the EDR for your area as shown in part XVI.

SUPPLEMENTARY INFORMATION:

I. Funding Availability

Funding appropriated under Pub. L. 108–07 is available for economic development assistance programs authorized by the Public Works and Economic Development Act of 1965, as amended (Pub. L. 89–136, 42 U.S.C. 3121, *et seq.* and as further amended by Pub. L. 105–393), and for trade adjustment assistance authorized under title II, chapters 3 and 5 of the Trade Act of 1974, as amended (19 U.S.C. 2341–2355; 2391) (Trade Act), and as further amended by Pub. L. 107–210. Funds in the amount of $288,115,000 have been appropriated for FY 2003 and shall remain available until expended.

EDA receives and processes requests for funding on an ongoing basis, and has begun processing requests under the FY 2003 appropriation. New requests submitted that require approval during this fiscal year will face substantial competition. EDA will focus on outcomes such as value-added employment and private sector investment.

II. Authority

The authority for programs listed below in parts VIII through XII is the Public Works and Economic Development Act of 1965, as amended (Pub. L. 89–136, 42 U.S.C. 3121, *et seq.*), and as further amended by Pub. L. 105–393. The authority for the program listed in part XIII is title II, chapters 3 and 5 of the Trade Act of 1974, as amended by Pub. L. 93–618, 98–120, 98–369, 99–272, 99–514, 100–418, 103–66, 105–277, and 107–210 (19 U.S.C. 2341–2391) (Trade Act).

III. Eligibility

Eligible recipients of EDA financial assistance are defined at 13 CFR 300.2 and eligible applicants are specified at 13 CFR 301.1. An ''area'' is an eligible recipient and is defined at 13 CFR 301.2. One category of the areas eligible for financial assistance are those areas meeting the ''special needs'' criteria. The special needs criteria are published each year by this notice and are provided at part XV.

IV. Proposal Format

Preapplication proposals must be submitted on EDA's Preapplication for Federal Assistance, Form ED–900P. This form contains both questions and a narrative statement. The narrative statement need not exceed four pages. The narrative statement must address the following topics in the order listed:

1. Project Area.
2. Project Description.
3. Proponent's Capability.
4. Problem.
5. Project Impact.
6. Project Beneficiaries.
7. Civil Rights Issues.
8. Funding.
9. Identity of Sources of Non-EDA Funding.
10. Title/Ownership/Operation and Maintenance (Construction Projects).
11. Environmental Issues.

Proposals for Public Works and Economic Development Facilities assistance and Economic Adjustment assistance must also include Form ED–900P, Exhibit A, Area Eligibility for Grants under 13 CFR parts 305 (Public Works) and 308 (Economic Adjustment) and the necessary documentation and narrative statement.

Proposals for University Center funding must also include the additional information set forth in part X.

Proposals for projects on which EDA is requested to fund more than 50 percent of project costs may be required to include Form ED–900P, Exhibit B, EDA Grant Rate Determination, and the necessary documentation and narrative statement.

An original and two copies must be submitted to the appropriate Economic Development Representative or regional office.

Unless otherwise provided herein, eligibility, program objectives, application procedures, selection process, evaluation criteria, and other requirements for all programs are set forth in EDA regulations at 13 CFR chapter III, and applicants must address those requirements. The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), is incorporated by reference into this notice and is available on EDA's Web site (*www.eda.doc.gov*).

For Public Works (13 CFR part 305) and Economic Adjustment Investments (13 CFR part 308) (CFDA No. 11.300 and 11.307 respectively), EDA reviews area eligibility at the time an application is invited and again at the time an application is received. This review is based on the most recent Federal data available for the area where the project will be located or where the substantial direct benefits will be received. If no Federal data is available to determine eligibility, an applicant must submit to EDA the most recent data available for the area through the government of the State in which the area is located, *i.e.*, conducted by or at the direction of the State government. Other data may be

submitted, as appropriate, to substantiate eligibility based on ''special need'' (*see* part XV of this notice). Project areas must be eligible on the date of receipt of the application. In the case of any application received by EDA more than six months prior to the time of award, EDA will reevaluate the project to determine that the area remains eligible for EDA assistance before making the award. EDA will reject any documentation of eligibility that it determines is inaccurate and the application may be rejected.

V. General Policies

EDA encourages only those investment proposals that will significantly benefit areas experiencing or threatened with substantial economic distress. Distress may exist in a variety of forms, including, but not limited to: high levels of unemployment, low income levels, large concentrations of low-income families, significant declines in per capita income, substantial loss of population because of the lack of employment opportunities, large numbers (or high rates) of business failures, sudden major layoffs or plant closures, military base closures, natural or other major disasters, depletion of natural resources, or reduced tax bases.

Communities affected by the 1988, 1991, 1993, or 1995 Base Realignment and Closure (BRAC) actions, and which qualify for either regular Public Works or regular Economic Adjustment funding, may apply for investments under one or both of those programs. EDA anticipates that construction proposals will seek funding from the regular Public Works program while credit enhancement or other innovative financing proposals will compete under the regular Economic Adjustment authority.

Potential applicants are responsible for demonstrating to EDA, by providing statistics and other appropriate information, the nature and level of the distress their project efforts are intended to alleviate. EDA provides funding for eligible investment activities through direct grants and cooperative agreements. In funding cooperative agreements, a common example of substantial involvement is collaboration between EDA program staff and the recipient of a conference planning award to select a conference site, develop the agenda, and choose presenters, or to review a research project's methodology at critical stages and the draft written report.

EDA is not authorized to provide grants directly to individuals or to other for-profit entities seeking to start or expand a business. Such requests may be referred to state or local agencies, or to non-profit economic development organizations serving the project area.

VI. Evaluation and Selection Process

To apply for an award under this notice, an eligible recipient must submit a pre-application proposal to the appropriate Economic Development Representative for the area or regional office. Each pre-application proposal is circulated by a project officer to the appropriate regional office staff for review, comments, and recommendations. When the necessary input and information are obtained, the pre-application proposal is considered by the regional office Investment Review Committee (IRC) made up of regional office staff. The IRC discusses the proposal and all pertinent documentation and evaluates it using the general evaluation criteria set forth at 13 CFR 304.1 and 304.2 as further defined by the Supplemental Evaluation Criteria set forth in this notice below, and the program specific criteria provided under 13 CFR 305.2 for Public Works, 13 CFR 306.2 for Planning Assistance, 13 CFR 307.2 for Technical Assistance, 13 CFR 307.6 for University Centers, 13 CFR 307.10 for National Technical Assistance, Training, Research, and Evaluation, and 13 CFR 308.2 and 308.4 for Economic Adjustment. University Center funding proposals will be evaluated using the Special Evaluation Criteria set forth in part X in lieu of the Supplemental Evaluation Criteria set forth below. In addition, each proposal is evaluated for consistency with the Funding Priorities set forth below. After completing its evaluation, the IRC recommends whether or not an application should be invited, documenting its recommendation in the meeting minutes or in the Investment Proposal Summary and Evaluation Form. The IRC action is reviewed at headquarters for quality assurance. After receiving quality control clearance, the Selecting Official (depending on the program, either the Regional Director or the Assistant Secretary) selects the applications to be invited. In the case of a continuation grant, no pre-application proposal is required. Proposals received after the date of this notice will be processed in accordance with the requirements set forth herein until the next annual NOFA is published.

Supplemental Evaluation Criteria

EDA will invest in applicants who are entrepreneurial in spirit and in action. Potential investments will be analyzed using the following seven supplemental evaluation criteria of approximate equal weight, which further define the criteria provided at 13 CFR 304.2:

1. Extent that proposed investments are market-based.
2. Extent that proposed investments are pro-active in nature and scope.
3. Extent that proposed investments look beyond the immediate economic horizon, anticipate economic changes, and diversify the local and regional economy.
4. Likelihood that proposed investments maximize the attraction of private sector investment and would not otherwise come to fruition absent EDA's investment.
5. Likelihood that proposed investments have a high probability of success.
6. Likelihood that proposed investments result in an environment where higher-skill, higher-wage jobs are created.
7. Likelihood that proposed investments maximize Return on Taxpayer Investment.

Funding Priorities

The Selecting Official considers the evaluations provided by the IRC and the degree to which one or more of the following funding priorities are included (or packaged together) in making his/her decisions as to which preapplication proposals should be invited. Highly rated preapplication proposals may or may not be invited to submit full applications based on the following funding priorities. Generally, all proposals should enhance regional competitiveness and support long-term development of the regional economy. Further priority will be given to proposals that:

1. Encourage innovation and regional competitiveness:
   a. Reflect coordination of strong regional leadership committed to regional cluster development;
   b. Encourage a formal organization structure and process for working on cluster development and maintaining consensus;
   c. Encourage a common vision and collaboration among firms, universities, and training centers to implement a cluster strategy;
   d. Establish research and industrial parks that encourage innovation-based competition;
   e. Implement cluster-focused and innovation-focused business development efforts; and
   f. Develop or implement coordinated economic and workforce development strategies.
2. Upgrade core business infrastructure such as:
   a. Transportation infrastructure;

b. Communications infrastructure; and

c. Specialized training program infrastructure.

3. Help communities plan and implement economic adjustment strategies in response to sudden and severe economic dislocations (*e.g.*, major layoffs, plant closures, trade impacts, defense restructuring, or disasters).

4. Support technology-led economic development, for example, proposals that:

a. Reflect the important role of research and development capacity of universities in regional development; and

b. Create and support technology transfers.

5. Advance community and faith-based social entrepreneurship in redevelopment strategies for areas of chronic economic distress.

VII. Process for Invited Applications and Awards

If the Selecting Official declines to invite a full application, he/she provides written notice to the applicant. If an application has been invited by the Selecting Official, it is reviewed by EDA program officials to determine whether it contains any deficiencies under EDA regulations at 13 CFR chapter III and the requirements of this notice. If deficiencies are noted, the applicant is provided a written request to amend the application to resolve any deficiencies. If deficiencies are not resolved 30 days after receipt of the written notice, the application may be rejected. If the full application is accepted, the recipient and EDR are notified and it is forwarded for final reviews and processing in accordance with EDA and DOC procedures.

VIII. Program: Public Works and Economic Development Facilities Assistance—(Pub. L. 89–136, as amended by Pub. L. 105–393, 42 U.S.C. 3141)

(Catalog of Federal Domestic Assistance: 11.300 Grants for Public Works and Economic Development Facilities)

Funds in the amount of $203,667,500 have been appropriated for this program. The average funding level for an investment in FY 2002 was $1,240,000. This amount is not intended to restrict the size of future awards.

EDA will provide Public Works investments to support the construction or rehabilitation of essential public infrastructure and development facilities necessary to generate private sector jobs and investment, including investments that support technology-led development, redevelopment of brownfield sites, and eco-industrial development.

IX. Program: Planning—Planning Assistance for Economic Development Districts, Indian Tribes, States, and Other Planning Organizations—(Pub. L. 89–136, as Amended by Pub. L. 105–393, 42 U.S.C. 3143)

(Catalog of Federal Domestic Assistance: 11.302 Economic Development—Support for Planning Organizations)

Funds in the amount of $23,844,000 have been appropriated for the Planning Program. In FY 2002, the average Economic Development District planning investment was $59,000; the average Indian planning investment was $46,000; and the average state and other planning organization investment was $64,000. These amounts are not intended to restrict the size of future awards. EDA expects the majority of planning funds will be used for support to existing Economic Development District and Indian tribe grantees. Continuation grants are not competed. Any new planning grants shall be solicited and evaluated in compliance with this notice.

X. Program: Technical Assistance—Local Technical Assistance; National Technical Assistance; and University Centers—(Pub. L. 89–136, as amended by Pub. L. 105–393, 42 U.S.C. 3147)

(Catalog of Federal Domestic Assistance: 11.303 Economic Development—Technical Assistance)

Funds in the amount of $9,040,850 have been appropriated for the Technical Assistance programs of which approximately $1,490,250 is available for the Local Technical Assistance program; $1,093,843 for the National Technical Assistance program; and $6,456,757 for the University Center program. The average funding level in FY 2002 for Local Technical Assistance investments was $53,000; for National Technical Assistance investments, $134,000; and for University Center investments, the typical range was $75,000 to $110,000. These amounts are not intended to restrict the size of future awards.

Multi-year funding may be available for this program. Funding for each year's activities is contingent upon continued satisfactory performance during the preceding period, the availability of program funds, and will be at EDA's sole discretion.

A separate **Federal Register** notice(s) will set forth the specific funding priorities, application process, and time frames for certain National Technical Assistance projects.

Background Information on EDA's University Center Program

EDA's University Center program helps to make the wealth of resources—faculty, staff, students, computer facilities, laboratories, etc.—at institutions of higher education available for assisting in local and regional economic development activities. This announcement provides notice of several program and policy changes. EDA intends to make additional changes in subsequent years.

EDA will provide assistance under this program only to University Centers engaged in economic development. Activities such as community development or social service type activities are not consistent with EDA's mission and will not be considered for funding. Programs focused on activities other than economic development are encouraged to seek other sources of financial support. In addition, beginning in FY 2003, EDA will not fund any University Center that operates in isolation from other resources at its sponsoring institution and lacks the support of its sponsoring institution's leadership.

Funds to establish new University Centers will be available only if an existing University Center withdraws or is dropped from the program.

A. Additional Information Required

In addition to the information described in part IV, proposals in or after FY 2003 for University Center funding must include the additional information described in this section.

The Scope of Work for University Center proposals must be structured to address the University Center's contribution to the following elements: (a) Providing technical assistance, (b) conducting applied research, and (c) disseminating results of the activities of the University Center. Applicants are expected to submit a Scope of Work commensurate with the funding requested and consistent with EDA's mission.

B. Evaluation Criteria for University Centers

University Center funding proposals will be analyzed using the Evaluation Criteria set forth below. The ''Supplemental Evaluation Criteria'' set forth in part VI will not apply to University Center applications. EDA will invest in University Centers that are focused on economic development and are proactive and innovative in spirit and in action. Potential University Center proposals will be analyzed using the following six special evaluation

criteria, each of approximate equal weight.

1. Extent that the proposed University Center investment addresses the economic development needs, issues and opportunities of the proposed service area.

2. Extent that the service and value of the proposed University Center investment is unique, or fills a void not offered by other organizations in the proposed service area that provide potentially complementary or duplicate services.

3. Extent that the proposed University Center investment will maximize coordination with those other entities in ''2'' and will minimize the duplication of the services provided by those entities.

4. Likelihood that the proposed University Center investment will benefit economically distressed areas as defined in part III.

5. Extent that the proposed University Center investment will access, take advantage of, and be supported by the other resources of the sponsoring institutions.

6. Degree of evidence demonstrating the support and commitment (both financial and nonfinancial) of the proposed University Center investment from the leadership of the sponsoring institution for the University Center and its activities.

C. Support for Existing University Center Network

Funds to establish new University Centers will be available only if an existing University Center withdraws or is dropped from the program.

XI. Program: Economic Adjustment Assistance—(Pub. L. 89–136, as Amended by Pub. L. 105–393, 42 U.S.C. 3149)

(Catalog of Federal Domestic Assistance: 11.307 Economic Adjustment Assistance)

Funds in the amount of $40,634,150 have been appropriated for funding under the Economic Adjustment Assistance program. Of this amount, $16,900,000 is available for economic adjustment projects located in regions impacted by coal industry downsizing, timber industry issues and Alaska fishing-dependent communities. The average funding level for an Economic Adjustment investment in FY 2002 was $508,600. This amount is not intended to restrict the size of future awards.

XII. Program: Research and Evaluation—(Pub. L. 89–136, as amended by Pub. L. 105–393, 42 U.S.C. 3147)

(Catalog of Federal Domestic Assistance: 11.312 Economic Development—Research and Evaluation Program)

Funds in the amount of $496,750 have been appropriated for this program. The average funding level for an investment in FY 2002 was $105,000. This amount is not intended to restrict the size of future awards.

Multi-year funding may be available for this program. Funding for each year's activities is contingent upon continued satisfactory performance during the preceding period, the availability of program funds, and will be at EDA's sole discretion.

A separate **Federal Register** notice(s) will set forth the application process, specific funding priorities, and time frames for certain research and evaluation investments. For further information, contact: John J. McNamee, Director, Research and National Technical Assistance Division, Economic Development Administration, Room 7019, U.S. Department of Commerce, Washington, DC 20230, Telephone: (202) 482–2309.

XIII. Program: Trade Adjustment Assistance—Title II Chapters 3 and 5 of the Trade Act of 1974, as Amended by Pub. L. 93–618, 98–120, 98–369, 99–272, 99–514, 100–418, 103–66, 105–277, 107–210; 19 U.S.C. 2341–2391

(Catalog of Federal Domestic Assistance: 11.313 Economic Development—Trade Adjustment Assistance)

Funds in the amount of $10,431,750 have been appropriated for this program. EDA expects these funds will be used to support the existing network of Trade Adjustment Assistance Centers (TAACs). The average funding level for a TAAC in FY 2002 was $875,000. This amount is not intended to restrict the size of future awards. Continuation grants will not be competed. No new TAACs are expected this fiscal year. For further information on this program contact: Anthony J. Meyer, Coordinator, Trade Adjustment and Technical Assistance, Planning and Development Assistance Division, Economic Development Administration, Room 7317, U.S. Department of Commerce, Washington, DC 20230, Telephone: (202) 482–2127.

XIV. Other Information and Requirements

EDA regulations at 13 CFR chapter III are available on the EDA Web site *http://www.doc.gov/eda*. The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), are applicable to this solicitation and can be found on EDA's Web site *http://www.doc.gov/eda*. Certain Departmental and other requirements are noted below:

A. Projects are expected to be completed in a timely manner consistent with the nature of the project. For Public Works and most Economic Adjustment implementation investments, the maximum period for which assistance will be made available is generally not more than five years from the date of award.

B. 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 (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. This notice involves a collection of information requirement subject to the provisions of the PRA and has been approved by OMB under Control Number 0610–0094. The EDA preapplication (ED–900P) and application (ED–900A), which incorporates the SF–424, are the forms in the EDA application kit, approved under the aforementioned OMB control number.

C. The implementing regulations of the National Environmental Policy Act (NEPA) require EDA to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public as specified in 40 CFR 1506.6(b).

Depending on the project location, environmental information concerning specific projects can be obtained from the Regional Environmental Officer (REO) in the appropriate EDA regional office listed in part XVI.

D. If an application is selected for funding, EDA has no obligation to provide any additional future funding in connection with an award. Renewal of an award to increase funding or extend the period of performance is at the sole discretion of EDA.

E. EDA will notify unsuccessful applicants in writing and unsuccessful applications will be maintained in the

regional office files for not more than three years from the date of receipt.

F. EDA is committed to a policy of non-discrimination in the administration of all its programs.

G. EDA applications proposed for funding are subject to the requirements of Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' as referenced in EDA's regulations at 13 CFR chapter III.

H. This notice has been determined to be ''not significant'' for purposes of Executive Order 12866.

I. It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

J. Because notice and comment are not required under 5 U.S.C. 553, or any other law, for this notice relating to public property, loans, grants benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice, 5 U.S.C. 601 *et seq.*

XV. Special Need Criteria

These criteria are published in accordance with 13 CFR 301.2(h) and define what constitutes a special need sufficient to make an area eligible for Public Works and Economic Development Facilities assistance and Economic Adjustment assistance as described in part III above. An area is eligible pursuant to ''Special Need'' (13 CFR 301.2(b)(3)), if the area meets one of the criteria described below:

A. Closure or restructuring of industrial firms essential to area economies. An area has experienced either: (1) An actual closure or restructuring of a firm(s), within the past twelve months, resulting in sudden job losses and meeting the following dislocation criteria; or (2) a threat that results from a public announcement of an impending closure or restructuring of a firm(s), expected to occur within two years of preapplication, and result in sudden job losses meeting the following dislocation criteria:

1. For areas over 100,000 population, the actual or threatened dislocation is 500 jobs, or 1 percent of the civilian labor force (CLF), whichever is less.

2. For areas up to 100,000 population, the actual or threatened dislocation is 200 jobs, or 1 percent of the CLF, whichever is less.

B. Substantial out-migration or population loss. Applicants seeking eligibility under this criterion will be asked to present appropriate and compelling economic or demographic data to demonstrate the special need.

C. Underemployment, that is, employment of workers at less than full time or at less skilled tasks than their training or abilities permit. Applicants seeking eligibility under this criterion will be asked to present appropriate and compelling economic and demographic data to demonstrate the special need.

D. Military base closures or realignments, defense contractor reductions-in-force, or Department of Energy defense-related funding reductions.

1. A military base closure refers to a military base that was closed or is scheduled for closure or realignment pursuant to a Base Realignment and Closure Act (BRAC) process or other Department of Defense (DoD) process. Unless further extended by the Assistant Secretary for Economic Development, the area is eligible from the date of Defense Department recommendation for closure until five years after the actual date of closing of the installation.

2. A defense contractor reduction-in-force refers to a defense contractor(s) experiencing defense contract cancellations or reductions resulting from official DoD announcements and having aggregate value of at least $10 million per year. Actual dislocations must have occurred within one year of application to EDA and threatened dislocations must be anticipated to occur within two years of application to EDA. Defense contracts that expire in the normal course of business will not be considered in meeting this criterion.

3. A Department of Energy defense-related funding reduction refers to a Department of Energy facility that has experienced or will experience a reduction of employment resulting from its defense mission change. The area is eligible from the date of the Department of Energy announcement of reductions until five years after the actual date of reduced operations at the installation.

E. Natural or other major disasters or emergencies, including terrorists attacks. Unless further extended by the Assistant Secretary, an area that has received one of the following disaster declarations is eligible to apply for EDA assistance for a period of 18 months after the date of declaration.

1. A Presidential Disaster Declaration pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (Pub. L. 93–288), 42 U.S.C. 5121 *et seq*), or

2. A Federally-Declared Disaster pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, (Pub. L. 94–265) as amended by the Sustainable Fisheries Act (Pub. L. 104–297), or

3. A Federal Declaration pursuant to the Consolidated Farm and Rural Development Act, as amended (Pub. L. 92–419, 96–438, 97–35, 98–258, 99–198, 100–233, 100–387, and 101–624), or

4. A Federally-Declared Disaster pursuant to the Small Business Act, as amended (Pub. L. 85–536).

F. Extraordinary depletion of natural resources. EDA presently recognizes the following conditions of extraordinary natural resource depletion:

1. Fisheries.
2. Coal.
3. Timber.

Modifications to the above listing of conditions of extraordinary natural resource depletion, as they may occur, will be announced in subsequent public notices.

G. Communities undergoing transition of their economic base as a result of changing trade patterns. An area certified as eligible by the North American Development Bank (NADBank) Program or the Community Adjustment and Investment Program (CAIP).

H. Other special need. The area is experiencing other special and/or extraordinary economic adjustment needs as determined by the Assistant Secretary.

The applicant will be asked to present appropriate economic or demographic statistics to demonstrate a special need.

XVI. EDA Regional Offices and Economic Development Representatives

EDA regional offices and the Economic Development Representatives and the areas served are listed below:

William J. Day, Jr., Regional Director, Atlanta Regional Office, 401 West Peachtree Street, NW., Suite 1820, Atlanta, Georgia 30308–3510, Telephone: (404) 730–3002, Fax: (404) 730–3025, Internet Address: *wday1@eda.doc.gov*

Economic development representatives or regional office contacts	States covered
PATTERSON, Gilbert 401 West Peachtree Street, NW. Suite 1820	Mississippi.

Economic development representatives or regional office contacts	States covered
Atlanta, GA 30308–3510 Telephone: (404) 730–3000 Internet Address: *gpatterson@eda.doc.gov*	
SMITH, Lola B 401 West Peachtree Street, NW. Suite 1820 Atlanta, GA 30308–3510 Telephone: (404) 730–3013 Internet Address: *lsmith2@eda.doc.gov*	Georgia.
HUNTER, Bobby D 771 Corporate Drive, Suite 200 Lexington, KY 40503–5477 Telephone: (859) 224–7426 Internet Address: *bhunter@eda.doc.gov*	Kentucky. North Carolina (Western).
DIXON, Patricia M U.S. Department of Commerce—EDA P.O. Box 1707 Lugoff, SC 29078 Telephone: (803) 408–2513 Internet Address: *pdixon@eda.doc.gov*	South Carolina. North Carolina (Easter).
DENNIS, Bobby 401 West Peachtree Street, NW. Suite 1820 Atlanta, GA 30308–3510 Telephone: (404) 730–3020 Internet Address: *bdennis@eda.doc.gov*	Alabama.
TAYLOR, Willie C 401 West Peachtree Street, NW. Suite 1820 Atlanta, GA 30308–3510 Telephone: (404) 730–3032 Internet Address: *wtaylor5@eda.doc.gov*	Florida.
REED, Tonia 401 West Peachtree Street, NW. Suite 1820 Atlanta, Georgia 30308–3510 Telephone: (404) 730–3026 Internet Address: *treed@eda.doc.gov*	Tennessee.

Pedro R. Garza, Regional Director, Austin Regional Office, 327 Congress Avenue, Suite 200, Austin, Texas 78701–4037, Telephone: (512) 381–8144, Fax: (512) 381–8177, Internet Address: *pgarza@eda.doc.gov*

Area directors	States covered
CULBERTSON, David W Austin Regional Office 327 Congress Avenue, Suite 200 Austin, Texas 78701–4037 Telephone: (512) 381–8160 Internet Address: *dculbertson@eda.doc.gov*	Arkansas. New Mexico. Oklahoma. Texas (North).
FRERKING, Sharon T Austin Regional Office 327 Congress Avenue, Suite 200 Austin, Texas 78701–4037 Telephone: (512) 381–8176 Internet Address: *sfrerking@eda.doc.gov*	Louisiana. Texas (South).

Economic development representative	States covered
DAVIDSON-EHLERS, Pamela 501 Magazine Street, Room 1025 New Orleans, LA 70130 Telephone: (504) 589–4179 Internet Address: *pdavidson@eda.doc.gov*	Louisiana. Texas (South).

C. Robert Sawyer, Regional Director, Chicago Regional Office, 111 North Canal Street, Suite 855, Chicago, IL 60606, Telephone: (312) 353–7706, Fax: (312) 353–8575, Internet Address: *rsawyer@eda.doc.gov*

Economic development representatives	States covered
ARNOLD, John B. III 104 Federal Building 515 West First Street	Illinois. Minnesota.

Economic development representatives	States covered
Duluth, MN 55802 Telephone: (888) 865–5719 (Illinois), (218) 720–5326 (Minnesota) Internet Address: *jarnold1@eda.doc.gov*	
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Dated: April 3, 2003.

David A. Sampson,

Assistant Secretary for Economic Development.

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